

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist WALTER S. COLEMAN
United States Army, Appellant

ARMY 20100417

Maneuver Support Center of Excellence and Fort Leonard Wood
Charles D. Hayes, Military Judge
Colonel Steven E. Walburn (pre-trial)
Lieutenant Colonel James S. Tripp, Acting Staff Judge Advocate (post-trial)

For Appellant: Major Meghan M. Poirier, JA (argued); Colonel Mark Tellitocci, JA; Captain Jennifer A. Parker, JA (on brief); Major Richard E. Gorini, JA (on supplemental pleading); Captain Meghan M. Poirier, JA (on brief and supplemental pleading).

For Appellee: Captain Bradley M. Endicott, JA (argued); Major Amber J. Williams, JA; Major Ellen S. Jennings, JA; Captain Michael J. Frank, JA (on brief); Lieutenant Colonel Amber J. Roach, JA; Captain Bradley M. Endicott, JA (on supplemental pleading).

9 July 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SIMS, Senior Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of rape and adultery, in violation of Articles 120 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934 (2006) [hereinafter UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved a dishonorable discharge, confinement for five years, and reduction to the grade of E-1.

This case is before us for review pursuant to Article 66, UCMJ. Appellant has raised two assignments of error, both of which merit discussion but only one of which merits relief.¹

FACTS

Pretrial

Appellant and Private First Class (PFC) Pilago were accused by DD, PFC Pilago's female neighbor, of sexually assaulting her on 26 July 2009, after she had been drinking alcohol with them at a neighborhood gathering. When interviewed by investigators, appellant invoked his rights under Article 31, UCMJ, and declined to provide a statement. Private First Class Pilago, on the other hand, waived his rights and provided a detailed, six-page, written sworn statement to investigators on 29 July 2009. In his statement, PFC Pilago made certain admissions of wrongdoing and implicated appellant. Specifically, PFC Pilago related the following in regard to the incident upon which appellant's charges were based:

[Appellant] started to try and have sex with her again and when he tried to put his penis in her vagina she said stop. I stopped because I was about to get oral sex from her again, so I just stopped what I was doing and looked at [appellant] and said dude, and kept telling him dude, she said stop and he said keep going. [Appellant] continued to have sex with her, we tried to switch positions again, but I still could not get my penis erect enough to get it in her vagina, so I stopped, got off her, and got dress [sic].

In the question and answer portion of the statement, PFC Pilago answered as follows in regard to appellant's actions:

Q: What happened after [DD] told you and [appellant] to stop?

A: I pause, looked at [appellant] and said dude she said stop and said it to him like two or three times and he said just keep going.

Q: What was [DD] doing when she told you and [appellant] to stop?

¹ Oral argument in this case was heard at Valparaiso University Law School, Valparaiso, Indiana, as part of this Court's "Project Outreach." This practice was developed as part of a public awareness program to demonstrate the operation of a federal court of appeals and the military justice system.

A: Laying on her back in her bedroom.

Q: How long after [DD] told you and [appellant] to stop, did you and [appellant] stop having sexual intercourse with her and getting oral sex from her?

A: About 3 minutes.

Q: Did [DD] at anytime try to push you or [appellant] off of her while you and [appellant] were having sexual intercourse with her or receiving oral sex?

A: Yes, she tried to push him away one time but I don't think she did it anymore.

Q: What did [appellant] do after [DD] tried to push him off of her?

A: Just continued to have sex with her.

Prior to the courts-martial of PFC Pilago and appellant, appellant's trial defense counsel filed a discovery request for "immediate disclosure of any agreement with [PFC Pilago] to cooperate with the government in any way."

Trial

On 12 May 2010, PFC Pilago was convicted in a contested case of committing adultery and forcibly orally sodomizing DD. His sentence included forty-two months of confinement and a dishonorable discharge. Between the conclusion of PFC Pilago's trial on the afternoon of 12 May and the start of appellant's court-martial on the morning of 13 May, the staff judge advocate (SJA) orally agreed to recommend to the convening authority that the convening authority grant twelve months of clemency in regard to PFC Pilago's adjudged confinement in exchange for PFC Pilago's truthful testimony at appellant's trial.

After being informed that the government planned to call PFC Pilago as a witness, appellant's counsel made a motion in limine to prevent PFC Pilago from testifying about his conviction and/or his sentence. The military judge granted the motion. Immediately prior to PFC Pilago taking the stand as a government witness, trial defense counsel asked the assistant trial counsel if there was "a deal in place" with PFC Pilago to which the assistant defense counsel responded "no, there's nothing in writing." Thereafter, PFC Pilago testified, appearing as both a witness for the government (where he answered four questions posed by the trial counsel in order to corroborate some of DD's testimony) and as a witness for the defense (where he testified that he and appellant had previously engaged in consensual sexual activity with DD).

Although appellant's trial defense counsel refrained from confronting PFC Pilago on cross-examination as to his motives in testifying for the government, trial defense counsel nonetheless repeatedly argued in his closing statement that PFC

Pilago's testimony was motivated by a desire for clemency. For example, he referenced the military judge's instructions on accomplice testimony and warned the panel to "be wary of accomplice testimony because of the benefits that someone may receive from them; the benefits of immunity; and the benefits of potentially receiving some sort of clemency from the Commanding General in his own case." He further argued to the panel that PFC Pilago told them "what he had to tell [them] to get his clemency" and that the evidence PFC Pilago provided was the "evidence that is going to help with his clemency."

Thereafter, the panel found appellant guilty of rape and adultery. At some point prior to the submission of matters pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 1105 (almost six months after the conclusion of trial), appellant's trial defense team became aware of the existence of the unwritten agreement between PFC Pilago and the SJA. After appellant's defense counsel raised the agreement as a clemency matter in appellant's post-trial submissions, the convening authority ordered a post-trial hearing pursuant to Article 39(a), UCMJ, to look into the matter.

Post-Trial

On 5 January 2011, the military judge conducted a post-trial hearing which confirmed the existence of an unwritten agreement between the SJA and PFC Pilago, as well as the non-disclosure of that agreement.² At the conclusion of the hearing, appellant's defense counsel requested a mistrial based upon the "nondisclosure of both material and favorable information to the defense." In support of his motion for a mistrial the trial defense counsel informed the judge that the defense team would have used the agreement to attack PFC Pilago's credibility by asking the following question: "Isn't it true that your testimony today is being given in exchange for a recommendation from the [SJA] for 12 months off of your sentence?" Although the military judge found that the agreement should have been disclosed to

² The government called several members of the prosecution team to testify as to their recollection as to the facts surrounding the agreement with PFC Pilago. Although they all thought that the existence of the agreement had been disclosed, none of them could recall actually making the disclosure themselves. When called by the government and offered the opportunity to testify as to when exactly he was notified by the government about the clemency agreement, appellant's trial defense counsel cited to Professional Rules of Responsibility 1.7 and 3.7 and declined to testify because his testimony might "in fact conflict with his client's interest." The military judge accepted the trial defense counsel's representations at face value and denied the government's request to have him testify. In light of our ultimate decision to affirm the military judge's finding of harmless error, we need not decide whether those rules of responsibility would protect conversations between a government representative and a defense counsel.

appellant's counsel, he concluded that the error was harmless beyond a reasonable doubt and denied the motion for a mistrial.

LAW AND DISCUSSION

Denial of Mistrial

Appellant avers the military judge erred in failing to grant his motion for mistrial based on the government's failure to disclose that PFC Pilago testified against him in exchange for a clemency recommendation. Appellant argues that if his defense counsel had known of the existence of the agreement, he could have confronted PFC Pilago with his conviction and the fact that he was testifying in exchange for a twelve-month reduction in his sentence and thereby convinced the panel that PFC Pilago's corroboration of DD's testimony was motivated by PFC Pilago's self-interest and a desire for clemency.

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This is so whether there is a general request or no request at all. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Under due process discovery and disclosure requirements, the Supreme Court has "rejected any . . . distinction between impeachment evidence and exculpatory evidence." *United States v. Eshalomi*, 23 M.J. 12, 23 (C.M.A. 1986) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "[W]hen an appellant has demonstrated error with respect to a *Brady* nondisclosure, the appellant is entitled to relief only if there is a reasonable probability that there would have been a different result at trial had the evidence been disclosed." *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004). Disclosures in the military are also governed by R.C.M. 701, "which sets forth specific requirements with respect to 'evidence favorable to the defense' . . ." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (emphasis omitted). Under R.C.M. 701, the government bears a higher burden to prove a nondisclosure in response to a specific request: harmless beyond a reasonable doubt. *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (citing *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004)).

At oral argument, the parties agreed that the military judge properly concluded the existence of the SJA's promised clemency recommendation "was favorable and material to defense trial preparation and should have been disclosed." Likewise, the military judge also concluded that the government violated its disclosure duties under the United States Constitution and the UCMJ. *See* UCMJ art. 46; *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004); R.C.M. 701. Additionally, the military judge determined that the defense specifically requested disclosure of any agreement with PFC Pilago to

cooperate with the government so as to give the government “notice of exactly what the defense desired.” *Eshalomi*, 23 M.J. at 22 (quoting *Agurs*, 427 U.S. at 106).

Thus, the government bears the burden of showing that failure to disclose the SJA’s promise of a clemency recommendation for PFC Pilago was harmless beyond a reasonable doubt. The government argues that it met its burden at the post-trial session and urges us to affirm the military judge’s finding that the failure to disclose was harmless beyond a reasonable doubt. In support of its position, the government argues that if the disclosure had been made and the trial defense counsel made use of the agreement to impeach PFC Pilago, the trial counsel would have been able to introduce the detailed incriminating 29 July statement of PFC Pilago under Military Rule of Evidence [hereinafter Mil. R. Evid.] 801(d)(1)(B). Appellate defense counsel counters that the statement would not have been admitted even if the trial defense counsel had made use of the clemency agreement to impeach PFC Pilago because PFC Pilago’s motive to implicate appellant existed prior to the execution of PFC Pilago’s statement.³

Mil. R. Evid. 801(d)(1)(B) mirrors Federal Rule of Evidence 801(d)(1)(B) and provides for the admissibility of out-of-court statements where the “declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” Our superior court has “consistently interpreted” Mil. R. Evid. 801(d)(1)(B) as requiring that such a prior statement be made prior to “any motive to fabricate or improper influence it is offered to rebut.” *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998) (citing *United States v. Taylor*, 44 M.J. 475, 480 (1996); *United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990); and *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990)). “Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut.” *Allison*, 49 M.J. at 57.

This case clearly involves the possibility of more than one motivation for PFC Pilago’s pro-government testimony at appellant’s trial. For example, soon after the

³ As further explained in appellant’s brief and in a supplemental filing, the trial defense counsel “would not have argued that PFC Pilago’s trial testimony was the product of his agreement with the government; instead, defense counsel would have argued that the agreement provided PFC Pilago with an additional incentive to stick to his original story.” Not only does this explanation appear to conflict with what the trial defense counsel, at the post-trial session, told the military judge he would have argued had he been aware of the existence of the agreement, such an argument would have in and of itself informed the panel of the existence of PFC Pilago’s prior statement containing his “original story.”

offense when speaking to criminal investigators, PFC Pilago might have been motivated by a desire to minimize his own criminal culpability and maximize that of his co-accused. Following his conviction, he may have been motivated by a desire to reduce the severity of his adjudged sentence by offering to testify in exchange for a clemency recommendation.

Without introducing the agreement, the trial defense counsel in this case could have chosen to cross-examine PFC Pilago as to his general motive to minimize his own culpability and maximize that of appellant. Had the defense counsel chosen this tactic, the government would undoubtedly have offered as a prior consistent statement PFC Pilago's highly damaging statement made within a few days of DD's report of the incident. In such a scenario, the defense may have been able to prevent the introduction of the statement based upon the argument that PFC Pilago's general motive of self-preservation pre-dated his statement to criminal investigators. *See McCaskey*, 30 M.J. at 193 (finding error in the admission of a statement that post-dated the point in time at which the fabrication occurred in a case where the defense position was that the declarant "lied from the very beginning"). The defense counsel in this case, however, chose not to cross-examine PFC Pilago as to the motive of self-preservation and instead adopted him as a defense witness and then waited until closing to argue by inference that portions of PFC Pilago's testimony were given in the hope of clemency.

If the requisite disclosure had been made by the government and the trial defense counsel had chosen to impeach PFC Pilago by asking him if he was providing his in-court testimony in exchange for the clemency agreement, we have no doubt the government would have been successful in introducing PFC Pilago's prior consistent statement under Mil. R. Evid 801(d)(1)(B). The statement was consistent with PFC Pilago's in-court testimony and was made more than nine months prior to PFC Pilago's conviction and his agreement with the SJA. Furthermore, if admitted under Mil. R. Evid 801(d)(1)(B), the detailed incriminating written statement would have constituted substantive evidence that could have been used against appellant to further corroborate DD's allegations against appellant. *See Manual for Courts-Martial, United States* (2008 ed.), Appendix 22: Analysis of the Military Rules of Evidence, p. A22-52.

Having been presented with no plausible scenario in which we believe appellant ultimately would have been benefited by the use of the agreement to attack the credibility of PFC Pilago, we agree that the government met its burden of showing that the failure to disclose the agreement was harmless beyond a reasonable

doubt.⁴

R.C.M. 915(a) vests a military judge with the discretion to declare a mistrial when “manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.” Mistrials, however, are to be used only “under urgent circumstances and for plain and obvious reasons.” *United States v. Trigueros*, 69 M.J 604, 608 (Army Ct. Crim. App. 2010) (internal citations omitted). Accordingly, appellate courts “will not reverse a military judge’s determination on a mistrial absent clear evidence of an abuse of discretion.” *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009). A military judge abuses his discretion when his “findings of fact are clearly erroneous, the court’s decision is influenced by an erroneous view of the law, or the military judge’s decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008).

Because we agree with the military judge that the government’s failure to disclose was harmless beyond a reasonable doubt, we also conclude the military judge did not abuse his discretion in denying appellant’s motion for a mistrial in this case.

Failure to Include Terminal Element in Adultery Specification

Appellant also alleges that the Specification of Charge III failed to state an offense because it did not include any of the terminal elements of the UCMJ general article, either explicitly or by necessary implication. *See United States v. Humphries*, __ M.J. ____ (C.A.A.F. 15 June 2012); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012) and *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). We agree with appellant in that the government failed to allege either that appellant’s conduct (1) “was to the prejudice of good order and discipline in the armed forces” or (2) that it “was of a nature to bring discredit upon the armed forces.” After reviewing the record in its entirety we find that “under the totality of the

⁴ Additionally, although the brief testimony given at trial by PFC Pilago was an important part of the government's case to the extent that it corroborated DD's testimony, PFC Pilago’s one and a half pages of corroborating testimony in a 344-page (on the merits) record of trial was by no means the linchpin of the government’s case against appellant. The remainder of the government’s case was strong. The victim testified that she told appellant and PFC Pilago to “stop” when she regained consciousness and realized appellant and PFC Pilago were sexually assaulting her, but that they continued anyway. The government also produced medical and scientific evidence as well as evidence that DD promptly reported the assault to a neighbor.

circumstances in this case, the government’s error in failing to plead the terminal element of Article 134, UCMJ, resulted in material prejudice to [appellant’s] substantial, constitutional right to notice.” See *United States v. Girouard*, 70 M.J. 5, 11-12 (C.A.A.F. 2011); *Fosler* at 229; *Humphries*, slip op. at 16 (internal citations omitted). Accordingly, appellant’s conviction for adultery cannot stand.

In regards to sentencing, however, we conclude the members would have properly considered the evidence adduced regarding the adultery because the actions surrounding the adultery were inextricably linked to the offense for which appellant was properly convicted. Accordingly, “the sentencing landscape would not have been drastically changed” by the absence of the Specification of Charge III. We are, therefore, satisfied beyond a reasonable doubt the members would have adjudged a sentence no less severe than the sentence approved by the convening authority in this case. *United States v. Craig*, 67 M.J. 742, 746 (N.M. Ct. Crim. App. 2009), *aff’d on other grounds*, 68 M.J. 399 (C.A.A.F. 2010); see also *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

CONCLUSION

The findings of guilty of Charge III and its Specification are set aside. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion, the court affirms the sentence. We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit.

Judge COOK and Judge GALLAGHER concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court