

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, KRAUSS, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class KENNETH D. NUNEZ
United States Army, Appellant

ARMY 20100703

Headquarters, U.S. Army Maneuver Center of Excellence
James L. Pohl, Military Judge
Colonel Tracy A. Barnes, Staff Judge Advocate

For Appellant: Captain Meghan M. Poirier, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Laura R. Kesler, JA; Captain Meghan M. Poirier, JA (on brief).

For Appellee: Captain Christopher S. Glascott, JA (argued); Major Amber J. Williams, JA; Major Katherine S. Gowel, JA; Captain Christopher S. Glascott, JA (on brief).

11 May 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Judge:

A panel of officer and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of aggravated assault upon a child, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2006) [hereinafter UCMJ]. Appellant was sentenced to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.*

* The convening authority waived appellant's automatic forfeitures from 11 January 2011 to 23 January 2011, with the direction that they be paid to appellant's spouse.

Appellant's case is now before this court for review under Article 66, UCMJ. Appellant raises two assignments of error and personally submits matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We find appellant's claims relative to improper argument merit brief discussion but no relief.

BACKGROUND

Appellant's conviction stems from his rough mishandling of his infant child EN on divers occasions. After a medical examination revealed EN had multiple broken ribs and bleeding on her brain, Criminal Investigation Command (CID) agents interviewed appellant and his wife TN. During the interview, appellant admitted that he had handled EN roughly, squeezed her on both sides of her body, and could not think of any other way EN had been grievously injured. He further admitted to handling EN roughly on previous occasions as well. These admissions were reduced to writing and admitted into evidence against him at his court-martial.

During appellant's court-martial, his defense counsel sought to downplay these admissions and create reasonable doubt about the source of EN's injuries. In doing so, appellant called attention to the other people that had both access and opportunity to injure EN: appellant's wife TN and appellant's grandmother. In support of this strategy, the defense counsel elicited testimony from TN that she initially suspected appellant's grandmother of injuring EN. TN further testified that she informed both CID and EN's treating physician, Dr. Messner, of these concerns. The trial counsel attempted to impugn TN's credibility on this topic by aggressively questioning TN as to whether she actually expressed these concerns and, if so, why they were not included in her written statement to CID. Dr. Messner denies that TN ever told him that she suspected appellant's grandmother of injuring EN.

In closing, the assistant trial counsel (ATC) argued to the panel that TN's testimony lacked credibility and that appellant's trial strategy belied his guilt:

[TN] didn't tell CID that grandma handled the baby roughly. She didn't tell Dr. Messner that. She came up with that when she came in here to tell you about what happened. Because it's easier for her to blame the 74-year-old great-grandmother than it is for her to accept that her husband did this to her child.

. . . .

Keep in mind that it may be difficult to think that a father could do this to his child, but think about the kind of person who tries to throw his grandma and his wife under the bus when he's been charged.

Appellant's defense counsel did not object to either of these arguments. Following the defense closing, the record reflects that the ATC used on rebuttal a picture of EN that was not admitted into evidence:

ATC: I don't have any fancy slides because to me it doesn't come down to element charts and like crazy PowerPoint stuff. It comes down to that [displaying a photo of EN by overhead projector]. It's not complicated. There's a baby in the hospital with eight fractured ribs.

MJ: Captain [S]?

ATC: Sir.

MJ: Was that introduced into evidence.

ATC: No.

MJ: Then don't put it up.

The ATC immediately removed the photo. At the next break in the proceedings, the military judge asked the defense counsel if he would like a curative instruction on the ATC's use of evidence that was not admitted. Appellant's defense counsel refused the instruction.

LAW AND DISCUSSION

Appellant alleges that the ATC committed prejudicial error when she (1) argued appellant's wife lacked credibility, (2) argued appellant was trying to "throw his grandma and his wife under the bus," and (3) showed the panel a photograph that was not in evidence. However, appellant did not object to the ATC's arguments; therefore, this claim on appeal is reviewed for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F.2007) (holding that an appellant must prove not only that there was error but also that it was plain or obvious and materially prejudicial to a substantial right). While we find two of the three matters complained of to constitute obvious error, we find no prejudice.

As for the underlying error, "[i]mproper argument is a question of law that we review de novo." *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (quoting *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F.2011)). It is inappropriate for a trial counsel to calculate his or her argument to inflame the passions of the panel members. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). It is also inappropriate to argue evidence that is not of record or that is not reasonably derived therefrom. *Cf. id.*

First, we do not find that the ATC's argument as to TN's credibility was improper. It was certainly an exaggeration of the evidence supporting TN's motive to misrepresent the facts, but in our view, it was not improper. It was based on the trial counsel's examination of TN and sought to capitalize on the prosecution's view of her testimony.

On the other hand, the ATC's appeal to "think about the kind of person who tries to throw his grandma and his wife under the bus when he's been charged" is the sort of personal attack upon the accused that constitutes improper argument. Not

only does such an ad hominem attack against the accused degrade the dignity and solemnity of the proceeding, there is nothing in the evidence to support such attack. This comment could also be understood as an improper comment on his defense counsel's trial strategy. In any event, it falls well outside of the bounds of permissible argument and we find the error obvious.

Finally, as to the display of EN's unadmitted photograph during argument, we conclude that this was clearly and obviously improper. Indeed, the military judge immediately recognized the ATC's error and corrected her in open court. Mere display without proper notice or professional courtesy, at the least, is error enough but considered in conjunction with trial counsel's argument it becomes the very sort of effort to inflame passions that cannot be properly endorsed.

We are, however, confident that the members convicted the appellant on the basis of the evidence alone despite trial counsel's improper argument. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). Trial counsel's comments, taken as a whole, were not so damaging as to undermine that confidence. *Id.* We find no prejudice to the substantial rights of the appellant, thus no relief is warranted.

CONCLUSION

Therefore, on consideration of the entire record and the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we find appellant's arguments to be without merit. The findings of guilty and the sentence are affirmed.

Senior Judge JOHNSON and Judge KRAUSS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court