

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
D.E. O'TOOLE, J.F. FELTHAM, F.D. MITCHELL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DENNIS A. GUADALUPE
FIRST LIEUTENANT (O-2), U.S. MARINE CORPS**

**NMCCA 200700509
GENERAL COURT-MARTIAL**

Sentence Adjudged: 30 January 2007.

Military Judge: LtCol Tracy Daly, USMC.

Convening Authority: Commander, 1st Marine Logistics Group,
Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol G.L. Simmons,
USMC.

For Appellant: LT Heather Cassidy, JAGC, USN.

For Appellee: LT Derek Butler, JAGC, USN.

13 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conduct unbecoming and adultery, in violation of Articles 133 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 933 and 934. The military judge sentenced the appellant to a dismissal from the United States Marine Corps. The convening authority (CA) approved the sentence as adjudged.

The appellant raises four assignments of error. The appellant's first and second assignments of error allege that his pleas of guilty to conduct unbecoming and adultery are

improvident. His third assignment alleges that the military judge committed plain error when he allowed the Government to rebut good military character opinion with evidence of a prior adulterous relationship. Finally, the appellant alleges that the military judge committed plain error by admitting in pre-sentencing a sexual assault exam that was related to a dismissed charge of rape.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant is a prior enlisted, married Marine Corps 1st Lieutenant and was stationed with 1st Marine Logistics Group at Camp Pendleton, California. On 28 December 2005, the appellant and another male Marine, 1st Lieutenant Garcia, went to a local tavern named the Beach Fire. There the appellant met two women, J.G. and V.B. In chatting with the women, the appellant lied about his marriage and employment status, telling the women that he was single and unemployed.

At the Beach Fire, the appellant and J.G. began drinking together, with J.G. becoming intoxicated. Eventually, J.G. and the appellant began kissing and hugging one other, with the appellant touching and fondling J.G.'s breasts, legs and inner thighs on the outside of her clothing, in the presence of 1st Lieutenant Garcia and J.G.'s friends.

As the bar closed, J.G. and V.B. left the Beach Fire, as did the appellant and 1st Lieutenant Garcia. Shortly thereafter, the appellant began to call J.G. on her cell phone, which was actually answered by V.B. V.B. invited the appellant to J.G. and V.B.'s apartment. The appellant went to the apartment, but by the time he arrived, J.G. had fallen asleep. The appellant and V.B. talked together in the kitchen, where the appellant again stated that he was single and unemployed. In the early morning of 29 December, the appellant and V.B. engaged in intercourse.

Improvident Pleas

A military judge may not accept a guilty plea without inquiring into its factual basis. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Before accepting a guilty plea the military judge must explain the elements of the offense to the accused. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). Not only must the providence inquiry reveal that the accused actually believes that he or she is guilty of the offense, but it must also show that factual circumstances support that belief. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty.

Article 133, UCMJ, is a purely military offense that can be violated by acts which are not criminal by themselves or would not be criminal if committed by civilians. *See United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994) In describing the scope of behavior that is unbecoming of an officer or gentleman under Article 133, UCMJ, the MANUAL FOR COURTS-MARTIAL STATES, UNITED STATES (2005 ed.) in part provides that:

[A]ction or behavior in an unofficial capacity or private capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's . . . standing as an officer This article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising.

Part IV, ¶ 59(c)(2).

The appellant's drunk and disorderly acts with J.G. in the Beach Fire bar were beyond an acceptable level of public display of affection. The appellant's providency inquiry revealed that he was intoxicated, as he stated that he was "a seven or an eight" on a one to ten scale and that his actions were a direct result of his drinking. He also stated that his senses were impaired and that the alcohol did affect him. His acts of groping J.G.'s inner thighs, fondling her breasts, and kissing a woman who was not his wife, in a public bar, before her friends and his friend, meet the standard of disorderly conduct. The appellant also admitted that J.G.'s friends became concerned about their public display of sexual activity and took steps to prevent her from continuing to drink.

The appellant's argument that his actions were simply of "poor taste" and not conduct unbecoming is without merit. Article 133 states that certain moral attributes are common to the ideal officer, the lack of which is indicated by acts of dishonesty or unfair dealing. While the appellant was a married commissioned officer, he told J.G. that he was single and unemployed, in an obvious attempt to obfuscate his true identity and thereby increase his chances of securing her affections. His lack of candor and unfair dealing with J.G. by failing to present a truthful picture of himself hardly comports with the ideals of a truthful and faithful commissioned officer. Additionally, his public sexual acts were beyond the acceptable range of any public displays of affection. We note that not only were these acts done in a public place where J.G.'s civilian friends did notice the appellant's actions, they were also done in the presence of

another commissioned officer, 1st Lieutenant Garcia, who knew the appellant's true marital and employment status.

We additionally find that the appellant's argument that his plea to adultery is improvident is without merit. Under Article 134, UCMJ, clause one or two, the offending conduct must either be prejudicial to good order and discipline or service discrediting. The appellant's providency and stipulation of fact clearly show that his adulterous actions were prejudicial and service discrediting. He admitted lying to V.B. regarding his marital status and his status as a commissioned officer. V.B. testified that she learned that the appellant was a married Marine officer from law enforcement personnel. The appellant admitted that if others in the general public were to be aware of his actions, the perception and opinion of the Marine Corps would be lowered. V.B.'s testimony also revealed that she had told numerous people not only of the adulterous event, but of the appellant's duplicity. We find that the appellant's actions, taken as whole and on their face, were prejudicial to good order and discipline and service discrediting.

Improper Evidence in Aggravation

In addition to conduct unbecoming and adultery, the appellant was charged with rape, assault, and communication of a threat to V.B. Per his pretrial agreement, he entered pleas of not guilty to those charges and they were withdrawn by the Government. On appeal, the appellant now claims that the introduction of Prosecution Exhibit 1, a Sexual Assault Examination Report, was improperly admitted in presentencing by the Government as the appellant believes that this evidence was tied only to the allegation of rape.

In the appellant's pretrial agreement, he agreed not to object to the Sexual Assault Examination Report's introduction at sentencing and he did not object at trial. The appellant's failure to object to this document waives the issue absent plain error. To show plain error the appellant must show: 1) there was an error; 2) it was plain or obvious; and 3) the error materially prejudiced a substantial right. *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007)(quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

The initial prong only need be addressed as we hold that the Sexual Assault Examination Report was proper evidence to be admitted as evidence in aggravation by the Government in sentencing. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) allows the Government to introduce evidence of aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. While Sexual Assault Examination Report's are often compiled in cases of forcible sexual assault or rape, they are not so intertwined with those crimes that there should be a per se rule that limits their introduction only in those cases. In

this case, V.B. learned, after intercourse, that the appellant was not the man that he had claimed to be, neither single nor a civilian. Under the circumstances, attempting to ascertain what, if any, damage had been done to her body or physical evidence of the appellant remained to help procure his true identity, was a relevant and logical step to take. The method of securing this type of information may be called a Sexual Assault Examination Report, but the name alone is not dispositive of its use at trial. V.B. testified as to its logistical creation, including the extensive time it took, the requirement of her being photographed nude by strangers and the subsequent humiliation she felt. We find this type of testimony as one that directly related to the charge of adultery. Additionally, the military judge limited its use by the Government, stating that he would not consider the report for any purpose that related to force or violence. The assignment is without merit.

Improper Rebuttal Evidence

In presentencing the appellant called four military witnesses who each testified to his good military character and bearing. In rebuttal the Government called B.W., a woman who testified that she also had had an adulterous affair with the appellant. The military judge found that the defense had opened the door for a rebuttal of the appellant's character evidence by providing evidence not only of the appellant's good military character, but also evidence of his trustworthiness and dependability in general.

R.C.M. 1001(d) allows the Government to introduce sentencing evidence in rebuttal. It is well-settled that the function of rebuttal evidence is to explain, repel, or counteract or disapprove the evidence introduced by the opposing party. *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990). However, the Government is limited to evidence which actually rebuts or refutes evidence presented by the defense. *United States v. Manns*, 50 M.J. 767, 770 (N.M.Ct.Crim.App. 1999).

We review a military judge's decision in regard to admitting or excluding evidence utilizing an abuse of discretion standard. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005). "[T]he abuse of discretion standard of review recognizes that a judge has a range of choices [in such matters] and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)).¹

¹ We note that in the appellant's brief he argues that the standard of review is plain error. However, a review of the record of trial reveals that the trial defense counsel objected multiple times to the introduction of B.W.'s testimony. As such, we will apply an abuse of discretion standard regarding the military judge's ruling.

We hold that the admission of the uncharged misconduct of the appellant's additional adultery was proper evidence in rebuttal. The testimony of B.W. rebutted the appellant's sentencing witnesses' opinion evidence of military character and directly rebutted his character for trustworthiness and dependability in general. A commissioned officer who engaged in an adulterous affair yet put on sentencing evidence of good military character, character for trustworthiness and dependability, opens the door for rebuttal of similar adulterous uncharged misconduct. It is inconceivable that the appellant did not know of this evidence's existence before trial. While the Government would have been precluded from introducing this evidence in its sentencing case in aggravation, we find that it was proper rebuttal evidence and therefore the military judge did not abuse his discretion in allowing B.W.'s testimony.

Conclusion

The findings and the approved sentence are affirmed.

Chief Judge O'TOOLE and Senior Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court