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

Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN B. LAW
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201100286
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 January 2011.
Military Judge: LtCol G.W. Riggs, USMC.
Convening Authority: Commanding General, 2d Marine Logistics Group, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol S.R. Stewart, USMC.
For Appellant: LT Kevin Quencer, JAGC, USN; LT Daniel C. LaPenta, JAGC, USN.
For Appellee: Maj William C. Kirby, USMC.

21 September 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MODZELEWSKI, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of premeditated murder and larceny, in violation of Articles 118 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 918 and 921.[1] The

[1] The appellant entered a plea of guilty to robbery in violation of Article 122, UCMJ, 10 U.S.C. § 922. Record at 43. The military judge found him not

military judge sentenced the appellant to confinement for life without the possibility of parole, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.[2]

In one of the assignments of errors submitted on 23 September 2011, the appellant asserted that his trial defense counsel did not submit certain clemency documents to the CA for his consideration under RULE FOR COURTS-MARTIAL 1105, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Following a preliminary review of the record, we set aside the CA's action and returned the record of trial for post-trial processing in compliance with R.C.M. 1105-1107. On 11 May 2012, the CA again approved the sentence as adjudged, noting that he considered the additional matters submitted by the appellant.

Having resolved that assignment of error, two remain: (1) that the nature and extent of the Government's evidence in aggravation violated the Supreme Court's holding in *Payne v. Tennessee*, 501 U.S. 808 (1991), and R.C.M. 1001(b)(4); and (2) that the appellant's sentence to confinement for life without possibility of parole was inappropriately severe.[3] After carefully considering the record of trial and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

Background

In the early hours of 6 November 2009, the appellant murdered Corporal JH (Cpl JH) outside his barracks on Camp Lejeune, North Carolina. Cpl JH was standing, talking to his girlfriend on his cellular phone, when the appellant came from across the courtyard and beat him in the head repeatedly with a ten-pound jack hammer spike. Moments earlier, the appellant had told his friend, Private (Pvt) RT, that he wanted to kill someone. The appellant then left the barracks room and chose Cpl JH, a complete stranger, as his victim.

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guilty of robbery but guilty of the lesser included offense of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921. *Id.* at 261-62, 287.

[2] To the extent that the CA's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

[3] After the record was redocketed with the court, the appellant informed the court that he would not file any additional assignments of error.

After the appellant murdered Cpl JH, he returned to his barracks and asked Pvt RT to help him move the body. Pvt RT refused and fled to alert authorities. The appellant then dragged the body across a road, through a parking lot, and into the woods, partially covering him with pine straw. In the parking lot, investigators discovered a significant amount of pooled blood and brain tissue. The body was discovered at the tree line, with the face and skull crushed by the blows. The appellant was apprehended in the bathroom of his barracks room, with self-inflicted injuries to his neck, wrist, and lower abdomen.

The appellant had a long history of self-mutilation, substance abuse, and mental illness, dating back to his early teen years and continuing during his time in the Marine Corps. In the months preceding the murder, he drank heavily, abused controlled substances, and was seen more than ten times at the Naval Hospital Camp Lejeune Mental Health Clinic.

During the providence inquiry, the appellant claimed that he did not remember anything about the murder, because he "blacked out" from having consumed alcohol, marijuana, and cough medicine that night. Nonetheless, he was thoroughly convinced of his guilt after he reviewed the Government's evidence and the testimony of the eyewitnesses.[4]

Evidence in Aggravation

In its sentencing case, the Government called twenty-three witnesses; they included the investigators assigned to the case, medical specialists who examined Cpl JH's body, Marines from his unit, a high school coach, his siblings, and his parents. Although the appellant raised no objection during the sentencing hearing, he now asserts that the testimony of ten of the witnesses violated R.C.M. 1001(b)(4) and *Payne v. Tennessee*. Further, he asserts that this improper evidence, when considered in the aggregate, amounted to cumulative error, prejudicing his right to a fair sentencing hearing. We disagree.

Where no objection is raised at trial, an appellant may only prevail on appeal if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). To

[4] Record at 63-68. *See United States v. Jones*, 69 M.J. 294, 299 (C.A.A.F. 2011) ("If an accused is personally convinced of his guilt based upon an assessment of the government's evidence, his inability to recall the specific facts underlying his offense without assistance does not preclude his guilty plea from being provident") (citation omitted).

demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. The error must have "'had an unfair prejudicial impact on the [judge's] deliberations.'"[5] The failure to establish any of these three prongs is fatal to a claim of plain error.[6]

(1) Was There Error?

Turning to the first prong, this court is not convinced that the military judge erred in admitting this testimony. We address first the appellant's argument that testimony violated R.C.M. 1001(b)(4). We begin with part of the text of the rule:

> The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person . . . who was the victim . . . ."

Here, the appellant challenges the testimony of ten witnesses who testified about Cpl JH as an individual and the impact of his murder on their lives: five fellow Marines, his high school wrestling coach, and four members of his family. The Marines described the impact of the crime on themselves, on their unit, and on their mission. The coach and family members described the impact of his loss on themselves and their families. Each of these witnesses testified briefly, with the victim's mother testifying for slightly longer than the others. To the extent that the appellant questions whether these witnesses were "victims," we do not accept such a narrow proffer. The Court of Appeals for the Armed Forces (CAAF) has affirmed the admission of testimony from family members and the community. *United States v. Fontenot*, 29 M.J. 244, 251 (C.M.A. 1989); *United States v. Pearson*, 17 M.J. 149, 152-53 (C.M.A. 1984); *see also United States v. Wilson*, 35 M.J. 473, 476-77 (C.M.A. 1992) (finding it unnecessary to determine whether

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[5] *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 16 n.14 (1985)); *see also United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997).

[6] *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

witness was a "victim" since her testimony was evidence in aggravation, a broader category than victim-impact evidence).

The appellant now contends that particular testimony was too "emotional" (i.e., the high school coach testified about "specific acts of kindness" of the victim and that he had named his son after the victim, and a fellow Marine testified about a memorial named after the victim).[7] Moreover, the appellant contends that other testimony described effects that are too attenuated from the crime (i.e., family members and friends described taking prescription medications for depression or sleep disorders; his mother testified that she quit her job; his sister described the impact of his death on her five-year-old son; his brother and another Marine testified that they left military service because of his murder; and one Marine described relapsing from sobriety).

Certainly, an appellant is not "responsible for a never-ending chain of causes and effects."[8] "The phrase 'directly relating to or resulting from the offenses' imposes a 'higher standard' than 'mere relevance.'"[9] But here we find that the challenged testimony was fairly within the ambit of social, psychological, and medical impact testimony contemplated by the rule. These witnesses gave brief, thoughtful, and measured testimony as to how the murder directly affected them as fellow Marines, friends, and family. We find that the effects they describe were not so attenuated from the crime itself to be outside the parameters of R.C.M. 1001(b)(4).

The appellant directs the thrust of his argument at the extensive testimony about Cpl JH's life and character, but the CAAF has recognized that "courts-martial . . . can only make intelligent decisions about sentences when they are aware of the full measure of loss suffered by all of the victims, including the family and the close community" and has held that "trial judges, in their sound discretion, may permit counsel to introduce evidence of the character of the victim."[10] Both the Supreme Court and the CAAF caution that trial courts must be

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[7] Appellant's Brief at 9, 11.

[8] *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citation and internal quotation marks omitted).

[9] *Id*. (citation and internal quotation marks omitted).

[10] *Pearson*, 17 M.J. at 153.

wary of aggravation evidence that is unduly inflammatory.[11] In *Pearson*, the CAAF cautioned about the danger inherent in permitting emotional or inflammatory testimony by family members, noting that such testimony, if excessive, could equate to "the bloody shirt being waved."[12] Courts have cautioned against victim-impact evidence that is "bitter, recriminatory, or inflammatory,"[13] but admitted testimony that reveals "the true plight of the victim in each case."[14]

The testimony of Cpl JH's parents, siblings, friends, and wrestling coach about Cpl JH's character and life did nothing more than reveal their true plight; as such it was permissible. Although the appellant refers to the testimony as inflammatory or unduly emotional, our review of their testimony reveals that it was not bitter, recriminatory, or inflammatory, but instead was nostalgic, sentimental, and sad. None of the witnesses opined about the appellant's character or what sentence should be imposed upon him, and none exhibited any desire for vengeance.[15] The single comment about the nature of the offense (one witness' use of the word "appalling") was in reference to what he experienced every time duty forced him to walk by the scene of the crime.[16]

The appellant also argues that there was simply too much evidence of the victim's character, urging us to find a quantitative, as opposed to qualitative, violation of R.C.M. 1001(b)(4). But the appellant's citation to *Fontenot,* 29 M.J. at 244, *United States v. Ashby*, 68 M.J. 108, 121 (C.A.A.F. 2009), and *United States v. Dudding*, 34 M.J. 975, 979 (A.C.M.R. 1992), provides no authority for such a conclusion. The appellant's contention that *Fontenot* was "concerned with brevity" is inaccurate.[17] Instead, the *Fontenot* court was concerned with emotional displays that "exceed the limits of

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[11] *Payne*, 501 U.S. at 831 (O'Conner, J., concurring); *Wilson*, 35 M.J. at 476 n.5 (internal citations omitted).

[12] 17 M.J. at 153.

[13] *United States v. Whitehead,* 30 M.J. 1066, 1071 (A.C.M.R. 1990).

[14] *United States v. Terlep*, 57 M.J. 344, 350 (C.A.A.F. 2002) (citations omitted).

[15] *See Pearson*, 17 M.J. at 152-53.

[16] Record at 266.

[17] Appellants Brief at 17.

propriety."[18] Similarly, neither *Ashby* nor *Dudding* support the defense's contention that an aggravation case must be brief. We therefore decline the appellant's invitation to hold that the quantity or length of the testimony here violates R.C.M. 1001(b)(4).

Finally, the appellant also claims that this testimony violated *Payne,* in that it gave more than a "quick glimpse" of the victim and the impact of the crime. His reliance on *Payne* is singularly misplaced, as the case simply does not mandate the "quick glimpse" rule that he cites.[19] *Payne* instead stands for the proposition that the Eighth Amendment erects no *per se* bar prohibiting a capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family. The *Payne* decision instructs trial courts to treat victim-impact evidence like all other relevant evidence.[20] The particular relevance of victim-impact evidence lies in showing "*each* victim's 'uniqueness as an individual human being . . . .'"[21] Here, the Government called more witnesses than in *Payne*, but nothing in that decision *per se* limits the Government to a "quick glimpse" of the life of Cpl JH, or erects a limit as to a particular number of witnesses. We find no merit in the argument that this sentencing case somehow violated *Payne*.

In sum, we conclude that the testimony now challenged by the appellant was properly admitted under R.C.M. 1001(b)(4) and that the trial judge did not err.

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[18] *Fontenot*, 29 M.J. at 252 (quoting *Pearson*, 17 M.J. at 153).

[19] The term "quick glimpse" cannot reasonably be mistaken for a holding in *Payne.* It was used once only in the majority opinion, quoting from the dissent in a previous case:

> This misreading of precedent in *Booth* has, we think, unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering "a quick glimpse of the life" which a defendant "chose to extinguish," *Mills* v. *Maryland*, 486 U.S. 367, 397, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) (REHNQUIST, C.J., dissenting), or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide.

501 U.S. at 822.

[20] *Id.* at 827.

[21] *Id*. at 823.

(2) Was Any Error Plain or Obvious?

Assuming arguendo that admission of one or more of the particular statements challenged by the appellant constituted error, we find that it was certainly not plain or obvious. This was a guilty plea case, where the development of facts was limited to that deemed necessary by the military judge to establish the providence of the appellant's pleas. Although he pled providently, the appellant's lack of memory and his intoxicated state on the evening of the murder left the court without great detail or context as to the circumstances surrounding the crimes.[22] The Government presented a robust sentencing case, with witnesses testifying on a multitude of issues, from the details of the crime scene, to forensic examination of the body, to statements made by the appellant while in confinement, to the impact of the murder on the unit, and to the impact on a host of individuals, including those challenged now.

In the context of that sentencing case, the appellant now argues that the military judge should have recognized as plain or obvious error that the wrestling coach should not have been allowed to testify that he named his child after the victim, that the mother should not have been allowed to testify that holiday pictures will never be the same, and that a young Marine should not have been allowed to testify that the battalion had named a football trophy after Cpl JH.

Assuming for the sake of argument that one or more of the challenged statements was outside the rule,[23] we decline to find that the error was plain or obvious, requiring the military judge to *sua sponte* truncate the testimony of that witness. We again note that all of these witnesses testified briefly, that none of them used inflammatory language, and that none of them testified about appropriate sentences or what should happen to the appellant. Any of those matters may well have prompted the military judge to rein in the testimony, even absent objection. Nothing in the testimony cited by the appellant was so obviously in error that the military judge should have halted the direct examination of that witness. We find no plain or obvious error in admitting the testimony of the ten witnesses.

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[22] The statements establishing the providence of the guilty plea to murder span pages 53-59 of the record and portions of pages 1-2 of Prosecution Exhibit 1, a stipulation of fact.

[23] R.C.M. 1001(b)(4).

(3) Was Any Error Prejudicial?

However, even if we assumed plain or obvious error, we find no material prejudice to a substantial right of the appellant. This was a military judge alone trial. Just as in *Bungert*, the appellant "does not explain how the outcome might have been different if [the witnesses'] testimony had been excluded, particularly in light of the fact that the sentencing was by a military judge sitting alone."[24] Judges are presumed to know the law and apply it correctly.[25] That presumption holds absent clear evidence to the contrary.[26] Judges are presumed to be able to filter out inadmissible evidence and to not rely upon inappropriate evidence when making decisions as to guilt, innocence, or sentence.[27] Consequently, we conclude that even if this evidence was improperly admitted, viewed in context of the entire court-martial, it did not materially prejudice the substantial rights of the appellant.

(4) Cumulative Error

The appellant also urges us to find cumulative error, but we do not. Under the cumulative-error doctrine, we must review all errors preserved for appeal and all plain errors,[28] but "[a]ssertions of error without merit are not sufficient to invoke this doctrine."[29]

Sentence Appropriateness

In his final assignment of error, the appellant argues that a sentence to life without possibility of parole is

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[24] 62 M.J. at 348.

[25] *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009).

[26] *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) and *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)).

[27] *See United States v. Ellis*, 68 M.J. 341, 347 (C.A.A.F. 2010); *United States v. McNutt*, 62 M.J. 16, 26 (C.A.A.F. 2005); *United States v. Robbins*, 53 M.J. 455, 457 (C.A.A.F. 2000).

[28] *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996).

[29] *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

inappropriately severe in light of his well-documented history of mental health problems and troubled childhood.

Under Article 66(c), UCMJ, we have a duty to independently review the sentence of each case within our jurisdiction and only approve that part of a sentence which we find should be approved.[30] This obligation requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves.[31] In making this important assessment, we consider the nature and seriousness of the offenses, as well as the character of the offender,[32] keeping in mind that courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the CA.

The appellant pleaded guilty to the premeditated murder of Cpl JH, an offense that carried a potential sentence of death. In return for his pleas of guilty, the CA referred the charge as a noncapital offense. The record before us documents the gravamen of this crime. With no provocation whatsoever, the appellant left his barracks room to find someone to kill, and carried out his plan on Cpl JH, a stranger chosen at random. The record is replete with evidence of the violence of the attack. The record also contains voluminous evidence in mitigation that documents the appellant's troubled childhood and his significant history of serious mental health problems. After carefully considering the entire record, we are convinced that justice was done and the appellant received the punishment he deserved.

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[30] *United States v. Baier,* 60 M.J. 382, 383-84 (C.A.A.F. 2005).

[31] *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988).

[32] *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

We affirm the findings and the sentence as approved by the CA.

Chief Judge PERLAK and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court