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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, J.A. FISCHER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHARLES E. DAME III
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300103
GENERAL COURT-MARTIAL

Sentence Adjudged: 13 November 2012.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commanding General, II MEF, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.W. Hitesman, USMC.
For Appellant: CAPT Brent Filbert, JAGC, USN.
For Appellee: Maj Crista Kraics, USMC; Maj Paul Ervasti, USMC.

24 October 2013

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.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful general order, one specification of indecent conduct, and two specifications of assault, in violation of Articles 92, 120, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 928. The military judge sentenced the appellant to 18 months confinement,

reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended all confinement in excess of 12 months.

The appellant assigns one error: that the military judge erred in allowing the Government to introduce improper evidence in aggravation. We have examined the record of trial, the appellant's assignment of error, and the pleadings of the parties. We conclude that the findings and the 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 sole assignment of error pertains to the appellant's conviction for indecent conduct, which arises from the following chain of events. While on temporary duty to Whitman Air Force Base in Missouri, the appellant and five other Marines met Ms. R.M. (RM) and her friends in a bar. Late in the evening, the six Marines went with RM and a friend to a private residence. There, the appellant used his cell phone to video record three of the Marines as they engaged in various sexual activities with RM. The following day, the appellant texted an acquaintance that he intended to post the videos on an internet porn site.

The appellant was charged with indecent conduct for video recording RM "without her consent" while other Marines engaged in sexual acts with her. Pursuant to a pretrial agreement, he pled guilty to video recording three Marines, Lance Corporal (LCpl) Falk, LCpl Doss, and LCpl Garcia, engaged in sexual activity with RM, but excepted out the words "without her consent."[1] During the providence inquiry, the military judge focused on what made the conduct indecent, i.e., the open and notorious nature of the sexual activity being recorded by the appellant. The military judge properly constrained his inquiry to the offense as pled to by the appellant, and did not inquire into whether RM consented to the video recording or indeed whether she consented to the sexual acts themselves. Similarly, the stipulation of fact did not address whether RM consented to the recording or to the sexual acts.

During the Government's sentencing case, the trial counsel requested that the military judge take judicial notice of the guilty pleas and conviction in the companion case of LCpl Falk,

[1] The appellant also pled guilty to order violations and assaults arising from unrelated hazing incidents.

one of the Marines whom the appellant filmed committing sexual acts with RM.[2] Prior to the appellant's court-martial, LCpl Falk pleaded guilty to sexually assaulting RM when she was incapable of declining participation. Appellate Exhibit XI. Defense counsel objected to the request for judicial notice as improper evidence in aggravation, arguing that the military judge could not properly consider the conviction in LCpl Falk's case as evidence in the appellant's sentencing hearing, in part because the appellant was not a party at LCpl Falk's trial and was not able to present his own evidence on the issue of whether RM was sexually assaulted. Trial counsel responded that she was offering proof of LCpl Falk's pleas and conviction "to show the context" of the appellant's offense. Record at 114.

With no further discussion, the military judge overruled the defense's objection, finding the pleas and conviction to be directly related to the appellant's offense and thus proper evidence in aggravation:

> So, the facts are that what [the appellant] was videotaping with his phone has been legally determined to be, through a conviction at a court-martial of competent jurisdiction, a sexual assault, and that is an aggravating factor that is directly related to the offenses of which the accused has been found guilty."

Id. at 115.

The defense counsel did not raise an objection under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), and the military judge did not articulate any MIL. R. EVID. 403 analysis on the record.

On appeal, the appellant asserts that the military judge erred in several regards. First, the appellant contends that he was not convicted of video recording a sexual assault or of videotaping without RM's consent, and that his punishment cannot be based on criminal conduct of which he was not convicted. Secondly, he contends that the probative value of the results from LCpl Falk's court-martial was substantially outweighed by the danger of unfair prejudice. The probative value is limited, he argues, in that it contains no information as to how LCpl Falk described the actions of himself, RM, or the appellant. Additionally, he notes the disparate results in the two other

[2] Prior to taking the appellant's forum election, the military judge disclosed that he had presided in the companion case of *United States v. Falk.* He invited *voir dire* or challenge, but both parties declined. Record at 27.

companion cases demonstrate the lack of probative value of the results in LCpl Falk's case. LCpl Doss was charged and convicted only of indecent conduct, not sexual assault, and LCpl Garcia was charged with sexual assault, but acquitted at court-martial.[3] Those results, the appellant contends, demonstrate that the results in LCpl Falk's case provide little probative evidence of whether the appellant actually video recorded RM being sexually assaulted.

In contrast, the appellant argues, the danger of unfair prejudice by the consideration of the results in LCpl Falk's court-martial was significant. The military judge took judicial notice of the results of a proceeding at which the appellant was not a party and had no rights, thereby escalating his criminal conduct from what previously appeared to be the recording of consensual sexual acts into something much more serious - the recording of a sexual assault. Finally, he contends that the admission of the evidence violated his due process rights, in that the evidence was wholly unreliable as it related to his own criminal responsibility.

Discussion

We turn first to the appellant's argument that evidence of the conviction for sexual assault was improper because it was outside the ambit of what he pled guilty to and was convicted of. He argues that the results from LCpl Falk's court-martial go far beyond the charge that he pled to and the facts that were elicited during the providence inquiry. Indisputably, the trial counsel sought to paint a different picture than the appellant admitted to during his providence inquiry.

We review a military judge's admission of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) provides that "(t)he 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." This rule poses a higher burden than mere relevance. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

[3] LCpl Garcia's court-martial was adjudicated several months after the appellant's; the fact of his acquittal was noted in the staff judge advocate's recommendation and the CA's action, but was not before the military judge.

In pleading guilty, LCpl Falk admitted under oath that the sexual acts he committed with RM, as captured on video by the appellant, constituted a sexual assault, perpetrated on RM while she was substantially incapable of declining participation in the sexual activity. Those admissions and the resultant conviction are "directly related" under R.C.M. 1001(b)(4) to the crime for which the appellant was convicted, as they illuminate the true extent and nature of the appellant's crimes. *See United States v. Gargaro*, 45 M.J. 99, 101 (C.A.A.F. 1996). The appellant also expressed the intent to post the videos on an internet porn website; the fact that the videos he intended to post captured a sexual assault heightens the impact on RM, as the victim of the assault, and is an appropriate factor to be considered in sentencing. *See United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003) (holding that selfish indifference to the nature or consequences of the appellant's crime was a proper matter in aggravation).

This does not end our analysis, however, as sentencing evidence is subject to the balancing test of MIL. R. EVID. 403. *Stephens*, 67 M.J. at 236. When the military judge conducts a proper balancing test under Rule 403 on the record, his ruling will not be overturned absent a clear abuse of discretion. *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 2008). He receives less deference if he fails to articulate his balancing analysis on the record, and no deference if he fails to conduct the Rule 403 balancing. *United States v. Mann*, 54 M.J. 164, 166 (C.A.A.F. 2000). Because the military judge in this case failed to conduct a Rule 403 balancing test, we examine the record ourselves. *Stephens*, 67 M.J. at 236.

In doing so, we find that the underlying information of LCpl Falk's pleas and conviction for sexual assault was probative because they illuminate the true nature of the sexual conduct that the appellant was video recording and the impact on RM of that recording. *See* R.C.M. 1001(b)(4) (stating that aggravation evidence includes evidence of psychological impact on the victim). The concern for unfair prejudice arises in part from the form in which the trial counsel presented this information: as a request for judicial notice of the pleas and conviction rather than the testimony of LCpl Falk or the victim, through which further facts may have been adduced, including whether the appellant was aware that RM was substantially incapacitated and whether all the sexual acts the appellant filmed were sexual assaults.

Under the circumstances of this sentencing case, we conclude that "[t]he admission of this evidence did not distort accurate fact finding." *Stephens*, 67 M.J. at 236. First, the trial judge admitted, without objection, a written victim impact statement from RM. Prosecution Exhibit 3. Although that statement does not explicitly refer to a sexual assault or to being video recorded without permission, RM clearly communicates that she did not know what was happening to her, and did not know that she was being recorded.

Secondly, the trial judge admitted, upon defense motion, the report of results of trial in the case of LCpl Doss, and noted that he would consider that report as evidence that what was videotaped by the appellant for "at least one other of the participants . . . did not rise to the level . . . of a sexual assault." Record at 133. The report reveals that LCpl Doss was charged and convicted of indecent conduct only, i.e., engaging in sexual conduct in the presence of others, and not sexual assault.

Finally, we note that in his unsworn statement the appellant chose not to rebut or contradict the fact that LCpl Falk sexually assaulted RM or the implication that he knew RM was being sexually assaulted.[4] In his lengthy and articulate unsworn statement, the appellant instead took the opportunity to accept responsibility, to express his shame and remorse, and to issue a heartfelt apology to RM for the part he played "in her pain." *Id*. at 154-59.

With these considerations in mind, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice to the appellant. Because we find it provided a fuller portrayal of the appellant's actions and the extent of his offense, we conclude that any resultant prejudice did not substantially outweigh the probative value and therefore the military judge did not abuse his discretion. The evidence of LCpl Falk's pleas and conviction was proper aggravation evidence admitted under R.C.M. 1001(B)(4). We are not persuaded by the appellant's related argument that the admission of the evidence violated his Due Process Rights, as we determine the evidence to be reliable for the purpose for which it was offered.

Even assuming *arguendo* that the evidence failed the Rule 403 balancing test, and that the military judge abused his discretion in admitting it, the error was harmless for the same

[4] Of note, the military judge had earlier reminded the appellant and defense counsel of the broad latitude afforded to the appellant to address issues in controversy in his unsworn statement. Record at 132.

reasons noted above: the admission of RM's victim impact statement, the consideration of the results in the case of LCpl Doss, and the opportunity afforded the appellant to address the issue in his unsworn statement. For these reasons, any error was harmless under either a constitutional or nonconstitutional standard.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court