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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JIMMY L. GALYON
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

NMCCA 201300163
SPECIAL COURT-MARTIAL

Sentence Adjudged: 13 February 2013.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding Officer, First Marine Corps District, Eastern Recruiting Region, Garden City, New York.
Staff Judge Advocate's Recommendation: LtCol R.G. Palmer, USMC.
For Appellant: CAPT Ross Leuning, JAGC, USN.
For Appellee: Maj Crista Kraics, USMC.

12 November 2013

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of four specifications of violating a lawful general order, and one specification of making a false official statement, in violation of Articles 92 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 907. The military judge sentenced the

appellant to four months confinement, reduction to pay grade E-2, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) suspended all confinement in excess of 90 days, but otherwise approved the sentence as adjudged.

The appellant assigns one error: that the military judge erred by considering 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

In December of 2011, the appellant was assigned to recruiter duty in Springfield, Massachusetts. Prior to reporting for duty, he attended Recruiter School in San Diego, California, where he learned that forming unprofessional personal relationships with members of the Delayed Entry Program (DEP) or prospective recruits was prejudicial to good order and discipline, and a violation of various orders prohibiting such behavior. Despite his training, and the fact that he was the married father of three children, the appellant engaged in a "nonprofessional personal relationship" with two different DEP members during the first six months he was assigned to recruiting duty. Charge Sheet. One of those relationships involved the exchange of sexually provocative text messages, the appellant e-mailing the DEP member a naked picture of himself, and multiple instances of sexual intercourse. The other relationship involved drinking with the DEP member in a local bar before bringing her back to the recruiting office and having sexual intercourse.

The appellant's misconduct with the two DEP members, several false statements that he made during a subsequent investigating, and various other misconduct all led to a series of charges and specifications being preferred against the appellant in November of 2012. Those charges included not just those the appellant pled guilty to, but also a number of charges

and specifications that the CA agreed to withdraw and dismiss as part of a pretrial agreement. Among those withdrawn and dismissed where two specification of adultery, stemming from his alleged sexual encounters with the two DEP members, and two specifications of making false official statements, stemming from his denials about those sexual encounters.

During the Government's sentencing case, the trial counsel introduced, without defense counsel's objection,[1] the sexually explicit text messages, the naked self picture that the appellant had sent, and summaries of statements from a variety of witnesses, to include both of the DEP members.

Discussion

The appellant argues that the sentencing evidence considered by the military judge was improper because it was outside the ambit of what he pled guilty to and was convicted of. We disagree.

Where no objection is raised at trial, an appellant may prevail on appeal if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). To establish plain error, the appellant must demonstrate: (1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). Moreover, in cases such as this, the error must have "'had an unfair prejudicial impact on the [military judge's] deliberations.'" *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).

During the presentencing phase of a court-martial, "trial counsel may present evidence as to any aggravating circumstances

[1] The appellant's trial defense counsel did object to several of the statements, but only on the basis that the statement were from individuals scheduled to give live testimony at the trial, thus rendering the written statements "cumulative" with their expected live testimony. Record at 55-56. No objection was made arguing that the evidence was improper.

directly relating to or resulting from the offenses of which the accused has been found guilty." RULE FOR COURTS-MARTIAL 1001(B)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). The language "directly relating to or resulting from" has been interpreted as encompassing evidence of other crimes which are part of a "'continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community.'" *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001) (quoting *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)). Nonetheless, this rule does "'not authorize introduction in general of evidence of . . . uncharged misconduct,' [*Nourse*, 55 M.J. at 231)] *and* is a 'higher standard' than 'mere relevance[,]' [*United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)]." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). The evidence of uncharged misconduct must be direct and "closely related in time, type, and/or often outcome, to the convicted crime." *Id.* at 281-82.

In this case, the military judge did not commit plain error by admitting sentencing evidence amounting to uncharged misconduct. Evidence that the appellant was having sexual relations with the two DEP members, and sending sexual texts and pictures to one of them, gave context to, and more fully explained, the nature of the "nonprofessional personal relationship[s]" he was charged with. Moreover, none of the evidence that the appellant now complains of dealt with other alleged victims, or encompassed a time frame outside of the charged misconduct. As such, the evidence was directly related to the charged offenses, was part of a continuous course of misconduct toward the same victims, and was closely related in time and type to charged offenses. *Hardison*, 64 M.J. at 281-82; *Nourse*, 55 M.J. at 231. Accordingly, we find no plain error by the military judge in admitting this evidence.

Of course, any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the balancing test of MIL. R. EVID. 403. *Hardison*, 64 M.J. at 281. However, this inquiry is easily disposed of given the fact that sentencing was presented before a military judge-alone who "is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008) (citation omitted).

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court