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

Before
K.J. BRUBAKER, D.C. KING, M.C. HOLIFIELD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MARQUETTE R. DIGGS
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201400153
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 October 2013.
Military Judge: Maj Nicholas A. Martz, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: LT Jessica L. Ford, JAGC, USN.
For Appellee: Maj Suzanne M. Dempsey, USMC.

25 June 2015

OPINION OF THE COURT

PER CURIAM:

Contrary to his pleas, the appellant was convicted by a general court-martial consisting of officer and enlisted members of forcible rape, abusive sexual contact, and communicating a threat, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged.

In his initial brief to this court, the appellant asserted the following assignments of error (AOEs):

> (a) that his trial defense counsel (TDC) provided ineffective assistance by failing to inform him of a pretrial agreement (PTA) offer from the Government that would have allowed the appellant to plead guilty at a special court-martial and avoid sex offender registration;
>
> (b) that the evidence is factually insufficient to support a finding of guilt;
>
> (c) that the military judge erred in admitting the appellant's statement regarding "rough sex" causing pregnancy miscarriages as improper character evidence; and,
>
> (d) that the military judge failed to instruct the members regarding consent evidence as it applied to proof of abusive sexual contact.

In a supplemental brief, the appellant raised what amounts to a restatement of the first AOE.

After careful consideration of the record of trial and the submissions of the parties, we are convinced 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 appellant and a civilian female, CB, engaged in an intermittent relationship over an approximately three-year period. In January 2009, while CB was pregnant with the appellant's child, she visited the appellant to show him ultrasound pictures and discuss complications related to the pregnancy. After telling the appellant she was medically directed not to engage in sexual activity, the appellant forcibly raped her. Despite this, the relationship continued after the child's birth.

Sometime before this rape, but while CB was pregnant, the appellant engaged in a smoke pit conversation with several other Marines regarding parenthood, DNA testing, and abortions. The

appellant stated, "I know pretty much having rough sex with someone can cause a miscarriage."[1] The Government offered this statement at trial as evidence of the appellant's intent to use force during sexual intercourse with CB.

Due to the appellant's subsequent transfer, CB repeatedly drove from Parris Island, South Carolina to China Grove, North Carolina to maintain the relationship and allow her daughter to bond with the appellant. On one of these trips, in the fall of 2010, CB fell asleep at the appellant's house. When she awoke the next morning she noted soreness in her vagina and asked the appellant whether they had engaged in sexual activity, as she had no recollection of any events after falling asleep. The appellant denied they had sex, but later texted CB two pictures that showed, among other things, his penis touching her bare buttocks. These photos were later destroyed during a failed attempt by a special agent of the Naval Criminal Investigative Service (NCIS) to retrieve them from CB's locked cellphone. Two witnesses, however, testified to the photos' contents, stating CB showed them the photos shortly after she received them.

During the fall of 2011, CB received a text from the appellant threatening to kill her if she "had been" with anyone else. This text was also lost in NCIS's failed attempt to unlock the cellphone, but was likewise corroborated by a third party.

In January 2012, within a day of being served with notice that the appellant had filed for joint custody of their child, CB reported the charged offenses. During a pretext phone call arranged by NCIS, the appellant made numerous incriminating statements in response to CB's accusations.

Additional facts necessary to address individual AOEs will be provided below.

Procedural History of Case

The appellant's record of trial was originally docketed with this court on 10 April 2014. Appellate defense counsel submitted a brief with the above listed AOEs on 3 July 2014. The Government's answer followed on 11 September 2014. Confronted with contradictory affidavits regarding the appellant's ineffective assistance of counsel (IAC) claim, this court, on 22 October 2014, ordered a fact-finding hearing in

[1] Record at 491.

accordance with *United States v. DuBay*, 37 C.M.R. 441 (C.M.A. 1967).

Based on evidence provided at the *DuBay* hearing conducted on 23 January 2015, the *DuBay* judge provided his detailed findings of fact and conclusions of law on 24 February 2015. The appellant's case was redocketed on 13 March 2015 and forwarded to appellate counsel for supplemental briefing in light of the *DuBay* hearing. In his supplemental brief, the appellant renewed his IAC claim and requested that this court consider the AOEs raised in his original brief.

Ineffective Assistance of Counsel

Claims of IAC are subject to a two-part test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). This test requires that an appellant demonstrate, first, that his counsel's performance was deficient, and, second, that the deficiency resulted in prejudice. *Id.* at 687; *United States v. Green*, 68 M.J 360, 361 (C.A.A.F. 2010). To prevail, the appellant must meet both prongs of the *Strickland* test. *Green*, 68 M.J. at 361-62.

Regarding pretrial negotiations, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye,* 132 S. Ct. 1399, 1408 (2012). A counsel's failure to do so would satisfy the first *Strickland* prong. To meet the second prong, the appellant must show that, but for the failure by TDC to advise him of the PTA offer, there is a reasonable probability that: (1) the appellant would have accepted the offer; (2) the Government would have been bound by it at the time of trial; (3) the court would have approved the PTA; and (4) the conviction, sentence, or both would have been less severe than the actual conviction or sentence in his case. *See Lafler v. Cooper,* 132 S. Ct. 1376, 1385 (2012) (creating a similar test for civilian plea bargains where an appellant claims, after being convicted at a trial on the merits, he declined a PTA offer based upon erroneous advice of counsel). In doing so, the appellant must overcome a "strong presumption" that the TDC was competent. *United States v. Grigoruk*, 56 M.J. 304, 306 (C.A.A.F. 2002).

A *DuBay* judge's findings of fact regarding an allegation of IAC are reviewed under a clearly erroneous standard, while conclusions of law are reviewed *de novo*. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). Finding no clear

error, we accept the *DuBay* judge's findings of fact and adopt them as our own.

Despite the appellant's current claims to the contrary, the *DuBay* judge found that TDC thoroughly advised the appellant regarding an informal, oral offer from trial counsel that would have allowed the appellant to plead guilty to non-sexual offenses at a special court-martial, and that the appellant declined the offer.[2] Thus, we find no deficient performance. Even were we to assume the TDC did not so advise the appellant, the evidence indicates that the CA likely would not have approved such an agreement. Specifically, the *DuBay* judge found that neither the victim nor the CA's staff judge advocate would have supported such an offer, and, without their support, it was unlikely the CA would have approved it.[3] While the appellant now claims he would have accepted such an offer if he had known of it, it is unlikely there would have been any formal offer to accept. Accordingly, we find the appellant has failed to meet either prong of the *Strickland* test, as there was neither deficient performance nor prejudice.

Factual Sufficiency

We review questions of factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The Government had many hurdles to overcome in proving its case, including: numerous inconsistencies in CB's statements; her purported reputation for untruthfulness; the timing of her first reporting the assaults; and the fact she continued to pursue a relationship with the appellant after he allegedly sexually assaulted her on two occasions. However, the appellant's statements during the pretext phone call corroborated much of CB's allegations. At one point, in response to CB's accusation that he raped her, the appellant said he "didn't mean to rape" her, but he "got mad," and that he ignored her entreaties to stop because "it was all like revenge and all this other stuff going through my head."[4] The testimony

[2] *DuBay* Findings of Fact (FOF) 2r and 2s.

[3] *DuBay* FOF 2bb, 2cc and 2ff; Conclusion of Law 3j((2).

[4] Appellate Exhibit LXXII at 3-4.

of witnesses regarding the photographs and threatening text sent by the appellant further corroborated the victim's testimony. After carefully reviewing the entire record of trial, we are convinced of the appellant's guilt beyond a reasonable doubt.

Appellant's Statements

The appellant next claims the military judge erred in admitting evidence of the appellant's statement that "rough sex . . . can cause a miscarriage."[5] We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). To constitute an abuse of discretion, "'[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *Id*. (quoting *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010)).

MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) "permits evidence of 'other crimes, wrongs, or acts' to prove facts other than a person's character, such as 'intent, knowledge, or absence of mistake or accident.'" *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001) (emphasis omitted). For evidence of the appellant's statement to be admissible under this rule, it must, at a minimum, meet the three-part test set forth in *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A., 1989). First, the evidence must support a finding that the appellant made the statement offered. Second, a fact of consequence must be made more or less probable by the existence of the statement. *See* MIL. R. EVID. 401. Finally, the statement's probative value must be weighed against any danger of unfair prejudice. *See* MIL. R. EVID. 403.

"The standard required to meet this first prong is low." *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (citation omitted). While the witness described the appellant as "joking around"[6] and the statement as "sarcastic,"[7] the evidence that the appellant made the statement is unquestioned. Thus, we find the first prong is met.

In ruling on the admissibility of the statement, the military judge satisfied the remaining two prongs. First, he

[5] Record at 491.

[6] *Id*. at 493.

[7] *Id*.

found the fact that CB was pregnant at the time the statement was made "provides the logical nexus between the accused's smoke pit comment and the 2008 act. In effect, showing the intent of the accused's used [sic] force during sexual intercourse."[8] Second, although details of his analysis are lacking, the military judge found that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice[,] confusion of the issues or misleading the members."[9] We find these conclusions to be a reasonable exercise of judicial discretion, and not arbitrary, fanciful, clearly unreasonable or clearly erroneous.

After overruling the objection regarding the statement's admissibility, the military judge said he would provide a limiting instruction telling the members that they could not use this evidence for any other purpose beyond showing the appellant's intent. The military judge never gave this instruction, during either the witness's testimony or the charge, and the TDC did not object to his failing to do so. The appellant claims that the absence of a limiting instruction left the members free to use the evidence for any purpose, and, therefore, prejudiced him. We disagree.

"Failure to object to . . . omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). We conclude the absence of a limiting instruction here did not constitute plain error. First, such an instruction is not required under R.C.M. 920(e)(1)-(6). *See United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988) (holding that R.C.M. 920(f)'s waiver rule applies only to instructions listed in R.C.M. 920(e)(7), and not to other "required instructions")). Second, the Government did not argue in any way that would have invited the members to use appellant's statement for an impermissible purpose. Third, any consideration given to the statement was outweighed by the Government's remaining evidence. And, fourth, the military judge declared his intent to provide a limiting instruction *sua sponte*; the TDC neither requested it nor objected to its ultimate omission. Accordingly, we find

[8] *Id*. at 273.

[9] *Id*.

that the failure to give a limiting instruction was not plain error, and the issue was forfeited.[10]

Members Instructions

"Whether a panel is properly instructed is a question of law reviewed *de novo*." *United States v. Ignacio*, 71 M.J. 125, 125 (C.A.A.F. 2012) (citation and internal quotation marks omitted). In the absence of objection at trial, we review for plain error. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013). In evaluating instructions, we must do so "'in the context of the overall message conveyed to the jury.'" *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (quoting *Humanik v. Beyer,* 871 F.2d 432, 441 (3d Cir. 1989)).

The military judge's proposed instructions included the following language:

> The evidence has raised the issue of whether [CB] consented to the sexual act concerning the offense of abusive sexual contact, as alleged in Specification 3 of Charge I.
>
> Consent is a defense to that charged offense. . . .
>
> . . . .
>
> A person cannot consent to sexual activity if that person is substantially incapable of appraising the nature of the sexual conduct at issue . . . or otherwise substantially incapable of physically declining participation in the sexual conduct at issue or substantially incapable of physically communicating an unwillingness to engage in the sexual conduct at issue.
>
> . . . .
>
> The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense of abusive sexual contact . . . you must be convinced

[10] Although R.C.M. 920(f) uses the term "waiver," a failure to raise a timely objection normally results in forfeiture of the issue. Waiver requires the "intentional relinquishment or abandonment of a known right." *See United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted).

> beyond a reasonable doubt that, at the time of the sexual contact alleged, [CB] did not consent.[11]

The TDC did not object to this language, either when proposed or when provided to the members. The appellant now claims the military judge erred in omitting the following: "Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt."[12] We find the instructions, taken as a whole, reasonably instructed the members that evidence of consent may be used either to support an affirmative defense or to cast doubt on whether the Government has meet its burden of proof regarding substantial incapacitation.

In *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011), the court held similar language (albeit applied to aggravated sexual assault) "was clear and correctly conveyed to the members the Government's burden." *Medina*, 69 M.J. at 465 (citation omitted). The court went on to state that any error in using this language was harmless beyond a reasonable doubt. *Id*. at 466. We reach the same conclusion here.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court

[11] Record at 762-63; AE CIII at 4-5.

[12] Appellant's Brief of 3 Jul 2014 at 45-46.