IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

W.L. RITTER **K.K. THOMPSON** **J.F. FELTHAM**

UNITED STATES

v.

Kamil ABDIRAHMAN
Seaman Recruit (E-1), U. S. Navy

NMCCA 200401082 Decided 16 November 2006

Sentence adjudged 20 October 2003. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

Capt RICHARD VICZOREK, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

THOMPSON, Judge:

A general court-martial composed of enlisted and officer members convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 9 months, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error: (1) factual insufficiency of the evidence to support a conviction of rape; (2) improper comment by trial counsel on the appellant's failure to testify; (3) error by the military judge in allowing a nurse practitioner to testify as an expert on rape trauma; and (4) allowing testimony concerning the alleged victim's character for truthfulness before it was attacked by the defense. We have considered the record of trial, the appellant's four assignments of error, and the Government's response. We find merit in the

appellant's second assignment of error and we will take corrective action in our decretal paragraph.[1]

Background

The victim, Fireman (FN) O, and the appellant lived in the same barracks. She knew him only by sight, and did not know his name. Two days prior to the rape, FN O stated that the appellant had made an unwelcome advance towards her while they were in another shipmate's barracks room. FN O extricated herself from this situation and saw the appellant at least twice more that weekend at a night club. She states she did not have any contact with the appellant on these occasions.

On Sunday afternoon, the day the rape occurred, FN O testified that she encountered the appellant in the laundry room at the barracks. Although expressing surprise at seeing him, and in spite of their previous encounter, she readily agreed to accompany him to his barracks room to watch movies. While in the appellant's barracks room, FN O sat on the appellant's bed and looked at a pornographic magazine with him. They also engaged in consensual horseplay. When the appellant tried to kiss her, FN O stated that she resisted and told the appellant she did not wish to kiss him, as they both were involved with other people.

At some point, while FN O sat on the appellant's bed, the appellant sat behind her. He touched her twice, and she shrugged him off, pushing his hand away. After this, the appellant got off of the bed, stood to the rear of FN O, and removed his clothing. In spite of hearing the jangling of a belt buckle and the sound of clothes dropping, FN O did not turn around to see what the appellant was doing.

When the appellant again sat on the bed behind FN O, he extended his bare legs on either side of her. FN O stated that she merely thought he had changed into shorts and again made no effort to turn and look at the appellant. At this time, FN O said the appellant placed her hand on his penis. She pulled her hand away and, when the appellant tried to kiss her, resisted him. FN O testified that the appellant then proceeded to forcefully remove her clothing and violently rape her, in spite of her efforts to fight him off.

[1] As a result of our corrective action, we need not address the remaining assignments of error.

After the rape, the appellant asked FN O if she had enjoyed having sex with him and then went to the bathroom. When FN O grabbed her belongings to leave, the appellant appeared surprised and asked her if she was going to stay and watch the rest of the movie. FN O declined and went to her barracks room. She claimed she suffered extreme pain and discomfort after the rape. Shortly afterwards, FN O testified that the appellant came by her room to ask if she was okay and to tell her where he would be if she needed him.

At one point, while FN O was at her barracks room door, looking into the hall, Engineman Fireman (ENFN) Stanton saw her and spoke to her. FN O told him she had been crying for an hour, and gave an explanation, but did not mention the rape. A friend of FN O's, Seaman (SN) Murray, went to FN O's barracks room. She stated that she was on her cell phone for several minutes before speaking to FN O, who did not appear to have been crying. FN O told SN Murray that she had gone to the appellant's room to watch a movie and he had tried to kiss her. SN Murray stated that at some point she asked FN O if she had been raped. FN O replied that she had been raped and began to cry.

Later, after learning of the rape accusation made by FN O, SN Myatt confronted the appellant and accused him of raping FN O. He testified that the appellant appeared surprised, claimed FN O was lying and said he wanted to talk to her. The appellant told SN Myatt that he tried to mess around with her but that she did not want to. He made no other statements or admissions.

FN O went to the hospital to undergo a rape examination. The attending nurse testified that FN O appeared to be calm, showing little emotion. There was no evidence of any contusions, bruises, abrasions or other indications of a struggle or forcible rape. On the medical intake form, the nurse noted that no coercion was used.

At trial, Engineman First Class (EN1) Taylor testified that he encountered FN O shortly after her claim of rape was reported. He stated that he spoke to her and felt that portions of her account of the rape did not make sense. Specifically, he questioned FN O's claim that she had yelled and screamed for help, stating his belief that, had she done so, someone would have heard her. He further stated that, in light of the fact that the rape occurred on a Sunday afternoon in the barracks, and sounds could easily be heard through the walls, any screams and yells would likely have been heard by other occupants.

Furthermore, during her testimony, FN O admitted that she did not scream or yell loud enough for anyone to hear her.

Other witnesses stated that the appellant appeared normal during the time period after the rape, but that, after being accused of the rape, appeared surprised and confused. At trial, the appellant did not testify, nor did he call any witnesses or present evidence.

Comment Upon Appellant's Failure to Testify

The appellant contends that the trial counsel's repeated references to the evidence as "undisputed" during closing argument was an improper comment on the appellant's Fifth Amendment right not to testify in this case, where only the appellant could have disputed the Government's single eye-witness to the alleged rape. We agree.

During argument to members on the findings, the trial counsel recounted the evidence presented during the prosecution's case-in-chief. The trial counsel broadly described the facts and evidence as "undisputed" 12 times in her first argument, and 7 times in her rebuttal argument.[2] We note that many of the "facts" which the trial counsel argued were "never disputed" involved details of the sexual encounter in the appellant's room, which could only have been disputed by the appellant testifying in his defense.

Specifically, the defense counsel argued that the trial counsel had made numerous, inappropriate comments that

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[2] During her first argument, the trial counsel used the word "undisputed" a total of 12 times as follows: "Undisputed facts of what happened during the time that she was raped. Undisputed fact that she never consented. Undisputed fact that she said 'stop' to the accused over and over and over again." "These details, undisputed fact." "Undisputed fact. She had been flipped over . . . This is an undisputed fact. The accused took her . . . undisputed fact . . . she could do nothing . . . an undisputed fact." "That's an undisputed fact . . . all of these facts . . . are undisputed facts." Record at 399-400.

During her rebuttal argument, the trial counsel used the word "undisputed" a total of 7 times: "But what you didn't hear the defense say at one point [*sic*] ever dispute any fact or detail about the rape. Never disputed the position. Never disputed the fact that he forced the pants off of her. Never disputed the fact that she was face down on the floor, crawling across the floor. Never disputed the fact that she was bent over backwards on the bed. Never disputed the fact that he flipped her over, and never disputed the fact that once it was all said and done he said, 'Wasn't that fun?'" Record at 406-07.

encouraged the members to speculate about the appellant's failure to testify. The defense counsel objected to the trial defense counsel's argument after the military judge instructed the members on findings and they had been sent to the deliberation room.

The military judge ruled that the trial counsel's argument was not improper, but agreed to give the members a curative instruction. He advised the counsel of the wording on the instruction he intended to give. The defense counsel did not object to the curative instruction proposed by the military judge. The members were recalled to the courtroom, where the military judge addressed them as follows:

> Members, before I send you to the deliberation room, I just want to clarify one issue by repeating some of the instructions I gave you before, briefly. I was concerned that you misinterpret or misapply Trial Counsel's reference to unrebutted facts, and in that argument that reference was not a comment on the accused not testifying. The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness. You must disregard the fact that the accused has not testified. I also remind you that arguments of counsel are not evidence in this case."[3]

Following this instruction, the members exited the courtroom to continue their deliberation on findings.

Discussion

In his second assignment of error, the appellant asserts that the trial counsel's improper argument constituted plain error, which was not cured by the military judge's instruction. We agree and hold, for the reasons stated below, that the trial counsel's argument was improper and violated the appellant's constitutional rights.

It is black letter law that a trial counsel may not comment upon the fact that an accused did not testify in his own defense, either "directly, indirectly, or by innuendo[.]" *United States v. Mobley,* 31 M.J. 273, 279 (C.M.A. 1990)(citing *Griffin v. California,* 380 U.S. 609 (1965)). Furthermore, trial counsel is

[3] Record at 421; *see* Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 2-7-20 (Ch-1, 30 Jan 1998).

not permitted to comment on an accused's failure to produce witnesses on his behalf. *See United States v. Swoape,* 21 M.J. 414 (C.M.A. 1986). We must determine whether the trial counsel's statements amounted to an impermissible reference to the appellant's Fifth Amendment right not to testify, or whether the statements were a fair response to the defense's theory of the case. A prosecutorial comment must be examined in light of its context within the entire court-martial. *United States v. Carter,* 61 M.J. 30, 33 (C.A.A.F. 2005).

Here, the trial defense counsel objected to the trial counsel's improper argument and, apparently, was satisfied with the military judge's admonition to trial counsel and saw no need for any additional instructions. Therefore, absent plain error, that issue is waived. *United States v. Gilley,* 56 M.J. 113, 123 (C.A.A.F. 2001); R.C.M. 1005(f); *see United States v. Southwick*, 53 M.J. 412, 414 (C.A.A.F. 2000), *overruled in part on other grounds, United States v. Inong,* 58 M.J. 460 (C.A.A.F. 2003); *United States v. Powell,* 49 M.J. 460, 465 (C.A.A.F. 1998). If the plain error is constitutional error, the Government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial. *Powell,* 49 M.J. at 465 (citing *United States v. Adams,* 44 M.J. 251, 252 (C.A.A.F. 1996)).

In the case before us, the trial counsel's argument clearly highlighted the fact that the appellant did not testify by repeatedly calling the evidence "undisputed". When such comments are made, the record must be examined to determine whether the error was harmless. *Chapman v. California,* 386 U.S. 18 (1967). A prosecutorial comment must be examined in light of its context within the entire court-martial. *Carter,* 61 M.J. at 33. In reviewing the potential impact of indirect comments, this court looks at four analytical factors to determine whether the improper argument was prejudicial. We must decide:

(1) whether the language used was "manifestly intended" to comment on the failure of the appellant to testify or was of such a character that the members would "naturally and necessarily" take it as such;

(2) whether the improper comments were isolated or extensive;

(3) whether evidence of guilt is overwhelming; and

(4) whether curative instructions were given, and when.

United States v. Dennis, 39 M.J. 623, 625 (N.M.C.M.R. 1993) (quoting *United States v. Mobley,* 34 M.J. 527, 531 (A.F.C.M.R. 1991)(citing *Lent v. Wells,* 861 F.2d 972, 975 (6th Cir. 1988)), *aff'd,* 40 M.J. 305 (C.M.A. 1994)(summary disposition). This principle is also found in the discussion section to R.C.M. 919(b), which prohibits a trial counsel from arguing that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused.

Concerning the first and second analytical factors, the trial counsel may not have "manifestly intended" to comment on the appellant's silence, however, the sheer number of times she mentioned the word "undisputed" effectively ensured that the members would naturally and necessarily take it as such. *Carter,* 61 M.J. at 34. Trial counsel used the word "undisputed" repeatedly, so that the reference to the appellant's decision not to testify became a centerpiece of her closing arguments. She clearly highlighted the fact that the appellant did not testify by repeatedly calling the Government's evidence "undisputed." Every comment made by the trial counsel in this regard was a reference to evidence provided by FN O which could only have been rebutted by the appellant. *See United States v. Webb,* 38 M.J. 62, 66 (C.M.A. 1993)(citing *United States v. Coven,* 662 F.2d 162, 171 (2d Cir. 1981)). Additionally, the fact that she mentioned the word so often makes it difficult to conclude that the comments were isolated. *United States v. Carter,* No. 045002, unpublished op., 2003 CCA LEXIS 257, at 9-10 (A.F.Ct.Crim.App. 17 Oct 2003), *aff'd*, 61 M.J. 30 (C.A.A.F. 2005).

As to the third analytical factor, while we believe there is sufficient evidence to sustain the member's findings on the charge, we cannot conclude that the evidence is overwhelming. *Id.* at 11 (citing *United States v. Hasting,* 461 U.S. 499 (1983)). Specifically, there are no admissions or confessions by the appellant concerning the rape. There were several inconsistencies surrounding FN O's account of events and her actions that day. Also, there was no third-party witness to the event. In light of the evidence presented, and the absence of any independent corroborative evidence, we do not find that the Government's case was an overwhelming one. *See United States v. Riley,* 47 M.J. 276, 280 (C.A.A.F. 1997).

Regarding the fourth analytical factor, we do not find that the error was rendered harmless by the curative instruction given by the military judge. In many instances, a judge can

correct trial error by suitable instructions and by assuring that the court members fully understand those instructions. *See United States v. Rushatz,* 31 M.J. 450, 456 (C.M.A. 1990); *United States v. Watkins,* 21 M.J. 224 (C.M.A. 1986). Here, the military judge never informed the members that the trial counsel's argument was improper, nor did he direct the members to disregard the numerous improper comments. Instead, the military judge gave an instruction to the members which proclaimed that the trial counsel's argument was not a comment on the appellant's not testifying, when it clearly was. In failing to specifically state to the members that the argument was improper and that they must disregard it, the military judge's instruction effectively endorsed the trial counsel's improper comments in her closing and rebuttal arguments. In light of this seeming endorsement by the military judge, the curative instruction could not vitiate the effect of the trial counsel's improper comments on the members.[4] We find that this instruction did nothing to prevent prejudice to the appellant, and may have added to it. *See United States v. Rushatz,* 31 M.J. 450, 456 (C.M.A. 1990); *United States v. Evans,* 27 M.J. 34, 39 (C.M.A. 1988).

After applying the four analytical factors, we conclude that the trial counsel's comments were an impermissible reference on the appellant's exercise of his Fifth Amendment right not to testify, and not a fair response to the defense's theory of the case. Where, as here, the error is constitutional, the burden shifts to the Government to persuade the appellate court beyond a reasonable doubt that the error did not affect the verdict. *See Chapman,* 386 U.S. at 23-24.

Considering the prejudicial impact of this argument within the context of the entire trial, and the endorsing curative instruction given by the military judge, as well as the entire record before us, we are not convinced that this constitutional error was harmless beyond a reasonable doubt. *United States v. Carpenter,* 51 M.J. 393, 396 (C.A.A.F. 1999).

[4] The lack of an objection by the defense counsel during the argument does not relieve the military judge of his paramount responsibility to instruct the members properly regarding this improper argument. *See United States v. Graves,* 1 M.J. 50, 53 (C.M.A. 1975).

Conclusion

Accordingly, the findings of guilty and the sentence are set aside. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority. A rehearing is authorized.

Judge FELTHAM concurs.

RITTER, Senior Judge (dissenting):

I agree with the majority that, under the specific circumstances in this case, the trial counsel's repeated references to the "undisputed" facts in her argument on findings amounted to an indirect comment on the appellant's right to remain silent and not testify in his own defense.[1] But I must respectfully dissent from the majority's finding that this constitutional error was not harmless beyond a reasonable doubt. Specifically, I would find the military judge's curative instruction was sufficient to prevent any prejudice to the appellant from the trial counsel's argument. I would therefore affirm the findings and the sentence as adjudged.

The trial counsel's argument did not directly comment on the appellant's failure to testify, and, like the military judge, I find no manifest intent to do so. But it raised a valid concern on the part of the military judge that the members might interpret it as such. Thus, upon defense objection, the military judge asked if the defense wanted to propose a curative instruction. The defense agreed to a curative instruction, but declined the offer to propose their own. The military judge then crafted a curative instruction, to which the defense agreed. It was given immediately prior to the members' deliberations. Since the trial counsel did nothing after the curative instruction to undermine its effect, by the logic of our superior Court in *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005), the military judge's action should have rendered any error harmless beyond a reasonable doubt.

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[1] I disassociate myself with the majority ‘s apparent finding that the repeated use of the word “undisputed” is *per se* comment on an accused’s failure to testify, or that the trial counsel’s comments in this case “clearly highlighted” that fact. *See United States v. Saint John,* 48 C.M.R. 312, 314 (C.M.A. 1974). But since so many of the specific facts thus labeled by the trial counsel involved acts only witnessed by the appellant and the alleged victim, and the trial counsel’s comments were not tailored to address weaknesses in the defense counsel’s cross-examination of FN O, I consider it reasonable that the members would view these comments as challenging the appellant’s decision not to testify.

But the majority views the curative instruction as insufficient, because the military judge failed to label the trial counsel's argument "improper." Yet the instruction was acceptable to the defense, and contained the appropriate guidance to the members regarding the appellant's absolute right to remain silent. Thus, the military judge's curative instruction was much like the one upheld by our superior Court in *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991), *aff'd* 36 M.J. 34 (C.M.A. 1992). In that case, the Air Force Court of Military Review faced a similar situation involving both a trial counsel's improper comment on the appellant's right not to testify, and a curative instruction that gave proper guidance concerning the accused's rights but failed to describe the trial counsel's argument as error. The Air Force court stated:

> We are satisfied in this case, however, that the instructions adequately ameliorated any prejudice caused by the improper comments. Although the judge had not found the argument to be error, he provided a proper and effective curative instruction.

Id. at 34 M.J. 531.

In such cases as these, where a military judge does not view a questionable aspect of counsel's argument as clear error, I am not aware of any legal bar against the military judge taking cautionary steps to cure any possible prejudice to the accused. Indeed, that kind of preventative action is expected of a seasoned military judge. Nor am I aware of any requirement in the law that the military judge must first label counsel's efforts as error or improper before curative action may be taken. Our superior Court's decision in *Mobley* would certainly seem to indicate otherwise.

Here, the curative instruction was a clear and accurate statement of the law. It was well-placed to get the members' attention: in fact, it was the very last thing the members were told prior to deliberations. Record at 421. There is no evidence in the record that the members ignored the military judge's instruction. In the absence of such evidence, we presume

the members understand and follow a military judge's instructions. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). In view of the foregoing, I am convinced that the error was harmless beyond a reasonable doubt.

For the Court

R.H. TROIDL
Clerk of Court