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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **C.L. CARVER**

UNITED STATES

v.

Lewis L. BUTLER
Sergeant (E-5), U.S. Marine Corps

NMCCA 200000528 Decided 29 April 2005

Sentence adjudged 4 June 1999. Military Judge: R.G. Sokoloski. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.

Maj CHARLES C. HALE, USMC, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel

Senior Judge CARVER:

At the appellant's general court-martial he pled guilty to willful dereliction of duty. Contrary to his pleas, the appellant was convicted by a panel of officer and enlisted court members of battery and kidnapping. The appellant's crimes violated Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The adjudged and approved sentence included a bad-conduct discharge, confinement for 3 years, total forfeiture of pay and allowances, and reduction to pay grade E-1.

The appellant claims that: (1) the evidence supporting the battery and kidnapping are legally and factually insufficient, (2) the military judge erred by failing to instruct the court members concerning the past sexual relationship between the appellant and the victim, (3) the military judge erred by failing to give an instruction on uncharged misconduct, (4) the military judge erred by refusing to allow the appellant to introduce evidence regarding the victim’s lawsuit against the Government, (5) the military judge was biased against the appellant, (6) the trial defense counsel was ineffective during sentencing, (7) the

military judge erred by denying the appellant's request for an individual military counsel, and (8) the appellant was denied access to a law library while confined.

We have carefully considered the record of trial, the appellant's eight assignments of error and the Government's response. We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged with a variety of crimes arising out of a series of incidents that occurred at or near Camp Butler, Okinawa, Japan, during the late night and early morning hours of 26 and 27 December 1998.

During the previous year the appellant had been romantically involved with JS, who was married to an active duty U.S. Air Force Master Sergeant. When the relationship began, the appellant believed that JS was divorced. The appellant's relationship with JS was emotionally intense and at times violent. Upset when he found out that JS was still married and that she had ongoing relationships with many other men, the appellant had, according to JS, communicated to JS his desire to kill himself and her. The relationship ended in acrimony in late November 1998, with the appellant warning JS that if she ever came on base while he was on patrol, he would "take care of her." The appellant did not testify in his own behalf, but he said in his statement to a special agent of Naval Criminal Investigative Service that "if I ever observed her on Camp Foster with a guy other than her husband, I would inform the guy of the fact that she was married, and not to allow him to make the mistake I made." Prosecution Exhibit 9.

During the evening of 26 December 1998, JS, accompanied by Lance Corporal (LCpl) L, drove her car onto the base. The appellant, who was on duty as a military policeman, recognized her car, switched on his patrol vehicle's flashing lights, and pulled her over. The appellant told LCpl L to get out of the car and disappear, which he did. JS then drove off at a high rate of speed. The appellant turned on his vehicle's flashing lights and pursued JS. His vehicle cornered her vehicle in the parking lot of the bowling alley and blocked her escape. The appellant did not issue a traffic citation to JS.

At this point, their stories diverge. The appellant claimed in his statement that JS willingly exited her car and entered into his patrol vehicle. They then drove off base to talk about their relationship and ended up having consensual sex in the patrol vehicle. Thereafter, he dropped her off at her car still parked by the bowling alley.

To the contrary, JS testified that the appellant dragged her out of her car, put her in handcuffs, and forced her into his vehicle. Two disinterested witnesses observed the altercation at the bowling alley. One testified that he saw the appellant handcuff her. Both witnesses overheard the appellant curse at JS and observed the appellant pull her into the patrol car. As the appellant and JS drove off base, JS testified that he pulled her hair, hit her in the face, pointed his gun at her, and threatened to kill her. He then parked by a golf course and raped her in the vehicle. Thereafter, he dropped her off at her car. She drove home. When her husband questioned her about the new bruises on her face, she told him that the appellant had beaten her.

JS's husband called the police. JS thereafter reported that she had been raped. As a result, she was taken to the hospital and treated for rape trauma. JS had linear bruises on her wrists that were consistent with being handcuffed. She also had a bruise over her left eyebrow and a large bruise under her chin.

The appellant pled guilty to willful dereliction of duty. He admitted that pulling over JS, driving off base with her, and then having sex with her in his patrol vehicle was a willful dereliction of his duties as a military policeman who was supposed to be on patrol on the base. Since he denied all other allegations made by JS, the Government proceeded to trial on the merits on the remaining offenses: battery by handcuffing her, hitting her with his fists, and pulling her hair; aggravated assault by pointing his loaded pistol at her; kidnapping; communication of a threat to kill; and rape. The court members returned guilty verdicts only as to kidnapping and battery by handcuffing her, excepting out the other allegations of battery. These were the only two offenses arising at the bowling alley and which were observed, at least in part, by other witnesses.

Assignments of Error

The appellant assigns eight errors for our consideration. Only a brief discussion of each is necessary.

First, the appellant asserts that the findings of not guilty reaffirm his contention that JS cannot be believed, and, therefore, the evidence is insufficient as to the remaining findings of guilty on battery and kidnapping. What the appellant fails to take into account, however, is that JS provided the *only* eyewitness testimony to the charges and specifications of which the appellant was found not guilty. But, on those offenses where there was *other* eyewitness testimony, the appellant was found guilty.

In particular, LCpl V and LCpl H both observed the incident at the bowling alley. They testified that they heard the appellant order JS to "get the f--- out of her car." Record at 257, 268. LCpl V testified that after JS got out, the appellant

"picked her up and then handcuffed her behind her back . . . ." Record at 258. The handcuffing was further corroborated by the testimony of the camp staff physician. He examined her wrists that day and noted linear bruises, which could only have come from handcuffs or something similar to handcuffs. Record at 282. Inasmuch as this testimonial evidence regarding the battery and kidnapping offenses is independent of JS's testimony. We conclude that the evidence is legally sufficient. We are likewise convinced of the appellant's guilt beyond a reasonable doubt. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

As his second assignment of error, the appellant complains that the military judge did not instruct the members to consider the past sexual history between the appellant and victim in determining whether she was kidnapped against her will. However, at the trial defense counsel's request, the military judge did instruct the members that:

> [past acts of sexual intercourse] should be considered by you on the issue of whether JS consented to the sexual act with which the accused is charged and on the mistake of fact as to whether JS was consenting to the sexual intercourse.

Record at 377.

The court asked the trial defense counsel on two separate occasions whether he objected to or requested further instructions. Both times, the trial defense counsel replied in the negative. Record at 330, 381. The failure to object to an instruction or to request a specific instruction forfeits the issue, unless it amounts to plain error. *See United States v. Boyd,* 55 M.J. 217, 222 (C.A.A.F. 2001).

We find no plain error in this case. Any such additional "mistake of fact" instruction for kidnapping would have been cumulative. We find that it would not have had any further impact upon the members' verdict. The court members were never told that they could not consider this mistake of fact theory on the kidnap issue. The appellant presented the evidence of their past sexual relationship during cross-examination and his counsel argued this point on the merits both forcefully and at length. The members were able to consider the credibility of both the appellant and the Government witnesses, as well as the veracity of their testimony, in deciding whether JS entered the patrol vehicle under her own free will. Thus, the appellant was not deprived of this defense.

Thirdly, the appellant complains that the requested evidence regarding his past sexual relationship with JS was uncharged misconduct, namely oral sodomy and adultery. The appellant now avers that the military judge should have *sua sponte* given a

limiting instruction for both findings and sentencing. Such an instruction is not necessarily required where the uncharged misconduct is part of the chain of events that leads to the consummation of the crime charged. *See United States v. Dagger,* 23 M.J. 594 (A.F.C.M.R. 1986), and citations listed therein at 597-98. We conclude that this evidence of their sexual relationship, which evidence was requested by the appellant, was an inextricable part of the chain of observed events that led to the criminal offenses charged. Therefore, no instruction was necessary.

Fourth, the appellant complains that the military judge would not allow him to introduce evidence of JS's lawsuit against the federal government over this incident nor evidence about JS's alleged sexual relationship with LCpl L who was in her car that night. The standard of review for a military judge's ruling on the admissibility of evidence is whether he clearly abused his discretion. *United States v. Johnson,* 46 M.J. 8, 10 (C.A.A.F. 1997). We can find no such abuse of discretion here. Counsel has not asserted how this evidence would further contribute to the defense allegation that JS was a liar, motivated to hurt the appellant. Evidence of the acrimony between JS and the appellant was sufficiently developed for the members. Indeed, the members found the appellant not guilty of all charges wherein the elements of the offenses rested solely on JS's credibility. We conclude that this requested evidence would have been of little value against the corroborating eyewitness testimony and scientific testimony that secured the appellant's conviction on battery and kidnapping at the bowling alley.

Fifth, the appellant complains for the first time on appeal that the military judge abandoned his impartial role by asking questions of witnesses, cutting defense counsel off in his questioning, and generally ruling against the defense. The appellant does not, however, specify any particular ruling or question as erroneous, but rather argues that the cumulative effect of adverse rulings and questioning had a deleterious effect on the members. Having carefully reviewed the entire record, we find that the military judge's comments, questions, and rulings, considered from the viewpoint of a reasonable person in the context of the whole trial, would not cause that person to doubt the legality, fairness, and impartiality of the appellant's trial. We find absolutely no evidence that the military judge in this case abandoned his role as an impartial party. The assignment of error is without merit. *See United States v. Reynolds,* 24 M.J. 261, 264 (C.M.A. 1987); and *United States v. Paaluhi,* 50 M.J. 782, 794 (N.M.C.C.A. 1999) *rev'd on other grounds*, 54 M.J. 181 (C.A.A.F. 2000).

In his sixth assignment of error, the appellant asserts that his trial defense counsel rendered ineffective assistance during the sentencing phase. Specifically, he asserts that his trial defense counsel should have called live character witnesses, instead of simply offering their written statements into

evidence. Also, the trial defense counsel should have requested an instruction regarding the impact a punitive discharge could have on his retirement. To obtain relief, the appellant must show that (1) his counsel's performance was deficient, and (2) resulted in prejudice. *Strickland v. Washington,* 466 U.S. 668 (1984). The appellant can satisfy neither prong. The trial defense counsel brought before the court members written evidence by both officer and enlisted personnel extolling the appellant's outstanding character of service. The statement of the officer concluded by stating that if he were not deployed in another country at the time, he would have testified in person on behalf of the appellant. Defense Exhibit A.

During sentencing, the Government did not dispute that, apart from this incident, the appellant's service was honorable. Thus, whether this character evidence was in written or oral form was of little significance. The sentencing argument by the Government revolved around the consequences of the appellant's abuse of his police authority, not his general character of service. Lacking prejudice, we need not even look at the ineffectiveness prong. *United States v. Adams,* 59 M.J. 367, 371 (C.A.A.F. 2004). This conclusion equally applies to the appellant's other point on this assignment. Case law is quite clear that one literally has to be "knocking at retirement's door" in order to qualify for the retirement instruction. *United States v. Boyd,* 55 M.J. 217, 220 (C.A.A.F. 2001)(quoting *United States v. Becker*, 46 M.J. 141, 144 (C.A.A.F. 1997)). The appellant herein still had another seven years before becoming eligible for retirement. This assignment of error lacks merit.

One week before the scheduled trial date, some four months after the preferral of charges, with two continuances already granted, the appellant demanded that his assigned counsel be relieved and that "a Navy attorney" represent him. He then requested two trial defense counsel, one Marine stationed in mainland Japan, and one Navy judge advocate stationed in Hawaii. The convening authority determined that both counsel were not reasonably available, relying upon the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C § 0131 (27 Jul 1998) that provides that counsel assigned to commands located more than 100 miles from the site of the trial or outside the judicial circuit are not reasonably available. At trial, the appellant requested an indefinite continuance in the hope that the requested Marine Corps judge advocate in Japan or the requested Navy judge advocate in Hawaii would be available for trial. Both counsel were involved in other matters and advised the defense team that they would not be available until late July or August, at least 2 more months away. Several Government witnesses were on legal hold and one was due to return to the United States in June.

The denial of the appellant's request for new counsel and the related continuance request form the appellant's seventh assignment of error. The discretion granted trial judges in

deciding the question of continuance requests is very broad, and only "a myopic insistence upon expeditiousness in the face of a justifiable need for delay," which must be determined case-by-case, will constitute an abuse of discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)*; see United States v. Thomas,* 22 M.J. 57 (C.M.A. 1986); *United States v. Kelley,* 40 M.J. 515, 516 (A.C.M.R. 1994). We find no abuse of discretion here. As to the request for new counsel, the convening authority was well within his discretion to deny the appellant's request since neither requested counsel was "reasonably available" under the provision in the JAGMAN cited above. Further, even if they were nonetheless made available to represent the appellant, they could not participate in the appellant's case for at least another 2 months. The appellant refused to request any other individual military counsel. We find that these requests were frivolous attempts by the appellant to delay the court-martial. Thus, we deny the appellant relief on this ground.

Lastly, the appellant complains that he did not have access to a law library during his incarceration. He alleges this is a violation of the dictates of *Bounds v. Smith,* 430 U.S. 817, 821 (1977), which guarantees prisoners full access to the courts. This argument is frivolous. The Supreme Court held that a prisoner's fundamental constitutional right of access to the courts requires either an adequate law library or assistance from a lawyer, but not both. In the instant case, the Government met its constitutional obligation under *Bounds* by providing the appellant with free trial defense and appellate counsel. By so doing, the Government's duty is discharged.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur

For the Court

R.H. TROIDL
Clerk of Court