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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Jason L. HAWKINS
Radioman Third Class (E-4), U.S. Navy

NMCCA 200001089 Decided 31 May 2005

Sentence adjudged 23 September 1999. Military Judge: S.A. Jamrozy. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Warfare Center Aircraft Division, Patuxent River, MD.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Division
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel
CAPT D.C. HOWARD, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiracy to commit perjury and to obstruct justice, assault with a means likely to produce grievous bodily harm, and obstruction of justice by impeding an investigation, in violation of Articles 81, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 928, and 934. The appellant was sentenced to a bad-conduct discharge and confinement for 13 months. The convening authority approved the adjudged sentence. There was no pretrial agreement.

We have carefully considered the record of trial, the appellant's four assignments of error,[1] and the Government's

[1] The appellant raised the following assignments of error:

response. We conclude that the findings and 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.

Non-Disclosed Statement

The appellant contends that the military judge abused his discretion by allowing the introduction of incriminating statements made by the accused that were not adequately disclosed to the defense prior to trial. We disagree.

During its case-on-the-merits, the prosecution presented the testimony of Air Traffic Controller Third Class (AC3) "M." AC3 M testified that the appellant told him that he (the appellant) went home and changed clothes after the assault. The appellant also told AC3 M that the red shoes and red shirt he turned over to police investigators for forensic analysis were not the clothes he wore on the night of the incident. The trial counsel learned of the appellant's statement one or two weeks prior to the court-martial, but failed to disclose these incriminating statement to the trial defense counsel. The trial defense counsel did not object to the testimony on direct examination. Instead, he cross-examined AC3 M on the statement. After cross-examination, the military judge, *sua sponte*, raised the issue of non-disclosure, at which time the trial defense counsel requested that AC3 M's testimony be stricken and that the members be instructed to disregard it.

As a remedy for the non-disclosure, the military judge recessed the court-martial for lunch, during which time the trial defense counsel re-interviewed AC3 M. Upon returning to

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I. The military judge abused his discretion by allowing the introduction of "pretty damaging" evidence that had not been adequately disclosed to the appellant prior to the testimony of the witness introducing the evidence to the members.

II. The post-trial process was irrevocably tainted by the actions of the staff judge advocate and his failure to provide the convening authority with a supplemental SJAR when new and adverse matters were raised by trial defense counsel in a clemency package.

III. The Government counsel committed plain error by her repeated references in sentencing argument to appellant as "an animal."

IV. The convening authority's action erroneously states that appellant was found guilty of "assault with a means likely to produce grievous bodily harm" without specifically excepting out the words of which he was found not guilty by the court members.

Appellant's Brief of 5 Mar 2003.

court, the trial defense counsel declined the military judge's offer of a continuance, another recess, or consideration of a mistrial motion. Record at 308, 312, 319. When AC3 M's testimony resumed on re-direct examination, the military judge offered to give a curative instruction to the members; however, the trial defense counsel replied, "Not at this time." *Id.* at 322-23. Instead, the trial defense counsel continued to vigorously cross-examine AC3 M on the statement and never renewed the request for a curative instruction. Finally, after reviewing the military judge's proposed findings instructions, and after being asked if there were any further objections to the proposed instructions or requests for additional instructions, the trial defense counsel said, "No, sir." *Id.* at 654.

"Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel and within the control of the armed forces." MILITARY RULE OF EVIDENCE 304(d)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). When the prosecution plans to introduce a statement made by the accused that was not disclosed, the prosecution must notify the military judge and the defense counsel, to allow for timely objection and so that the military judge "may make such orders as are required in the interests of justice." MIL. R. EVID. 304(d)(2)(B). When there is a "violation of a discovery mandate, the facts of each case must be individually evaluated." *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

We begin by noting that a military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). Considering the facts of this case, we find that the military judge did not abuse his discretion by admitting the challenged testimony. We further find that the military judge did not err by offering the defense a curative instruction, a continuance, a further recess, and/or potential mistrial rather than exclusion of the testimony as a remedy for non-disclosure. We find no prejudicial error flowing from the trial defense counsel's election to cross-examine AC3 M about withholding the statement in lieu of the options offered by the military judge. Lastly, we conclude that the military judge acted appropriately

by admitting the testimony subject to "such orders as are required in the interests of justice." *See* MIL. R. EVID. 304(d)(2)(B).

Defense Clemency Submission

The appellant next contends that a supplemental staff judge advocate's recommendation (SJAR) was required because " new and adverse matters " were raised in an additional clemency package submitted by his trial defense counsel. We disagree.

A convening authority must consider matters submitted by an accused under RULE FOR COURTS-MARTIAL 1105 and 1106, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). *See United States v. Stephens*, 56 M.J. 391, 392 (C.A.A.F. 2002). Our superior court has held that "[s]peculation concerning the consideration of such matters simply cannot be tolerated in this important area of command prerogative." *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989)(citing *United States v. Siders*, 15 M.J. 272, 273 (C.M.A. 1983)). The staff judge advocate must include in the SJAR a statement as to whether any corrective action on the findings or sentence is warranted if the appellant alleges legal error in matters submitted pursuant to R.C.M. 1105. R.C.M. 1106(d)(4).

In this instance, the appellant's supplemental clemency package did not raise new legal issues; therefore, we find that a supplemental SJAR was not required. Furthermore, the convening authority's action specifically notes that, "requests for clemency submitted by Defense Counsel on 30 December 1999 and 21 June 2000 and the recommendation of the Staff Judge Advocate, have been considered." Convening Authority's Action of 5 Jul 2000. Thus, we find that the appellant's assertion of error is without merit.

Improper Sentencing Argument of Government Counsel

During argument on sentencing, the trial counsel used the following phrases: (1) "... but yet that is what this animal did" and, (2) "Despite what this animal told you in his unsworn statement...." Record at 728. The trial defense counsel did not object when the trial counsel first used the term "animal," but did object to the trial counsel's subsequent use of the term. The military judge sustained the objection without further elaboration. *Id.* at 729. No curative instruction was requested and none was given. The appellant now contends that the trial counsel committed plain error. We disagree.

A trial counsel has a duty to be a zealous advocate for the Government. *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003)(citing *United States v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975)). However it is improper for trial counsel to attempt to "inflame the passions or prejudices of the court members." *Id*. (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). To demonstrate plain error, the appellant must show that the alleged error was plain and obvious and that it materially prejudiced his substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

We hold that the trial counsel's references to the appellant as an "animal" were improper but did not rise to the level of prejudicial error. *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986). Taken in context, the comments reflected the brutal assault and severe injuries inflicted by the appellant on his victim. We also note that the trial defense counsel did not object to the initial characterization of the appellant as an animal nor did he request a curative instruction. Considering the argument as a whole, we conclude that the improper comments of the trial counsel did not materially prejudice any substantial right of the appellant. *See* Art. 59(a), UCMJ.

Court-Martial Order Error

The appellant contends, and the Government concedes, that the court-martial promulgating order (CMO) incorrectly reflects that the appellant was found guilty of the sole Specification of Charge I as charged. The members actually found the appellant guilty of a modified version of the specification, substituting the words, "and by kicking him about the head and body" for the words "and by striking him about the head and body with a steel chair." We agree with the parties that the CMO is in error in this respect.

While we find no prejudice to the appellant as the result of this scrivener's error, he is entitled to accurate official records concerning his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will order corrective action in our decretal paragraph.

Conclusion

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

supplemental court-martial order accurately reflect the modified findings with respect to the sole specification under Charge I.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court