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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Derrick L. OLIVER
Private First Class (E-2), U.S. Marine Corps

NMCCA 200101259 Decided 29 April 2005

Sentence adjudged 2 August 2000. Military Judge: T.L. Miller. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Marine Aircraft Wing, FMF Pacific, Okinawa, Japan.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
PHILIP D. CAVE, Civilian Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

The appellant was tried before a general court-martial composed of both officer and enlisted members. Contrary to his pleas, the appellant was convicted of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The members sentenced the appellant to confinement for 4 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence.

We have carefully considered the record of trial, the appellant's twelve assignments of error, and the Government's answer. 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.

Assignments of Error

The appellant, through counsel, raises the following twelve assignments of error (AOEs):

I. THE FINDINGS AND SENTENCE SHOULD BE SET-ASIDE BECAUSE THE EVIDENCE IS NOT FACTUALLY SUFFICIENT.

II. [THE] APPELLANT WAS DENIED DUE PROCESS BECAUSE THERE WAS NO CHALLENGE TO THE PANEL, OR IN THE ALTERNATIVE[,] A CHANGE OF VENUE[,] OR A SUBSTANTIAL ENOUGH DELAY IN TRIAL TO AMELIORATE PREJUDICIAL PRETRIAL PUBLICITY.

III. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE [APPELLANT] WHEN HE PERMITTED THE PROSECUTION TO CALL A MEDICAL WITNESS[] WHO[M] SHE HAD NOT INTERVIEWED[,] AND WHO[M] THE DEFENSE HAD NOT INTERVIEWED, TO REBUT EVIDENCE ELICITED ON CROSS-EXAMINATION OF THE ALLEGED VICTIM.

IV. THE FINDINGS AND SENTENCE WERE INFECTED BY [THE] IMPROPER AND INFLAMMATORY ARGUMENTS OF TRIAL COUNSEL[] [WHEN HE MADE] REFERENCE TO [THE] APPELLANT'S SILENCE, TO [THE] APPELLANT'S ATTITUDE TO THE CHARGES, AND TO THE POLITICAL CLIMATE.

V. [THE] APPELLANT WAS SUBSTANTIALLY PREJUDICED ON SENTENCING BY [THE MILITARY JUDGE'S] FAILING TO OBTAIN THE TESTIMONY OF MRS. GWENDOLYN OLIVER, [THE] APPELLANT'S MOTHER[,] BY DEPOSITION OR VIDEO.

VI. THE TRIAL DEFENSE COUNSEL DID NOT PROVIDE [THE] APPELLANT EFFECTIVE ASSISTANCE [OF] COUNSEL DURING THE PRE-TRIAL AND TRIAL PROCEEDINGS IN HIS CASE.

VII. [THE] APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE.

VIII. THE LACK OF A QUALIFIED INDEPENDENT INTERPRETER AND THE FAILURE TO HAVE A SUBSTANTIALLY VERBATIM RECORD REQUIRE THAT THIS COURT AFFIRM A SENTENCE [OF] NO MORE THAN SIX MONTHS CONFINEMENT, FORFEITURE OF TWO-THIRDS PAY PER MONTH FOR SIX MONTHS, AND A REDUCTION TO THE LOWEST ENLISTED PAY GRADE.

IX. IT WAS ERROR FOR THE MILITARY JUDGE TO PERMIT THE TRIAL COUNSEL TO CALL A SURPRISE EXPERT WITNESS, WHO PRESENTED SPECULATIVE AND HIGHLY PREJUDICIAL TESTIMONY.

X. IT WAS ERROR FOR [THE] TRIAL COUNSEL TO HAVE [THE VICTIM] TESTIFY THAT SHE FELT SHE WANTED TO KILL [THE] APPELLANT.

XI. [THE] APPELLANT IS ENTITLED TO DAY FOR DAY CREDIT FOR ABUSE OF THE LIBERTY RISK PROGRAM BY [THE CONVENING AUTHORITY'S] PLACING [THE] APPELLANT ON LIBERTY RISK AS A SUBTERFUGE TO AVOID PRETRIAL RESTRAINT.

XII. [THE] APPELLANT'S SENTENCE TO FOUR YEARS CONFINEMENT AND A DISHONORABLE DISCHARGE [IS] INAPPROPRIATELY SEVERE IN COMPARISON TO OTHER SIMILAR CASES.

AOEs V, VI, VII, IX, X, and XII are advanced by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982).

Sufficiency of Evidence

In the appellant's first AOE, he asserts that both the findings and sentence should be set aside because the evidence is not factually sufficient. The appellant avers that a rehearing should be ordered. We disagree.

A military Court of Criminal Appeals has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). In doing so, this court's assessment of both legal and factual sufficiency is limited to only the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Spann*, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), *aff'd*, 51 M.J. 89 (C.A.A.F. 1999). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Article 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). In exercising the duty imposed by this "awesome, plenary, *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ. Further, we may believe one part of a particular witness' testimony yet disbelieve another part. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ.

To support the appellant's conviction under Article 120, UCMJ, for the rape of Ms. "YS", the Government must establish the following elements beyond a reasonable doubt:

> (1) That the [servicemember] committed an act of sexual intercourse; and
>
> (2) That the act of sexual intercourse was done by force and without consent.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 45b(1). Under these elements, "[a]ny penetration, however slight, is sufficient to complete the offense." *Id*. at ¶ 45c(1)(a).

We have carefully examined all of the evidence admitted on the merits. While the appellant argues against the credibility of his victim, we find the victim to be a credible witness. The Government's evidence on the merits was strong and compelling.

We conclude that the evidence is both legally and factually sufficient. We are, therefore, convinced beyond a reasonable doubt that the appellant is guilty of the offense of rape, as found by the court-martial. As such, we decline to grant relief.

Denial of Due Process

In the appellant's second AOE, he asserts that he was denied due process because there was no challenge to the panel, or in the alternative, a change of venue, or a substantial enough delay in trial to ameliorate prejudicial pretrial publicity. The appellant avers that both the findings and sentence should be set aside and that a rehearing should be ordered. We disagree.

Without doubt, military servicemembers are entitled to the due process protections afforded by the Fifth Amendment of the United States Constitution. *See United States v. Mapes*, 59 M.J. 60, 65 (C.A.A.F. 2003)(citing *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992)(concluding that "[t]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.")). Even so, the appellant, at trial, failed to raise any challenge to the panel, or request a change of venue, or request a delay in trial of any substantial length that may have ameliorated this appellate allegation of prejudicial pretrial publicity. *See* RULE FOR COURTS-MARTIAL 912(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.)(*Challenge of selection of members*);[1] R.C.M. 906(b)(11)(*Change of place of trial*);[2] R.C.M.

[1] "Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2)." R.C.M. 912(b)(3)(*Waiver*).

906(b)(1)(*Continuances*).[3] Thus, because the appellant failed to raise his concerns before or during trial, we conclude that the issue has been waived. R.C.M. 905(e);[4] *see also United States v. Upshaw*, 49 M.J. 111, 112 (C.A.A.F. 1998)(citing R.C.M. 912 (b)(2)); *United States v. Hawkins*, 37 M.J. 718, 724 (A.F.C.M.R. 1993). Even assuming the issue was not waived, we conclude that the appellant has failed to demonstrate error. Accordingly, we decline to grant relief.

Surprise Expert Witness Testimony

In his third AOE, the appellant asserts that the military judge erred to his substantial prejudice by permitting the prosecution to call a medical witness who had not been interviewed by either the trial counsel or the defense counsel to rebut evidence elicited on cross-examination of the alleged victim. In the appellant's ninth AOE, he asserts that it was error for the military judge to permit the trial counsel to call a surprise expert witness who presented speculative and highly prejudicial testimony. We decide the appellant's third and ninth AOEs together. The appellant avers that both the findings and sentence should be set aside and that a rehearing should be ordered. We disagree.

MILITARY RULE OF EVIDENCE 402, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), provides that:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to the members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

See also United States v. Burns, 53 M.J. 42, 44 (C.A.A.F. 2000)(concluding "[r]elevant evidence is necessary if not cumulative and it 'contributes to a party's presentation of the case in some positive way on a matter in issue.'")(citing *United States v. Abrams*, 50 M.J. 361, 362 (C.A.A.F. 1999)); *see* R.C.M. 703(f)(1), Discussion. Relevant evidence is evidence having "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

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[2] "The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby." R.C.M. 906(b)(11).

[3] "A continuance may be granted only by the military judge." R.C.M. 906(b)(1).

[4] "Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised *before the court-martial is adjourned* for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver." R.C.M. 905(e)(*Effect of failure to raise defenses or objections*)(emphasis added).

less probable than it would be without the evidence.'" *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)(quoting MIL. R. EVID. 401).

However, although relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MIL. R. EVID. 403; *see United States v. Dimberio*, 56 M.J. 20, 24 (C.A.A.F. 2001). Further, we review a military judge's ruling admitting evidence over objection for an abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003)(citing *United States v. Moolick*, 53 M.J. 174, 176 (C.A.A.F. 2000)). An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact. *Id*. (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).

The appellant opines that the military judge should have precluded the Government from calling a "surprise" expert medical witness due to lack of notice and that the witness' testimony was "speculative" and "highly prejudicial." Appellant's Brief of 13 Dec 2002 at 19, 36. However, the appellant never challenged at trial the rebuttal witness' testimony on the grounds that it was speculative or prejudicial. After reviewing the record, we find there was nothing speculative about the substance of the expert witness' testimony.

Finding no plain error, we conclude that the appellant forfeited these potential bases for objection. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001)(citing MIL. R. EVID. 103(a)(1))and (d)). Accordingly, we decline to grant relief.

Arguments of Trial Counsel

In the appellant's fourth AOE, he asserts that the findings and sentence were infected by the improper and inflammatory arguments of trial counsel when she made reference to the appellant's silence, to the appellant's attitude to the charges, and to the political climate. The appellant avers that both the findings and sentence should be set aside and that a rehearing should be ordered. We disagree.

Both trial counsel and trial defense counsel are entitled to argue evidence contained in the record, as well as any and all reasonable inferences which can be fairly derived from such evidence. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Where there is a timely objection, this court reviews a military judge's ruling on whether either trial counsel or trial defense counsel has exceeded the permissible scope of argument on findings, as set forth in R.C.M. 919(b), and on presentencing, as set forth in R.C.M. 1001(g), under an abuse of discretion standard. *United States v. Warner*, 59 M.J. 573, 583

(A.F.Ct.Crim.App. 2003), *rev. granted*, 60 M.J. 124 (C.A.A.F. 2004). A failure of defense counsel to object at trial to an improper argument of trial counsel, however, normally constitutes forfeiture of the issue. *Baer*, 53 M.J. at 237. Nonetheless, where a forfeited error rises to the level of plain error that was not *sua sponte* addressed by the military judge at trial, this court may take notice of that forfeited error. *Id.*; *see* MIL. R. EVID. 103(d); *see also* Art. 59(a), UCMJ. To show plain error, the appellant must show:

> (1) Which argument of trial counsel was error;
>
> (2) That the argument of trial counsel was plain or obvious error; and,
>
> (3) That the trial counsel's improper argument materially prejudiced the appellant's substantial rights.

See United States v. Powell, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

After carefully reviewing the entire record, we conclude that the appellant has not demonstrated plain error. We have considered, in particular, the military judge's ruling on the trial defense counsel's objection to the trial counsel's failing to abide by the military judge's earlier ruling concerning reference to the current international political climate with accompanying limiting instruction to the members. We have also considered the trial counsel's arguments on the merits and on sentencing and, applying our superior court's standards articulated in *Powell* and *Baer*, we conclude that the record simply does not support the appellant's claims. We further conclude that the military judge did not abuse his discretion in handling the appellant's trial objection. *Warner*, 59 M.J. at 583. There is no showing that any of the alleged errors, in particular, the error immediately addressed by the military judge, materially prejudiced a substantial right of the appellant. *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(citing *Powell*, 49 M.J. at 465). We, therefore, decline to grant relief.

Witness Production

In the appellant's fifth AOE, he asserts that he was substantially prejudiced during sentencing by the military judge's failure to obtain the testimony of his mother, by deposition or video. The appellant avers that the sentence should be set aside and that a rehearing on sentence should be ordered. We disagree.

"The right of an accused to compel the attendance of witnesses in his behalf is well established in military law." *United States v. Carpenter*, 1 M.J. 384, 385 (C.M.A. 1976)(citing Article 46, UCMJ); *see also* R.C.M. 703(a). While "[t]his right

is not absolute in that it involves consideration of relevancy and materiality of the expected testimony[,] . . . once materiality has been shown the Government must either produce the witness or abate the proceedings." *Carpenter*, 1 M.J. at 385-86. R.C.M. 703(b)(3) further provides, with certain exceptions, that, notwithstanding the materiality of the testimony of a prospective witness, "a party is not entitled to the presence of a witness who is unavailable within the meaning of MIL. R. EVID. 804(a)" unless the testimony of that unavailable witness "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony. . . ."

Pursuant to R.C.M. 905(b), "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial." However, motions for production of witnesses must be raised before a plea is entered. *United States v. Bell*, 34 M.J. 937, 947 (A.F.C.M.R. 1992)(citing R.C.M. 905(b)(4)). The effect of a party's "[f]ailure . . . to raise defenses or objections or to make motions or requests which must be made before pleas are entered . . . shall constitute waiver." R.C.M. 905(e); *see United States v. King*, 58 M.J 110, 115 (C.A.A.F. 2003). Nonetheless, during trial, "[t]he military judge for good cause shown may grant relief from the waiver." *United States v. McElroy*, 40 M.J. 368, 371 n.2 (C.M.A. 1994)(quoting R.C.M. 905(e)).

Upon consideration of the record of trial and the briefs of counsel, we conclude that the appellant's failure to persist on the motion to produce his mother at trial constitutes waiver of the issue. R.C.M. 905(e). Accordingly, we decline to grant relief.

Effective Assistance of Counsel

In the appellant's sixth AOE, he asserts that the trial defense counsel did not provide him effective assistance of counsel during the pretrial and trial proceedings in his case. The appellant avers that the findings and sentence should be set aside and that a rehearing should be ordered. We disagree.

We presume the competence of trial defense counsel. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). To rebut the presumption of competence of trial defense counsel, the appellant is required to point to specific errors committed by his trial defense counsel, which, under prevailing professional norms, were unreasonable. *Id*. Further, the appellant must establish a factual foundation for a claim that his trial defense counsel's representation was ineffective. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). An appellant's sweeping, generalized accusations will not suffice. *Id*.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth the standard for reviewing claims of

ineffective assistance of (trial) defense counsel on appeal. The Court declared that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. These same standards are equally applicable before this court. *Scott*, 24 M.J. at 188. Moreover, in *Strickland*, the Supreme Court reasoned, that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

466 U.S. at 689. Further, we review allegations of ineffective assistance of counsel, *de novo*. *United States v. McClain*, 50 M.J. 483, 487 (C.A.A.F. 1999).

In order to show ineffective assistance of trial defense counsel, an appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). When viewing tactical decisions by (trial) defense counsel, the test is whether such tactics were unreasonable under prevailing professional norms. *United States v. Cronic*, 466 U.S. 648, 666 (1984). It is strongly presumed that (trial) defense counsel is competent. *Id*. at 658. "Acts or omissions that fall within a broad range of reasonable approaches do not constitute a deficiency." *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). Further, we also "strongly presume that [trial defense] counsel has provided 'adequate assistance.'" *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998)(quoting *Strickland*, 466 U.S. at 690). Lastly, similar standards are set forth in *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). *Polk*, however, makes clear that the appellant cannot overcome the presumption unless he can show that, absent the ineffective

assistance of his trial defense counsel, there would have been a reasonable doubt respecting guilt. *Id*. at 153.

Our superior court has held that trial defense "[c]ounsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary." *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002)(citing *United States v. Brownfield*, 52 M.J. 40, 42 (C.A.A.F. 1999)). Further, "'[w]e do not look at the success of a . . . trial theory, but rather whether [trial defense] counsel made an objectively reasonable choice in strategy from the alternatives available at the time.'" *Dewrell*, 55 M.J. at 136 (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F.Ct.Crim.App. 1998)(internal citation omitted)). Also, "where the alleged error of [trial defense] counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *United States v. Ginn*, 47 M.J. 236, 247 (C.A.A.F. 1997)(citing *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)). We note that we have no evidence before us to suggest that the appellant's trial defense counsel failed to properly investigate the circumstances surrounding the victim's alleged sexually transmitted disease (STD).

However, this court need not reach the question of deficient representation if we can first determine a lack of prejudice. *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F. 2004); *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004). In order to constitute prejudicial error, the appellant's trial defense counsel's deficient performance must render the result of the proceeding unreliable or fundamentally unfair. *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(citing *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). We do not believe that the trial defense counsel's actions in the appellant's case, even if questionable in some respects, rise to this level.

Specifically, we reject the appellant's contention that his trial defense counsel was ineffective because he should have explored more closely the victim's alleged STD. Further, we find that the appellant has failed to identify how any specific conduct on the part of his trial defense counsel was unreasonable under the circumstances.

In conclusion, we do not find deficient representation of trial defense counsel under the *Strickland* standard. To the contrary, trial defense counsel effectively defended the appellant at trial on the charge. To the extent that trial defense counsel did not raise the victim's alleged STD, we find no prejudice. As such, we decline to grant relief.

Sentence Appropriateness

In the appellant's seventh AOE, he asserts that his sentence is inappropriately severe. In the appellant's twelfth AOE, he

asserts that his sentence to four years confinement and a dishonorable discharge is inappropriately severe in comparison to other similar cases. We decide the appellant's seventh and twelfth AOEs together. The appellant avers that the sentence should be set aside and that a rehearing on sentencing should be ordered. We disagree.

In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "'nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires a balancing of the offenses against the character of the offender.

Sentence comparison is required in closely related cases involving highly disparate sentences. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001); *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). To be closely related, "cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994). Where this court finds sentences to be highly disparate in closely related cases, it must determine whether there is a rational basis for the differences between the sentences. *United State v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001). A disparity between the sentences in closely related cases will warrant relief when it is so great as to exceed "'relative uniformity,'" or when it rises to the level of an "'obvious miscarriage of justice or an abuse of discretion.'" *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995)(quoting *Snelling*, 14 M.J. at 269).

Applying these criteria, we find no other closely related military or civilian case. Further, as discussed above, the appellant committed a very serious offense. After reviewing the entire record of trial and considering all the circumstances, to include the appellant's service and character, we find the appellant's sentence to be appropriate for this offender and his offense. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988); *Snelling*, 14 M.J. at 268; *see also United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001). Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96. Therefore, we decline to grant relief.

Interpreter and Verbatim Record

In the appellant's eighth AOE, he asserts that the lack of a qualified independent interpreter and the failure to have a

substantially verbatim record require that this court affirm a sentence of no more than 6 months confinement, forfeiture of two-thirds pay per month for 6 months, and a reduction to the lowest enlisted pay grade. We disagree.

A. Qualified Independent Interpreter.

The appellant opines that "[t]he [i]nterpreter was [n]ot an [i]ndependent and [q]ualified [i]nterpreter." Appellant's Brief of 13 Dec 2002 at 32. The appellant further avers that pursuant to R.C.M. 502(e)(2), the military judge had a *sua sponte* duty to ensure that the interpreter was qualified, independent and competent. *Id*.

Interpreters "interpret for the court-martial or for an accused who does not speak or understand English." R.C.M. 502(e)(3)(A); *see also* Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7(C), ¶ 0130d(5) (14 Mar 2004). Pursuant to R.C.M. 502(e)(1), the Secretary concerned may prescribe the qualifications of interpreters. In every case before a courts-martial the convening authority "shall appoint, when necessary, an interpreter for the court . . . ." JAGMAN, ¶ 0130d(2)(b). "Interpreters will be sworn by the trial counsel as provided in R.C.M. 807(b)(2) Discussion, MCM." *Id*. at ¶ 0130d(3)(b). Interpreters "shall be disqualified as provided in R.C.M. 502(e)(2), MCM." *Id*. at ¶ 0130d(4). "[N]o person shall act as interpreter . . . in any case in which that person is or has been in the same case:

> (A) The accuser;
> (B) A witness; [or]
> (C) An investigating officer [. . . .]"

R.C.M. 502(e)(2); *see United States v. Yarbrough*, 22 M.J. 138, 139 (C.M.A. 1986); *McKinney v. Jarvis*, 46 M.J. 870, 874 (Army Ct.Crim.App 1997). Further,

> Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall *cause a report of the matter to be made before the court martial is first in session to the convening authority* or, *if discovered later, to the military judge*.

R.C.M. 502(f) (emphasis added); *see United States v. Ladell*, 30 M.J. 672, 675 (A.F.C.M.R. 1990).

A complete review of the record of trial and allied papers does not reveal any person causing any report of any potential court-martial interpreter disqualification being made to the convening authority before the court-martial was first in session. R.C.M. 502(f). Likewise, no objection was made by the defense during trial, nor was any post-trial report made, to the

military judge of any potential court-martial interpreter disqualification before the military judge authenticated the record of trial on 8 November 2000. The appellant first raises the issue in post-trial matters submitted to the convening authority in accordance with R.C.M. 1105 and R.C.M. 1106. Request for Clemency and Response to Staff Judge Advocate Review of 26 Jan 2001 at 10-11. The staff judge advocate (SJA) in his recommendation (SJAR) addendum adequately addressed the matter raised by the appellant. SJAR Addendum of 19 Mar 2001 at 3. We, therefore, find no plain error.

The appellant does not provide any support for his argument that the interpreter for his court-martial was, in fact, disqualified or even subject to disqualification. Therefore, we find no prejudice to the appellant. Nor do we find, absent defense objection, that the military judge had a *sua sponte* duty to inquire into the interpreter's qualifications or independence after the trial counsel swore the court-martial interpreter. Record at 102. We conclude that the appellant's failure to timely raise the issue constitutes forfeiture of the issue. *See generally* R.C.M. 905(e). Therefore, we decline to grant relief.

B. Non-verbatim Record of Trial.

The appellant opines, "the testimony in Japanese should have been separately transcribed and attached to the record of trial." Appellant's Brief of 13 Dec 2002 at 36. The appellant further avers that "[w]ithout comparing the Japanese text with the English interpretation," neither the military judge, nor the convening authority, nor this court can say that the transcript is accurate and that the record is substantially verbatim. *Id.*; *see* R.C.M. 1103.

A complete record of the proceedings and testimony must be prepared for each general court-martial resulting in an adjudged sentence which includes "death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial[.]" Art. 54(c)(1)(A), UCMJ. A verbatim transcript includes all proceedings, including sidebar conferences, arguments of counsel, rulings and instructions by the military judge, and matters which the military judge orders stricken from the record or disregarded. R.C.M. 1103(b)(2), Discussion. "If testimony is given through an interpreter, a verbatim transcript must so reflect." R.C.M. 1103(b)(2)(B), Discussion. We find that the appellant's record complies with that language in the Discussion. Even so, a "verbatim record" is not necessarily a "complete record." *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(citing *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)).

To be complete, the record of trial must include "[e]xhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits." R.C.M.

1103(b)(2)(D)(v). Technical violations of R.C.M. 1103(b)(2) do not require reversal in every case; rather, an incomplete or non-verbatim record only raises a rebuttable presumption of prejudice. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999); *see also United States v. Santoro*, 46 M.J. 344, 346 (C.A.A.F. 1997).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A transcript without a charge sheet, convening order, and sentencing exhibits is not complete. *Santoro*, 46 M.J. at 346 (citing R.C.M. 1103(b)(2)(D)). Further, a single missing prosecution exhibit can render the record incomplete, if it is of sufficient import to the findings in a contested case. *See McCullah*, 11 M.J. at 237-38. Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982). What constitutes a *substantial omission*, however, must be approached by this court on a case-by-case basis. *Abrams*, 50 M.J. at 363. When items described in R.C.M. 1103(b)(3) are not attached to the record of trial, this omission does not automatically render that record of trial non-verbatim. *United States v. Blaine*, 50 M.J. 854, 856 (N.M.Ct.Crim.App. 1999).

We need not determine whether the appellant's record of trial is "substantially verbatim," however, because we are convinced that, even if the appellant's record of trial is incomplete, the Government has successfully rebutted the resulting presumption of prejudice. *See Santoro*, 46 M.J. at 347. Considering the record of trial as a whole, we find no possibility of prejudice resulting from the Government's failure to have testimony in Japanese transcribed in Japanese and attached to the record of trial as an appellate exhibit. Finding no material prejudice, we decline to grant relief.

Improper Aggravation Evidence

In the appellant's tenth AOE, he summarily asserts that it was error for the trial counsel to have the victim testify that she felt she wanted to kill the appellant. The appellant implicitly avers that the sentence should be set aside and that a rehearing should be ordered. We disagree.

The Government is correct in that it is entitled during presentencing to offer evidence of the impact of the relevant criminal conduct on the victim. *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990); *see* R.C.M. 1001(b)(4). The appellant avers that the testimony of his victim, "I feel like I want to kill him," was improper testimony. Record at 243. We, nonetheless, find this testimony to simply illustrate the overwhelming impact the appellant's crime had on his victim. Further, we find that the trial counsel did not intentionally solicit this specific victim impact testimony in the manner it was delivered.

In any event, the appellant has failed to demonstrate that this testimony resulted in prejudice since the military judge immediately instructed the members that they could not consider that testimony. *Id.* at 244. Finding no prejudice, the appellant is not entitled to the relief requested. Art. 59(a), UCMJ.

Pretrial Punishment

In the appellant's eleventh AOE, he asserts that he is entitled to day for day credit for abuse of the command's liberty risk program by the convening authority's placing him on liberty risk as a subterfuge to avoid pretrial restraint. We disagree.

A servicemember is entitled to day-for-day credit for pretrial confinement against any future adjudged confinement. *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984). No such credit is available based on other forms of pretrial restraint, such as pretrial restriction, unless the pretrial restriction is tantamount to confinement. *United States v. Mason,* 19 M.J. 274 (C.M.A. 1985)(summary disposition)(extending *Allen* credit to pretrial equivalent to confinement); *see also United States v. Pierce,* 27 M.J. 367 (C.M.A. 1989)(requiring equivalent credit when an accused has been previously punished for the same offense).

"Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses." R.C.M. 304(a). "Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts." *Id*. at (1). Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits [. . . .]" *Id*. at (2). "Pretrial restraint is not punishment and shall not be used as such." R.C.M 304(f).

Before trial the appellant served just over five months on the command's liberty risk program. Record at 239; Defense Exhibit A. The military judge informed the parties that he was going to inform the members of "the duration of the accused's restriction to the base while on Liberty Risk Program starting from 7 March 2000 until the present. . . ." Record at 240. The military judge initially informed the members that "[t]here has been no pretrial restraint of the accused." *Id*. at 242. The trial defense counsel did not object at that time or request any clarification of the military judge's statement to the members. *Id*. The members, nonetheless, fully considered evidence of the fact that the appellant was on "restriction to the base while on the Liberty Risk Program . . . that's evidence in Defense Exhibit Alpha. . . ." *Id*. at 268; Defense Exhibit A. As such, we find that the military judge did instruct the members as to any pretrial restraint of the appellant. *See* Record at 268.

The appellant has not alleged that his serving under the command's liberty risk program was so onerous as to be tantamount to confinement or pretrial punishment. *See King*, 58 M.J. at 113. Further, the appellant has not alleged that the conditions imposed under the command's liberty risk program were not sufficiently flexible to permit pretrial preparation. We find that any conditions placed on the appellant under the command's liberty risk program did not hinder pretrial preparation. *See* R.C.M. 304(a), Discussion.

Finally, the appellant addressed his service under the command's liberty risk program in his post-trial matters and response to the SJAR. Request for Clemency and Response to Staff Judge Advocate Review of 26 Jan 2001 at 11-13. The SJA in his SJAR addendum adequately addressed the matter of appellant's assignment to the command's liberty risk program as raised by the appellant in those post-trial matters. SJAR Addendum of 19 Mar 2001 at 4. Therefore, we decline to grant relief.

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