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

BEFORE

C.A. PRICE **C.L. CARVER** **M.J. SUSZAN**

UNITED STATES

v.

David E. SOREY
Yeoman Third Class (E-4), U.S. Navy

NMCCA 9901186 Decided 8 January 2004

Sentence adjudged 8 August 2001. Military Judge: P.J. McLaughlin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Jacksonville, FL.

Capt JAMES D. VALENTINE, USMC, Appellate Defense Counsel
Maj PATRICIO A. TAFOYA, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of failure to obey an order, aggravated assault, and breaking restriction, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 43 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 24 months.

In an unpublished opinion, we affirmed the findings of guilty, but disapproved the sentence due to improper victim impact testimony and authorized a rehearing. *United States v. Sorey*, No. 9901186 (N.M.Ct.Crim.App. 24 Jan 2001). The appellant was HIV positive. He violated a safe sex order which required him to inform his prospective sexual partner of his medical condition and, if she agreed, to use a condom during sexual intercourse. The circumstances of the misconduct are summarized in more detail in our earlier opinion.

At a sentencing rehearing on 8 August 2001, the appellant was sentenced by a different military judge to a dishonorable discharge, confinement for 36 months, total forfeiture of pay and allowances, and reduction to pay-grade E-1. The convening authority mitigated the dishonorable discharge to a bad-conduct discharge and approved the sentence, but, pursuant to the pretrial agreement, suspended confinement over 24 months.

The appellant now claims that the Government presented improper rebuttal evidence at the rehearing.

After carefully considering the record of trial, the appellant's assignment 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 the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Rebuttal Evidence
To Unsworn Statement

The appellant contends that Rehearing Prosecution Exhibits (RPE) 7 and 8 did not rebut the appellant's unsworn statement, as asserted by the Government, and that the exhibits should not have been admitted over the appellant's objection. We disagree.

The question before us is whether the appellant made a statement of fact which could be rebutted or whether he merely expressed an opinion which could not be rebutted. "The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein." RULE FOR COURTS-MARTIAL 1001(c)(2)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2000 ed.). On the other hand, the Government may not rebut mere opinions expressed in unsworn statements. *United States v. Cleveland,* 29 M.J. 361 (C.M.A. 1990); *United States v. Goree,* 34 M.J. 1027 (N.M.C.M.R. 1992). A statement that the appellant tried to obey the law may be rebutted by evidence of unrelated misconduct. *United States v. Manns,* 54 M.J. 164 (C.A.A.F. 2000). We will use the following standards in reviewing this issue:

> A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Sullivan*, 42 M.J. 360, 363 (1995). Sentencing evidence, like all other evidence, is subject to the balancing test of Mil. R. Evid. 403, Manual. *United States v. Rust*, 41 M.J. 472, 478 (1995). A military judge enjoys "wide discretion" in applying Mil. R. Evid. 403. Id. "Ordinarily, appellate courts 'exercise great restraint' in reviewing a judge's decisions under Rule 403." *United States v. Harris*, 46 M.J.

> 221, 225 (1997), quoting *Government of the Virgin Islands v. Archibald*, 28 V.I. 228, 987 F.2d 180, 186 (3d Cir. 1993). When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." *United States v. Ruppel*, 49 M.J. 247, 250 (1998). This Court gives military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing. See *Government of the Virgin Islands v. Archibald*, *supra*. Because the military judge in this case did not conduct a Rule 403 balancing, we have examined the record ourselves. *United States v. Lebovitz*, 669 F.2d 894, 901 (3d Cir. 1982), cited with approval in *Archibald*, *supra*.

Id. at 166. Since the military judge in this case did not conduct a 403 balancing, we have given his ruling no deference and have, instead, reviewed the facts ourselves. Upon review, we find and hold that the appellant's unsworn statement expressed a statement of fact, which was properly rebutted by the Government.

During his unsworn statement, the appellant said, "The consequence of my offense has made me realize that my actions were negligent on my behalf and completely out of character for me." Record at 53. In rebuttal, the Government offered, and the military judge admitted, evidence of a general court-martial conviction[1] and a statement of the victim in that case reflecting that the appellant had committed similar misconduct before he committed the misconduct in this case.

We conclude that the evidence of other misconduct was properly admitted to show that the appellant's acts in this case were not negligent and were not out of character since he had committed similar acts just a few months before he committed the misconduct here.

Conclusion

Accordingly, the findings of guilty and sentence, as approved below, are affirmed.

Senior Judge PRICE and Judge SUSZAN concur

For the Court

[1] The conviction and sentence in that case occurred between the trial and rehearing of this case. The misconduct in that case occurred before the misconduct in this case.

R.H. TROIDL
Clerk of Court