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

BEFORE

C.A. PRICE **C.L. CARVER** **J.L. FALVEY**

UNITED STATES

v.

Peter T. COSBY
Machinist's Mate Third Class (E-4), U.S. Navy

NMCCA 9901704 Decided 26 August 2004

Sentence adjudged 3 February 1999. Military Judge: D.M. Hinkley. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.

CAPT RYAN M. WILSON, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LtCol K.P. KELLY, USMCR, Appellate Government Counsel
CDR ROBERT P. TAISHOFF, JAGC, USN, Appellate Government Counsel

FALVEY, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of burglary and indecent assault in violation of Articles 129 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 929 and 934. The appellant was sentenced to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence, but suspended confinement in excess of four years for a period of one year from the date of his action.

In three assignments of error, the appellant alleges that the military judge abused his discretion by not declaring a mistrial after the government elicited testimony about prior rapes committed against the alleged victim; that the evidence is factually and legally insufficient to sustain his burglary conviction; and that his sentence is inappropriately severe.

We have carefully considered the record of trial, the appellant's 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 the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

On the night of 18 September 1998, Radioman Seaman (RMSN) EC and her boyfriend, Fireman (FN) MP, obtained a sixth floor hotel room in Yokosuka, Japan. The hotel room had two levels; a lower-level containing a sitting area, hot tub, and bathroom, and an upper-level loft area containing two futon-style beds. While in the room, MP and EC engaged in multiple acts of sexual intercourse. Afterwards, EC wanted to sleep and MP left the room to go to one of the local bars. During his absence, the appellant entered the hotel, went to the 6th floor, and entered the room occupied by EC. Upon entering the room, the appellant went to the upper-level where he found EC asleep. He touched her back, buttocks, breasts, and vaginal area, and masturbated while lying on the bed, ejaculating onto her body. He then left the hotel.

The members found the appellant guilty of burglary for unlawfully entering a hotel room during the nighttime with the intent to commit an indecent assault. The members also found the appellant guilty of an indecent assault for touching the back, buttocks, breasts, and vaginal areas of EC, and masturbating and ejaculating on her back and buttocks, with the intent to gratify his sexual desires. He was acquitted of attempted forcible sodomy, rape, burglary (with intent to rape), and another indecent assault.

Abuse of Discretion for Failing to Grant Mistrial

In his first assignment of error, the appellant contends that the military judge abused his discretion when he failed to declare a mistrial after the government elicited testimony about previous rapes committed against the alleged victim. While questioning MP, one of the Government’s principal witnesses, about the alleged victim’s failure to promptly report the assault, trial counsel elicited the following testimony:

> TC: What happened over the weekend? Did you try to convince her to say something?
> WIT: Yes sir. We had planned to go to a picnic the next day. So we ended up still going and she just sat there and everything. I asked her if everything is okay. She ignored me and everything. Then Sunday, the next following Sunday, she finally told me what happened with her--I guess Grandpa and Cousin.

> TC: Specifically, what did she say about her Grandpa and her Cousin?
> WIT: That she had been raped when she was younger.

Record at 318. At this point, defense counsel objected to this testimony as hearsay, cumulative with the alleged victim's testimony, and "highly prejudicial." *Id.* at 318-19. The military judge sustained the objection stating,

> I understand the defense's position and if nothing else, I do believe it is cumulative at this point. So on the basis of that, I'm going to sustain the objection. You will not answer that question and essentially, members as I have instructed you before, there has been an objection to the question and the answer and I have sustained that objection. In that regard, you are instructed you must completely disregard the question and answer and not consider it for any purpose what so ever [sic]. You will put it out of your minds as if the question and answer had not been said and decide this case solely upon the evidence properly brought in front of you. Is there any member who cannot follow that instruction?

Id. at 319. In response to this instruction and question, all members responded in the negative. *Id.* at 320.

The appellant contends that trial counsel's question to MP as to what EC told him and his response was "highly prejudicial and served to substantially impact the rights of appellant to a fair and impartial trial." Appellant's Brief of 6 May 2002 at 4. The appellant claims that the trial counsel engaged in prosecutorial misconduct when he elicited this information knowing what the answer would be and that it would be hearsay, cumulative, and prejudicial. *Id.* The appellant notes that there was already evidence introduced explaining EC's failure to promptly report the alleged offenses and, thus, the above evidence was cumulative. Moreover, the appellant contends that the evidence was prejudicial in that it presented EC "in a highly sympathetic light and certainly influenced the members and their deliberations." *Id*. Finally, the appellant claims this alleged error "impaired [his] constitutional right to a fair and impartial trial" and was in direct violation of MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). *Id*. at 5.

Although the appellant claims that he was prejudiced by introduction of this evidence, he only speculates that it influenced the members and their deliberations, noting that "[w]ithout this sympathy factor, [he] may have been acquitted on all of the charges and specifications." *Id.* at 4. Consequently, the appellant contends the military judge should have declared a mistrial. *Id*. at 5.

The Government responds to the assigned error by noting that the appellant did not object to the introduction of this evidence when it was initially solicited through EC herself and, in fact, inquired into it himself during her cross-examination. Moreover, the Government notes that the appellant did not raise the issue of prosecutorial misconduct to the military judge during trial, never asserted MIL. R. EVID. 412 as a grounds for objection, and never asked the military judge to declare a mistrial. Government's Brief of 4 Sep 2002 at 10. The Government further notes that the military judge gave a curative instruction. *Id.* at 12.

As noted above, prior to the objection to the testimony of MP, the trial counsel had previously introduced similar evidence through EC, the alleged victim. During her direct examination, the following exchange occurred between the trial counsel and EC:

> TC: RMSN [EC], you walked past security and walked right up to the front gate?
> WIT: Yes, sir.
>
> TC: Why didn't you report this immediately?
> WIT: This had happened to me before and I knew that if I said anything that it would cause trouble. I was scared and I didn't want to get anybody involved in my problems.
>
> TC: Why did you feel that it was your problem?
> WIT: Because it's not exactly something I wanted everybody to know about and I knew what they were going to do to me when I went to the hospital, and that's just like getting raped all over again.

Id. at 172. The defense counsel did not object to this testimony. Instead, the defense counsel inquired into it further during his cross-examination:

> DC: You testified under direct examination by [trial counsel] that you didn't report this yourself because this type of thing happened to you before, right?
> WIT: Three times.
>
> DC: And that because of that, you know that going through examination at the hospital would be like going through it again, is that what you said?
> WIT: Yes, sir.

Id. at 205. Importantly, these questions are embedded in a long series of questions detailing that EC did not promptly report her alleged assault to authorities. In so doing, the appellant appears to have made the tactical decision to use the alleged victim's failure to promptly report in an attempt to foster doubt in the members' minds regarding her veracity.

When trial counsel began to explore with MP the alleged victim's reluctance to report the alleged assault as described above, however, the appellant objected, but not until MP had answered. The military judge sustained this objection and gave the curative instruction described above. Trial defense counsel did not object to this instruction.

Absent evidence to the contrary, the members are presumed to have followed this instruction. *United States v. Graham,* 54 M.J. 605, 612 (N.M.Ct.Crim.App. 2000). The appellant offers no evidence that the members failed to follow this instruction, and our review of the record of trial reveals no such evidence. All of the members indicated they would be able to disregard the objected to evidence and would "put it out of [their] minds as if the question and answer had not been said. . . ." Record at 319. Moreover, review of the questions posed by the members throughout the course of the trial reveals no indication the members did not follow the instruction. Accordingly, we presume the members followed the instruction and disregarded the objected to question and answer.

Although the trial defense counsel did not move for a mistrial, the appellant now argues that "the proverbial bell had already been rung" and that only a declaration of mistrial would cure any perceived error. Appellant's Brief at 5. MIL. R. EVID. 103(a)(1) requires that objections or motions to strike must be both timely and specific. In this case, the trial defense counsel did not object until after the witness had answered. He did so even though, based on the question posed and previous testimony, he knew the nature of the alleged victim's response. In our view, the appellant cannot now claim that his failure to lodge a timely objection (prior to the witness's answer) can only be cured by a declaration of mistrial.

Moreover, even if the trial defense counsel had moved for a mistrial or if the military judge had raised the issue *sua sponte*, we do not believe that it would have been an abuse of discretion for the military judge to deny it. Under RULE FOR COURTS-MARTIAL 915(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), the military judge may declare a mistrial "when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

A mistrial should only be considered under extreme circumstances when a curative instruction would be inadequate. *United States v. Barron*, 52 M.J. 1 (C.A.A.F. 1999); *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993); *United States v. Waldron,* 36 C.M.R. 126 (C.M.A. 1966). Such a remedy is appropriate whenever circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial. *Dancy*, 38 M.J. at 6 (quoting *Waldron*, 36 C.M.R. at 129*).* Additionally, "[g]iving a curative instruction, rather than declaring a mistrial, is the preferred remedy for curing error." *United States v. Rushatz*, 31

M.J. 450, 456 (C.M.A. 1990). "A military judge's determination on a request for mistrial, or on his own *sua sponte* consideration of a mistrial, will not be reversed 'absent clear evidence of abuse of discretion.'" *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999)(citing *Rushatz,* 31 M.J. at 456).

The only potential prejudice claimed by the appellant is that the objectionable evidence might have made the alleged victim seem more sympathetic to the members. Appellant's Brief at 4. This does not, however, appear to have been the case. The members acquitted the appellant on the most serious charges (attempted sodomy, rape, burglary "with intent to rape," and a second indecent assault). It is inconceivable that the members would have acquitted the appellant of these charges if they had been unduly sympathetic to the victim. Rather, they would have more likely accepted the victim's testimony in its entirety and convicted the appellant of these crimes as well. Instead, it appears that the members discounted her claims of rape and relied heavily on the appellant's oral confession which was introduced through the testimony of Naval Criminal Investigative Service (NCIS) Special Agent Donald Parnell and the appellant's signed confession. Thus, we conclude that the appellant suffered no material prejudice from this claimed error.

Finally, although the appellant couches his assignment of error in terms of prosecutorial misconduct, we do not view trial counsel's attempt to elicit this testimony as constituting prosecutorial misconduct. Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Golston*, 53 M.J. 61, 64 (C.A.A.F. 2000) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). The appellant claims this constituted prosecutorial misconduct because the trial counsel "knew what [MP's] response would be, he knew it was hearsay, he knew it was essentially cumulative, and he had to have known that it was highly prejudicial." Appellant's Brief at 4. In other words, trial counsel knew he was eliciting inadmissible evidence and had no good faith basis for doing so. In our view, trial counsel had a colorable claim that the question and anticipated response were admissible.

The appellant contends that this question elicited a hearsay response. Under MIL. R. EVID. 801(c), hearsay is an out of court statement offered to prove the truth of the matter asserted. The trial counsel argued that the response was not offered for the truth of the matter asserted, but rather was offered to demonstrate the alleged victim's state of mind. Record at 318-19. In other words, the Government was not offering the evidence to prove that the alleged victim had been raped in the past, but rather to explain her failure to promptly report her alleged assault. As such, the solicited testimony was arguably not hearsay.

The appellant also contends that this question elicited cumulative evidence.

> Evidence is "cumulative" when it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates.

United States v. Kizeart, 102 F.3d 320, 325 (7th Cir. 1996) (quoting *United States v. Williams*, 81 F. 3d, 1434, 1443 (7th Cir. 1996)). It is on this objection that the appellant prevailed at trial. Although this evidence was arguably cumulative with previously elicited, and unobjected to, testimony, we do not believe the trial counsel's limited attempt to further explore the alleged victim's failure to report rose to the level of prosecutorial misconduct. This is especially true given trial defense counsel's cross-examination of the alleged victim as described above.

Finally, the appellant contends that introduction of this evidence would have violated MIL. R. EVID. 412. Subject to certain exceptions, MIL. R. EVID. 412 excludes evidence offered to prove either an alleged victim's sexual predisposition or evidence that an alleged victim engaged in other sexual behavior. The analysis of MIL. R. EVID. 412 indicates the rule was adopted "to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), App. 22, at A22-35. Moreover, "[M.R.E.] 412 does not apply unless the person against whom the evidence is offered can reasonably be characterized as a 'victim of alleged sexual misconduct.'" *Id.,* App. 22, at A22-36. In this case, the evidence was being offered against the alleged perpetrator of sexual misconduct and not the alleged victim. As such, the evidence was arguably not offered in violation of MIL. R. EVID. 412.

Although we need not resolve the issue of whether the objected to question and its response were admissible, we do not find them to be so obviously objectionable so as to conclude that the trial counsel engaged in prosecutorial misconduct. We conclude that the military judge's failure to *sua sponte* declare a mistrial was not an abuse of discretion and the curative instruction given by the military judge adequately addressed any perceived error. Moreover, even if this constituted error, the appellant suffered no material prejudice.

Sufficiency of the Evidence

The test for legal sufficiency is whether considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 318-319 (1979); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed,* 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd.* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant challenges the factual and legal sufficiency of his conviction for burglary. Specifically, he argues that there is insufficient evidence to establish the lack of consent necessary for his entry into the dwelling place of another. We disagree.

The elements of burglary are as follows:

(1) That the accused unlawfully broke and entered the dwelling house of another;
(2) That both the breaking and entering were done in the nighttime; and
(3) That the breaking and entering were done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 55(b). The Manual also explains that "[a]n entry is 'unlawful' if made without the consent of any person authorized to consent to entry or without other lawful authority." MCM, Part IV, ¶ 111c. The military judge instructed the members consistent with these elements and this definition. Record at 521.

The essence of the appellant's claim is that there was inadequate evidence to establish that he lacked authority to enter the victim's hotel room. The record of trial, however, provides ample evidence from which the members could have concluded that the appellant's entry was unlawful.

The only evidence offered that the appellant had permission to enter the victim's hotel room was the testimony of defense witness FN Henry Johnson. FN Johnson testified that both MP and the appellant were his friends and that he had known both for over a year. FN Johnson further testified to a conversation with

MP claiming that MP had admitted giving the hotel room key to the appellant. MP had previously testified that he did not see the appellant that night and that he was certain that he did not talk to the appellant that night. Subsequent to FN Johnson's testimony, MP was called as a rebuttal witness and again testified that to the best of his recollection he did not see or speak with the appellant that night.

When confronted by authorities, the appellant himself did not claim to have permission to enter the victim's hotel room. Special Agent Parnell testified that the appellant claimed that he went to the hotel to look for a friend and entered the victim's hotel room when he saw the door ajar, thinking his friend had left the door open for him. The appellant's written and signed confession also fails to reveal any claim of consent.

Examining this evidence in a light most favorable to the Government, we conclude that a rational trier of fact could have found the elements of burglary beyond a reasonable doubt. The members could have reasonably believed MP's testimony that he neither saw nor spoke with the appellant and could not, therefore, have given the appellant consent to enter the hotel room. Likewise, the members could have accepted the appellant's confession, which never once claimed that he had consented to enter the hotel room. The members could have reasonably discounted the testimony of FN Johnson due to his friendship with the appellant.

Moreover, we are convinced beyond a reasonable doubt that the appellant's entry into the hotel room was without the consent of either occupant and was thus unlawful. Even had MP told the appellant that he could go up to the hotel room, the appellant's entry would undoubtedly have been unlawful. The purpose for the entry remains a relevant factor in determining whether an entry was lawful. *United States v. Davis*, 56 M.J. 299, 301 (C.A.A.F. 2002). "The term [authority] also carries with it the notion that implicit in a grant of authority is the understanding that it will be exercised for proper purposes." *Id*. at 302. As such, an authorized entry may be made unlawful when the scope of the authorization is exceeded. Thus, even if MP gave the appellant permission to enter the hotel room for some lawful purpose, the appellant's entry was made unlawful when the scope of the authorization was exceeded. As MP could not have given consent, express or otherwise, for the appellant to enter the hotel room for the purpose of committing an indecent assault, the appellant's entry would be unlawful even under these circumstances.

Accordingly, the Government amply met its burden of proof in this case, and the evidence is both factually and legally sufficient to sustain the appellant's burglary conviction.

Sentence Appropriateness

The appellant also contends that his sentence to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to pay grade E-1 is inappropriately severe. We disagree and find the sentence to be appropriate for this appellant and these offenses.

The appellant contends that his punishment is inappropriate and excessive where the offenses were nonviolent, the appellant had no criminal history and an exemplary military record, and military courts-martial have adjudged lighter sentences for the same or similar conduct. Appellant's Brief at 8-9.

Sentence appropriateness involves the "'individualized consideration' of the particular accused 'on the basis of 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)(citing *Unites States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the evidence admitted on the merits, in aggravation, and in mitigation, including the appellant's unsworn testimony, we conclude that the appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ.

We do not agree with the appellant's assertion that his crimes are nonviolent. The appellant was convicted of indecent assault and burglary. Under the facts of this case, assault consummated by a battery is the first element of indecent assault. MCM, Part IV, ¶ 636. An assault consummated by a battery occurs when the accused does bodily harm to another and the harm is done with "unlawful force or violence." *Id.*, ¶ 54b(1). In this case, the bodily harm inflicted by the appellant included the unwanted touching of EC's breasts, buttocks, back and genitalia. The appellant was also convicted of burglary involving the breaking and entering of a hotel room during the nighttime with the intent to commit indecent assault. Burglary involves a breaking and entering and is certainly a crime of violence, especially a burglary committed with the intent to commit a separate violent crime.

The appellant also claims that other courts-martial have adjudged lighter sentences for the same or similar conduct. This court is required to engage in sentence comparison only "in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). "An appellant who asks the Court of Criminal Appeals to engage in sentence comparison bears the burden of demonstrating that any cited cases are 'closely related' to the appellant's case, and that the sentences are 'highly disparate.'" *Sothen*, 54 M.J. at 296.

Although the appellant cites twelve cases as allegedly closely related, based upon our review, the appellant has failed to meet the burden of proving that any of the cases is a "closely related" case or that its sentence is "highly disparate" with his.

Finally, we note that the appellant's crimes were in violation of two different societal norms. First, the appellant broke into and entered his victim's dwelling place in the middle of the night, while she was sleeping. This entry clearly violated her reasonable expectation of privacy and security in her "dwelling." Second, the appellant, without consent, indecently touched his victim for his own sexual gratification. Society cherishes the right of the individual to be secure in one's own person and the right to be free from the violence of others. The appellant violated these rights.

Viewed in this context, along with the nature of the offenses and the character of the appellant, we do not believe the sentence is inappropriately severe.

Conclusion

Accordingly, we affirm the findings and sentence, as approved below.

Senior Judge PRICE and Senior Judge CARVER concur.

For the Court

R.H. TROIDL
Clerk of Court