Not Reported in M.J. Rptr., 2023
WL 5750798 (Army Ct.Crim.App.)

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Only the Westlaw citation is currently available.

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U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee
v.
Specialist Anthony R. ALLRED,
United States Army, Appellant

ARMY 20220141

25 August 2023

Headquarters, Fort Carson, Steven C. Henricks, John M. Bergen and Jacqueline L. Emanuel, Military Judges, Lieutenant Colonel Kenton E. Spiegler, Acting Staff Judge Advocate

For Appellant: Captain Ian P. Smith, JA; Scott R. Hockenberry, Esquire; Daniel Conway, Esquire (on brief); Scott R. Hockenberry, Esquire; Daniel Conway, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Major Andrew M. Hopkins, JA; Captain Cynthia A. Hunter, JA (on brief).

Before FLEMING, HAYES, and POND, Appellate Military Judges

MEMORANDUM OPINION

HAYES, Judge:

***1** Appellant asserts five errors before this Court, three of which merit discussion and one of which merits relief.[1] We take action in our decretal paragraph.

BACKGROUND

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of one specification of rape, one specification of sexual assault, one specification of rape of a child, one specification of domestic violence, and one specification of assault consummated by a battery on a child under the age of sixteen years, in violation of Articles 120, 120b, 128b, and 128, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920, 920b, 928b, and 928. The military judge sentenced appellant to a dishonorable discharge, confinement for 21 years, and reduction to the grade of E-1. The convening authority took no action on the findings or sentence.[2]

The misconduct resulting in appellant's convictions occurred between September 2018 and October 2020 and involved three disparate victims: appellant's wife (Mrs. [Redacted] appellant's daughter (Ms. [Redacted] and a servicemember (PFC [Redacted] Appellant was acquitted of another charge of sexual assault alleged to have occurred in 2014 involving a fourth victim (Ms. [Redacted] The government's case against appellant included the introduction of evidence of prior sexual offenses of nearly identical nature against Mrs. [Redacted] and Ms. [Redacted] occurring during a break in appellant's service.

Appellant alleges the evidence is factually insufficient to sustain the conviction for sexual assaulting the servicemember victim; we agree and grant relief. Appellant also alleges the military judge improperly admitted evidence under Military Rule of Evidence (Mil. R. Evid.) 404(b). We agree but find no prejudice. Additionally, appellant argues his counsel were ineffective for their failure to introduce prior inconsistent statements by the victims into evidence; we disagree.

LAW AND DISCUSSION

Factual Sufficiency

This Court reviews the legal and factual sufficiency of the evidence de novo. *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005). The test for factual sufficiency in effect at the time these offenses were committed 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 appellant's guilt beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003) (citation omitted).[3]

***2** Convictions are not reviewed under a "preponderance of the evidence" standard-rather, this Court "may only affirm convictions that we are ourselves convinced have been proven beyond a reasonable doubt." *United States v. Whisenhunt*, ARMY 20170274, 2019 CCA LEXIS 244, at *6 (Army Ct. Crim. App. 3 Jun. 2019) (summ. disp.). If the defense, at trial or on appeal, lays out a scenario that leaves this Court

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with a fair and rational hypothesis of the evidence other than appellant's guilt, Article 66, UCMJ, mandates this Court *must* set aside and dismiss the findings of guilt. *Id.*

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are far from convinced of appellant's guilt beyond a reasonable doubt regarding the sexual assault alleged in The Specification of Additional Charge IV. There were multiple fair and rational hypotheses except that of guilt offered by the defense and not refuted by the government regarding the element of penetration.

While appellant was charged with penile penetration of PFC [Redacted] vulva, there was no physical evidence of penetration. The victim testified to feeling sore the next morning, "assum[ed]" she had sexual intercourse, and appellant told another witness he "got some" the night prior. Left unsaid and unproven was what or who appellant was referring to, and what if anything, particularly appellant's penis, penetrated the victim. She testified to having no memory of any sexual encounter, and no physical evidence was collected. The government failed to prove beyond a reasonable doubt the victim was penetrated by appellant's penis.

Mil. R. Evid. 404(b) Evidence

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019). A military judge abuses their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if their application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). An abuse of discretion may also be found where a military judge "fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017).

Prejudice from erroneous evidentiary rulings is reviewed de novo. *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017) (quotation omitted). For nonconstitutional evidentiary errors, the Government has the burden to demonstrate that the error did not have a substantial influence on the findings. *Id.* (quotation omitted). Harmlessness is evaluated by weighing: "(1) the strength of the [g]overnment's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kohlbek*, 78 M.J. at 334 (citing *United States v.* Norman, 74 M.J. 144, 150 (C.A.A.F. 2015); *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is generally not admissible as evidence of the person's character to show the person acted in conformity with that character on a particular occasion. However, such evidence may be admissible for another purpose, including, *inter alia,* proving knowledge, absence of mistake, or the existence of a plan. Mil. R. Evid. 404(b)(2).

***3** Military courts apply the three-part "Reynolds Test" to review the admissibility of evidence under Mil. R. Evid. 404(b): (1) does the evidence reasonably support a finding by the factfinder that appellant committed other crimes, wrongs or acts; (2) does the evidence of the other act make a fact of consequence to the instant offense more or less probable; and (3) is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

Military courts have long emphasized, "we do not approve 'of broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)'; and we have expressed 'concern ... with the dangers in admitting such evidence even if it meets the requirements of Mil. R. Evid. 404(b).' " *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989) (quoting *United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984)).

In the context of child molestation charges, the Court of Appeals for the Armed Forces (C.A.A.F.) has observed: "Whereas [Mil. R. Evid.] 414 was intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation, admissibility under [Mil. R. Evid.] 404(b) is comparatively restrictive." *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010) (cleaned up). To this end, evidence of other acts " 'must be *almost identical* to the charged acts' to be admissible as evidence of a plan or scheme." *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (emphasis added) (quoting *Brannan*, 18 M.J. at 183).

"Under *Reynolds'* second prong, the common plan analysis considers whether the uncharged acts in question establish a

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'plan' of which the charged act is an additional manifestation, or whether the acts merely share some common elements." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citing *Morrison*, 52 M.J. at 122; *United States v. Munoz*, 32 M.J. 359, 363-64 (C.M.A. 1991)). "In answering such a question [in the context of child molestation], [the CAAF has] examined the following factors: the relationship between victims and the appellant; ages of the victims; nature of the acts; situs of the acts; circumstances of the acts; and time span." *Id.* (citing *Morrison*, 52 M.J. at 122-23).

In an extremely thorough 34-page omnibus ruling covering the admissibility of evidence under Mil. R. Evid. 404(b), 413, and 414, the military judge admitted evidence under Mil. R. Evid. 404(b) that appellant, as an 18-year-old, had attempted to record his 11-year-old half-sister undressing. The military judge found this evidenced a "motive and plan" to sexualize underage females living with appellant to support the charge of digitally penetrating Ms. [Redacted] 10 years later.

Given the comparably restrictive nature of Mil. R. Evid. 404(b) evidence as compared to Mil. R. Evid. 413 and 414, as well as the restrictive nature of the 'plan' analysis in child molestation cases that was not specifically acknowledged in the military judge's ruling, we find the disparities between the recording and the charged digital penetration are too significant and numerous to warrant admission under Mil. R. Evid. 404(b). To establish a plan to sexualize underage females in the home that would support a conviction for digital penetration, the government included the following: the victim of the Mil. R. Evid. 404(b) incident was a half-sister who was around 11 years old at the time of the offense. The nature of the offense was an attempted recording of the half-sister undressing. The Mil. R. Evid. 404(b) incident occurred nearly 10 years before the charged offense, when appellant was 18 years old. The charged offense involved his biological daughter and an approximate gap in age of 20 years, as compared to approximately 7 years for the Mil. R. Evid. 404(b) offense.

***4** Given the significant difference between the character of the two offenses, the limited probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The military judge failed to consider the binding precedent requiring common plan evidence in child molestation cases " 'be *almost identical* to the charged acts' to be admissible as evidence of a plan or scheme." *Morrison*, 52 at 122 (emphasis added) (quoting *Brannan*, 18 M.J. at 183). Even under a deferential abuse of discretion standard, it was error to admit the evidence of the attempted recording under Mil. R. Evid. 404(b).

However, we find the error was harmless. The strength of the government's case rested on the admission of the Mil. R. Evid. 413 and 414 evidence, which was devastating in its similarities to the charged offenses. In support of the child rape charge, the government introduced Mil. R. Evid. 414 evidence of a prior, nearly factually identical digital penetration of the same victim in their previous home. The government also introduced evidence that appellant tricked his blindfolded half-sister to perform oral sex on him. The testimony of both the half-sister and Ms. [Redacted] was detailed and compelling. Given the propensity value of Mil. R. Evid. 414 evidence compared to the limited use of Mil. R. Evid. 404(b) evidence, and the egregious nature of the highly material Mil. R. Evid. 414 evidence in this case compared to the relatively low materiality of the Mil. R. Evid. 404(b) evidence, we are confident appellant was not prejudiced by the inclusion of the Mil. R. Evid. 404(b) evidence.

Defense Counsel's Performance

We review claims of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (citing *United States v. Carter*, 79 M.J. 478, 480 (C.A.A.F. 2020)). Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* "Under *Strickland,* an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (citing *Strickland*, 466 U.S. at 687).

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citing *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)). In defining what constitutes deficiency in a claim of ineffective assistance of counsel, the Supreme Court has stated a "defendant must show that counsels' representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

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Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id.* at 693. This means appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (emphasis added). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

***5** While defense counsel did not elicit testimony Ms. [Redacted] previously *denied* a penetrative act during her law enforcement interview, they did elicit she did not *allege* a penetrative act. Although perhaps not as damning, they still elicited the inconsistent prior statement.

Additionally, while defense counsel did not introduce evidence of Mrs. [Redacted] alleged statement the assault on Ms. [Redacted] may have been unintentional, that statement was both speculative and hearsay. Even if admitted, the statement would have very little probative value in comparison to the compelling testimony of Ms. [Redacted] as to the force applied by appellant.

Finally, while our holding that the sexual assault conviction regarding PFC [Redacted] is factually insufficient moots this particular claim of ineffective assistance, PFC [Redacted]s purported statement to a friend that the initial sexual encounter was consensual, if admitted, would have cut against defense counsel's argument there was no physical evidence of the assault on PFC [Redacted] Presenting evidence the sexual act was consensual would have conceded the sexual act element which we have found the government failed to prove.

Appellant's trial defense counsel's performance was not deficient from an objective standard of reasonableness. Each decision by defense counsel raised by appellant falls well "within the wide range of reasonable professional assistance" expected of trial defense counsel. *Strickland*, 466 U.S. at 689. Based on the entire record, we conclude appellant has not overcome the strong presumption that his defense counsel were competent.[4]

Assuming *arguendo* deficient performance, appellant also fails to establish prejudice. Appellant fails in his burden to establish a "reasonable probability" of a different outcome if defense counsel elicited the evidence they were allegedly ineffective for failing to elicit. *Id.* at 694. Given the strength of the testimony by the victims, it is unreasonable to conclude the outcome of the trial would have been different if any, or all, of the evidence in question had been elicited.

CONCLUSION

On consideration of the entire record, the finding of guilty of The Specification of Additional Charge IV and Additional Charge IV is SET ASIDE and that Specification and Additional Charge is DIMISSED. The remaining findings of guilty are AFFIRMED. The sentence to three years' confinement for The Specification of Additional Charge IV is SET ASIDE. The remainder of the sentence to confinement, and remainder of the sentence, is AFFIRMED.[5,6]

Senior Judge FLEMING and Judge POND concur.

Footnotes

1 We have given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and they merit neither discussion nor relief.

2 The Entry of Judgment reflects the Convening Authority did not take the required action on the sentence in this case. While the convening authority's inaction is error based on the dates of the offenses of which appellant was convicted, given this case was referred after 1 January 2019 and a dishonorable discharge was adjudged, we have jurisdiction to review this case and find the error harmless. *See* *United States v. Brubaker-Escobar*, 81 M.J. 471, 472 (C.A.A.F. 2021).

3 We recognize that Article 66(d)(1)(B) was amended by the National Defense Authorization Act for Fiscal Year 2021; but as the amendment applies only to a courts-martial in which every finding of guilty in the Entry of Judgment is for an

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offense that occurred on or after 1 January 2021, the amended language is not applicable to appellant's case. *See* Pub. L. No. 116-283, § 542(b), 134 Stat. 3612.

4 We see no need to order a post-trial evidentiary hearing under *United States v. DuBay*, 17 U.S.C.M.A 147, 37 C.M.R. 411 (1967). *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (stating in most instances involving an ineffective assistance claim, "the authority of the Court to decide that legal issue without further proceedings should be clear.").

5 Having considered the entire record, including the fact appellant received segmented sentences to confinement for each specification of which he was convicted, we are able to reassess the sentence in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). Our reassessment is aided by the segmented sentence to 3 years of confinement for the sexual assault conviction. Reassessing the remainder of the sentence in light of the mandatory dishonorable discharge for convictions of rape and rape of a child, and the imposition of 18 years of confinement for the remaining offenses, we are confident the military judge would have reduced appellant to the grade of E-1 even absent the dismissed sexual assault conviction.

6 The "Modifications or Supplements to the Statement of Trial Results" block of the Judgment of the Court is amended to reflect the Statement of Trial Results was dated 25 March 2022.

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