16 December 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
DANIEL A. FREY
USAF,
Appellant.

USCA Dkt. No. 14-0005/AF

Crim. App. No. 37759

BRIEF IN SUPPORT OF PETITION GRANTED

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Appellant.	)	
	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE AIR FORCE COURT ERRED IN FINDING TRIAL COUNSEL'S PRESENTENCING ARGUMENT WAS HARMLESS ERROR WHERE TRIAL COUNSEL INSINUATED THAT APPELLANT WILL COMMIT FUTURE ACTS OF CHILD MOLESTATION?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 4 November 2009, 8-11 March 2010, and 7-10 June 2010, Appellant was tried at a general court-martial by a panel of officer members at Joint Base McGuire-Dix-Lakehurst, NJ. Contrary to his pleas, Appellant was found guilty of two specifications alleging a violation of Article 120 (aggravated sexual contact & digital rape of a child under 12). (J.A. 11). Appellant was sentenced to a reduction to the grade of E-1,

confinement for eight (8) years, and a dishonorable discharge. (J.A. 50). On 25 October 2010, the convening authority approved the sentence as adjudged.

On 3 July 2013, the AFCCA affirmed the findings and sentence as approved. *United States v. Frey*, ACM No. 37759 (A.F. Ct. Crim. App. 3 July 2013). (J.A. 11). On 8 July 2013, the Appellate Records Branch notified Appellant via first class mail of the Air Force Court's decision.

Statement of Facts

In presentencing argument, trial counsel attacked Appellant's apology where he stated he did not intend for this to happen. (J.A. 20). Trial counsel stated "What does that say for how he will act in the future if 18 months, as he pointed out, later he still can't admit to it?" *Id.* Trial counsel asked the members to consider:

> "What is the sentencing process trying to help here? Are we trying to focus more on helping a child molester get out of jail, a child molester who refuses to admit and apologize for his actual crimes he was found guilty of, or are we trying to fairly and justly show that the Air Force will not tolerate child molesters, **that we want to protect young girls from the same fate**. . ."

(J.A. 22-23). Trial defense counsel responded by saying "there's absolutely no evidence before you that [Appellant] is a threat to little girls out there." (J.A. 25).

In rebuttal argument, trial counsel conceded there was no evidence of similar misconduct, but then stated: "But think what we know, common sense, ways of the world about child molesters." (J.A. 32). Trial defense counsel objected to this improper argument. *Id.* In response, trial counsel stated, "I'm just arguing the ways of the world, Your Honor." *Id.* Trial defense counsel replied, "Your Honor, this is not ways of the world." *Id.* The military judge overruled the objection. *Id.*

At the end of surrebuttal argument, the military judge gave an instruction relating to trial counsel's comments that "we all know that most sexual assaults do not occur from the guy in the bushes; that they occur from a family member or a friend." (J.A. 31, 33). The military judge instructed:

> Court members, let me begin by reminding you of the instructions I gave you during findings which apply equally here, that when counsel make argument, that is not evidence. It is appropriate for you to apply commonsense and knowledge of the ways of the world whether or not in your particular case that involves any implication suggested by counsel. Again, it is up to you to determine whether or not that comports with your sense of the ways of the world. A few statements Trial Counsel made in particular that most sexual assaults occur by family or friends is not before you in evidence, put that in context of whatever knowledge of the ways of the world you have. But that specific assertion of fact is not in evidence" (emphasis added).

(J.A. 33). The military judge did not specifically reference trial counsel's arguments regarding "what we know about child molesters."

Trial counsel recommended a sentence of 10 years of confinement, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to E-1. (J.A. 17). The panel adjudged 8 years of confinement, a dishonorable discharge, total forfeitures of all pay and allowances, and reduction to E-1. (J.A. 50).

The Air Force Court held that trial counsel's argument "went beyond the evidence of record and any reasonable inference that can be derived from it, including appellant's unsworn statement, and thus [we] find error." (J.A. 6).

Summary of the Argument

This Court cannot be confident that the panel exercised its independent judgment in imposing a sentence. Trial counsel inflamed the passions of the panel in the worst way possible – arguing that Appellant was a recidivist and only lengthy confinement will protect other children from Appellant, all after admitting there was no evidence to support such an argument.

Argument

THE AIR FORCE COURT ERRED IN FINDING TRIAL COUNSEL'S PRESENTENCING ARGUMENT WAS HARMLESS ERROR WHERE TRIAL COUNSEL INSINUATED THAT APPELLANT WILL COMMIT FUTURE ACTS OF CHILD MOLESTATION.

Standard of Review

Improper argument is a question of law that the courts review de novo. *United States v. Marsh*, 70 M.J. 101, 104

(C.A.A.F. 2011). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000).

Law

"[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.' " *Marsh*, 70 M.J. at 106 (citing *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). Trial counsel must not inject matters that are not relevant into argument such as facts not in evidence. *Schroder*, 65 M.J. at 49 (citing *United States v. Fletcher*, 62 M.J. 175, 180 (C.A.A.F. 2005)). In *Marsh*, this Court held it was plain error for trial counsel to argue that the panel place themselves in the shoes of future potential victims. 70 M.J. at 106 (quoting *Hodge v. Hurley*, 426 F.3d 368, 384 (6th Cir. 2005). This Court warned that trial counsel must not "fan the flames of the jurors' fears by predicting that if they do not convict. . . some . . . calamity will consume their community." *Marsh*, 70 M.J. at 106 (quoting *Bedford v. Collins*, 567 F.3d 225, 234 (6th Cir. 2009).

For determining prejudice, the courts balance the severity of the improper argument with any measures by the military judge to cure the improper argument and look at the evidence supporting

the sentence to determine whether trial counsel's comments, taken as a whole, were so damaging that the courts cannot be confident Appellant was sentenced on the basis of the evidence alone. ***Marsh***, 70 M.J. at 107; see also ***United States v. Erickson***, 65 M.J. 221, 224 (C.A.A.F. 2007).

This Court has adopted a three part balancing test: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. ***Fletcher***, 62 M.J. at 184. "[I]t is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." ***Id.*** at 184 (citing ***United States v. Meek***, 44 M.J. 1, 6 (C.A.A.F 1996)).

Analysis

a. Severity of the Misconduct

First, trial counsel attacked Appellant for not taking "responsibility" 18 months later after the incident by asking the members: "how he will act in the future if 18 months . . . later he still can't admit to it?" (J.A. 20). Trial counsel then egregiously insinuated to the members that child molesters are serial offenders and that Appellant would re-offend unless the panel adjudged a lengthy sentence to confinement. Trial counsel did so despite conceding there was no evidence of other misconduct or evidence of his re-offending potential before the members.

Because there were no facts in evidence the Appellant would re-offend in the future or that he committed similar offenses in the past, this evidence lacked any rational nexus and factual support in the record. Trial counsel insinuated that "we" want to protect young girls from child molesters. Trial counsel specifically sought to inflame the passions of the panel by arguing Appellant was a serial offender and invoked the need for the panel to protect future potential victims by adjudging lengthy confinement.

b. Curative measures

The trial defense counsel objected to this improper argument. The military judge clearly erred by not sustaining the objection. By doing so, he gave credence to trial counsel's argument that she was arguing "the ways of the world," especially after trial defense counsel specifically argued that the argument was not "the ways of the world." The military judge's endorsement of the argument acted as approval for the members to consider such arguments in their deliberations.

The military judge then compounded the error during his curative instruction. First, he failed to instruct that trial counsel's assertion that all child molesters are serial offenders was not a fact in evidence. Second, the military judge instructed that, with respect to "any implication suggested by counsel," "it is up to you to determine whether or not that comports with your sense of the ways of the world." (J.A. 33).

In other words, as noted above, if the panel believed trial counsel's assertion that all child molesters are serial offenders, then the panel is free to consider this when adjudging an appropriate sentence. This violated one of the purposes of sentencing, i.e. to punish members for the crime they committed, not because of some alleged future crime the trial counsel believes she can predict. *See United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004). In ***Fletcher***, this court found "The military judge's curative efforts were minimal and insufficient to overcome the severity of the trial counsels' misconduct," where the military judge gave a generic limiting instruction reminding the members of the findings instructions that what the attorneys say is not evidence. 62 M.J. at 185. On the facts of this case, it is impossible to say that the influence upon the members was removed by such a mild judicial action. Instead of curing the misconduct, the military judge gave credence to it.

c. Weight of the Evidence

When reviewing trial counsel's comments as whole, nothing can be more damaging than arguing that child molesters in general are recidivists and the only way to protect future victims is lengthy confinement for child molesters. Just as in ***Marsh***, the trial counsel erred by improperly arguing the panel members should protect future possible victims, because Appellant was a recidivist, when no evidence was presented to support such an assertion.

Furthermore, this Court should review the evidence presented in presentencing. The government's presentencing evidence consisted of a personal data sheet, a picture of R.K. with her mother, and Appellant's enlisted performance reports. (J.A. 82-101). As in *Marsh*, "the government did not present a significant case in aggravation." 70 M.J. at 107. Appellant, on the other hand, presented several character letters on his behalf and made a compelling unsworn statement. (J.A. 102-110). The panel then sentenced Appellant to eight years of confinement - only two years less than trial counsel's recommendation –a dishonorable discharge, reduction to E-1, and total forfeitures, just as trial counsel requested. (J.A. 50). Unlike in *Marsh*, it appears the panel was not receptive to the defense's argument and awarded Appellant a sentence just below trial counsel's recommendation. 70 M.J. at 107.

This was not a case where the panel exercised independent judgment in sentencing. *See Schroder*, 65 M.J. at 58-59. Arguably, the panel was encouraged to consider trial counsel's arguments by the military judge's failure to sustain an objection. The military judge compounded the error with a flawed "curative" instruction, allowing the members to consider common sense and ways of the world for evidence that did not exist at trial. Independently, if an individual member felt that a convicted child molester was likely to reoffend, the military

judge's instruction allowed the permissibility to adjudge harsher punishment.

d. Conclusion

The sentencing argument given by the prosecutor was improper, the curative measures by the military judge exasperated the misconduct, and minus the improper statement, the weight of the evidence does not support the sentence. As a result, this court cannot be confident that the Appellant was properly sentenced on the weight of the evidence alone.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the sentence.

Very Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on December 16, 2013.

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