IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Omar M. GOMEZ Boatswain's Mate Second Class (E-5) United States Coast Guard, Appellant	BRIEF ON BEHALF OF THE APPELLANT USCA Dkt. No. 16-0336/CG Crim. App. No. 1394

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

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Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY PERMITTING TWO COMPLAINING WITNESSES TO TESTIFY ON SENTENCING THAT APPELLANT WAS RESPONSIBLE FOR THEIR PREGNANCY COMPLICATIONS WITH NO EVIDENCE CONNECTING HIS MISCONDUCT TO THE COMPLICATIONS.

Statement of Statutory Jurisdiction

The convening authority approved a sentence that included a punitive discharge. Accordingly the U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Boatswain's Mate Second Class (BM2) Omar M. Gomez's case under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). 10 U.S.C. §866(b)(1)(2012). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A members panel with enlisted representation, sitting as a general court-martial, convicted BM2 Gomez, contrary to his pleas, of one specification of an orders violation, three specification of maltreatment, one specification of making a false official statement, one

specification of wrongful sexual contact, one specification of sexual assault, two specifications of indecent exposure, three specifications of abusive sexual contact, and one specification of conduct prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces in violation of Articles 92, 93, 107, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 893, 907, 920, 934 (2012).

The members sentenced BM2 Gomez to confinement for eight years, reduction to paygrade E-1, and a dishonorable discharge. (J.A. at 68.) The convening authority approved the adjudged sentence and, except for the dishonorable discharge, ordered the approved sentence executed. (J.A. at 30.)

On December 14, 2015, the lower court affirmed the findings and sentence as approved by the convening authority. (J. A. at 15). BM2 Gomez petitioned this Court for a grant of review on February 12, 2016. This Court granted review on April 1, 2016.

Statement of Facts

Petty Officer Gomez was convicted of committing sexual assault on the civilian girlfriend of one of his coworkers and of sexually

harassing a number of his female coworkers. Among them were Seaman (SN) M.S. and SN S.W.

SN M.S. testified in the Government's case in aggravation. She told the members she had been carrying twins during the pendency of the court-martial and only one child survived. (J.A. at 41.) She blamed BM2 Gomez for the loss of her baby, implying that it was because of the stress of participating in his court-martial:

> Q: [M.S.], has this been a stressful process for you, going through a trial?
>
> A: It has. It's, it's been very stressful. I'm more aggressive, I'm more angry, I'm more detached from…
>
> Q: And has the stress had any impact on your pregnancy?
>
> A: It did, and I'm also getting help for that, um, it could be for, and, the stress from this case and I found out that early on that I was supposed to have twins and one didn't make it. And with more stress from this case, I was worried for this baby that was living inside me, hopefully hoping that this stress didn't make his heart rate go up, or hopefully I was protecting him, and every time I would always go to the doctor to see my blood pressure, always ask questions if my son was okay, because that's my, that's my baby.

(J.A. at 41.) The civilian defense counsel did not object to this testimony. (*Id.*)

In his sentencing argument, trial counsel referenced SN M.S.'s testimony arguing, "He apologized to his Chiefs and he asked for his job back, but he didn't think it important enough to apologize to [SN M.S.], for interfering with her relationship with her husband. Or for causing stress during her pregnancy." (J.A. at 64.)

SN S.W. also testified in the Government's case in aggravation. She told the members that her child was born prematurely, blaming BM2 Gomez because of the stress of participating in a court-martial for her complications:

> Q: Seaman [S.W.], can you tell this panel how the crimes that the accused, excuse me, the convicted has perpetrated upon you as it impacts your life?
>
> A: Um, it's definitely impacted tremendously. I uh, it's really hard going home to my family and you know, having to lie to them, tell them I'm going to training because I'm here. Because they don't know. And um, it's hard to see my baby, because he was born premature, so, the whole July thing, it's early. It was early. It's just, it's really hard.
>
> Q: Do you believe stress had something to do with?
>
> A: I was diagnosed with pre-eclampsia, which is brought on by stress.
>
> Q: Do you believe that this trial and this process has caused you to have stress?
>
> A: Yes.

(J.A. at 46-47.) The Civilian defense counsel failed to object to this testimony. (*Id.*)

Summary of Argument

It was plain error for SN M.S. and SN S.W. to imply in their testimony on sentencing that BM2 Gomez was responsible for their pregnancy complications. Evidence regarding their pregnancy complications was improper evidence in aggravation because it was not directly related to or resulting from BM2 Gomez's convictions. Additionally, any probative value of the evidence was far outweighed by the danger of unfair prejudice.

Argument

THE MILITARY JUDGE ERRED BY PERMITTING TWO COMPLAINING WITNESSES TO TESTIFY ON SENTENCING THAT APPELLANT WAS RESPONSIBLE FOR THEIR PREGNANCY COMPLICATIONS WITHOUT ANY EVIDENCE CONNECTING HIS MISCONDUCT TO THEIR COMPLICATIONS.

Standard of Review

When the trial defense counsel fails to object, a military judge's decision to admit evidence in aggravation under Rule for Courts-Martial 1001(b)(4) is reviewed for plain error. *United States v. Patterson*, 54 M.J. 74, 78-79 (C.A.A.F. 2000). To establish plain error, an appellant must "demonstrate that there was error, that the error was obvious and substantial, and that the error materially prejudiced his substantial rights." *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999).

Discussion

A. SN M.S. and SN S.W.'s pregnancy complications were not directly related to or did not result from BM2 Gomez's offenses.

It was plain and obvious error to allow the complaining witnesses to opine that BM2 Gomez was responsible for their tragic pregnancy complications.

During sentencing, the Government may produce evidence in aggravation. RULE FOR COURTS-MARTIAL (R.C.M.) 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). That evidence "must directly relate to or result from the accused's offense." *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990); *see also* R.C.M. 1001(b)(4). To be

admissible, aggravating evidence must demonstrate a relationship between the offense and the impact of the offense. *See United States v. Antonitis*, 29 M.J. 217, 220 (C.M.A. 1989). R.C.M. 1001(b)(4) provides:

> Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

However, an accused is not "responsible for a never-ending chain of causes and effects." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). (quoting *United States v. Witt*, 21 M.J. 637, 640 n.3 (A.C.M.R. 1985)). It is not enough that evidence offered on sentencing is merely logically related to the offense. *Rust*, 41 M.J. at 478. Rather, aggravating evidence must show "'the specific harm caused by the defendant.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

In *Rust*, a pregnant woman suffering from vaginal bleeding went to the emergency room. Dr. Rust, an obstetrician, advised the treating physician to have the woman go home and rest. The woman did so and returned to the hospital the next day. She spoke to Dr. Rust on the phone. There was testimony that the woman was upset because Dr.

Rust would not come to the hospital and admit her, although Dr. Rust disputed this at trial.

The woman left the military emergency room, went to a civilian hospital, and delivered her baby prematurely. The baby died three days later. A day or two after the baby's death, the baby's father strangled the mother to death and committed suicide by shooting himself. He left a suicide note explaining they both wanted to die because they were distraught over the death of their baby and wanted to be with him. *Id.* at 474-75.

The Government charged Dr. Rust with dereliction of duty. During sentencing, the military judge admitted the suicide note into evidence. On appeal, this Court rejected the Government's argument that "R.C.M. 1001(b)(4) is satisfied if Maj Rust's acts can reasonably be shown to have contributed to the murder-suicide." *Id.* at 478. This Court found that any logical connection between the murder-suicide and the suicide note to Dr. Rust's offenses was "too indirect to satisfy the requirement of R.C.M. 1001(b)(4) that the consequences be 'directly relating to or resulting from' Maj Rust's dereliction of duty." *Id.*

In this case, two complaining witnesses, SN M.S. and SN S.W., testified that they suffered pregnancy complications around the time of the trial. (J.A. at 41, 46-47.) SN M.S. was pregnant with twins and one of the babies did not survive. (J.A. at 41.) SN S.W. had a baby who was born premature. (J.A. at 46-47.) Both implied that stress from the trial process caused their pregnancy complications. (J.A. at 41, 46-47.)

The evidence presented to link BM2 Gomez's actions with these complications was thin. The women testified they felt stress from the trial process. They also testified without citation to any authority other than their own say-so, that stress was a factor in the types of complications they suffered. (J.A. at 41, 46-47.) SN S.W. explicitly blamed BM2 Gomez for her premature labor. (J.A. at 46-47.) SN M.S.'s testimony was less clear, but she implied that the stress from the legal process might have caused her to miscarry one of her unborn twins. (J.A. at 41.)

The Government offered no medical or expert testimony to corroborate a link or causation between the stress of trial and their complications. Other than the temporal proximity, there is no reason to suppose that BM2 Gomez's actions had any effect on their pregnancies.

It is just as likely these complications were not caused by stress at all, but by any number of other causes including random chance.

The link to BM2 Gomez's actions is further attenuated because the stress complained of by the witnesses was a result of the trial, not a direct result of the unlawful acts. While this Court previously held in *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) the effects of the trial process are within the "broad ambit" of R.C.M. 1001(b)(4), in this case it adds yet another layer of removal to the already tenuous link between BM2 Gomez's actions and the pregnancy complications. The links between BM2 Gomez's actions and the pregnancy complications are simply too tenuous to be appropriate evidence in aggravation.

B. The testimony offered to establish a link between BM2 Gomez's offenses and the birth defects was either improper lay opinion evidence or inadmissible hearsay.

The evidence offered to demonstrate a link between BM2 Gomez's offenses and the complaining witnesses' pregnancy complications was not only tenuous, but it was not even legally competent evidence. If SN S.W. and SN M.S. testified based on their assumptions, it was improper opinion evidence. If they testified based of the opinion of their medical

doctors, it was hearsay. Either way, it should have been abundantly clear to the military judge based on unambiguous rules of evidence that these lay witnesses could not be used to offer an opinion of the medical cause of their pregnancy complications

1. Improper Lay Opinion

Lay witness opinions must be limited to those that are "(a) rationally based on the witness's perception; (b) helpful to clearly understand the witness's testimony or to determine a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge. . . " Mil. R. Evid. 701(a). A witness is also not permitted to testify about that which they do not possess personal knowledge. Mil. R. Evid. 602.

SN S.W. and SN M.S. were not medical doctors. Nor was any evidence offered that would provide a basis for specialized knowledge about birth defects or their causes. They should not have been permitted to offer their opinions about the cause of their complications because such an opinion is outside the scope of a layperson's knowledge.

2. Hearsay

On the other hand, if SN S.W. and SN M.S. testified based on the out-of-court diagnoses of medical doctors rather than their own

opinions, their testimony was hearsay. Hearsay is defined in Mil.R.Evid. 801(c) as a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Hearsay is not admissible unless it falls under one of the recognized exceptions to the hearsay rule. Mil. R. Evid. 802. No recognized exemption that would allow a witness to testify about the medical opinion of another person. This Court has stated:

> Among the underpinnings of the hearsay rule is the fact that admitting hearsay can deprive the party against whom the evidence is offered the opportunity to test that evidence by cross-examination. Because the declarant is absent, the opponent cannot delve into matters such as memory, perception, bias, or motive during cross-examination. Additionally, the finder of fact cannot observe the demeanor and reaction of the declarant during cross-examination to assess what, if any, weight to give to the testimony of the declarant. This right to cross-examination is at the core of the confrontation clause.

United States v. Hall, 58 M.J. 90 (C.A.A.F. 2003) (internal citations omitted).

While the Government may argue that the Defense did not cross-examine the witnesses about the diagnoses, cross-examining the complaining witnesses about the merits of diagnoses made by other

people would have no bearing on the testimony presented. Trial defense counsel are not able to cross-examine a witness on the merits of someone else's opinion, just as the witnesses were not equipped to make such a diagnosis on their own.

If the Government wished to show a link between BM2 Gomez's actions and SN S.W. and SN M.S.'s birth complications it should have called an appropriate witness. SN M.S. and SN S.W. were not the proper witnesses for such testimony. BM2 Gomez suffered as a result.

C. Any tenuous relevancy of the testimony about SN M.S. and SN S.W.'s pregnancy complications was substantially outweighed by the danger of unfair prejudice.

Even if the evidence of the pregnancy complications were valid evidence in aggravation under R.C.M. 1001(b)(4), any minimal probative value was substantially outweighed by the danger of unfair prejudice. Pursuant to Mil. R. Evid. 403, when the danger of unfair prejudice substantially outweighs the probative value of the evidence in aggravation, the evidence should be excluded. Mil. R. Evid. 403; *United States v. Wilson*, 35 M.J., 473, 476 (C.M.A. 1992.).

In this case, as in *Rust*, the link between the offense and the harm is tenuous and therefore of minimal probative value. *Rust*, 41 M.J. at

478. The complaining witnesses failed to describe a connection between the actions of the accused and their pregnancy complications, other than temporal proximity. On the other hand, the danger of unfair prejudice was extremely high, in that the complaining witnesses claimed the accused was responsible for harms to innocent and defenseless unborn children. It is hard to imagine evidence that is more prejudicial.

Before the Court below, the Government argued Mil. R. Evid. 403 balancing test did not apply where the defense fails to object. This is incorrect. While this Court tests for plain error in the absence of objection, error under Mil. R. Evid. 403 can be plain error. *See E.g. United States v. Quarles*, 25 M.J. 761, 777 (N-M. Ct. Crim. App. 1987). Regardless of objection, the military judge is expected to weigh the prejudicial nature of evidence and act *sua sponte* to block evidence if the probative value is substantially outweighed by the danger of unfair prejudice.

D. BM2 Gomez was substantially prejudiced.

Permitting the members to hear this evidence substantially prejudiced the rights of BM2 Gomez. Rather than being sentenced for his acts and the valid aggravating results of his actions, BM2 Gomez was sentenced based on the improperly admitted evidence of the tragic complications that two complaining witnesses endured during pregnancy. As stated above, testimony that BM2 Gomez was responsible for the loss of a baby or an innocent child being born premature is highly prejudicial.

Petty Officer Gomez received a harsh sentence of eight years of confinement, reduction to E-1 and a dishonorable discharge. While the nature of his offenses and the other evidence presented in sentencing played a role in his heavy sentence, it is hard to imagine that the severe complications for which he was blamed would not have inflamed the panel and led to an increased sentence.

Conclusion

The pregnancy complications suffered by SN M.S. and SN S.W. were not directly related to BM2 Gomez's convictions. Admission of such testimony was plain and obvious error. Given the terrible nature of

the complications, BM2 Gomez was prejudiced by the introduction of their testimony during sentencing. This Court should set aside the sentence.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 02 May 2016.

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