IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Major (O-4) **ERIK J. BURRIS,** United States Army, Appellant	) BRIEF ON BEHALF OF APPELLEE)))) Crim. App. Dkt. No. 20150047)) USCA Dkt. No. 17-0605/AR))

NATANYAH GANZ
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0786
Natanyah.ganz.mil@mail.mil
U.S.C.A.A.F. Bar No. 36930

CORMAC M. SMITH
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36435

ERIC K. STAFFORD
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36897

TANIA M. MARTIN
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36898

Issue Presented

CITING RULES FOR COURTS-MARTIAL 905(e) AND 919(c), THE ARMY COURT HELD THAT THE FAILURE OF APPELLANT'S TRIAL DEFENSE COUNSEL TO OBJECT TO IMPROPER CHARACTER EVIDENCE AND IMPROPER ARGUMENT WAIVED ANY ERROR. THIS COURT, HOWEVER, TREATS SUCH FAILURES AS FORFEITURE AND TESTS FOR PLAIN ERROR. WHICH COURT IS RIGHT?

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On 25 January 2015, a panel of officers sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of willful disobedience of a superior commissioned officer, two specifications of rape, one specification of forcible sodomy, and four specifications of assault consummated by a battery in violation of Articles 90, 120, 125, and 128, UCMJ.[1] (JA 176-79). The panel sentenced appellant to forfeiture of all pay and allowances, to be confined for twenty years, and to be dismissed from the service. (JA 605). The convening authority approved the findings and the sentence as adjudged, but waived automatic forfeitures for six months. (JA 180).

On 8 May 2017, the Army Court affirmed the findings and sentence. (JA 1-19). That day, appellant filed a petition for reconsideration. (JA 20-27) On 28 July 2017, the Army Court issued a summary disposition on reconsideration and again affirmed the findings and sentence. (JA 69-71). On 20 December 2017, this Honorable Court granted review.

Statement of Facts

Appellant, a judge advocate and chief of military justice, met his second wife, Mrs. WB, in January of 2009. (JA 257, 614). In December 2009, Mrs. WB

[1] The members acquitted appellant of two specifications of Article 120, UCMJ, and two specifications of Article 125, UCMJ. (JA 170-179).

became pregnant. (JA 257). She and appellant married in March of 2010, one month prior to appellant's deployment to Afghanistan. (JA 259, 262). During the first month of their marriage, appellant raped Mrs. WB. (JA 273-74). Mrs. WB woke up to appellant holding her down, physically restraining her arms, and forcibly penetrating her vagina with his penis. (JA 274). Mrs. WB repeatedly told appellant to stop, but appellant continued to rape her. (JA 274). Mrs. WB testified that she confronted appellant the next morning: "Why did you do that? You hurt me." (JA 274). Appellant responded: "Oh, you must have been talking about The Beast. You met the Beast last night." (JA 274). Appellant explained to Mrs. WB that The Beast refers to a nickname girls gave him in college when "he sleepwalks and – does things of a sexual nature." (JA 768-69).

Mrs. WB testified that prior to appellant returning to Texas on mid-tour leave from Afghanistan in December 2010, she was worried about seeing The Beast again. (JA 275). As she feared, while appellant was home on leave, similar to the first time, appellant woke Mrs. WB up from her sleep, held her down, and vaginally penetrated her. (JA 287-80). Mrs. WB tried to push appellant off of her and told him "no" and "stop," but he continued to rape her. (JA 288-89). Mrs. WB did not tell anyone about appellant raping her because of embarrassment and fear. She testified: "I was afraid of [appellant.] He'd just done that to me, and he

made it very clear that no one would listen to me. Once again, he was the law." (JA 289).

In February 2012, appellant and Mrs. WB met for a night at a hotel in Raleigh, North Carolina. (JA 314-15). That night, appellant was drinking and angry. (JA 314). Mrs. WB testified that she did not want to get into bed that night because she "had this feeling that the way he was acting" The Beast would come out that night. (JA 314). As predicted, appellant woke Mrs. WB up while she lay on her stomach, held her neck and face down on a pillow, and forcibly sodomized her anus with his penis. (JA 315). Mrs. WB testified she screamed "Stop, Erik. What are you doing? I can't breathe. Get off me. Why are you doing this?" (JA 315). After appellant stopped raping her, she crawled into the bathroom and discovered she was bleeding anally. (JA 316). At trial, Mrs. WB described this incident in the following way: "Yes. I had seen the Beast, and he was an animal going after my body. I was nothing. It was not love." (JA 316).

On another occasion during a visit to Texas, appellant raped Mrs. WB again. (R. at 821-22). During the night, Mrs. WB woke up to appellant on top of her, holding her wrists down, and vaginally penetrating her. (R. at 821-22). Mrs. WB believed that was when their second daughter was conceived. (R. at 820).

While Mrs. WB and appellant were living in North Carolina, sometime between 7 and 9 November 2012, Mrs. WB testified that she saw The Beast again.

(JA 334). On this occasion, an argument broke out regarding whether Mrs. WB would drive appellant to the airport the next morning. (JA 341). Appellant's mother-in-law, Mrs. AJ, saw appellant grab Mrs. WB by the arm during the argument. (JA 342). Later that evening, appellant raped Mrs. WB. Despite her protests and pleas to stop, appellant bent Mrs. WB over the bed, and vaginally penetrating her with his penis. (JA 345).

During trial, Mrs. WB described appellant's behavior when he raped her:

> The Beast is a name that Erik gave for his sexual – his uncontrollable sexual urges. . . . To me . . . The Beast is this complete different person, this evil, angry, animal that comes at you. It doesn't have any empathy for you at all, just attacks you and is non-responsive . . . unresponsive to my telling him to stop or asking him, "Please stop. What are you doing? It hurts." You know, there was no communication back. . . . The Beast was this totally different personality . . . .

(JA 365-66).

During opening argument, the trial counsel referred to The Beast and said: "this is not a government characterization of the accused. . . . That is the name the accused gives the alter ego that sexually assaults [Mrs. WB] time and time again." (JA 186).

Defense counsel was the first party during the trial to elicit evidence about The Beast. On cross examination of a government witness, defense counsel asked:

"[Appellant] told you about something called The Beast, correct?" The witness responded: "That may not have been until January; but, yes, he did." (JA 199).

Later, Special Agent (SA) AT of the Criminal Investigation Command (CID) testified about the interview he conducted with appellant. (JA 685-86). Through SA AT, the government introduced and published to the panel the video recording appellant's CID interview. Defense counsel stated he had "[n]o objection" to admitting the video into evidence. (JA 241). During the interview, appellant told SA AT that The Beast was just a joke. Appellant went on to explain that The Beast was a name he made up to describe himself when he would get aroused from sleeping next to a woman and how this arousal would lead to "cuddling" and "kissing." (JA 609).[2] He went on to state that classmates of his knew about the nickname. (JA 609).

Prior to closing arguments, the military judge gave the following instruction: "At this time, you will hear argument by counsel, which is an exposition of the facts by counsel for both sides as they view them. Bear in mind that the argument of counsel are not evidence." (JA 548). Trial counsel's closing argument spans twenty pages. (JA 549-69). In closing argument, trial counsel used the word "beast" nine times. (JA 1925, 1927). In closing argument alone, defense counsel used the word "beast" at least seven times. (JA 575, 576, 579, 580, 584).

[2] At approximate 44:28 in the interview, appellant begins discussing The Beast.

At trial, "appellant was represented by a military defense counsel (DC), an individual military counsel (IMC), and a civilian defense counsel (CDC)." (JA 10). Defense counsel did not object to testimony about the Beast before trial, during the presentation of evidence, or during trial counsel's opening or closing arguments. Moreover, the military judge did not raise any concerns about the government's use of The Beast. The defense theory was essentially that Mrs. WB was a liar who fabricated or orchestrated all of the allegations against appellant. (JA 577, 584; SJA 619).

The Army Court concluded "[The Beast] issue is waived and there is no legal error to correct on appeal." (JA 4). In that same opinion, the Army Court further analyzed the issue and determined, "there is no cause for us to exercise our discretionary authority to address this issue notwithstanding appellant's waiver." (JA 4). "[T]he term 'The Beast' is not a character trait. Mil. R. Evid. 404(a)(1). It is appellant's self-imposed nickname, and it is not 'necessarily suggestive of a criminal disposition.'" (JA 4) (quoting *United States v. Farmer*, 583 F.3d 131, 145 (2d Cir. 2009).

Standard of Review

"Whether an accused has waived an issue is a question of law [appellate courts] review de novo." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017). This Court does "not review waived issues because a valid waiver leaves

no error to correct on appeal." *Id.* (citing *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009))

Summary of Argument

Even if this court reviews the failure to object to character evidence and argument for plain error, in this case, appellant affirmatively waived his right to object. The following facts support waiver: (1) defense counsel had advance notice of The Beast evidence; (2) defense counsel never objected to The Beast at any point prior to or during trial; (3) defense counsel introduced The Beast into evidence; (4) defense counsel affirmatively stated "no objection" to certain evidence the government introduced about The Beast; (5) defense counsel referred to appellant as The Beast multiple times when cross-examining the complaining witness; and (6) defense counsel argued about The Beast in closing. Even if the issue is not waived, reference to The Beast was not plain error because the self-imposed nickname The Beast does not suggest a criminal disposition. Rather, it helps describe and prove the actual charges. Finally, when viewed in the context of the entire trial, reference to The Beast did not materially prejudice a substantial right of the accused.

Argument

I. Waiver Applies

Although failure to object to improper character evidence and argument typically results in forfeiture of the objection, in this case, appellant waived his right to object on appeal. *See United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017);[3] *see also Ahern*, 76 M.J. at 197 (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) ("Deviation from a legal rule is 'error' unless the rule has been waived.").

"This is not simply a case where [The Beast] came into evidence without any objection or comment from defense counsel. If that were the case, [this Court] would review for plain error." *Campos*, 67 M.J. at 332. In this case, the facts and circumstances indicate defense counsel's "intentional relinquishment or abandonment of a known right." *Id.*

In *Campos*, appellant objected for the first time on appeal to admissibility of an expert's testimony. 67 M.J. at 331. At trial,

> there [was] no question that defense counsel had advance notice of the substance of [the expert's] testimony, that he reviewed the expected testimony, and that he considered

[3] The Army Court recently acknowledged that in applying waiver instead of forfeiture to failure to object to improper argument, it had potentially "faulted." *United States v. Koch*, ARMY 20160107, 2018 CCA LEXIS 34, at *11, n.11 (A. Ct. Crim. App. Jan. 29, 2018) (mem. op.). Moreover, in his concurring opinion, Judge Wolfe, stated: "I would . . . revisit our holding in *Kelly* that the failure to object to errors in argument waives, rather than forfeits, the error." *Id.* at *28.

> the impact of the stipulation on his client's case. At trial the military judge presented defense counsel with an opportunity to voice objections to the expected testimony and counsel responded that he had no objections.

Id. at 333. Based on these facts, the Court of Appeals for the Armed Forces (CAAF) "conclude[d] that there was a waiver to object to both the stipulation of expected testimony of [the expert] and to the substance of that testimony." *Id.*

Similarly, in *Ahern*, this Court determined:

> Under the clear dictates of M.R.E. 304(f)(1), Appellant's failure to object to the admission of the telephone calls waives his right to object to their admission on appeal. Moreover, under the ordinary rules of waiver, Appellant's affirmative statements that he had no objection to their admission also operate to extinguish his right to complain about their admission on appeal.

76 M.J. at 198.

To find waiver in *Ahern*, this Court considered the following significant facts: "Appellant was fully aware of the content of the phone calls prior to their admission, and introduced similar evidence in the form of the text message sent by SS." *Id.* Moreover, "Appellant had numerous opportunities to object to the admission of the phone conversations both before and during the trial. *Id.* "Later, Appellant replied that he had 'no objection' when the Government actually sought to admit the phone calls and play them for the panel." *Id.* Finally, during closing

argument, when trial counsel argued that aspects of the phone conversations "indicated his guilt, Appellant still raised no objection." *Id.*

Similarly, here, trial defense counsel was on notice of appellant's nickname well in advance of trial from multiple sources, including appellant's own CID interview. (JA 609). Additionally, at no point prior to or during trial did defense counsel file any motions to preclude evidence, testimony, or reference to The Beast. (Def. App. Br. 8). In fact, defense counsel was the first party to admit testimony of The Beast into evidence. On cross-examination, defense counsel elicited from appellant's supervisor, a government witness, that appellant had told the supervisor about The Beast. (JA 199).

Moreover, defense counsel did not object to any of the government's witnesses testifying about The Beast despite making repeated objections on other grounds. For example, defense counsel consistently objected to Mrs. WB's mother's testimony on the grounds of relevance, speculation, narrative, hearsay, and non-responsiveness. (JA 535, 539, 541, 542, 543, 544, 545, 565, 568, 572, 574, 575, 670). However, when Mrs. WB's mother testified about The Beast, defense counsel did not object. (JA 237). Additionally, during Mrs. WB's testimony on direct, defense counsel objected multiple times on various grounds including relevance, speculation, narrative, hearsay, and unresponsiveness. (JA 787, 812, 830, 840, 857, 1019). However, defense counsel never objected to trial

counsel's reference to the Beast or Mrs. WB's explanation of it. (JA 739-860). In fact, defense counsel herself referred to appellant as The Beast numerous times while cross-examining Mrs. WB. (SJA 616, 617, 618, 619). Furthermore, the military judge asked defense counsel if they had any objection to government's introduction of appellant's CID interview in which appellant describes The Beast. Defense counsel replied affirmatively: "No objection, Your Honor." (JA 686). Finally, defense counsel did not object to trial counsel's use of The Beast at any time during opening or closing argument, despite objecting to other arguments trial counsel made. (JA 182-91; 549-69).

Defense counsel's actions before and during the trial indicate they made "a conscious choice" to waive any potential objection to The Beast. *Ahern*, 76 M.J. at 197. Instead of objecting, defense counsel appeared to strategically use Mrs. WB's explanation of The Beast to develop and support the defense theory of the case. Defense counsel argued this theory at the outset of closing argument: "[Mrs. WB] is a liar, she takes something that happened in reality, and embellishes them to an outlandish extreme." (SJA 620). It follows that Mrs. WB's description of The Beast raping her was just another example of her exaggerating reality.

Defense counsel juxtaposed appellant's innocent explanation of The Beast as a joke nickname, something classmates knew about, and something he even told his supervisor about, with what they hoped the panel would believe was Mrs.

WB's embellished description of The Beast as "an animal going after [her] body" during the night. (JA 197, 316, 609). To advance this theory, defense counsel emphasized the absurdity of Mrs. WB's story about The Beast multiple times throughout the closing argument. (JA 575, 576, 579, 580, 584). As a result, appellant has waived the right to object to The Beast evidence and argument on appeal.

II. No Plain Error

There was no error because The Beast is not impermissible character evidence; rather, it is a nickname, which is not necessarily suggestive of a criminal disposition. *See United States v. Dean*, 59 F.3d 1479, 1492 (5th Cir. 1995) ("the nickname 'Crazy K' is not necessarily suggestive of a criminal disposition."); *cf. Farmer*, 583 F.3d at 135 ("the prosecutors . . . invited prejudice by repeatedly emphasizing Farmer's nickname [Murder] in a manner designed to suggest that he was known by his associates as a murderer and that he acted in accordance with that propensity . . . ."

Moreover, "[a]s many courts have recognized, a prosecutor may introduce evidence of a defendant's alias or nickname if this evidence . . . directly relates to the proof of the acts charged in the indictment." *United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984). Here, The Beast was relevant because it described appellant's behavior when he raped Mrs. WB. The description of appellant turning

into The Beast when he raped Mrs. WB illustrated the important difference in appellant's behavior and motivation for nonconsensual versus consensual sex. (JA 364). Additionally, this description helped explain to panel members the motive for this judge advocate, a chief of military justice, to commit these heinous crimes. (JA 614).

Even if use of The Beast was error, it was so slight that both defense counsel and the military judge did not recognize it as error. *See United States v. Short*, No. 17-0187, 2018 CAAF LEXIS 7, at *10 (C.A.A.F. 2017) ("With regard to the allegedly improper arguments Appellant now challenges, we note that the perceived errors were so slight that both defense counsel and the military judge failed to recognize them, indicating that neither saw the need for remedial measures at all."). Therefore, even if use of appellant's nickname The Beast was error, it was not plain or obvious.

III. No Material Prejudice

Even if this Court finds that such use of The Beast constitutes error, appellant has not demonstrated prejudice. Any alleged error is minor when viewed in the context of the entire trial. *See United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) (enumerating five indicators that help determine the severity of alleged misconduct). Trial counsel referenced The Beast only nine times during a closing argument which spanned twenty pages. (JA 549-69). Additionally, the

military judge gave the panel an instruction that counsel's arguments are not evidence. (JA 548). Furthermore, the government's case against appellant was strong, consisting of multiple corroborating witnesses, an expert witness to explain victim behavior, and appellant's own unconvincing explanation of the meaning of his nickname as The Beast. (JA 369, 378, 414, 516).

Additionally, the members mixed findings demonstrate that any impermissible character evidence did not result in prejudice to appellant. (JA 602-03). If the panel members convicted appellant based on impermissible character evidence and argument, one would expect convictions on all similar charges and specifications relating to Mrs. WB. However, the panel members convicted and acquitted appellant of similar Article 120, UCMJ, and Article 125, UCMJ offenses. (JA 602-03). These mixed findings indicate the members were not swayed by impermissible character evidence. *See Sewell*, 76 M.J. at 19 ("The panel's mixed findings further reassure us that the members weighed the evidence at trial and independently assessed Appellant's guilt without regard to trial counsel's arguments."). Therefore, any error in this case did not materially prejudice appellant.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

NATANYAH GANZ
Captain, Judge Advocate
Appellate Government
Counsel
U.S.C.A.A.F. Bar No. 36930

For:

CORMAC M. SMITH
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36435

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U.S.C.A.A.F. Bar No. 36898

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 3,373 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

NATANYAH GANZ
Captain, Judge Advocate
Attorney for Appellee
February, 2018

CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at efiling@armfor.uscourts.gov, and contemporaneously served electronically on Mr. Zachary Spilman, civilian appellate defense counsel, at zack@zacharyspilman.com, and the Defense Appellate Division, on this 15th day of February, 2018.

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0822