IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

RODNEY M. TYLER,
Master Sergeant (E-7), USAF
Appellant

Crim. App. No. 39572

USCA Dkt. No. 20-0252/AF

BRIEF ON BEHALF OF APPELLANT

MATTHEW L. BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth@us.af.mil

TODD J. FANNIFF, Lt Col, USAF
Deputy Chief, Appellate Defense Division
U.S.C.A.A.F. Bar No. 33050
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

(240) 612-4770
todd.fanniff@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Court of Appeals for the Armed Forces and Court of Military Appeals

Air Force Court of Criminal Appeals

Statutes and Rules

Issue Presented

WHETHER THE MILITARY JUDGE ERRED WHEN HE PERMITTED TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE; NAMELY, THE UNSWORN VICTIM IMPACT STATEMENTS WHICH WERE NOT ADMITTED AS EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001(b)(4).

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter Air Force Court) reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2018). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

On April 17, June 22, and June 25-30, 2018, a panel of officer members sitting as a general court-martial tried Appellant, Master Sergeant Rodney M. Tyler (hereinafter MSgt Tyler) at Keesler Air Force Base, Mississippi. (Joint Appendix (JA) at 52.) Contrary to his pleas, the panel found MSgt Tyler guilty of one charge and one specification of aggravated sexual abuse of a child, two specifications of indecent liberty with a child, and one specification of indecent acts, all in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008); and an additional charge and two specifications of sexual abuse of a child, in violation of Article 120b, UCMJ (2012). (JA at 54, 141.) The panel sentenced MSgt Tyler to reduction to E-4, confinement for four years and six months, and a bad-conduct discharge. (JA at

213.) The convening authority approved the sentence. (JA at 49.) The Air Force Court affirmed the findings and sentence on March 30, 2020. (JA at 18.) This Honorable Court granted review on September 22, 2020. *United States v. Tyler*, 2020 CAAF LEXIS 517 (C.A.A.F. September 22, 2020).

Statement of Facts

Findings Testimony

ML, MSgt Tyler's stepdaughter, testified in findings that that she had a "decent relationship" with him, and that he was "like a father figure." (JA at 59.) MSgt Tyler and ML's mother divorced in 2012. (JA at 60.) ML claimed that in 2010 MSgt Tyler touched her genitalia after she went to sleep in his bed during a storm. (JA at 61, 64-65.) ML stated that she moved onto her side and the touching stopped. (JA at 65.) When Trial Counsel (TC) asked what was "going on in her head" when MSgt Tyler touched her, ML responded "I was scared," without elaboration. (JA at 65.) She also explained that she did not report to her mother because "I was scared. I didn't know what [ ]they would think." (JA at 66.) ML also alleged that MSgt Tyler played pornography at their home and "advised" her to touch herself. (JA at 69.) ML claimed she did not tell her mother because she was "scared." (JA at 70.) ML provided no other testimony on how she felt at the time, or later, or what the continuing impact on her life may have been.

MC, MSgt Tyler's biological daughter whom he first contacted after she

turned 11, testified in findings that "every little girl wants to be a daddy's girl," to take part in "father/daughter dances," and that she wanted "to know who this man is." (JA at 116.) She described him as a "decent" dad during the first couple of years of their newfound relationship. (JA at 117.) They saw each other three times, but most communication was texting or calling. (JA at 117.) She claimed MSgt Tyler twice requested, via email, that she send him a nude picture of herself. (JA at 118–20.) On cross examination, MC stated she was "shocked" to receive the email. (JA at 124.) MC admitted to telling the Air Force Office of Special Investigations (AFOSI) that she wanted "justice for me" and that MSgt Tyler had not owned up to the consequences of a one-night stand with her mother. (JA at 125.) Trial Defense Counsel (TDC) summarized, and MC agreed, that she had talked about wanting justice, and wanting MSgt Tyler to realize actions have consequences, while bringing up his absence from her life. (JA at 125–26.) She also acknowledged that she told another person she "want[ed] [MSgt Tyler] to burn for all the mean things he's said and done." (JA at 125.) On redirect, TC asked why MC came forward; MC responded that "I've been through past abuse" and that blocking it out had started to "ruin my life." (JA at 127.) MC did not elaborate on the details of the alleged abuse or the identity of the abuser. There was no other testimony on how she felt at the time or whether she experienced any continuing impact.

Sentencing

During presentencing, MC and ML each provided the court with written unsworn statements for review. (JA at 142.) TDC lodged extensive objections to both statements. (JA at 142–56.) The discussion focused exclusively on admissibility under Rule for Courts-Martial (R.C.M.) 1001A,[1] with no mention of aggravation evidence under R.C.M. 1001(b)(4).[2] (JA at 142–56.) The military judge admitted ML's unsworn statement as written as Court Exhibit 1. (JA at 146, 297.) The military judge sustained several of TDC's objections to MC's written statement, and later admitted a revised version as Court Exhibit 3. (JA at 157, 298.)

TDC also objected to MC's statement that she hoped for a relationship with MSgt Tyler as a father. (JA at 143.) Before ruling on this portion of MC's statement, the military judge demonstrated an understanding of the then-applicable law in the Air Force. (JA at 152–53.) The judge referenced[3] the Air Force Court's

---

[1] Unless otherwise noted, all references to the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] The discussion transcript uses 1001(A), but it is clear from the context that this is a scrivener's error, as the parties and military judge refer to victim unsworn statements under R.C.M. 1001A. (*See* JA at 142–56.)

[3] The military judge did not cite the case directly, but explained that "the Air Force Court of Criminal Appeals, in a published opinion, has said the Military Rule of Evidence don't apply, neither does 403 . . . ." (JA at 152.) The Air Force Court's published opinion in *Hamilton* in 2017, holding that victim unsworn statements are not evidence, and the timing of the judge's comments in June 2018, make it

decision in *United States v. Hamilton*, 77 M.J. 579 (A.F. Ct. Crim. App. 2017), noting that the Military Rules of Evidence do not apply. (JA at 152.) Anticipating this Court's review of *Hamilton*, he stated that he found it significant that "this information is already out there, or at least reasonable inferences of this information is already out there." (JA at 152.)

TDC also objected to MC's statement that "[MSgt Tyler] was barely a father." (JA at 154.) The military judge recognized, but quickly dismissed, the potential that the members would interpret this as a request to punish MSgt Tyler for barely being a father (separate from the allegation). (JA at 154.)

After the Government rested, both ML and MC delivered their unsworn statements essentially verbatim from the written exhibits. (*See* JA 158–60, 297–98.) ML verbally addressed the court as follows:

> The things that my ex-stepfather Master Sergeant Rodney Tyler has done to me have affected me and my life in many ways. I used to be able to trust him as he was more of a father to me than my own biological father was. Because he took advantage of me I now have trust issues not just with men, but every friendship or relationship that I have and that I may have in the future. I was so young when he started to do these things to me. He has ruined my innocence of a child. I experienced traumatic events and saw things that most kids my age at that time [ ]may not have seen or known. I felt corrupted as a child because I knew about sex when other kids my age did not. This made it harder for me to make friends and connect with kids my age. My mother and I have always had a close mother/daughter relationship. What Rodney Tyler did has made me keep things from my own mother, which hindered our

---

probable he was referencing *Hamilton*. 77 M.J. at 585.

> relationship. As a result of the things that he has done to me, he has made me feel worthless and less of a person. I feel that if he is punished for the disgusting and cruel things that he has done to me, I'll be able to move past this and get on with my life to be a successful adult. I will finally be able to let go of this part of my past and move on. Thank you for your time and consideration.

(JA at 158–59.)

MC then delivered the following unsworn statement:

> My name is [MC]. When I first reached out . . . was first reached out to by Rodney Tyler, I was hopeful that I would finally get to have a father figure in my life, a chance to have someone to take to father/daughter dances and someone to ask for advice. When he asked for nude pictures of me . . . a nude picture of me, when I was 14, I first felt angry. No father should ever see his daughter in a sexual way. I don't think it was appropriate, let alone okay. I was confused because he has no problem asking his own biological daughter for a nude picture. The request made me feel like he was no longer a father figure. He was barely a father and ruined what little father/daughter relationship we had. I lost all respect for him.

(JA at 160) (ellipses in original).

Certain portions of the unsworn statements contained information not found elsewhere in the Record of Trial, such as the purported continuing impact on ML and MC, and new descriptions of their emotions at the time of the offenses. (*See* JA at 158–60, 297–98.) The military judge gave no instructions on the use of victim impact statements immediately after their delivery, but provided standard sentencing instructions on unsworn statements before argument, including how "[t]he weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member" and that the panel was "expected to use

[its] common sense and [its] knowledge of human nature and the ways of the world." (JA at 160, 168–69.)

TC began her sentencing argument as follows:

> "Given what little father/daughter relationship we had, I lost all respect for him." "He has ruined my innocence as a child." "He has made me feel worthless and less of a person." Those are the words of [ML] and [MC] from the statements that they provided you. Those words describe how they felt. How they were impacted by Master Sergeant Tyler's actions, by his crimes against them. That's how he made those girls feel. Afraid. That is how [ML] felt, when she was 10 years old and she woke up in a bed, feeling the sensation of an adult male--

(JA at 173.)

TDC objected to facts not in evidence. (JA at 173.) The military judge initially overruled the objection, instructing that argument is not evidence, but simply counsel's views of the evidence and reasonable inferences therefrom. (JA at 173.) After further objection, the court entered an Article 39(a), UCMJ, session. (JA at 174.) TDC clarified that he objected to TC's arguing the victim impact statements as if they were evidence. (JA at 174.) The military judge asked if such references were permissible to an accused's unsworn statement; TDC agreed that *references* were permissible, which is why the initial quotes drew no objection, but asserted that TC cannot *argue* the victim impact statements. (JA at 174–75.) TC said she was only referencing the statements. (JA at 175.)

The military judge then mused on the possibility that evidence in the victim impact statement could be admissible in the Government's case-in-chief; thus, he

would allow the parties to argue unsworn statements that *could* have been admitted as evidence. (JA at 175–76.) Specifically, he stated that:

> [F]or instance, victim impact . . . in that particular format, it is something that could be directly related to resulting from the offense or to the extent of the Accused, is proper extenuation and mitigation evidence even though it was found within an unsworn statement. I have instructed, and the members certainly may consider that, regardless of whether we, in our lawyerly fashion, call it evidence or not, . . . but certainly in the context of this, I will allow the Trial Counsel to argue information in the unsworn statement that would be . . . the same information that would otherwise be properly admissible if offered in the Government's case-in-chief. And I will do the same for you, Defense.

(JA at 175–76) (final alteration in original).

TDC extended the objection to any further references to victim impact statements as if they were evidence, arguing that the victims had a choice between sworn testimony and an unsworn statement, and chose the latter. (JA at 176.) The military judge made clear that TDC had preserved the objection. (JA at 176.) The military judge then instructed the members as follows: "I overruled the objection, at least subject to my instruction, and my instruction, in short, is that this is argument of counsel, but ultimately you must resolve the questions before you based on the facts and information before you as you recall it." (JA at 177.)

TC then proceeded with a lengthy sentencing argument, spanning a further 21 pages in the record, (JA at 177–93, 207–210), resuming with the following arguments:

> Corrupted, that's how [ML] felt when she was exposed to pornography for an hour, when she had to stare at that screen and listen to her stepfather explain to her the sexual acts that were taking place in front of her eyes. At ten years old, she was asked by him to masturbate . . . . I don't believe she could even comprehend fully what that meant, what she was being asked to do, what that was for.
>
> …
>
> Angry, confused, that's how [MC] felt when she received that request from Sergeant Tyler, her biological father.

(JA at 177.)

> TC continued with the following arguments:
>
> The earliest of the offenses that Sergeant Tyler committed happened in 2008, against [MC], that's when he started damaging her. And then in 2010, is when he started damaging [ML]. So for eight years, 10 years, while they're suffering the consequences of what he's done to them, he feels nothing.
>
> …
>
> Sexual crimes can be the most egregious, and that is because of the impact that they have on the victim. They strip the person of everything, their dignity, their self-worth; being touched while asleep, being forced to watch explicit sexual content, being spoken to, or texted in the ways those girls were texted.
>
> …
>
> He used his position as a father figure to exploit those girls for sexual gain.

(JA at 187–89.)

Continuing on the theme of victim impact, TC argued that:

> He robbed those girls of their innocence, of their childhood, something that no amount of money can buy back possibly, and he wants you to be concerned, this time, given all that he's done, he wants you to be concerned about his own financial security in the future.

> …
>
> [W]hen people like [the court members] are looking in the other direction, [MSgt Tyler] is completely different from the person that he has shown himself to be to those innocent girls, completely different. To them he was [ ] their monster.
>
> …
>
> And those memories, the feelings, the impact from his actions will never be erased from [ML's] or [MC's] memory, never.

(JA at 192–93).

TC argued for specific punishment in close proximity to invoking victim impact. Immediately before discussing her sentence recommendation, TC argued:

> Another way to think about that is justice and fairness. And it's important here, because [ML] and [MC] have been dealing with the consequences of his actions for years now, and they're still dealing with that today. And for him not to have to account for that pain that he's caused in a meaningful and proportional way, that is unjust, and that is unfair.

(JA at 182.)

Directly after asking the members to return a sentence including 20 years of confinement, TC argued: "more importantly, 20 years because of the retribution, because of the proportionality, because that is what's fair and what's just, to account for the pain that he's caused." (JA at 186.) She returned to this theme, highlighting that his career continued after the abuse but "they are struggling, and it's all because of him. That's not fair . . . . They're still dealing with that now, and are going to be dealing with it in the future. And he should have to do the same in a meaningful way." (JA at 187–88.)

Just before closing her sentencing argument with a recitation of the suggested sentence, TC stated:

> And Trial Counsel asks that [ML and MC] not be erased from your consideration, the two daughters that he chose not to include in his sentencing exhibits, not be forgotten. They have been silenced for eight years and ten years, despite Sergeant Tyler's best efforts to sweep it under the rug, they are silenced no more. Their feelings, their emotions are bubbling [ ]at the surface right now, and even though they're not in Sergeant Tyler's family photo collection, they are the reason we are here today. His actions, what he did to them, and the impact, is the reason we're here.

(JA at 193).

TDC attempted to counteract TC's extensive argument on victim impact by urging the members against choosing a longer sentence simply because of the TC's repetition of how MC and ML felt "over, and over and over again." (JA at 206.)

During rebuttal argument, TC circled back to the connection between victim impact and the sentence, dismissing TDC's sentence suggestion as unreasonable "for the pain that he's caused them for a decade now that they're still working through." (JA at 209.) In closing, TC discussed the impact of the sentence "[u]pon the people that he hurt, [ML], and [MC], and the message that you send, that you want to send, about his crimes and what they mean, and what they're worth, is for you and you alone to choose. So what do you want to say?" (JA at 210.)

At the close of arguments, the military judge instructed the members to consider counsel's arguments "only to the extent that it may or may not assist you

in your duties in determining an appropriate sentence in this case." (JA at 212.) The members sentenced MSgt Tyler to reduction to E-4, a bad-conduct discharge, and four years and six months' confinement. (JA at 213.)

The Air Force Court's Opinion

In an unpublished opinion, the Air Force Court affirmed the findings and sentence. (JA at 18.) It first agreed with the Government that merely referencing a victim unsworn statement is permissible. (JA at 12.) Next, the Air Force Court deemed the vast majority of the alleged improper argument "directly references evidence properly before the members, or reasonable inferences therefrom, and is therefore proper argument." (JA at 12.)

The Air Force Court expressly rejected each allegation of improper argument except TC's comment that "he was their monster," instead assuming error. (JA at 12–13.) It then tested that comment, and all other alleged improper statements, for prejudice. (JA at 13.) The Air Force Court concluded MSgt Tyler was not prejudiced by any improper argument, and thus could not have been prejudiced by the military judge's ruling. (JA at 16.) The Air Force Court further opined that the sentencing evidence weighed so heavily in favor of the Government that it was confident MSgt Tyler was sentenced based on the evidence alone. (JA at 14–15.)

Summary of the Argument

The military judge abused his discretion by flouting the meaningful distinction between R.C.M. 1001A victim impact statements and R.C.M. 1001(b)(4) aggravation evidence. His ruling allowed TC to conflate unsworn statements admitted under R.C.M. 1001A with evidence that *could* have been admitted under R.C.M. 1001(b)(4). This enabled and encouraged TC's argument, which was powerful, passionate, and, due to a lack of evidentiary basis, improper. The ultimate result was prejudice to MSgt Tyler's substantial rights by misusing victim impact statements to increase his sentence. Given the circumstances, this Court cannot be confident that the panel sentenced MSgt Tyler based on properly admitted evidence.

Argument

THE MILITARY JUDGE ERRED WHEN HE PERMITTED TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE; NAMELY, THE UNSWORN VICTIM IMPACT STATEMENTS WHICH WERE NOT ADMITTED AS EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001(b)(4).

Standard of Review

Whether argument is improper is a question of law, reviewed de novo. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). If a proper objection is made, courts review to determine whether the military judge's ruling constituted an abuse of discretion. *United States v. Sewell,* 76 M.J. 14, 18 (C.A.A.F. 2017)

(citing *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014); Art. 59(a), UCMJ, 10 U.S.C. § 859(a)).

Law and Analysis

1. Unsworn Victim Impact Statements are Not Evidence

This Court has stated that "unsworn victim impact statements are uniquely situated in the substrate of the sentencing process." *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). However, this Court has not yet decided the question of whether unsworn victim impact statements are evidence. The granted issue here turns on whether TC argued facts not in evidence; thus, unlike *Hamilton*, and *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018), this Court has a compelling reason to answer the question. This Court should, like the military judge in this case and the Air Force Court, acknowledge that unsworn victim impact statements are not evidence.

The National Defense Authorization Act for Fiscal Year 2014 established the "rights of the victim of an offense," under Article 6b, UCMJ, requiring that a victim be given the right to be "reasonably heard" at a sentencing hearing. (JA at 31–33). R.C.M. 1001A implements this right for "crime victims," which includes individuals who have suffered "direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." R.C.M. 1001A(b)(1). Victim impact under R.C.M. 1001A includes "any financial,

social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2). The right to be heard includes the right to make an unsworn statement, and not to be cross-examined. R.C.M. 1001A(e).

This Court explored the origins of R.C.M 1001A in *Barker*, recognizing that victim testimony under R.C.M. 1001A "does not constitute witness testimony." 77 M.J. at 382 (citing R.C.M. 1001A(a)). The removal of the oath requirement places an unsworn statement in a separate category beyond the scope of the Military Rules of Evidence. Indeed, this Court in *Hamilton* recognized that the plain language alone indicates that at least some Rules for Evidence do not apply. 78 M.J. at 342. The right to be heard implemented in R.C.M. 1001A derives from a victim's right of allocution, not a means to present evidence. *See United States v. Hamilton*, 77 M.J. 579, 584 (A.F. Ct. Crim. App. 2017.)

Additionally, the language implementing this right to be heard—R.C.M. 1001A(e)—is almost identical to the language establishing the right for an accused to make an unsworn statement under R.C.M. 1001(c)(2)(C). This Court has ruled that an accused's unsworn statement is not evidence.[4] This Court should similarly

---

[4] *United States v. Provost*, 32 M.J. 98, 99 (C.A.A.F. 1991) ("It must be remembered that, if an accused elects to make an unsworn statement, he is not offering evidence."); *United States v. Breese*, 11 M.J. 17, 24 (C.M.A. 1981) ("The truth of the matter is that these statements are *not* made under oath and, thus, the

hold that unsworn victim impact statements are not evidence and are regulated only by R.C.M. 1001A. *Cf. United States v. Sowell*, 62 M.J. 150, 152 (C.A.A.F. 2005) (holding "the [accused's] unsworn statement remains a product of R.C.M. 1001(c) and thus remains defined in scope by the rule's reference"). Thus, like an accused's unsworn statement, unsworn victim impact statements would generally not be the subject of argument.[5]

2. The Military Judge Abused His Discretion by Ignoring the Distinction Between Rules for Courts-Marital 1001A and 1001(b)(4).

R.C.M. 1001(b)(4) permits *trial counsel* to "present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty," including, but not limited to, evidence of "social, psychological, and medical impact on or cost to any person . . . who was the victim of an offense committed by the accused." Victim impact evidence under R.C.M. 1001(b)(4) must comply with the Military Rules of Evidence. *See Hamilton*, 78 M.J. at 341. Article 42(b), UCMJ, directs that "each witness before a

---

unsworn statement is not evidence.") (emphasis in original) (internal quotation marks omitted).

[5] This Court has recognized some exceptions: (1) trial counsel may point out that an accused's statement is unsworn—as opposed to sworn testimony, *United States v. Marsh*, 70 M.J. 101, 105 (C.A.A.F. 2011); and (2) it is fair comment to note that an accused has failed to express remorse, provided a proper foundation is laid. *United States v. Paxton*, 64 M.J 484, 487 (C.A.A.F. 2007).

court-martial shall be examined on oath." 10 U.S.C. § 842(b); *see also Hamilton*, 78 M.J. at 341 (citing *United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004)).

In *Hamilton*, this Court made it eminently clear that R.C.M. 1001A and R.C.M. 1001(b)(4) are distinct means of presenting information to the sentencing authority, and that a military judge errs by blurring the lines between the two. *See* 78 M.J. at 340. The military judge here similarly erred when he gave TC blanket authority to argue the contents of unsworn victim impact statements, admitted only under R.C.M. 1001A, if the contents *could* have been admitted in the Government's case-in-chief. In essence, this ruling allowed the Government to bypass evidentiary controls, and the rigors of cross-examination, to argue, as evidence, an unsworn victim impact statement. This approach obliterates the distinction between sworn testimony and unsworn statements.

The choice between providing a sworn or an unsworn statement must have meaning. A victim may justly exercise the right to be heard either through sworn testimony or unsworn statements, or both. Sworn testimony allows cross-examination to probe the source and extent of victim impact. Denying cross-examination by treating sworn and unsworn testimony alike takes on a Constitutional dimension when TC is allowed to argue based on unsworn statements that are not in evidence. *See United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (noting the danger of arguments without basis in evidence, which

"clearly impact[ ] an accused's right of confrontation and the opportunity to impeach the source of the adverse comment") (citations omitted).

The military judge's erroneous ruling also had an enduring impact. The ruling cut off TDC's ability to continuously challenge TC's arguments that strayed beyond admitted evidence. Had the military judge simply addressed the improper argument before him, and not issued a free pass to argue unsworn impact statements with impunity, TDC's later objections could have limited the flow of improper arguments to the members—or at least clarified for the record the source of the evidence argued. Instead, TC argued virtually without objection. This left the Air Force Court to determine whether TC's argument rested on findings evidence and fair inferences, or instead on the victim impact statements. Although the Air Force Court found a modicum of supporting evidence from findings, it erred in concluding that this evidence sufficed to support TC's extensive argument on victim impact. The Air Force Court relied heavily on an expansive view of "reasonable inferences" from the limited findings testimony. But in assessing a proper sentence, the members do not have the luxury of scouring the record. It is far more likely that members focused on the TC's argument on the just-delivered victim impact statements (which they also took back for deliberations as exhibits), rather than snippets of testimony from days earlier.

3. Trial Counsel's Improper Argument Prejudiced MSgt Tyler

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Sewell*, 76 M.J. at 18 (quoting *Hornback*, 73 M.J. at 159–60) (internal quotation marks and alterations omitted). This Court "has consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'" *White*, 36 M.J. at 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975)).

Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *United States v. Fletcher,* 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). When assessing prosecutorial misconduct's prejudicial effect, this Court has outlined a balancing approach of three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* at 184. When applying *Fletcher* to improper sentencing argument, this Court considers whether "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the

evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (citations, alterations, and internal quotation marks omitted.)

Victim impact in a child sexual abuse case harbors tremendous power. The Air Force Court, in reviewing the strength of the Government's case, highlighted first that the victims were his daughter and stepdaughter. (JA at 15.) And statements and sentiments derived solely from their unsworn statements suffused the argument. But since victim impact was understandably not the focus at findings, a review of MC and ML's findings testimony yields minimal impact evidence.

ML only testified to the general nature of her relationship with her father. (JA at 59.) She did state "I was scared" when MSgt Tyler allegedly touched her genitalia, although she also said she was scared of what her mother would say, and thus did not report her allegation. (JA at 65–66.) There is no other evidence of continuing impact upon ML other than her unsworn statement. Either through ML or another witness, the Government could have set up the continuing impact on ML. It failed to do so, yet argued as if it had.

MC gave slightly more, but still limited, testimony on findings that could constitute victim impact. She explained her desire to have a father/daughter relationship with the man she did not know. (JA at 116.) From her findings testimony it is clear she harbored animosity for her father's absence. (JA at 125–

26.) On cross, she admitted she had previously wanted him to own the consequences of what he had done, which included being absent from her life. (JA at 125–26.) In explaining her decision to report, she referenced the damaging impact of blocking out "past abuse," without explaining if this related to MSgt Tyler. (JA at 127.) Again, the Government did not introduce evidence, through MC, her family, or experts, of continuing impact upon her.

TC improperly used the unsworn victim impact statements as the glue to hold together her argument. There may well have been profound impact on MC and ML, but where the impact almost exclusively exists in unsworn statements, the Government may not argue it as aggravation evidence. Without the use of the unsworn victim impact statements, the TC's argument would lack cogency. The Air Force Court missed the forest for the trees in its analysis as its excessive focus on each individual comment missed the larger prejudice.

TC's argument extracted key language from the unsworn victim impact statements and argued to the members what it meant:

- ML stated in her unsworn statement that she "felt corrupted as a child because I knew about sex when other kids my age did not." (JA at 159.) It is unclear which offense she refers to. TC then uses the potent language "corrupted" to argue about what ML felt with regard to certain offenses. (JA at 177.)

- MC also stated in her unsworn statement that she felt "angry" and "confused" when MSgt Tyler requested photographs from her. (JA at 160.) TC argued these exact words, absent from MC's findings testimony, to

explain to the members how MC felt. (JA at 177.)

- When TC lacked evidence of continuing impact, the military judge's ruling allowed her to use unsworn victim impact statements to bridge the gap between the offense and impact.

    - MSgt Tyler "robbed those girls of their innocence, of their childhood." (JA at 192.)

    - "[F]or eight years, 10 years, while they're suffering the consequences of what he's done to them, he feels nothing" (JA at 187.)

    - "[T]o them he was [ ] their monster" (JA at 192.)

    - "[A]nd those memories, the feelings, the impact from his actions will never be erased from [ML's] or [MC's] memory, never." (JA at 193.)

Applying the first *Fletcher* factor, the severity of the misconduct is significant. Here, TC appropriated the sentiments from the unsworn victim impact statements, used them to tie together her argument, and weaponized them to argue for a higher sentence. Before her specific sentence recommendation, TC invoked the impact on ML and MC—who "have been dealing with the consequences of his actions for years now, and they're still dealing with that today"—to argue that MSgt Tyler has to account in a "meaningful and proportional way." (JA at 182.) TC argued for 20 years of confinement, among other things, "to account for the pain he's caused," and contrasted MSgt Tyler's continuing career with how ML and MC "are going to be dealing with it in the future. And he should have to do

the same in a meaningful way." (JA at 186.) Before closing, TC reminded the members that MC and ML's "feelings, their emotions are bubbling [ ] at the surface right now . . . . His actions, what he did to them, and the impact, is the reason we're here." (JA at 193.) And in rebuttal argument, TC dismissed TDC's sentence suggestion as unreasonable "for the pain that he's caused them for a decade now that they're still working through." (JA at 209.)

Regarding the second *Fletcher* factor, in the face of this severe misconduct the military judge's curative efforts, if anything, exacerbated the situation. From the members' perspective, they received no instructions immediately after the unsworn statements. Before argument, the military judge gave a standard instruction on unsworn statements, including that "[t]he weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member." (JA at 169.) Soon after TC began arguing, TDC objected and the military judge instructed the members that "argument is not evidence but it is counsel's belief *on what the evidence was*, and reasonable inferences from it." (JA at 173) (emphasis added). Dissecting this instruction shows the military judge, in effect, called the victim impact statements evidence. If the military judge tells the members that TC's argument is not evidence, but just her belief on what the evidence was, it follows that the subject of her argument—victim impact from the unsworn statements—is *evidence*.

After the Article 39(a), session, the military judge indicated he overruled the objection, instructing only that "this is argument of counsel, but ultimately you must resolve the questions before you based on the facts and information before you as you recall it." (JA at 177.) Finally, at the close of argument, the military judge instructed the members to consider arguments "only to the extent that it may or may not assist you in your duties in determining an appropriate sentence in this case." (JA at 212.)

The cumulative effect of these instructions is confusion, not clarity. The members cannot have understood the boundary between unsworn victim impact statements and admitted evidence, and how TC was allowed to use each in argument. Even if they could understand this fine distinction, it matters little because the military judge's ruling allowed TC to operate as though the distinction did not matter.

When assessing the effect of error on the sentence, it is highly relevant when a case is tried before a military judge. *Barker*, 77 M.J. at 384 (citing *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008)). The converse should also be true. Although members are presumed to follow instructions, absent evidence to the contrary, this case presents ample evidence to the contrary. *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). In a typical improper argument, the military judge would instruct the members to disregard certain comments. However, in this

case, military judge was complicit in the improper argument: he gave no curative instructions because he believed no error occurred. The members essentially received standard instructions. Additionally, he effectively called the victim impact statements evidence before the members. The final charge to the members was to consider arguments "only to the extent that it may or may not assist you in your duties in determining an appropriate sentence in this case." (JA at 212.) This instruction is so bland it cannot have limited the members' consideration of unsworn statements as TC argued them. Certainly TDC, in the untenable position of listening to the building improper argument as it progressed, could not cure the error.

On the third *Fletcher* factor, the Air Force Court found the Government's case strong enough to convince it that MSgt Tyler was sentenced on the basis of the evidence alone. (JA at 15.) But as the Air Force Court itself recognized, the victims and their relationship to MSgt Tyler were key to the case's strength. (JA at 15.) And this was the core of TC's aggressive misuse of victim impact testimony; it is highly likely that the improper argument affected MSgt Tyler's ultimate sentence.

In summary, TC took effective advantage of the military judge's erroneous ruling to weaponize the victim impact statements against MSgt Tyler. Taking TC's improper comments as a whole, this Court cannot be confident that MSgt Tyler

was sentenced on the basis of the evidence alone. *See Halpin*, 71 M.J. at 480.

Conclusion

The military judge abused his discretion when he ignored the meaningful distinction between aggravation evidence under R.C.M. 1001(b)(4) and victim impact statements under R.C.M. 1001A. TC's extensive argument of the unsworn victim impact statements, which were not evidence before the court, amounted to improper argument. As the military judge noted, the Government could have admitted this information in its case-in-chief. But it did not. The misuse of the powerful impact statements, especially when bound to TC's argument for a specific sentence, leaves the clear impression that MSgt Tyler was not sentenced based on the evidence alone. There was error, MSgt Tyler was prejudiced, and his sentence cannot stand.

WHEREFORE, MSgt Tyler respectfully asks this Honorable Court to set aside his sentence.

Respectfully submitted,

MATTHEW L. BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100

Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth@us.af.mil

TODD J. FANNIFF, Lt Col, USAF
Deputy Chief, Appellate Defense Division
U.S.C.A.A.F. Bar No. 33050
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
todd.fanniff@us.af.mil

Counsel for Appellant

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 October 22, 2020.

Respectfully submitted,

MATTHEW BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
matthew.blyth@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,569 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,

MATTHEW BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Matthew.blyth@us.af.mil

Counsel for Appellant