UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOHN S. FREEMAN
United States Air Force

ACM 35822

13 June 2006

Sentence adjudged 31 October 2003 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Patrick M. Rosenow and Kurt D. Schuman.

Approved sentence: Dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Major Stacey J. Vetter.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A general court-martial, consisting of members, convicted the appellant, contrary to his pleas, of one specification of false official statement and one specification of assault with a means or force likely to cause death or grievous bodily harm, in violation of Articles 107 and 128, UCMJ, 10 U.S.C. §§ 907, 928. The panel sentenced the appellant to a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted four assignments of error: (1) Whether the military judge erred by failing to suppress a confession; (2) Whether the sentence is inappropriately severe; (3) Whether the military judge abused his discretion by denying a defense request for an expert consultant; and (4) Whether the military judge erred by admitting uncharged misconduct. Finding no prejudicial error, we affirm.

Facts

The victim in this case was a civilian female. During the early morning hours of 7 February 2002, an assailant savagely beat her, causing cuts to her face and scalp, a broken nose, and damage to her right index finger so severe that the finger subsequently had to be amputated. Agents of the Air Force Office of Special Investigations (AFOSI) came to suspect the appellant and brought him in to the local AFOSI detachment at Holloman Air Force Base (AFB), New Mexico, for questioning. Following an advisement of rights under Article 31, UCMJ, 10 U.S.C. § 831, the appellant agreed to answer questions.

Although he initially denied committing the assault or knowing who did, the appellant agreed to submit to a polygraph examination. The AFOSI agents concluded that the appellant's answers were deceptive, and continued questioning him. Finally, after approximately 10 ½ hours, the appellant produced a written statement in which he admitted that he had visited the victim's house, had gotten into an altercation with her, had struck her "about three times," and, having been shown photographs of the victim taken after the attack, acknowledged that he caused her injuries.

Motion to Suppress

"The voluntariness of a confession is a question of law which we review de novo." *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). This court reviews a military judge's findings of fact under a "clearly erroneous" standard. *United States v. Pipkin*, 58 M.J. 358, 360 (C.A.A.F. 2003).

"[A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement." Mil. R. Evid. 304(a). "A statement is 'involuntary' if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, [UCMJ,] or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3).

"In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v.*

Bustamonte, 412 U.S. 218, 226 (1973). Although a confession may be involuntary through the application of psychological coercion, law enforcement officials are not precluded from utilizing some measure of trickery in questioning a suspect. *See Ledbetter v. Edwards*, 35 F.3d 1062 (6th Cir. 1994). "The use of deception in obtaining a confession is not impermissible as long as the artifice was not designed or calculated likely to produce an untrue confession." *United States v. Thrower*, 36 M.J. 613, 614 (A.F.C.M.R. 1992).

We have examined the military judge's findings of fact in light of the evidence presented at trial on this motion and conclude that they are not clearly erroneous. Therefore, we adopt them as a factual basis for our opinion. These facts establish, among other things, that the agents of the AFOSI began questioning the appellant at around 0900 on the day of the interview. As stated above, the appellant eventually provided a written confession over ten hours later. The evidence demonstrates that during the interrogation he was provided with food and water, with opportunities to smoke, and with breaks. There is no evidence that he was subjected to physical injury or the threat thereof, nor did the agents treat him in an abusive manner. Following the polygraph examination, the agents utilized a method of interrogation called the Reid Technique, in which they attempted to suggest scenarios in which the appellant could have committed the assault while at the same time minimizing his culpability.

Of particular relevance to this issue is an alleged threat an AFOSI agent made to the appellant during the questioning. As the military judge stated in his findings of fact:

> Over the course of the interview, [AFOSI Special Agent (SA) James] Bogle suggested to the accused that everyone makes mistakes and the best thing to do is admit it and get it behind you. He promised the accused that if he cooperated, they could tell his commander about it and it might help. On the other hand, he told the accused, if you don't tell the truth, the case will go downtown and with a civilian victim you could get five years in jail. When the accused denied being out that night, SA Bogle lied to him and told him a witness saw him out. He also told the accused that his fingerprints were found at the scene.

We find no basis to conclude that the AFOSI overbore the appellant's will in eliciting the incriminating statement. Despite the fact that the interrogation was relatively lengthy, we conclude the circumstances do not evidence coercion within the meaning of Mil. R. Evid. 304. Additionally, none of the trickery which the agents employed appears to have been calculated to produce a false confession; rather, it is generally consistent with standard police practices.

The agent stated that without the appellant's truthfulness the case could be turned over to the civilian authorities. We conclude that this did not constitute an unlawful

inducement. In any event, this statement was less coercive than the tactics utilized in *Ellis*, 57 M.J. 375, in which investigators told a child abuse suspect that failure to cooperate could result in the suspect's children being removed from his home. The court held that this ruse did not render the confession involuntry.

Considering the totality of the circumstances, we conclude the appellant's confession was voluntary. We hold that the military judge did not err in failing to suppress the confession.

Admission of Uncharged Misconduct

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). Mil. R. Evid. 404(b) forbids the admission of uncharged misconduct for the purposes of showing criminal propensity, but permits such evidence for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court evaluates the admission of evidence under Mil. R. Evid. 404(b) according to the following criteria:

> (1) Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> (2) What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> (3) Is the "probative value . . . substantially outweighted by the danger of unfair prejudice?"

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted).

The appellant was charged with aggravated assault on KS, "by unlawfully throwing her down onto the floor with his hands and by striking her head and body repeatedly with an object", thereby "intentionally inflicting grievous bodily harm upon her."[1] Over defense objection, the military judge permitted the prosecution to elicit evidence about three prior instances in which the appellant engaged in abusive behavior with the victim. The appellant describes the instances in his brief to this Court, as occasions where the appellant:

> (1) allegedly grabbed KS by her purse and swung her around;

[1] As stated above, he was convicted of the lesser-included offense of assault with a means likely to produce death or grievous bodily harm.

(2) allegedly followed KS into a bathroom during an argument to talk to her where she subsequently slapped the appellant in the face; and

(3) KS got into an argument over French fries that led to a mutual shoving match between the appellant and KS.

In ruling against the defense, the military judge stated, "[t]he evidence is relevant to the charged offenses towards tendency [sic], if any, to prove the accused's plan or intent to exercise control over [KS] through the use of physical intimidation and physical force."

Trial testimony established that KS had been drinking alcohol and smoking marijuana on the evening in question and was never able to identify her attacker. Indeed, she gave differing descriptions of the incident, stating that she had been raped or that she believed certain named individuals other than the appellant may have committed the crime. She never identified the appellant as a suspect, although she had lived with him and moved out a few days prior to the crime.

While there are two issues to which this evidence might have born minimal relevance, identity and/or intent to inflict grievous bodily harm, we find the judge's stated reason for admitting the evidence, which he subsequently read to the members during findings instructions, to be confusing at best. For example, we do not see how relatively minor squabbles between former lovers evidenced a plan, the fruition of which was the extraordinarily violent crime committed against KS. Nor are we convinced of the relevance of the appellant's alleged intent to exercise control over the victim. To the contrary, the essence of the case is that the attacker flew into a rage against her, probably during the course of an altercation, rather than that he was acting through an intent to control.

Had the judge framed his reasoning with more precision, and instructed the members accordingly, we might conclude that his decision in admitting the evidence was not improper. For example, if he had advised the panel that the prior acts were to be considered for whatever light they shed on the appellant's intent to inflict grievous bodily harm, he would have tied the uncharged misconduct into issues actually raised by the prosecution's evidence. However, interpreting the uncharged misconduct in light of his stated reason for admission, we conclude that it fails the second prong of the *Reynolds* test. A plan or intent to control, rather than to cause serious injury, bears no real relationship to the facts adduced at trial. After examining the entire record, we conclude that the military judge erred by admitting the evidence in question.

Having so concluded, we also note that the other evidence of the appellant's guilt was strong. This evidence included the following:

- The nature and extent of the victim's injuries, as evidenced by her testimony and by photographs;

- That investigators discovered injuries to the appellant's knuckles;

- The fact that the victim had recently stopped living with the appellant, suggesting that he might have been angry or dissatisfied with her;

- The fact that after the assault the appellant treated the victim with noticeable kindness and solicitousness, evidencing knowledge of guilt;

- The fact that the appellant admitted to the AFOSI that he assaulted the victim and caused her injuries;

- The fact that the appellant made inconsistent statements to the AFOSI, indicating an intent to deceive; and

- The fact that the appellant admitted to an inmate of the jail where he was being held in pretrial confinement that he had beaten the victim.

In light of the strength of the government's case, we conclude that the improperly admitted uncharged misconduct was relatively insignificant and that it is unlikely to have exerted an influence upon the finding of guilty. Therefore, we hold that any error in the judge's ruling was harmless.

We resolve the remaining assignments of error adversely to the appellant. The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge FINCHER participated in this decision prior to his reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator