UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant KIRK A. MOSS
United States Air Force

ACM 35379

14 April 2005

Sentence adjudged 8 June 2002 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Ann D. Shane.

Approved sentence: Bad-conduct discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of carnal knowledge, sodomy of a child under the age of 16, and indecent acts with a child, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The general court-martial, consisting of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant has submitted three assignments of error: (1) Whether the military judge erred by excluding impeachment evidence; (2) Whether the prosecution

unreasonably multiplied the charges against the appellant; and (3) Whether the sentence is inappropriately severe. Finding no error, we affirm.

Background

The incident which formed the basis of the charges occurred on 22 July 2000. On that date, the appellant was driving his 14-year-old niece, KLVD, from Pensacola, Florida, to his home in Tampa, Florida, by motorcycle, so she could spend some time with his family. The victim's mother and the appellant's wife were sisters; the appellant was the victim's uncle by marriage. According to evidence adduced at trial, the pair spent the night in a billeting room at Tyndall Air Force Base (AFB), Florida, due to inclement weather. The testimony was uncontroverted that they slept in the same bed. According to testimony by KLVD, during the night the appellant fondled her breasts and thighs, penetrated her vagina with his fingers, licked her vagina, and had sexual intercourse with her.

Impeachment Evidence

This court reviews a military judge's rulings on admission of evidence for an abuse of discretion. *United States v. Rynning*, 47 M.J. 420, 423 (C.A.A.F. 1998); *United States v. Bins*, 43 M.J. 79, 83 (C.A.A.F. 1995); *United States v. Hurst*, 29 M.J. 477, 481 (C.M.A. 1990). To constitute an abuse of discretion, a challenged action must be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (quoting *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980)). *See also United States v. Glenn*, 473 F.2d 191, 196 (D.C. Cir. 1972).

The defense sought to introduce evidence of bad acts by KLVD in order to attack her credibility. During a hearing on a prosecution motion in limine to exclude such evidence, the trial counsel questioned KLVD's mother:

> Q: And prior to July 2000 . . . were you having any sort of problems with [KLVD] as far as disciplinary problems?
>
> A: Not really, just you know, a couple of little things, teen things, but nothing, you know, really tremendous.
>
> Q: And when was it after she came back that you started seeing a change in her?
>
> A: Well, we noticed a change almost immediately. . . . [S]he started . . . pulling into her room, and I would go back to check on her, and I'd open

the door and she'd be sitting on the floor with like her back against the bed, kind of huddled up and just - sometimes she'd be crying . . . she went into depression. A lot of things like that.

Q: When did you start having disciplinary problems with her?

A: We started having problems just a little while after she got back.

Q: [D]id she start drinking?

A: She tried it once, I think – well, once or twice – or I'm not sure how many times.

Q: Well, how many times did you catch her drinking?

A: I never caught her. I mean, caught her-caught her, you understand what I am saying? We would find out after we questioned her.

Q: Did she also tell you . . . that she had tried marijuana that one time?

A: She did one time . . .

Q: When she started trying to commit suicide, what sort of effect did that have on your family?

A: Oh . . . horrendous.

Following the trial counsel's questioning of the witness, the trial defense counsel cross-examined:

Q: There were incidents of discipline prior to the trip, weren't there?

A: Yes, there were.

Q: She had snuck out of the house a couple of times?

A: Well, yes.

. . . .

Q: After the trip, there was stuff going on in addition to what's happening with [KLVD]. You had . . . engaged in an extramarital affair—

A: I certainly was.

. . . .

Q: Okay. And [KLVD] didn't approve of that, did she?

A: You'll have to ask [KLVD].

Q: Did she know about it?

A: Of course.

Q: [Y]ou found some evidence of drinking or something, that was where there was alcohol in the front house and some cigarette butts . . . and you confronted her about it?

A: That's correct.

Q: And she initially lied about it?

A: For about the first 15 minutes.

. . . .

Q: And it was not long after that that she came home with alcohol on her breath, glassy eyes, red cheeks—

A: That's correct.

. . . .

Q: And your husband was going to punish her? He was going to spank her?

A: Yes, that's right.

Q: And you took the belt out of his hands—

A: I did.

Q: —and pretty much went overboard and left marks, didn't you?

A: Yes, I did, you're right.

The victim's mother testified that family protective services responded to the incident and provided the family with counseling on parenting skills. She further testified that the victim continued to have problems in the weeks and months following the trip with her uncle, resulting in her removal from her school, two suicide attempts, and hospitalization for psychological treatment. It was only in March of 2001 that the victim reported the sex offenses to her mother.

In arguing on the motion in limine, the prosecution attacked the relevance of the proposed evidence. The defense replied that the facts outlined above show the victim's motive to misrepresent, as set forth in Mil. R. Evid. 608(c). According to the defense, the victim was resentful of her mother because of the severe discipline she had been receiving and made a false claim against her uncle in order to shift attention from herself. According to the defense's written response to the prosecution's motion, "The allegations in this case are a calculated ploy by a manipulative young woman to improve her family situation."

In addition to the above, and during the case in chief, the defense sought to question the victim as to prior false statements she allegedly made on various occasions. As the appellant stated in his brief, the trial defense counsel wanted to question the victim on "untruths contained in her mental health records, lies surrounding a drug incident at school and lies to her parents." The appellant asserts that these matters were probative of truthfulness under Mil. R. Evid. 608(b).

In granting the prosecution's motion in limine, the military judge concluded that the relationship between the appellant and the victim's immediate family was too tenuous to provide a motive for her to make a false accusation against him. She stated:

> I'm not persuaded by defense counsel's argument that there is even a logical relevance to even send to the court members as to a motive for the alleged victim to falsify against this particular accused, as opposed to anybody else. In fact, I think that evidence, at least this point, would . . . tend to indicate in the opposite, if anything.

Concerning the Mil. R. Evid. 608(b) matters, the military judge permitted the defense to cross-examine the victim on a false statement she made to mental health officials about whether she kept a diary. Additionally, the military judge permitted the defense to cross-examine the victim on prior inconsistent statements and her prior alcohol use in rebuttal to her testimony that she had limited exposure to alcohol. However, on those matters whose exclusion the appellant asserts to be contrary to Mil. R. Evid. 608(b), the military judge stated that the proposed cross-examination questions related to matters

not properly probative of truthfulness, or which were so collateral as to invite confusion or waste the court's time.

We find no reason to disturb the military judge's rulings under either Mil R. Evid. 608(b) or (c). Admittedly, a child victim's resentment at his or her parents can provide a motive for false accusations. In *United States v. Bahr*, 33 M.J. 228 (C.M.A. 1991), cited by both parties in their arguments on the motion in limine, our superior court held that a child victim's resentment of her mother, evidenced by diary entries in which she stated she hated her mother, that her parents were "pests," and that she intended to get back at her mother at some point in the future, were admissible under Mil. R. Evid. 608(c) as providing a motive to falsely accuse her father of committing indecent acts upon her. "[The appellant] was the husband of the prosecutrix' mother, and it was not unreasonable to suggest that the prosecutrix might vent her hatred of her mother by hurting her mother's husband." *Bahr*, 33 M.J. at 233. The appellant in the case sub judice asserts that similar reasoning would require the admission of the evidence of the victim's resentment at her mother's harsh discipline.

However, in this case the relationship between the victim's mother and the appellant was much more remote than in *Bahr*. The victim's mother testified she wasn't close to the appellant and had limited contact with him. The record provides no further basis to infer a particularly close relationship between them, such as would provide a plausible motive to harm the mother by fabricating falsehoods against her mother's brother-in-law. Further, the victim testified that she loved her aunt and was looking forward to visiting with her. There was no evidence to contradict this, which buttresses the victim's testimony that she waited nearly eight months to report the offenses due to fear of harming her relationship with her aunt. The military judge's comments in ruling on the motion appear to recognize that any motive that the victim had to harm her mother would have been counterbalanced by an equally compelling motive not to harm her aunt, thereby substantially vitiating the force of the defense argument for admission of the evidence. All in all, we conclude that any possible relevance to this evidence was substantially outweighed by the danger of unfair prejudice, confusion, or of misleading the members. Mil. R. Evid. 403.

As to the other challenged evidentiary rulings, we have considered all those which the appellant asserts to have contravened Mil. R. Evid. 608(b). We are not left with "a definite and firm conviction" that the military judge's concerns about avoiding confusion and a waste of time were erroneous. *See United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004); *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). After considering the entire record, we hold that the military judge did not abuse her discretion in ruling as she did.

Even if there was error, however, we conclude that it did not operate to the material prejudice of the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The victim's version of the incident was detailed, internally consistent, and believable. In addition, her story was corroborated in many respects by the findings testimony of the appellant himself, as well as the testimony of a police detective regarding the statement made by the appellant during the investigation. The appellant admitted that he traveled with the victim from Pensacola to Tampa, that they stopped on the way to spend the night at Tyndall AFB, that they checked into a single room, that the appellant drank beer prior to going to bed, that the victim sipped some of the appellant's beer, and that they slept in the same bed, the appellant wearing only boxer shorts.

In addition, the appellant's statement to the detective contained some significant inconsistencies, undermining his credibility. Given the strength of the prosecution's case, and the tenuous nature of the excluded evidence, we conclude that, even if the evidence had been admitted, the result of the trial would have been the same.

Furthermore, despite the appellant's contention that the military judge's evidentiary rulings deprived him of his right to confrontation under the Sixth Amendment, we are satisfied beyond a reasonable doubt that, even if there was error in those rulings, it was harmless. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

We have considered the remaining assignments of error and resolve them adversely to the appellant. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Conclusion

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.

OFFICIAL

ANGELA M. BRICE
Clerk of Court