UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMES L. PARKER JR.
United States Air Force

ACM 35673

18 October 2005

Sentence adjudged 20 June 2003 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major James K. Floyd, and Major Kevin P. Stiens.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was convicted, contrary to his pleas, of indecent acts with a child, AMF, the 10-year-old dependent daughter of another Air Force noncommissioned officer, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was charged with, but acquitted of, the rape of a second minor, JRH, while at a previous assignment. He was sentenced by a court consisting of officer members to a bad-conduct discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends that the military judge erred in denying his request for an expert consultant, that his trial defense counsel were ineffective, and that his sentence was unduly severe.[1] We agree that the military judge erred, but find no prejudice, and conclude that the remaining assignments of error are without merit. Accordingly, we grant no relief.

Background

The evidence against the appellant consisted of AMF's testimony at trial, corroborating testimony from her parents, an oral admission the appellant made to AMF's stepfather indicating how he hates "child molesters" and "he had never done this before" his misconduct with AMF, and a handwritten sworn statement the appellant provided to agents of the Air Force Office of Special Investigations (AFOSI). In his statement, the appellant admitted that he touched AMF's vagina "to relieve sexual tension." He explained that he "had not had sex in 8-10 months" and that he began "rubbing on" AMF – a friend of the appellant's daughter who was sleeping over at the appellant's on-base quarters – because she "was there."

In a second statement to AFOSI, the appellant admitted that in addition to his acts involving AMF, he engaged in various sexual acts with JRH 12 to 15 years earlier, when she was under the age of 16. Most of these acts did not involve intercourse and were outside the statute of limitations, but the appellant admitted he engaged in intercourse with JRH on one occasion; this was the basis of the rape charge on which he was acquitted.

Six weeks prior to the appellant's court-martial, the appellant's trial defense counsel asked the convening authority to fund the hiring of a local psychologist as a defense expert consultant. The trial defense counsel averred they needed an expert "to properly and completely analyze the statements of the alleged victims, the statements of the accused, and the statements of any other witnesses," and "to participate in certain witness interviews." The convening authority did not grant the request.

Two weeks later, in a pretrial motion, trial defense counsel moved to compel the production of an expert, offering two new reasons: to rebut testimony regarding the impact of the appellant's offenses on AMF, and "to explore the defense's own evidence." The appellant's counsel informed the court, without elaboration, that they suspected the appellant "was sexually abused as a child, and that he repressed those memories," and suggested an expert might help ferret out such forgotten traumas. The appellant's counsel also hinted that an expert would be useful to address issues relating to

[1] The second and third assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

confinement and other elements of sentencing, but provided no details as to what aspects of the sentencing case called for expert analysis. The military judge denied the motion.

The appellant's trial defense counsel renewed the motion during the second day of the appellant's court-martial—after the prosecution rested its case-in-chief. This time, the appellant's counsel argued that an expert was needed to comment on notes in the appellant's mental health records. These notes, dated more than seven months prior to the start of the appellant's trial, make reference to a so-called "Abel assessment" of sexual interests.[2] The trial defense counsel suggested that the results of this assessment demonstrated their client was not a pedophile.

The appellant's counsel argued the "Abel assessment" findings were potentially relevant because the members might otherwise infer the appellant was a pedophile. Such an inference, they contended, might be based on uncharged misconduct evidence admitted during presentation of the prosecution's case pursuant to Mil. R. Evid. 414. This evidence included AMF's testimony that on one occasion prior to the charged indecent act, the appellant "scooted" her up against him and started "rubbing . . . his private part up against [her] behind," as well as testimony that the appellant exposed his genitals to JRH.

The appellant's trial defense counsel offered no details about the "Abel assessment," nor did they claim to have made any effort to educate themselves concerning it. The person who made the notes, a Dr. David Walker, was on active duty in the Air Force at the time they were written, but left the service some time prior to trial. The appellant's trial defense counsel apparently did not discuss the testing with Dr. Walker before he separated. The prosecutor pointed out, and the trial defense counsel did not contest, that evidence concerning the "Abel assessment" had been available to the defense team for months.[3]

Discussion

A military judge's decision regarding a request for expert assistance is reviewed for an abuse of discretion. *United States v. McAllister,* 55 M.J. 270, 275 (C.A.A.F. 2001) (citing *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999)). To demonstrate the necessity of having expert assistance appointed, an accused must show more than a "mere

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[2] The record contains little detail about the "Abel assessment," but it appears to be a diagnostic tool intended for use in cataloguing sexual activities and preferences.

[3] Rather than squarely addressing this timeliness issue, the appellant's counsel sought to change the subject by noting that mental health records belonging to AMF had recently come into their possession. They argued that they now required an expert to review her records and testify in rebuttal to any victim impact testimony concerning AMF. This contingency never materialized; trial counsel did not offer victim impact evidence concerning AMF, although her mother and stepfather both testified in sentencing about how they, as parents, were affected by the appellant's misconduct.

possibility of assistance" from an expert. *United States v. Gunkle,* 55 M.J. 26, 31 (C.A.A.F. 2001) (quoting *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987)). An accused must show both that there is a reasonable probability the expert would be of assistance to the defense and that lack of such assistance would result in a "fundamentally unfair trial." *Id.* Finally, an accused must further demonstrate that the trial defense counsel could not on their own gather and present the evidence that the expert would have been called upon to deliver. *United States v. Ford,* 51 M.J. 445, 455 (C.A.A.F. 1999) (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)).

First, we hold that the military judge did not abuse his discretion in denying the appellant's pretrial requests. Neither the defense's request to the convening authority nor their submission to the court below were sufficient to meet the requirements for appointment of an expert. The tasks to be performed by the expert according to the original request – analysis of witness statements and participation in pretrial interviews – are quintessentially the job of a trial attorney. Basic trial preparation does not justify appointment of an expert. *Short,* 50 M.J. at 373. The possibility raised for the first time in the motion to compel – that the appellant may have suffered from repressed memories of prior sexual abuse – was likewise inadequate. The trial defense counsel proffered no evidence other than his own suspicions to establish that such abuse ever occurred. Although the possibility that any person was abused and then repressed all memory of that abuse can never be entirely discounted, mere possibility is not enough to require appointment of an expert. *See Gunkle,* 55 M.J. at 32.

Next, we turn to the appellant's mid-trial contention that he needed an expert to rebut the inference that the appellant was a pedophile.[4] On this issue, the military judge engaged in the following colloquy with trial counsel:

> MJ: Well, what about -- I mean you offer -- the documents or the evidence was admitted for propensity under [Mil. R. Evid.] 414. How is it that you believe that the defense is entitled to rebut that information of propensity evidence? Do you believe they are not entitled to do that?
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> . . . .

[4] The appellant's newest argument, that he needed an expert to examine AMF's medical records and opine about her veracity, was never raised at trial and is therefore not available to the appellant now. *See generally United States v. Barron,* 52 M.J. 1, 7 (C.A.A.F. 1999). Even had the issue been properly preserved for appeal, the guidance of our superior court is unequivocal: "If anything is established in the area of expert testimony in child abuse cases, it is that the expert in child abuse may not act as a human lie detector for the court-martial." *United States v. Birdsall,* 47 M.J. 404, 410 (C.A.A.F. 1998). The court "has made it clear that child-abuse experts are not permitted to opine as to the credibility or believability of victims." *Id.*

> MJ: Are you saying that propensity evidence -- the government can offer propensity evidence all they want, and the only thing the defense can do is say, well, it didn't happen . . . I'm trying to get your idea about what the defense is entitled to. Are you saying he can't offer an expert witness? I mean, let's say that the defense is saying we want an expert witness to come in and say that this person has a character and their character is that they like to have healthy sexual relationships with adult women or people of the opposite sex. I mean, is that not admissible in your view? *I'm not saying you'd be wrong if you take that view.* I'm just asking your position.
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> TC: Then that essentially is our view, sir, that they can deny it, they can toss out a witness to say that they haven't seen evidence of that before or anything like that.

(Emphasis added.) Apparently agreeing, the military judge again denied the defense motion.

We review the military judge's conclusions of law de novo. *United States v. Pinson,* 54 M.J. 692, 696 (A.F. Ct. Crim. App. 2001) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995), *aff'd sub nom. United States v. Cicciarelli*, 56 M.J. 406 (C.A.A.F. 2002). Mil. R. Evid. 414, like its companion, Mil. R. Evid. 413, is a rule of inclusion, not exclusion; neither rule serves to prohibit an accused from introducing evidence that would otherwise be admissible. Evidence of a pertinent character trait of an accused may be offered by the defense under Mil. R. Evid. 404(a)(1). Mil. R. Evid. 414 notwithstanding, the appellant could have proffered character evidence to show that he was not sexually attracted to children. *See, e.g., United States v. Stanley,* 15 M.J. 949, 952 (A.F.C.M.R. 1983) (evidence of accused's moral nature and chastity admissible to prove character in child sexual abuse trial).

Such character evidence is most commonly offered through the testimony of lay witnesses, but there is no per se rule against the use of experts that appears in the text of the rule, and there is some authority for the proposition that expert opinion may be admissible to prove character. *See, e.g., United States v. Dimberio,* 56 M.J. 20, 26 (C.A.A.F. 2001) (opinion testimony concerning behavioral characteristics "may very well be relevant" to prove character); *United States v. Nunn,* 940 F.2d 1148, 1149 (8th Cir. 1991) (expert's opinion that defendant was susceptible to inducement admissible on entrapment defense); *United States v. Roberts,* 887 F.2d 534, 536 (5th Cir. 1989) (psychologist's opinion concerning defendant's "naive and autocratic" personality traits admissible). Such evidence must, of course meet the standard of reliability outlined in *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579 (1993). *Dimberio,* 56 M.J. at 27.

There was sufficient basis on the record at trial – or lack of it – to have denied the request on grounds of untimeliness; failure to demonstrate need under *Ford;*[5] and failure to demonstrate admissibility under *Daubert.* To the extent the military judge denied the expert request based on a belief that Mil. R. Evid. 414 would not permit the appellant to introduce character evidence *at all*, however, he was in error.

The existence of error, even in the exclusion of relevant character evidence, does not in itself entitle the appellant to relief. *United States v. Gagan,* 43 M.J. 200, 203 (C.A.A.F. 1995). We must now test for prejudice. We do so "by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F. 1999). Applying this standard, we find no prejudice.

The appellant was convicted of only the indecent acts with AMF. The evidence of his misconduct was solid: AMF's testimony was clear, compelling, and corroborated by the appellant's confession. The defense's efforts to suggest that the appellant was asleep when he molested AMF were fatally undermined by his admissions to the AFOSI that he was conscious and knew what he was doing. A test purporting to show that the appellant was not a pedophile – even assuming such evidence could have passed muster under *Daubert* – would have made little impact on the case: the appellant was not charged with being a pedophile, nor did the prosecution ever seek to label him as such. Finally, a generalized effort to show that the appellant was not sexually interested in children would have been wholly unpersuasive in the face of his admission to sexual contact with two girls, 10 and 14 years of age.

In sum, the appellant was convicted of no more than he confessed to, and the members were instructed to punish him only for that offense. Considering the entire record, we hold that, whatever the merits of the appellant's untimely request for expert assistance in evaluating the records, its denial was harmless beyond a reasonable doubt. *See United States v. Pruitt,* 46 M.J. 148, 151 (C.A.A.F. 1997).

We have examined the appellant's remaining assignments of error and find them to be without merit. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

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[5] We agree with Senior Judge Stone that the military judge could have denied the request based solely on the trial defense counsel's failure to establish necessity, but that was not the basis for his decision.

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 findings and sentence are

AFFIRMED.

STONE, Senior Judge (concurring):

I concur in the result, but write separately to focus on the threshold issue in this case — whether the appellant met his burden of establishing a need for expert assistance. *Ford*, 51 M.J. at 455. The admissibility of any evidence that might have developed as a result of consulting with an expert is not the most pertinent inquiry. In any request for expert assistance, we must determine "whether a reasonable probability exists that the expert services . . . would be of assistance and that denial of that assistance would result in a fundamentally unfair trial." *United States v. Allen*, 31 M.J. 572, 624 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). It is abundantly clear from the record that the appellant did not meet his burden. His counsel were aware of the "Abel assessment" rendered by Dr. Walker well in advance of trial and had ample opportunity to educate themselves and explore its potential usefulness and relevance. They made a tactical decision to wait and raise the issue mid-trial rather than pursue an existing, available source of expert assistance. *Ford*, 51 M.J. at 455. The military judge did not err in denying the belated request for expert assistance.

OFFICIAL

ANGELA M. BRICE
Clerk of Court