

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Technical Sergeant JAMES W. SUTTON  
United States Air Force

ACM 37155

29 January 2009

Sentence adjudged 11 October 2007 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, hard labor without confinement for 3 months, and reduction to E-4.

Appellate Counsel for the Appellant: Major Lance J. Wood and Gary Myers, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

WISE, BRAND, and HELGET  
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

Contrary to his pleas a general court-martial composed of officer members convicted the appellant of wrongfully soliciting his dependent step-daughter, a female under 16 years of age, to engage in indecent liberties with intent to gratify his lust, in violation of Article 134, 10 U.S.C. § 934. The convening authority approved the adjudged sentence consisting of a bad-conduct discharge, hard labor without confinement for three months, and reduction to E-4.

The appellant asserts four assignments of error before this Court: (1) the military judge erred in preventing the defense from presenting relevant evidence of appellant's step-daughter's history of sexual abuse to explain why she misunderstood her step-father's request for her to lift her shirt; (2) the military judge erred in denying the appellant's motion to suppress oral and written statements made prior to any *Miranda* warnings or advisement of his rights under Article 31(b), UCMJ, 10 U.S.C. § 831(b); (3) given the lack of evidence of sexual intent, the evidence was legally and factually insufficient to sustain the conviction; and (4) a reduction to E-4, three months hard labor without confinement, and a bad-conduct discharge was an inappropriate sentence.

### *Background*

On or about 19 December 2005, the appellant was in his bed wrestling with his two step-daughters, PS, who was 11 years old, and HS, who was 9 years old. The appellant's spouse, DS, was not at home at the time. At some point, the appellant specifically asked HS to leave the room. After HS departed, he asked PS if she could keep a secret, and PS, thinking it was about Christmas, said yes. The appellant then asked PS to lift up her shirt and show him her breasts. PS responded by shaking her head, indicating no. He then offered PS \$20 to show him her breasts. The appellant's solicitation upset his step-daughter and made her feel awkward, causing her to start crying and burying her head in a stuffed animal known to provide her comfort.

A few days later, PS reported the incident to her mother who then confronted the appellant about the incident. The appellant admitted to his wife that he asked PS to show him her chest and that he offered her \$20.

On 5 January 2006, the appellant's spouse discussed the incident with a chaplain and eventually reported the incident to the Air Force Office of Special Investigations (AFOSI). Because this case involved an allegation of sexual abuse of a young female victim, AFOSI contacted Investigator DW of the Tom Greene County District Attorney's Office in San Angelo, Texas. Investigator DW came to Goodfellow Air Force Base and interviewed PS and DS, PS's mother and the appellant's spouse. She then contacted the appellant and interviewed him at her office at the District Attorney's Office. During the interview, and in his signed statement, the appellant admitted that he had asked PS to show him her breasts but claimed he did so to tease her because she was wearing a bra that was a couple of sizes too big. However, he told the investigator that he later explained his request to PS by saying that he did it to test her to see if she would do what he asked her to do. Finally, he denied to the investigator that he offered PS \$20 but admitted he told his wife that he did offer PS \$20 to show him her breasts.

*Mil. R. Evid. 412 Evidence*

The appellant claims that the military judge abused his discretion in granting a government motion in limine to exclude from the members any evidence concerning PS's repeated molestation by her brother. The military judge found that the prior molestations by PS's brother were protected under Mil. R. Evid. 412, and the defense was barred from entering any evidence of her prior molestations into evidence.

The military judge found the following: (1) that between January 2003 and on or about 26 April 2005, PS was molested and sexually assaulted on multiple occasions by her brother; (2) that the alleged acts in the case at hand were not similar to the prior acts between PS and her brother; (3) that the prior acts between PS and her brother were not close in time to the alleged acts in the appellant's case; and (4) that the prior acts were not relevant, material, or vital to the appellant's case.

In cases of sexual misconduct, Mil. R. Evid. 412(a) bars admission of "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" and "[e]vidence offered to prove any alleged victim's sexual predisposition." Mil. R. Evid. 412(a)(1)-(2). However, Mil. R. Evid. 412(b) provides a short list of specific exceptions to the general prohibitions of Mil. R. Evid. 412(a). The exception at issue here falls under Mil. R. Evid. 412(b)(1)(C), which instructs military judges to receive evidence when its exclusion "would violate the constitutional rights of the accused." *See United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983); *see also United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983); *United States v. Colon-Angueira*, 16 M.J. 20 (C.M.A. 1983); *United States v. Elvine*, 16 M.J. 14 (C.M.A. 1983). Primarily, Mil. R. Evid. 412 is a rule of relevance, specifically concerned with the relevance of the victim's sexual past in a trial for a sex offense. *See Colon-Angueira*, 16 M.J. at 29 (Everett, C., concurring).

We review a military judge's decision to exclude evidence under Mil. R. Evid. 412 for abuse of discretion. *United States v. Banker*, 60 M.J. 216, 223 (C.A.A.F. 2004). In *Banker*, our superior court reiterated the principle laid down in the Court's earlier decisions that, in order to defeat the exclusionary function of Mil. R. Evid. 412, the appellant must "demonstrat[e] why the general prohibition in [Mil. R. Evid.] 412 should be lifted to admit evidence of the sexual behavior of the victim[.]" *Id.* at 222 (quoting *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997)). The Court further stated that the burden is on the proponent of the evidence to show that the evidence fits one of the enumerated exceptions. *Id.*

In considering the evidence, the military judge applies the two-prong test contained in Mil. R. Evid. 412(c)(3) to determine admissibility. The first part of the test is relevance, whether the evidence has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. If the evidence is relevant, the military judge must then determine whether "the

probative value of such evidence outweighs the danger of unfair prejudice . . . .” Mil. R. Evid. 412(c)(3).

Although this two-part analysis is applicable to all of the enumerated exceptions in Mil. R. Evid. 412(a), evidence offered under the constitutionally required exception is subject to additional analysis. Under Mil. R. Evid. 412(b)(1)(C), the accused has the right to present evidence that is “relevant, material, and favorable to his defense.” *Dorsey*, 16 M.J. at 5 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, *if the evidence is relevant*, the military judge must then decide if the evidence offered under the constitutionally required exception is material and favorable to the accused’s defense, and thus whether it is “necessary.” *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (Gierke, J., concurring).

“[B]ased on the analytic structure of [Mil. R. Evid.] 412, in ruling on relevancy the military judge was not also required to address the constitutional exception or the application of the balancing test. Therefore, without more, it was within the discretion of the military judge to conclude that the offered testimony was not relevant.” *Banker*, 60 M.J. at 225.

The appellant asserts that the history of sexual abuse and molestation by PS’s brother was relevant to show how she misinterpreted the appellant’s request for her to lift up her shirt. The appellant further argues that the history of the past sexual abuse goes to PS’s credibility and was favorable because it corroborated the appellant’s defense that he was trying to be a good father by not allowing his step-daughter to wear inappropriate clothing. We disagree. Considering the prior acts between PS and her brother were not close in time to the acts in the appellant’s case, and the prior acts between PS and her brother were not similar to the acts in the case at hand, the appellant has failed to meet his burden of proving why the general prohibition in Mil. R. Evid. 412 should be lifted. Accordingly, the military judge did not abuse his discretion in finding that PS’s history of sexual abuse by her brother was not relevant, material, or vital to the appellant’s case.

#### *Motion to Suppress*

The second assignment of error concerns the appellant’s motion to suppress his oral and written statements made to Investigator DW. The appellant asserts that these statements were made during a custodial interrogation in violation of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. Additionally, the appellant asserts that Investigator DW was acting as an instrument of the military so he should have been advised of his rights under Article 31(b), UCMJ.

The military judge made the following findings of fact pertaining to this motion:

One, that on 5 January 2005, Special Agent [MM], AFOSI Detachment 408, contacted [Investigator DW], Tom Greene County District Attorney's Office investigator regarding a complaint of criminal activity involving a young female victim. The AFOSI investigators did not feel comfortable interviewing and working with a young victim, particularly a female. [Investigator DW] came to Goodfellow Air Force Base and conducted interviews of [PS] and [DS], at Goodfellow Air Force Base;

Two, that at the conclusion of the interviews, [Investigator DW] contacted the accused telephonically. The accused expressed anxiety about the absence of his wife and step-daughter. He said that he wanted to know what was going on. [Investigator DW] informed the accused that she needed to talk to him. The accused agreed to an interview;

Three, that [Investigator DW] offered to come and pick up the accused at his home. The accused agreed. [Investigator DW] drove to the home of the accused to pick him up. The accused had his hands in his pockets. [Investigator DW] asked him to remove his hands from his pockets and then patted him down as an officer safety precaution. [Investigator DW's] vehicle was a Chevrolet truck and did not have a cage or other means of separating her from the accused. Two AFOSI agents followed them in another vehicle;

Four, that [Investigator DW] and the AFOSI investigators rode in the elevator with the accused. When they arrived at [Investigator DW's] office, [Investigator DW] advised the accused that he was not under arrest. She emphasized that she did not have an arrest warrant or any other subordinate purpose. She simply wanted to talk to the accused;

Five, that during the course of the interview of the accused, the AFOSI agents did not make any comments. Towards the conclusion of the interview, [Investigator DW] asked the agents if they could think of anything she had missed that would be good to talk about. The AFOSI agents had minimal input. At the conclusion of the interview, [Investigator DW] produced a typed summary of the interview and asked the accused to sign it as a sworn affidavit;

Six, that Investigator [DW] did not provide a Miranda or Article 31[, UCMJ,] rights advisement to the accused at any time during the interview. Investigator [DW] did suspect the accused had committed a crime at the time of the interview;

Seven, that civilian authorities viewed their involvement with the accused as running a parallel investigation to the one being conducted by AFOSI. AFOSI did not direct the Tom Green County investigation or control of [sic] it in any way. Tom Green County was not acting as an agent of or on behalf of AFOSI . . . ;

Eight, that the accused was never told he could leave. The accused was in the DA's Office for approximately one hour;

Nine, at no point during the time in which the accused was in the DA's Office were Miranda rights read nor Article 31[, UCMJ,] rights read, as I said before, but I'm saying it again, specifically, here;

Ten, that at the conclusion of the interrogation the special agents drove the accused back to their office, at Goodfellow Air Force Base, Texas, where members of his chain of command met him;

Eleven, that whether the investigation is called joint, monitor, or whatever, it is clear that when [Investigator DW] interviewed [DS] and the two daughters, she thought she was assisting AFOSI;

Twelve, that it is equally clear that after the interview of [DS] and the two daughters, [Investigator DW] took over the investigation with an eye to civilian prosecution and further that the AFOSI agents became observers;

Thirteen, that [Investigator DW] is not and was not at the time of the investigation a person subject to the [UCMJ];

Fourteen, that [Investigator DW] was not acting as a knowing agent of a military unit or of a person subject to the [UCMJ];

Fifteen, that the accused was not brought under guard;

Sixteen, that the accused reported voluntarily;

. . . .

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). Statements obtained during a custodial interrogation of an accused are inadmissible unless procedural safeguards are used to secure the suspect's

privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.*

In determining whether a custodial interrogation has taken place, “a court must examine all of the circumstances surrounding the interrogation.” *Stansbury v. California*, 511 U.S. 318, 322 (1994). The court determines the existence of a custodial interrogation based on an objective standard, or “how a reasonable man in the suspect’s position would have understood his situation.” *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Factors that should be considered include: Did the accused report voluntarily or was he ordered to report? Was he brought in under guard? Was he a suspect? Was he free to leave at any time? *United States v. Schneider*, 14 M.J. 189, 195 (C.M.A. 1982).

In the case *sub judice*, the military judge considered extensive testimony, written briefs and attached documentary evidence, and argument of counsel before announcing his detailed findings of fact on the record. We find the military judge’s findings of fact to be clear and well grounded in the evidence, and therefore, not clearly erroneous. Thus, we adopt them as our own. In considering the findings of fact in conjunction with our independent review of the evidence and arguments of appellate counsel, we hold that *Miranda* warnings were not required since based on an objective review of the facts the questioning of the appellant was not a custodial interrogation.

The next issue is whether Investigator DW was required to inform the appellant of his Article 31(b), UCMJ, rights. Those rights are required to be given when a person subject to the code is interrogating an accused. Article 31(b), UCMJ. A person acting as a “knowing agent of a military unit or of a person subject to the code” is considered a “person subject to the code.” Mil. R. Evid. 305(b)(1). There are two instances when a civilian investigator is required to inform the appellant of his Article 31, UCMJ, rights, and those are when the scope and character of the cooperative efforts of the two investigations (civilian and military) merge, and when the investigator is working in furtherance of the military investigation. *United States v. Rodriguez*, 60 M.J. 239, 252 (C.A.A.F. 2004).

From reviewing the record, it is clear that the investigation was a civilian investigation and not a military investigation. Investigator DW was not working with or at the behest of the military, and was not required to inform the appellant of his Article 31, UCMJ, rights. Accordingly, we hold that the military judge did not err in denying the appellant’s motion to suppress his oral and written statements made to Investigator DW.

### *Legal and Factual Sufficiency*

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). “The test for legal sufficiency of the evidence is ‘whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.’” *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused’s guilt beyond a reasonable doubt.” *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant asserts that there is insufficient evidence to show that he committed the offense with the intent to gratify his lust. We disagree. Considering: (1) the solicitation occurred while the appellant’s spouse had gone to the store and after the appellant had asked his younger step-daughter to leave his bedroom; (2) the appellant offered to pay PS \$20 if she showed him her breasts; and (3) the solicitation upset PS, causing her to start crying and burying her head in a stuffed animal for comfort, a reasonable fact finder could have found that the appellant committed the offense with the intent to gratify his lust. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant’s guilt beyond a reasonable doubt. Accordingly, we find the evidence is legally and factually sufficient to sustain a conviction.

### *Sentence is Inappropriately Severe*

The final issue is whether the appellant’s sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved.” Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant’s record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff’d*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is

appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988).

The maximum possible punishment in this case was a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, hard labor without confinement for three months, and reduction to E-4.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offense, the appellant's record of service, to include his combat service and 17 years of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

#### *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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF  
Clerk of the Court