UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant STACEY S. BROOKS
United States Air Force

ACM 35420

30 August 2005

Sentence adjudged 18 June 2002 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: David F. Brash.

Approved sentence: Dishonorable discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

STONE, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

The appellant was convicted, contrary to his pleas, of two specifications of indecent liberties with a female under the age of 16 in violation of Article 134, UCMJ, 10 U.S.C. § 934. The general court-martial, consisting of officer and enlisted members, sentenced the appellant to a dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority only approved confinement for 14 months, but otherwise approved the sentenced as adjudged.

The appellant has submitted 11 assignments of error: (1) Whether the military judge erred by allowing "human lie detector" testimony; (2) Whether the military judge erred by allowing improper profile evidence; (3) Whether the military judge erred by allowing the introduction of hearsay evidence; (4) Whether the military judge erred by allowing into evidence a prior consistent statement allegedly made after the motive to fabricate had arisen; (5) Whether the trial counsel made an improper argument; (6) Whether the military judge erred by denying a defense request for expert assistance; (7) Whether the convictions should be set aside on the cumulative error doctrine; (8) Whether the appellant was denied effective assistance of counsel; (9) Whether the evidence is legally and factually insufficient to support the convictions; (10) Whether the convening authority improperly excluded certain categories of officers from the pool of potential court members; and (11) Whether the court-martial was without jurisdiction. Finding no error, we affirm.

"Human Lie Detector" Testimony

We review a military judge's rulings on the admission of evidence for an abuse of discretion. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citing *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)). The question of whether the members were properly instructed is a question of law that we review de novo. *Id*. (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).

The charges in this case arose out of the appellant's wife having served as an occasional babysitter to the five-year-old victim. According to the victim, who was nearly eight years old at the time of trial, the appellant removed her panties on one occasion, and on another, he exposed his genitals to her while in his car. During cross-examination, the trial defense counsel asked the victim, among other things, about interviews she had given to the Air Force Office of Special Investigations (AFOSI). These questions were part of an overall defense strategy to undermine the credibility of the victim by showing that she had been subjected to subtle pressures to implicate the appellant.

The prosecution called Dr. Marvin Acklin, a licensed psychologist, who testified about the cognitive maturation process of children and their ability to understand information presented to them, to recall events, and to relate facts accurately. Dr. Acklin performed psychological testing on the victim and concluded that "she appeared to be . . . a normal little girl who had age appropriate cognitive abilities, broadly in the average range" and that "she also understands the difference between what's real and what's not real."

On cross-examination, the trial defense counsel asked Dr. Acklin about the susceptibility of children to the power of suggestion and the need for investigators and

clinicians to use proper interviewing techniques when questioning a child. Dr. Acklin stated that repeated interviewing can, if not conducted properly, suggest to the child responses that the interviewer presumably wants to hear. On the other hand, he stated, the fact that a child was interviewed more than once, or that there are certain inconsistencies in the child's description of an event, does not necessarily undermine a child's credibility. Trial defense counsel asked:

> Q: [T]aking all those other factors into account, it's also possible that the child is just wrong about the event, is that not true?
>
> A: Well, then you would be having to come to the conclusion that the child fabricated the event. In other words, they fabricate the recollection of an event.
>
> Q: Either that or it was suggested to them at some point and it became engrained through repeated interviews, Sir.
>
> A: That's a possible, but it seems to be [a] somewhat unlikely outcome, yes. If we're talking about the facts of this particular case.

On redirect, the trial counsel solicited Dr. Acklin's conclusions after observing videotapes of the AFOSI interviews of the victim.

> A: I did . . . have several impressions. In my view, there were…despite some of the technical shortcomings of the interview, it was my impression that there were credible disclosures. I believe that…
>
> DC [Defense Counsel]: Objection, Your Honor.
>
> MJ [Military Judge]: Members, disregard that response.

In the presence of members, the military judge advised Dr. Acklin that he was not to "comment on the credibility of the alleged victim . . . that is strictly off limits, you cannot assess the credibility of the alleged victim."

On redirect examination, the trial counsel asked a number of other questions, eliciting from Dr. Acklin the opinion that children do not typically confabulate unless there is an underlying "psychopathological condition," which he did not detect in the victim; that the victim did not appear to have been coached or coerced in her testimony; that young children, lacking sufficient social sophistication, rarely make false accusations of sexual abuse unless induced to do so by an adult; and that false accusations of child sexual abuse occur approximately five percent of the time. The appellant contends that the evidence described above constitutes "human lie detector" testimony.

During his subsequent findings instructions, the military judge instructed the panel that:

> Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Doctor Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.

While an expert may not serve as a "human lie detector" by giving an opinion as to the "credibility or believability of a victim," he or she may testify as to "typical behavior patterns" of child sexual abuse victims. *United States v. Cacy*, 43 M.J. 214, 217-18 (C.A.A.F. 1995).

> An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms; discuss patterns of consistency in the stories of victims and compare those patterns with patterns in the victim's story; and testify about a child's ability to separate truth from fantasy. . . . [Q]uestioning of the expert frequently delves into his or her ability to discern whether a victim appears rehearsed or coached, or is feigning, and this is usually admissible.

Id. (citations omitted). *See also United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986).

We have examined the statements by Dr. Acklin that allegedly constitute "human lie detector" testimony and conclude that, with one exception, the statements were not objectionable on that ground. Through cross-examination of the victim and of Dr. Acklin, the trial defense counsel had raised the question of whether the victim had been induced to provide false information. Dr. Acklin's opinions, for the most part provided during re-direct examination, rebutted the inference of fabrication, which the trial defense counsel had attempted to raise. *See United States v. Schlamer*, 52 M.J. 80, 86 (C.A.A.F. 1999). We conclude that the testimony was not error.

As to the one comment that is objectionable on the grounds that it is "human lie detector" testimony—that the victim's disclosures of sexual abuse were credible—we conclude that it constituted improper opinion testimony as to the believability of the victim. However, the military judge immediately instructed the members to disregard the

statement and gave more detailed instructions on the matter prior to findings. We conclude that the military judge adequately cured the error and that further corrective action on appeal is not warranted.

Improper Profile Evidence

We review a military judge's decision to admit expert testimony for an abuse of discretion. *United States v. Raya*, 45 M.J. 251, 252 (C.A.A.F. 1996) (citing *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)). The appellant contends that Dr. Acklin's testimony that children rarely fabricate reports of sexual abuse and that such false reports occur in only five percent of cases constituted inadmissible profile evidence.[1] We conclude that the testimony in question was not improper.

Admittedly, a military judge may not permit "testimony that an appellant's psychological profile was *consistent*" with having committed a charged offense. *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992). Such evidence violates the prohibition against character evidence set forth in Mil. R. Evid. 404(a). In the case sub judice, however, the evidence in question pertained not to the appellant but to the victim, whose credibility had been attacked. As such, we conclude that the testimony fell within the scope of admissible expert opinions on behavioral patterns of child victims. *See United States v. Brenton*, 24 M.J. 562, 565 (A.F.C.M.R. 1987); *United States v. Snipes*, 18 M.J. 172, 179 (C.M.A. 1984). To the extent that this assignment of error is predicated on the view that such testimony usurps the responsibility of the factfinder to determine witness credibility, we have already addressed that in our discussion of the first assignment of error. We hold that the military judge did not abuse his discretion by admitting the testimony in question.

Admission of Hearsay Statements

We combine into one discussion assignments of error (3) and (4). We review a military judge's rulings on admission of evidence for an abuse of discretion. *United States v. Hyder*, 47 M.J. 46, 48 (C.A.A.F. 1997).

During the findings portion of the trial, the victim's mother testified that some time in the fall of 2000, she had gone out dancing with the wife of the appellant, leaving the victim in the appellant's care. Upon returning, while carrying the victim upstairs to put her to bed, the victim told her that the appellant had touched her "private place." The

[1] We note that this assignment of error alleges the improper profile evidence was in regards to evidence that five-year-old children rarely make false claims of sexual abuse. However, upon further reading, we glean the appellant's argument to be in regards to Dr. Acklin's testimony that false reports occur in only five percent of sexual abuse cases.

mother stated that she thought it was just a bad dream and decided she would not leave the victim alone with the appellant anymore. The trial defense counsel did not object to the statement.

After the victim reported the alleged indecent exposure, however, the mother reported the appellant to the authorities. Some time after the victim was interviewed by the AFOSI, but apparently before two subsequent interviews with the AFOSI, the victim told her mother that the appellant had pulled down her panties, an act which formed the basis of Specification 1 of the Charge. Over defense objection, the military judge admitted the second statement for the limited purpose of rebutting the inference of recent fabrication by the victim, which the defense had raised through its cross-examination of the prosecution's witnesses. The military judge instructed the members that they were not to consider the statement for the truth of the matter asserted.

As regards to the victim's first statement about her private parts, to which there was no objection, counsel for both sides averred that it referred to the same incident that underlies Specification 1 of the Charge. It was made prior to any interviews of the victim, which the defense contended had improperly influenced the victim to accuse the appellant of sexual abuse. We conclude that it was admissible as a prior consistent statement, in accordance with Mil. R. Evid. 801(d)(1)(B).

Regarding the victim's second statement about her panties, the trial defense counsel was not precise as to when the victim's motive to fabricate may have arisen, although it could have been as early as the first AFOSI interview. The theory of the defense was, apparently, that at this interview the victim learned she could gain attention by making statements about the appellant. For a prior consistent statement to be admissible as substantive evidence, it must have been made prior to the improper motive. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998).

However, in this instance, as stated above, the military judge did not admit the statement for its truth, only for its rebuttal potential. We conclude that it is very similar to the statement at issue in *United States v. Faison*, 49 M.J. 59 (C.A.A.F. 1998). In that case, the military judge admitted prior consistent statements for rebuttal purposes only. "Such a theory of admissibility thus roughly parallels the limited use accorded prior consistent statements at common law and under the evidentiary rules preceding the Military Rules of Evidence. . . . [T]heir admissibility is dependent on logical relevance for [rebuttal purposes] not on an exception to the rule against hearsay." *Id.* at 62 (citations omitted).

Therefore, the sequence of the statement relative to opportunities for the victim to have acquired a motive to fabricate does not impair its relevance under Mil. R. Evid. 401 and 403. We hold that the military judge did not abuse his discretion by admitting it. Even if there was error, however, we conclude that any consequent prejudice was vitiated

by the fact that a similar statement had already come to the attention of the members without an objection and by the judge's limiting instruction. Therefore, we conclude that any error in admitting the statement was harmless.

Improper Argument

In his rebuttal argument during findings, the trial counsel stated to the members: "We are convinced, and we hope that you are convinced beyond a reasonable doubt that [the victim], when she testified in this courtroom, told the truth when she told the story, when she told her allegations to you." The trial defense counsel did not object.

Of course, a prosecutor may not substitute his or her own judgment for that of the court members on the ultimate issue in the case. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977). In this case, however, we conclude that the comment, read in the context of the trial counsel's argument as a whole, was not so egregious that it materially prejudiced the substantial rights of the appellant. We conclude that the failure of the trial defense counsel to object constituted waiver and that the argument was not plain error. *See United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000).

Denial of Request for Expert Assistance

Prior to the Article 32, UCMJ, 10 U.S.C. § 832, investigation, the defense requested the services of Dr. (Lieutenant Colonel) H. Alan Reid, a psychologist, to provide expert assistance, which the convening authority granted. Prior to trial, however, the defense requested Dr. Bruce Ebert, another expert, to replace Dr. Reid, on the grounds that he was more qualified. The military judge denied the request. We have examined the record, paying special attention to the military judge's findings of fact and conclusions of law, and hold that he did not abuse his discretion in so ruling. *See United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994); *United States v. Warner*, 59 M.J. 573, 578 (A.F. Ct. Crim. App. 2003) (Even upon a showing of necessity an accused is not entitled to a specific expert of his or her own choosing. All that is required is that "competent" assistance be made available and in the usual case, the expert services available in the military are sufficient.), *pet. granted*, 60 M.J. 124 (C.A.A.F. 2004).

Cumulative Error

The appellant contends that the accumulation of alleged errors requires dismissal of the charge and specifications. We have examined the entire record and have considered the nature and number of alleged errors, how the trial court addressed any errors arising during the course of the trial, and the strength of the government's case.

See United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996). We conclude that there is no basis for application of the cumulative error doctrine.

Effective Assistance of Counsel

The test for ineffective assistance of counsel is (1) whether "counsel made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) whether the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We conclude that we can resolve this issue without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

The appellant contends that the trial defense counsel's failure to interview or to call three potential witnesses precluded the admission of evidence that "likely [would] have made a difference in the outcome of his trial." We have considered the appellate filings, however, and conclude that the trial defense counsel have provided a reasonable explanation for their conduct in the appellant's case. Indeed, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of the appellant's claim. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We hold that the appellant has not been denied effective assistance of counsel.

Factual and Legal Sufficiency of the Evidence

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We have considered all matters properly before this Court. We recognize that the victim's testimony contains inconsistencies. However, when considered as a whole and in light of all the other evidence presented to the members, we are satisfied that the convictions are both legally and factually sufficient. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Improper Selection of Members

The appellant has alleged that the convening authority engaged in "court stacking" by excluding certain categories of officers from consideration for appointment to the panel. "Court stacking" is a form of unlawful command influence, which we review de novo. *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998) (citing *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997)); *See also United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). To raise unlawful command influence, "the defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Improper motive is a factor to be considered in evaluating a claim of unlawful command influence. "[W]here the convening authority's motive is benign, systematic inclusion or exclusion may not be improper." *Upshaw*, 49 M.J. at 113.

Prior to referral, the staff judge advocate (SJA) submitted to the convening authority a pretrial advice that contained the following language:

> If you decide to refer the case to a General Court-martial, you are required to select the members of the panel. Article 25[,] UCMJ states, "The convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." By law, you must select at least five officers. Although you may select a minimum of five members to serve on this court-martial panel, I recommend that you select 12 officers – 3 Colonels, 2 or 3 Lt [Lieutenant] Colonels, 3 or 4 Majors, and 3 or 4 company grade officers. Because both the United States and defense counsel have opportunities to challenge the members for cause and can each eliminate one officer peremptorily (i.e., for no reason at all), the above configuration will yield a balanced and diverse court-martial panel that will provide a sufficient number of officers. . . . At Tab 2 is a listing of officers assigned to Hickam AFB [Air Force Base]. You may select any of these officers as court-members. *Additionally, I have eliminated officers who would most likely be challenged for cause (i.e., JAGs [Judge Advocates], chaplains, IGs [Inspectors General], or officers in the accused's unit).*

(Emphasis added.)

We have considered the record as a whole, with particular attention to the pretrial advice. The excluded officers are those whose presence on a court-martial panel might itself raise questions about the fairness and impartiality of the proceeding. *See United States v. Hedges*, 29 C.M.R. 458, 459 (C.M.A. 1960); *United States v. Sears*, 20 C.M.R.

377, 381 (C.M.A. 1956); *United States v. Brocks*, 55 M.J. 614, 616 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. 11 (C.A.A.F. 2002).

We do not recommend the wholesale elimination of potential court members such as occurred in this case. However, we conclude that the SJA and convening authority acted to promote trial efficiency and "to protect the fairness of the court-martial not to improperly influence it." *Brocks*, 55 M.J. at 617. *See United States v. McKinney*, ACM 35485, slip op. at 4 (A.F. Ct. Crim. App. 15 Aug 2005). Therefore, we conclude that the first *Biagase* criterion is not satisfied.

Even if these facts would establish unlawful command influence, our examination of the record of trial convinces us that the proceedings were fair. We have found nothing to indicate that the members approached their duties without the requisite impartiality. Moreover, the defense did not challenge the court member selection process at trial. We conclude that the second and third criteria of *Biagase* are not met. We are satisfied beyond a reasonable doubt that the convening authority did not commit unlawful command influence.

Jurisdiction

This court reviews questions of jurisdiction de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). The appellant argues that by supplying the convening authority with only the alpha roster, a listing of officers assigned to Hickam AFB, the SJA did not provide the convening authority with enough information to make member selections that complied with Article 25, UCMJ, 10 U.S.C. § 825. As a consequence, the appellant alleges that his court-martial lacked jurisdiction.

The relevant portion of Article 25, UCMJ, is quoted in the pretrial advice and reproduced above. *See also* Rule for Courts-Martial (R.C.M.) 502(a)(1). The composition of court members is a jurisdictional element in a court-martial. *United States v. Ryan*, 5 M.J. 97, 101 (C.M.A. 1978); *United States v. Gaspard*, 35 M.J. 678, 681 (A.C.M.R. 1992); R.C.M. 201(b)(2).

The language of Article 25, UCMJ, requires the convening authority to select those who, in his opinion, are best qualified according to the criteria described therein. We conclude that this Article is intended to vest the convening authority with broad discretion. *See United States v. Owens*, 27 C.M.R. 658, 660 (A.C.M.R. 1959). Our review of the record provides no basis to conclude that the convening authority selected members whom he did not believe met these criteria. *See McKinney*, slip op. at 5. Further, as stated in our discussion of the previous assignment of error, we have also found no basis in the record to question any members' qualifications. Therefore, we hold

that the court-martial was not divested of jurisdiction by the court member selection process.

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); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court