UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAMES W. GOODWIN
United States Air Force

ACM 36770

27 July 2007

Sentence adjudged 4 May 2006 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Ronald A. Gregory.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

Contrary to his pleas, the appellant was found guilty of two specifications of indecent acts, one with a female under the age of 16 and one with a male under the age of 16[1], in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was acquitted of one specification of divers occasions of sodomy with a child under the age of 12. A general court-martial panel composed of officer and enlisted members sentenced the appellant to a dishonorable discharge, confinement for 2 years, total forfeitures of all pay and

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[1] The original specification alleged divers indecent acts upon the male victim. The members found the appellant guilty of a single indecent act, and specified the particular act for which they found him guilty.

allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asserts that the military judge erred by allowing Ms. F, a counselor who had been treating the two victims, to testify regarding certain statements made by WFF, the male victim. The military judge, over defense objection, allowed the hearsay testimony to be heard by the members after finding it to be allowable under Mil. R. Evid. 803(4). We find the appellant's assertion to be without merit and affirm.

We review a judge's evidentiary rulings for abuse of discretion. *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003). If there are mixed questions of law and fact we review factfinding under the clearly erroneous standard and conclusions of law de novo. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or his decision is influenced by an erroneous view of the law. *Id.* In *United States v. Kelley*, 45 M.J. 275, 279-280 (C.A.A.F. 1996) our superior court instructed, "when the medical exception to the hearsay rule is involved, the question of whether the patient has the requisite state of mind and expectation of receiving a medical benefit is a preliminary question of fact under Mil. R. Evid. 104(a). As such, it will be set aside only if clearly erroneous." *Kelley*, 45 MJ at 280 (quoting *United Sates v. Quigley*, 40 M.J. 64, 66 (C.M.A. 1994)).

In the case sub judice, the military judge took evidence and considered argument of counsel prior to ruling on the defense motion in limine. He then made detailed findings of fact and placed them into the record as an appellate exhibit. The military judge found that Ms. F, in her first session with WFF, told him that "she was someone who had the training to help [WFF] with his thoughts, feelings, and problems." This evidence, taken together with WFF's testimony that speaking with Ms. F made him feel "happy," led the military judge to find as a matter of fact that WFF expected to receive a treatment benefit from talking to her. Thus, he found the requirements for Mil. R. Evid. 803(4) to be met. After reviewing the evidence, we agree with the military judge's findings of fact. Finding them to be accurate and therefore not clearly erroneous, we adopt them as our own.

Further, we find the military judge's application of the law to these facts to be appropriate and not influenced by an erroneous view of the law. The military judge relied on *Kelley*, in finding that "the statements made by [WFF] were for the purpose of treatment and that [WFF] expected to receive a treatment benefit in talking with [Ms. F]." Therefore, we find the judge did not abuse his discretion by allowing the testimony as a statement made for the purpose of medical diagnosis or treatment under Mil. R. Evid. 803(4).

Even if the military judge had erred, we find the error would have been harmless beyond a reasonable doubt. In regard to the specifications involving WFF, the members found the appellant guilty of only the 18 March 2005 incident, not the other charged indecent touchings or oral sodomy allegations. This is significant because, in his testimony at trial, WFF only talked about the 18 March 2005 touching and denied any other improper behavior on the part of the appellant. Thus, the members convicted the appellant of only the single incident that WFF testified about at trial, and acquitted on the incidents for which Ms. F's testimony was the only evidence. Although Ms. F did testify regarding the 18 March 2005 incident, her testimony on this matter was cumulative with other evidence. This additional evidence included the appellant's wife's testimony about finding the appellant in WFF's room with the covers pulled down, statements made by the appellant in which he admitted going into both children's rooms that evening, and the direct testimony of WFF regarding the improper touching. Taken together, this evidence would have convicted the appellant without the testimony of Ms. F. We therefore find that, if the military judge had erred by admitting the testimony of Ms. F, the error would have been harmless beyond a reasonable doubt.

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

<center>AFFIRMED.</center>

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator

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