UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant ROSS A. HAYES SR.
United States Air Force

ACM 35498

19 September 2005

Sentence adjudged 11 October 2002 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Bryan T. Wheeler.

Approved sentence: Bad-conduct discharge, confinement for 8 years, and reduction to E-4.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major L. Martin Powell, and Frank Spinner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel David N. Cooper, Major Heather L. Mazzeno, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

The appellant was tried at Davis-Monthan Air Force Base, Arizona, by a general court-martial consisting of officer and enlisted members. Contrary to his pleas, the appellant was convicted of two offenses against his daughter, a child under the age of 16: sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925, and an indecent act, in

violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 8 years, and reduction to E-4.

On appeal, the appellant asserts three errors: (1) The evidence is factually insufficient to sustain the sodomy and indecent act convictions; (2) The military judge erred by admitting the hearsay testimony of two prosecution witnesses; and (3) The military judge erred by admitting evidence under the learned treatise exception to the hearsay rule because the prosecution failed to lay a proper foundation for introduction of the evidence.

Finding no error that materially prejudiced the substantial rights of the appellant, Article 59(a), UCMJ, 10 U.S. C. § 859(a), we affirm the findings and sentence.

Background

The appellant was charged with committing a variety of sexual acts upon and with his natural daughter, AH, over a three-year period. He was convicted of having AH perform sodomy on him on one occasion and of licking AH's vaginal area on a separate occasion.

The victim told a few close friends that her father had abused her and asked them not to tell anyone else. The secrecy did not last long. By the time the court-martial convened some 18 months later, AH had recounted some or all of her allegations to several individuals, to include: her mother, younger sister, a high school guidance counselor, state child protective services (CPS) officials, civilian juvenile court authorities, and an Article 32, UCMJ, 10 U.S.C. § 832, investigating officer. She also had recanted her allegations on at least two occasions.

AH was nearly 17-years-old when she testified at the appellant's trial. The trial defense counsel thoroughly explored the inconsistencies in AH's various accounts, her inability to recall certain specific details, and her possible motives to fabricate the allegations. The appellant testified and flatly denied all of his daughter's allegations. The trial counsel and trial defense counsel called a number of other witnesses to support their cases, and each side presented an expert qualified in forensic psychology and adolescent sexual abuse.

[1] The sodomy offense was alleged in Specification 1 of Charge I. In accordance with Rule for Courts-Martial 917, the military judge granted a defense motion for a finding of not guilty to a second sodomy specification under Charge I. The indecent act offense was part of the conduct alleged in Specification 5 of Charge II. The appellant was acquitted on the other four specifications of Charge II, which alleged various indecent acts and indecent liberties, in violation of Article 134, UCMJ.

Factual Sufficiency

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, the court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). We find we are convinced of the appellant's guilt beyond a reasonable doubt.

Factual sufficiency in this case hinges on AH's credibility. The appellant's counsel have vigorously, and fairly, attacked her credibility at trial, in their post-trial clemency submission, and before this Court. We fully recognize the inconsistencies between AH's various statements and her testimony at trial. We also appreciate that false allegations are made in some percentage of cases, and the appellant's counsel have suggested several motives for AH to fabricate her allegations.

Given the evidence of AH's personality and the distinctive manner of her testimony, we are convinced that she was telling the truth.[2] *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). She freely acknowledged the inconsistencies in her various accounts and her inability to remember certain facts. AH's answers to two central questions are representative and compelling. When asked if she was making up the allegations, she said no: "Because – making up something like this would – like – hurt a lot of people – especially if it wasn't true, and it's pointless – I mean – no one benefits from it." And when asked why she submitted to her father's sexual requests, AH responded, "Because he's my dad, and I was supposed to do what he said anyway." In short, we find AH to be credible. The record contains evidence to prove every element of the challenged offenses beyond a reasonable doubt.

Prior Consistent Statements – Mil. R. Evid. 801(d)(1)(B)

The trial counsel contended that the defense's detailed cross-examination of AH raised a charge of recent fabrication. To rebut the charge, the government asked two witnesses to recount what AH told them about the abuse allegations. Trial defense counsel objected to the testimony as improper hearsay, contending AH's statements to the witnesses were made after her motive to fabricate arose. The trial counsel contended, and the military judge concluded, that the statements were admissible under Mil. R. Evid. 801(d)(1)(B) as prior consistent statements. AH's close friend testified that AH told her the appellant touched her breasts and indicated there had been other instances of abuse. A high school guidance counselor testified AH told her the appellant asked her to put her

[2] The government expert's testimony was important. The expert believed AH presented symptoms consistent with child sex abuse, and he testified that inconsistencies and recantations are not uncommon in child sex abuse cases. He characterized AH as "adaptive and avoidant," which, he testified, could explain her acquiescence to her father's sexual overtures and her tendency to claim, during her trial testimony, that she did not remember a number of details about the alleged incidents.

mouth on his penis several times, and he had fondled her breasts. We review the military judge's evidentiary rulings for an abuse of discretion. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998); *United States v. Robles*, 53 M.J. 783, 791 (A.F. Ct. Crim. App. 2000).

To be admissible under Mil. R. Evid. 801(d)(1)(B), a prior consistent statement generally must have been made *before* the alleged recent fabrication, improper influence, or motive arose. *Allison*, 49 M.J. at 57; *United States v. McCaskey*, 30 M.J. 188, 189-90 (C.M.A. 1990). *See also Tome v. United States*, 513 U.S. 150, 157 (1995). In this case, the trial defense counsel contended AH's allegations were a complete fabrication, concocted before she said anything to anybody, for a variety of motives: anger and dissatisfaction with rigid rules imposed by her parents, including a rebuffed request to move out of the house, an unsatisfactory relationship with her mother, and a desire to get attention.

The prior statements by AH alleging the appellant touched or fondled her breasts were admissible to rebut an implied charge of *recent fabrication*. At trial, AH testified the appellant had touched her breasts. The trial defense counsel then established that the victim had not made an allegation of breast touching to CPS in September 2001, to the juvenile court in February 2002, or to the trial defense counsel during an interview shortly before the 8 October 2002 trial date. The defense "swung the door wide open" for admission of prior consistent statements about breast touching or fondling, having created the impression that AH was alleging such contact at trial for the first time. *McCaskey*, 30 M.J. at 194 (Cox, J., concurring). In any event, the members did not convict the appellant of any offenses related to touching or fondling of AH's breasts, so any error in admitting those statements was harmless. Article 59(a), UCMJ.

On the other hand, there was no express or implied charge of recent fabrication to support admissibility of AH's sodomy-related statement to the guidance counselor. The military judge abused his discretion in admitting the statement because it was made well after the asserted motives to lie would have arisen. We test for prejudice; that is, whether the error materially prejudiced the substantial rights of the appellant. Article 59(a), UCMJ; *McCaskey*, 30 M.J. at 193. The guidance counselor's testimony actually added another inconsistency, in that she testified AH told her the appellant asked AH to perform sodomy on him "several times," but at trial AH testified it happened once, "maybe twice." Under these circumstances, we find no "fair risk of prejudice" considering the overall state of the evidence. *Id*.

Learned Treatise Evidence - Mil. R. Evid. 803(18)

The appellant's expert testified at length in sentencing. He explained an actuarial assessment method that he used to support his opinion that the appellant posed a low recidivism risk. On cross-examination, the assistant trial counsel inquired about the

actuarial method and drew the defense expert's attention to the *Journal of Abnormal Psychology* (*Journal)*. The defense expert agreed that experts in the field relied on the *Journal*, although a given article contained within may or may not be relied upon. The assistant trial counsel asked him about a particular article in the *Journal*, "Men who Molest Their Sexually Immature Daughters – Is a Special Explanation Required?"[3] The defense expert was not familiar with the article, but he was very familiar with its authors: "Yes – and, again, I would say they are, in fact, the folks who did the principal research. I've spoken personally with Marnie Rice about the sex offender risk appraisal guide on several occasions."

The assistant trial counsel sought to introduce a single sentence from the article: "To date, there have been no evaluations of how well these actuarial instruments, or any other prediction instruments, work for father-daughter child molesters specifically." The trial defense counsel objected that his expert was not familiar with the article, and so it was not part of the basis of his opinion. Trial defense counsel did not object to a lack of foundation for the evidence under Mil. R. Evid. 803(18). The military judge allowed the excerpt to be read into evidence.

On appeal, the appellant contends the prosecution failed to lay a proper foundation for introduction of the excerpt. A foundational challenge to Mil. R. Evid. 803(18) learned treatise evidence is waived if not made at trial. *United States v. Coleman*, 41 M.J. 46, 49 n.5 (C.M.A. 1994). Even if not waived, we find that the defense expert's testimony about the *Journal* and, particularly, the authors of the article, established an adequate foundation for the evidence. The military judge did not abuse his discretion by admitting the excerpt.

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

[3] Marnie E. Rice & Grant T. Harris, *Men Who Molest Their Sexually Immature Daughters, Is a Special Explanation Required?*, 111 J. Abnormal Psychol. No. 2, 329-39 (2002).