UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DANIEL R. KAPUSCENSKI
United States Air Force

ACM 35861

14 July 2006

Sentence adjudged 17 October 2003 by GCM convened at Kadena Air Base, Japan. Military Judge: David F. Brash.

Approved sentence: Dishonorable discharge, confinement for 9 months, and reduction to E-2.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Andrew S. Williams, Major Terry L. McElyea, Major Sandra K. Whittington, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Carrie E. Wolf, and Captain Daniel J. Breen.

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 a single specification of indecent acts with a minor, RK, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was sentenced by a panel of officers to a dishonorable discharge, confinement for 9 months, and reduction to the grade of E-2. The convening authority approved the findings and sentence as adjudged.

In his initial brief before this Court, the appellant asserted the military judge abused his discretion by failing to grant a challenge for cause against a court member.

We resolve this assignment of error adversely to the appellant. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). Following our first review of the record, however, we specified an additional issue to the parties:

> WHETHER, IN LIGHT OF THE SUPREME COURT'S RULING IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004), STATEMENTS BY [CK] AND [RK] THAT WERE ADMITTED INTO EVIDENCE AT APPELLANT'S TRIAL CONSTITUTE TESTIMONIAL HEARSAY.

Both sides agree *Crawford* should be applied retroactively. Following this Court's precedent in *United States v. Johnston*, __ M.J. ___ ACM 35870 (A.F. Ct. Crim. App. 14 Jun 2006), we concur. Appellate defense counsel contend that all of the statements at issue were testimonial and therefore inadmissible. Appellate government counsel argue that CK's statements were not testimonial and therefore not subject to exclusion under *Crawford.* They concede RK's statements were testimonial, but contend admission of her statements was harmless beyond a reasonable doubt.

We find the military judge did not abuse his discretion when he admitted CK's statements as excited utterances under Mil. R. Evid. 803(2). We further find that CK's excited utterances were nontestimonial in nature. *See, e.g., United States v. Gardinier,* 63 M.J. 531, 540-41 n.8 (Army Ct. Crim. App. 2006). We concur with the parties that RK's statements, which the military judge admitted under the residual hearsay exception of Mil. R. Evid. 807, were testimonial in nature and should have been excluded.

Because RK's out-of-court statements were erroneously admitted, we must determine whether the appellant was prejudiced. In evaluating this question, a review of the facts and circumstances leading up to the appellant's court-martial is in order.

Background

The appellant was, at the time of his trial, a 29-year-old maintenance troop assigned to Kadena Air Base (AB), Okinawa, Japan, where he lived in base housing with his wife, CK, and 8-year-old daughter, RK. On 25 March 2003, CK placed a 911 call to the Security Forces squadron on Kadena AB, claiming that she "just found [her] husband pedophiling [sic] [her] daughter." Security Forces personnel, including Captain (Capt) Sean Philips, made the initial response to the appellant's quarters, arriving approximately six minutes after CK's 911 call. By the time they arrived, CK apparently had a change of heart about her report, telling Capt Philips her call "was all just a big misunderstanding." The captain noted that, despite her claim, CK was upset and appeared to have been crying.

While Capt Philips was present, CK "spontaneously blurted out that her daughter, [RK], had felt a burning sensation in her genitals and that her husband touched her there." According to Capt Phillips, CK also repeatedly called for her own mother and said that

she just wanted to take her children and leave Kadena. Shortly thereafter, Air Force Office of Special Investigations (AFOSI) agents arrived and initiated a formal investigation.

The AFOSI agents arranged for RK to meet that night with a pediatrician, Lieutenant Commander (LCDR) Nancy Harper, at the United States Naval Hospital, Okinawa. During the course of that evaluation, RK told LCDR Harper about incidents in Texas and Okinawa in which the appellant touched RK's private parts over and under her clothing, exposed his penis to RK, and masturbated in front of RK. RK also related to LCDR Harper that on one occasion, she saw "water" coming from the appellant's penis. According to LCDR Harper, RK related that she was given a secret by her father and "she was told not to tell anybody" about it. RK did not specify what the secret was, but did offer her opinion that if she told, her father would go to jail.

AFOSI agents interviewed the appellant, who provided them with two handwritten statements made under oath. In his first statement to investigators, the appellant recounted two instances when he touched RK's genitals. The first such occasion he described as an accident:

> I tickled [RK]. And in doing so I tickled her inner thighs. I do that to my wife and youngest daughter also. I think its thier [sic] most ticklish spot. And when I did this to [RK], I accidentally came in contact with her private area.

The second instance he described as part of giving RK a shower: "I helped her wash herself because she was just laughing and giggling. . . . I washed her all the way up to her inner thighs." The appellant denied any other touching of RK's genital area.

The appellant expounded on the "secret" he supposedly shared with RK. According to the appellant's first statement, he "caught [RK] masturbating" and told her "it was okay," but warned that she should not let CK catch her doing it. The appellant, referring to RK, said that they "decided it was a secret." The appellant also described an incident in which RK "inquired about [his] private area. She wanted to know what it was called, and she asked "what are those things?" referring to his testicles. The appellant wrote that he spoke "sternly" to RK to give her "the message that she was not supposed to know about that." The appellant insisted that he "never participated, or watched" RK masturbate.

The day after his first interview with the AFOSI, the appellant told them a substantially different story. In a second sworn statement provided to investigators, he described giving RK instruction on how to masturbate. According to the appellant, RK initiated a conversation with him about how, and how often, her mother masturbated. Then, according to the appellant:

> I took my hand and used my middle finger to touch her clitorous [sic] area. I told her thats [sic] where to do it. My hand or finger only came in contact with her for a brief moment. Actually less than a moment. It was maybe for a total of 2-3 seconds.

The appellant went on to describe how, when touching RK's genitals through her underwear, he was "moving [his] finger slightly" and "while doing that. . . . had an erection." He said that, while touching RK's vaginal area, he simultaneously "push[ed] on [his] erection with the palm of [his] other hand."

Contrary to his prior claim that he never watched RK masturbate, the appellant further admitted:

> [A] couple of times that [RK] had touched herself in my presence, I gained an involuntary erection, and dealt with it by firmly telling [RK] to "knock it off," and "do that on your own," while at the same time I may have suppressed my erection by pushing on it.

In addition to these incidents, the appellant related several other events omitted from his first statement, including at least three instances in which RK purportedly startled him while he was in the act of masturbation. On at least one of those occasions, he wrote, RK "was exposed to [his] bare penis." The appellant claimed not to recall whether RK touched his penis on that occasion, but allowed that "there is a good chance she did." If she did touch his penis, however, the appellant said "it was brief, and not anything [he] would remember."

The appellant described another occasion in which RK caught him masturbating as follows:

> [RK] startled me while I was masturbating. . . . At that time I may have bee [sic] ejaculating. In fact I think I was ejaculating. I did not discuss this with her.

He went on to describe yet another occasion when RK found him masturbating. This time, he wrote, she "climbed up on" him, while she was nude from the waist down, shortly after he ejaculated. According to the appellant, RK asked, "Why is that wet?"

The appellant described other incidents: one, when RK saw him ejaculate while he was being manually stimulated by CK, and an indeterminate number of occasions when RK saw him "engaged in sex" with CK. The appellant claimed to have a "great relationship" with CK, with "no sexual problems" that he was aware of, although he acknowledged that he "may have" a "higher sex drive" than his spouse.

Though the appellant disclosed considerably more than he revealed in his first statement, he insisted the omissions were unintentional, prefacing his second statement as follows:

> I would like to note . . . that my not disclosing the following information in my first interview, was not intentional. I did not recollect theese [sic] memories until today.

The Appellant's Trial

The appellant was charged with two specifications alleging he committed indecent acts with RK. The first specification tracked the touching admitted to by the appellant in his second statement to the AFOSI; the second specification captured the remaining abuse described by RK to LCDR Harper.

Neither CK nor RK testified against the appellant at trial.[1] The prosecution began its case-in-chief with Capt Philips, who described CK's excited utterance that the appellant had touched her daughter. The next two prosecution witnesses were AFOSI agents, who testified concerning their interviews with the appellant and the two handwritten statements he prepared. The prosecution next called LCDR Harper to testify about RK's statements,[2] and last called a base social worker, who described admissions by the appellant that were consistent with his statements to the AFOSI.

After the prosecution rested, the defense led off with testimony from the appellant. On direct examination, the appellant claimed that -- notwithstanding his earlier sworn statement -- he did not actually have an erection when touching RK's genitals through her panties. The appellant said he told the AFOSI agents only that he "might have had" or "thought [he] had an erection." The appellant acknowledged that his statements were "chock full" of sexual incidents involving RK, but denied ever harboring any sexual intent toward her.

Under cross-examination, the appellant admitted he was "not completely truthful" in his first statement to AFOSI. In particular, he acknowledged he was not truthful when he claimed that he had only touched RK's "private area" on two occasions. He further stated that, at the time he provided his first statement, he left out the various sexual incidents detailed in his second sworn statement because he "didn't feel it was necessary" to disclose them and not, as he claimed in his second statement, because he did not remember them.

[1] The military judge found that CK "agreed to be interviewed by the defense and appear to testify for the defense," but would not cooperate with the prosecution and refused to allow RK to "be a part of these proceedings."

[2] The military judge, after entering extensive findings of fact, concluded that RK's statements to LCDR Harper did not meet the criteria necessary for admission under Mil. R. Evid. 803(4), but were admissible under Mil. R. Evid. 807.

The appellant attempted to distance himself from some of the more damaging admissions in his earlier sworn statements, testifying, for example, that he "lied" about having an erection while watching RK masturbate. He contended that he touched her vaginal area for less than a second, rather than the two to three seconds he described in his second sworn statement. The appellant conceded that, if he *had* touched RK for the length of time described in his statement, it would "have been indecent," but denied that his sworn statement was true.

On a number of occasions, the appellant seemed to quibble with the trial counsel over the definition of words, contending, for example, that he did not "assist" RK in masturbating, but only "showed her where" to touch herself. In addition, the appellant contradicted his own in-court testimony at least twice. When confronted with a copy of his statement, the appellant admitted that he told the AFOSI agents he actually had an erection while touching RK -- not, as he testified on direct, that he only "might have" had an erection. The appellant also changed his story about the omitted incidents yet again, insisting that he actually *had* forgotten them and not, as he had just testified, left them out of his first statement because he thought it unnecessary to disclose them.

The defense finished its case with testimony of a psychiatrist stationed at Tripler Army Medical Center in Hawaii, who testified that masturbation is not uncommon in children as young as RK's age. He offered no opinion on the relative frequency of the many sexual incidents described by the appellant's testimony or pretrial statements. There was no rebuttal.

During argument on findings, the government's theory was simple: For Specification 1, alleging the appellant committed an indecent act by touching RK's vaginal area over her clothes, the trial counsel argued the appellant "admitted it. Maybe he didn't want to admit it to himself today, but he has admitted it." On Specification 2, alleging the additional indecent acts described by RK to LCDR Harper but denied by the appellant, the trial counsel argued: "[H]e's a liar." The members returned a guilty verdict on Specification 1, but acquitted the appellant on Specification 2.

Analysis

Erroneous admission of hearsay evidence rises to the level of a constitutional error when, as here, the appellant is thereby denied the opportunity to cross-examine the declarant. *United States v. Simmons*, 59 M.J. 485, 489 (C.A.A.F. 2004) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The government, which concedes the error but urges us nonetheless to affirm, bears the burden of establishing "beyond a reasonable doubt" that the error was harmless. *United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002). In determining whether the error was harmless, we consider all of the circumstances of the appellant's trial. *United States v. Hall*, 58 M.J. 90, 94 (C.A.A.F. 2003) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). To affirm, we must

"conclude beyond a reasonable doubt that the jury verdict *would have been the same* absent the error." *Neder v. United States*, 527 U.S. 1, 19 (1999) (emphasis added).

We find this standard easily met. To be sure, the military judge instructed the members to consider RK's statements during their deliberations, and the trial counsel included them in his argument.[3] But the members found the appellant guilty of only those acts to which he admitted, in court and in his second sworn statement to the AFOSI. The only remaining issue was the appellant's intent, i.e., whether he behaved as he did in order to gratify his own sexual desires or those of RK. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 87b(1)(d) (2005 ed.).[4]

We find beyond a reasonable doubt that the members -- or indeed, any reasonable trier of fact -- would, on the strength of the properly-admitted evidence, have concluded that the appellant acted with the requisite criminal intent. Also, we are ourselves convinced of his guilt beyond a reasonable doubt. *See United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The appellant's admission that he had an erection, and that he manually manipulated his erection several times as he touched RK's clitoris through her underwear, was utterly devastating. His patent deceit in attempting to distance himself from this admission only served to shine a spotlight on his guilt. His inconsistent and frankly incredible claim to have forgotten this incident, and all the many others, is further evidence of a guilty conscience. "In light of the record of trial in its entirety, we consider [the] appellant to have been his own worst enemy." *United States v. Williams*, 40 M.J. 216, 219 (C.M.A. 1994).

Conclusion

The 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.

SMITH, Judge (dissenting):

The appellant's explanation about his conduct with RK strained credibility. But I cannot agree that the erroneous admission of RK's statements to LCDR Harper is

[3] Our colleague, in dissenting, highlights this passage from the trial counsel's argument: "We have not heard from anybody else that was in that room in Texas and, frankly, there's no need to put a child on the stand in front of you when we have Dr. Harper's statements." The appellant, however, was acquitted of the offenses alleged to have occurred in Texas. He was convicted only of the acts alleged to have occurred on Okinawa.

[4] This paragraph is identical in the 2002 edition of the *Manual* that was in effect at the time of the appellant's court-martial.

harmless beyond a reasonable doubt. RK's statements were important: She confirmed the appellant touched her vagina in the manner alleged and characterized the "secret" she held as one that would send her father to jail. Understandably, the trial counsel emphasized RK's statements throughout the case. He effectively sharpened the issue in his cross-examination of the appellant:

> Q. So I guess I'll ask you again, both of you [the appellant and RK] can't be telling the truth, right?
>
> A. That would be a fair statement, sir.
>
> Q. And if she's telling the truth, then you're guilty?
>
> A. Yes, sir.

In his rebuttal argument on findings, the trial counsel summarized the importance of the testimonial hearsay:

> We have not heard from anybody else that was in that room in Texas and, frankly, there's no need to put a child on the stand in front of you when we have Dr. Harper's statements. There's no need to put a child through that because we know. Now so we can rely on what [RK] is telling us through Dr. Harper, what she told to her mother, what she told to Dr. Harper and whatever is coming out here.

In essence, the majority finds the evidence against the appellant to be overwhelming because his explanation was incredible. But the members who heard the evidence deliberated for seven hours before acquitting the appellant of one specification and convicting him on the other, weighing the appellant's explanation and RK's statements to LCDR Harper in each instance. Because I cannot say the inadmissible evidence did not contribute to the findings, I respectfully dissent. *See Chapman*, 386 U.S. at 23; *Simmons*, 59 M.J. at 492 (Baker, J., dissenting); *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994) ("reasonable likelihood that the . . . evidence may have tipped the credibility balance in [the] appellant's favor").

Judge Smith authored this dissent prior to his reassignment.

OFFICIAL

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