UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARSHALL C. LAWSON
United States Air Force

ACM 35549

14 October 2005

Sentence adjudged 13 September 2002 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was tried by officer members sitting as a general court-martial at Cannon Air Force Base (AFB), New Mexico. Contrary to his pleas, he was convicted of committing an indecent act upon the body of HMA, an 8-year-old female, by fondling her and placing his hands upon her vagina, with the intent to gratify his sexual desires, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant has submitted four assignments of error: (1) Whether the military judge abused his discretion by admitting a copy of Special Agent (SA) Thad Payne's notes as a court exhibit; (2) Whether the appellant's right to due process was violated because the Air Force Office of Special Investigations (AFOSI) failed to tape record a pretext phone call; (3) Whether the evidence is legally and factually sufficient to affirm the appellant's conviction for aggravated assault; and (4) Whether the appellant's sentence is inappropriately severe.[1] After carefully considering the appellant's assignments of error, the government's response thereto, and the entire record of trial, we find no prejudicial error and affirm.

Background

The 8-year-old victim, HMA, testified that on the evening of 16 February 2002, she, her mother, and her sister attended a cookout at the home of their neighbors, the Willamans, in Clovis, New Mexico. The appellant also attended this cookout. The victim testified that, later in the evening, her mother and Mrs. Willaman left the cookout, leaving the appellant inside the house with HMA, HMA's sister, and SSgt Willaman's daughter. SSgt Willaman remained at the cookout but was in the garage when the incident occurred.

After her mother left, HMA and the appellant were in the living room watching a movie. The victim's sister and SSgt Willaman's daughter, both under 12 years of age, were asleep. According to HMA, at approximately 0100 hours, the appellant asked her to sit with him in a recliner he was sitting in. HMA joined the appellant on the recliner. He had a large blanket with him which he used to cover both himself and HMA. HMA testified that, immediately after joining him on the chair, the appellant stuck his hand down her panties and rubbed and squeezed her vagina. She said she "wiggled," "jumped up," "got loose," and went over to sit between her sister and SSgt Willaman's daughter. Later that evening after returning home, HMA reported the incident to her mother.

HMA's mother testified that she left the Willaman's house around 2230 hours and returned between 0100 and 0130 hours. She found her daughter awake when she returned, which she said was unusual. After they arrived home, HMA became upset and began to cry. After questioning her, HMA told her she had been touched and pointed to her "private area" and that it was not an accident. After learning this, HMA's mother went back to the Willaman's house and told them what HMA had said to her. HMA's mother then contacted the police and reported the incident.

Pursuant to their investigation, on 1 March 2002, SA Craig Robertson and SA Thad Payne of the AFOSI at Cannon AFB, arranged for HMA's mother to make a pretext

[1] Issues (2), (3), and (4) are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

phone call to the appellant. SA Robertson supplied her with the questions to ask the appellant while SA Payne listened to the conversation on another phone and made handwritten notes. The conversation was not tape recorded. The pretext phone call lasted between 20 and 30 minutes. The government called HMA's mother in their case-in-chief to testify about her conversation with the appellant during the pretext phone call.

The defense called SA Payne as a witness to testify about the pretext phone call. SA Payne stated that the appellant repeatedly told HMA's mother he had not touched HMA. On cross-examination by the prosecution, SA Payne stated the appellant made the following statements: "I thought she loved me to death"; "I might have, but I don't remember"; "If I did it, it would have been a mistake---an accident"; "If I did it, I touched her, but I didn't rape her." The appellant, when he testified on his own behalf, denied making these statements to HMA's mother during the pretext phone call. He also vehemently denied he had inappropriately touched HMA in the early morning hours of 17 February 2002.

Admission of SA Payne's Notes as Court Exhibit 1

During deliberations on findings, the court members asked the military judge for a copy of the notes taken by SA Payne during the pretext phone call and used by him to refresh his recollection during his testimony. The military judge then asked the trial and defense counsel if they had any objection to the court members' request. The trial counsel had no objection. The defense counsel, however, initially objected stating the handwritten notes were hearsay and more prejudicial than probative under Mil. R. Evid. 403. They subsequently argued that Mil. R. Evid. 612, writings used to refresh a witness's memory, would also preclude the admission of SA Payne's handwritten notes. The military judge determined the members were entitled to the notes and, after making the notes Court Exhibit 1, they were given to the members.[2] The military judge instructed the members, in pertinent part, as follows regarding Court Exhibit 1:

> There are a couple of caveats by giving you these notes. First of all, you need to remember that the testimony you have already been provided about how they were taken, that these are not a verbatim transcript, and they were taken in the way that Agent Payne identified, that is, he was writing information down. You need to evaluate that in terms of the quality of the notes and whether or not---and use that as far as the credibility of what you have in front of you in what I've termed as Court Exhibit 1.
>
> MJ: Secondly and more importantly, these notes may not be used by you for substantive purposes. In other words, they can't be considered as evidence in the general sense of [the] word where you can say, "Well, I can

[2] A scanned copy of SA Payne's notes are set forth in the attached Appendix.

> make a finding of fact based upon these notes." They can only be used to the extent that they contradict---if they contradict what somebody has said, you can use that in evaluating the credibility of the witness that they contradict. So, that's the only way you can use them. In other words, you cannot base a factual decision, that is, that you've concluded that there is an element met or a fact proven with this court exhibit. They can only be used, essentially, for impeachment purposes.

The members indicated to the military judge that they understood this instruction and would follow it.

On appeal, the appellant contends the military judge erred by providing SA Payne's notes to the members. He argues that the notes are hearsay and asks this Court to set aside the findings and sentence. The government argues that the military judge did not abuse his discretion by providing the notes to the members; the notes are not hearsay, but were a prior inconsistent statement; the judge properly instructed the members on the proper use of the notes; and the members agreed to follow the judge's limiting instruction.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002*); United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). The law presumes that court members listen to, understand, and follow the instructions of the military judge. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). In the absence of any evidence in the record of trial to the contrary, we will presume that the court members used the notes as instructed by the military judge. *See id*. Further, we agree with the government counsel that Court Exhibit 1, SA Payne's notes, were not hearsay because they were admitted solely on the basis of impeachment and not to prove the truth of the matter asserted. *See* Mil. R. Evid. 801(c).

The question remains, however, whether the military judge erred by permitting the court members to take SA Payne's notes with them into the deliberations room. In *United States v. Austin*, 35 M.J. 271, 276 (C.M.A. 1992), our superior court examined Rule for Courts-Martial 921(b) and held it was error to allow the court members to take a verbatim Article 32[3] transcript into deliberations. The court noted that the error was "not *per se* reversible error" but must be tested for prejudice. *Id*. at 277 n.6. Additionally, in *United States v. Ureta*, 44 M.J. 290, 299 (C.A.A.F. 1996), our superior court, citing *Austin*, found that, although the military judge erred by permitting court members to take the pretrial investigation hearing transcript into their deliberations, this error was harmless under the circumstances where the transcript was not the only evidence against the appellant in his general-court martial for rape and carnal knowledge.

[3] Article 32, UCMJ, 10 U.S.C. § 832.

We hold the military judge in this case abused his discretion and erred by providing the court members with Court Exhibit 1. *See Ureta*, 44 M.J. at 299; *Austin*, 35 M.J. at 276. However, testing for prejudice, we find this error was harmless. First, as noted above, the military judge instructed the court members to use Court Exhibit 1 for the limited purpose of impeachment. Second, the appellant, SA Payne, and HMA's mother, all testified about the contents of SA Payne's notes. Third, the defense called SA Payne during findings to testify about the pretext phone conversation and the government called him in rebuttal during findings. Fourth, Court Exhibit 1 contained information that supported both the government and the defense. Fifth, by its contents, Court Exhibit 1 worked to impeach the testimony of both the appellant and HMA's mother before the members. Sixth, SA Payne referred to his notes often during his testimony before the members and, therefore, they knew that in many respects SA Payne's testimony was the product of his memory being refreshed by his notes. Seventh, the notes contained nothing new that had not already been testified to by the witnesses in the case. Finally, unlike in *Austin*, SA Payne's notes were not the only substantive evidence of the appellant's guilt. There was an abundance of evidence corroborating HMA's testimony. Moreover, the appellant's former supervisor, Second Lieutenant Jerry Wagner, testified the appellant was an untruthful person. We find that, under the facts and circumstances of this case, the military judge's error was harmless and did not materially prejudice the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We have considered the appellant's remaining assignments of error and find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

APPENDIX

Heathers Mom

Na I didn't Touch her
I've got my

I'm sorry but I really didn't
she made up & I know.
That's the most wrong thing in the world.
Theres no way in hell I would do that.
I believe her.

I've got a friend in the room.
Jessica I was talking to her.

No No

I didn't do anything.

I understand
I woke her from a night mare.

She was all cryin

Miky - I guess the hole thing was
going on

Shirt told

Why did you just take off?
We all been drinkin and every thing
You need to go.

COURT Exhibit 1
Page Marked 532
Appellate Exhibit IX
Marked Page

I was drinking that night

Not that I can recall, I was drinking that night. Jessica can

it confuses me too.
it surprised the hell out of me.

I was
I thought she loved me to death
yea.

I couldn't do it though.

I might have but I don't remember doing it.

If I did it would have been an accident

I would never ever intentionally

Do you know how much
we'd been drinking the whole day
If I did
I. touched her but I didn't rape her.