UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JUSTIN N. LEDBETTER
United States Air Force

ACM 36727

23 July 2008

Sentence adjudged 23 February 2006 by GCM convened at Hurlburt Field, Florida. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted[1] of one charge involving one specification of assault on a child under the age of 16 and one specification of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The approved sentence consists of a dishonorable discharge, confinement for 30 months, reduction to E-1, and total forfeitures[2].

The two issues on appeal are whether the military judge erred when he permitted the prosecution to introduce residual hearsay statements by the victim, BXA; and whether

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[1] With minor exceptions to the specifications.
[2] Adjudged forfeitures were suspended for six months and mandatory forfeitures were waived for six months.

the military judge erred by failing to determine whether BXA was unavailable to testify and by ruling that statements of BXA to a Family Services counselor from the Florida Department Children and Families (DCF), and a foster parent of BXA were non-testimonial hearsay, thereby violating the 6th Amendment[3] confrontation clause.

Background

BXA was the step-daughter of the appellant. She was three years old at the time of the offenses, and four at the time of trial. The appellant was convicted of physically abusing BXA during 2004.

The trial defense counsel made a motion to suppress out-of-court statements made by BXA to five individuals. After receiving evidence on the motion, the military judge granted the defense motion. Specifically, the military judge found that three (two at issue) of the statements were non-testimonial. Those statements were made to TM, BXA's foster mother, and RC, a DCF worker who was transporting BXA to a day care facility when she made the statement at issue. The military judge further found that the statements showed particularized guarantees of trustworthiness. But the military judge did not find BXA unavailable, and did not find the statements to TM and RC more probative than other evidence procurable. In issuing his ruling, the military judged stated the court would grant reconsideration on the admissibility of BXA's statements if "the government provides sufficient evidence that [BXA] is unavailable to testify".

During trial, BXA was called to testify and was cross-examined by trial defense counsel. Cross-examination ended with the trial defense counsel saying she was not going to ask BXA any more questions, and asking her if that was a "good idea". At that point, BXA stated she wanted to depart the courtroom.

The government trial counsel requested that the military judge reconsider his ruling specifically with reference to the statements made to TM and RC. He specifically asked the statements be admitted for the limited purpose of establishing a "timeframe" of the offenses charged. The trial defense counsel objected. The military judge stated that he had previously found the statements reliable but at the time there was more probative evidence the government could acquire without admitting the statements. Further, he re-stated the statements in question were non-testimonial. The military found that BXA's focus was waning and she appeared reluctant to testify. He then ruled BXA's statements to RC and TM were more probative on the point for which they were being offered, "namely a specific period of time that the alleged assault or assaults occurred" and were admissible under Mil. R. Evid. 807.

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[3] U.S. CONST. amend VI.

Discussion

We review a military judge's ruling on a motion to suppress under an abuse of discretion standard, considering the evidence in the light most favorable to the prevailing party. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintinilla*, 63 M.J. 29, 35 (C.A.A.F. 2006).

The military judge made detailed findings that the statements to TM and RC were reliable, had guarantees of trustworthiness, were non-testimonial and eventually were more probative than other available evidence. The appellate defense counsel specifically argues that the trustworthiness is irrelevant under the circumstances of this case. The crux of the argument is that the BXA's statements were not more probative than other evidence which could be procured. The military judge did not abuse his discretion in admitting the statements made by BXA to TM and RC for the limited purpose of establishing a timeframe for the offenses.

Even assuming arguendo, the admission of the statements as to the specific timeframe was in error, the error is harmless. In a judge alone trial when the issue of plain error is involved, the appellant faces a "particularly high hurdle". *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). A military judge is assumed to know the law and apply it correctly. *Id.* He is presumed to have filtered out the inadmissible evidence. *Id.* The statements made by the victim established that she had been taken to the hospital as a result of the last assault. Here the statements, in and of themselves, had little impact and were offered on a minor point.

The second issue, which dealt with the same statements, is that the military judge made no finding of non-availability as to BXA, and that he erred when he found the statements to be non-testimonial, thereby violating the Sixth Amendment confrontation clause. The trial defense counsel had the opportunity to and did cross-examine BXA. The confrontation clause has been met. Further, the confrontation clause guarantees only "an opportunity for effective cross-examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish". *United States v. Casteel*, 45 M.J. 379, 382 (C.A.A.F. 1996) (citing *United States v. Owens,* 484 U.S. 554, 559 (1988)). This issue is without merit. Again, if the admission was error, the error is harmless beyond a reasonable doubt considering the other overwhelming evidence presented at trial.

Conclusion

The findings and the 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.

Judge JACKSON did not participate.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court