UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ROBERT P. WALLS
United States Air Force

ACM 38078

29 July 2013

Sentence adjudged 01 October 2011 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Scott E. Harding.

Approved Sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $974.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Lieutenant Colonel Martin J. Hindel; and Gerald R. Bruce, Esquire.

Before

ROAN, HELGET, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of assault consummated by a battery,[1] one specification of willfully disobeying a superior commissioned officer, one specification of willfully disobeying a noncommissioned officer, and one specification of obstructing justice, in violation of Articles 90, 91, 128, and 134, UCMJ, 10 U.S.C. §§

[1] The appellant was acquitted of two specifications of aggravated assault with a means likely to cause death or grievous bodily harm, but found guilty of the lesser included offense of assault consummated by a battery.

890, 891, 928, 934.[2] The panel members sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved only forfeitures of $974 pay per month for four months and the remaining sentence as adjudged.

Before this Court, the appellant alleges the following issue: Whether the military judge erred by allowing a prosecution expert witness to testify over defense objection without a sufficient showing that the basis for her expert opinions was reliable. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The appellant was convicted, among other offenses, of assault consummated by a battery for choking two different female Airmen, each of whom he was in a relationship with at the time of the alleged assaults.

The first alleged victim, Senior Airman (SrA) GG (formerly GR), dated the appellant on and off from approximately March 2009 to June 2010. She testified about three instances during this period when the appellant assaulted her by using his hands to choke her. However, she did not initially report the assaults to the authorities. There were also periods where she broke off her relationship with the appellant but eventually would resume their relationship. She ultimately reported the assaults upon receiving an e-mail from Airman First Class (A1C) AC alleging that the appellant had also assaulted her.

The appellant's friend, A1C Andrew Juliano, testified that, on 23 January 2011, A1C AC came to his house after an alleged confrontation with the appellant. She was noticeably shaken, scared, and confused. A1C AC said that she and the appellant were at his apartment when the appellant suddenly snapped and threw her up against the wall, choked her, and threw an X-box controller at her. After Security Forces personnel responded, A1C Juliano and his wife escorted A1C AC to the Cheyenne Police Department where she made a formal complaint. The local police took photographs of A1C AC which showed some "red marks" on her neck.

At trial, A1C AC testified contrary to her original statements and said that the appellant did not choke her but instead had restrained her when she became physically aggressive with him. As a result of this incident, A1C AC broke up with the appellant but they resumed their relationship a couple of weeks later. In February 2011, they were engaged and remained together during the trial.

[2] The appellant was acquitted of one specification of stalking and one specification of assault consummated by a battery.

Expert Testimony

During its case in chief, over defense objection, the Government presented expert testimony from Dr. Veronique N. Valliere, on the areas of victim recantation, delayed reporting, and victims' tendency to stay in the relationship. In an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing on this issue, the Government proferred that Dr. Valliere would testify about counterintuitive behaviors by victims of domestic violence. Specific areas would include delayed or staggered reporting, returning to the offender, recantation, potential aggressiveness towards an offender, and the concepts of fear and dynamics of fear in a domestic violence relationship. The Government also wanted Dr. Valliere to explain what behaviors she saw by the victims in this case that might be consistent with those of a victim of a domestic violence relationship; however, the military judge would not permit this testimony. The trial defense counsel expressed concerns about the empirical basis for Dr. Valliere's testimony and wanted to know what studies she was relying on.

Dr. Valliere testified at the Article 39(a), UCMJ, hearing. She stated that she obtained her doctorate degree in clinical psychology in 1993 and, since 2003, maintained two primary practices. She described her first practice as an out-patient violent offender's practice for the treatment of domestic violence offenders, community violence offenders, and child abuse and sexual offenders. She described the second as a clinical practice for victims of abuse and general mental health services, treating children three years and older. She stated she had been specialized in domestic violence since 1997 and that she supervised four clinical technicians.

In response to trial defense counsel's questioning on the science she would rely upon to form her opinion, Dr. Valliere did not cite specific sources but generally referred to crime statistics, literature, and numerous empirically-based studies on "police reports, known victims, and victim interviews, and [victim] self-report." She also stated that the "literature is so steeped in the assumption that victim recantation happens" and that "studies are built on that assumption." Dr. Valliere indicated that there was not just one landmark study that she was relying on, but a series of continuous studies that had occurred over several decades. She stated that the victim behaviors she would opine upon had been peer-reviewed and were broadly accepted in clinical practice.

The military judge then examined Dr. Valliere. In response to his questions about the history of the study of domestic violence and victim behavior, Dr. Valliere indicated that "studies of trauma and people's reaction to trauma have existed for quite some time," but that in the 1980s the focus began on what was known as "battered spouse syndrome," and that the science had evolved since then. She described the initial methodology used to be mostly clinical data from self-reporting victims, but that it shifted to conducting anonymous surveys, as well as studying reports of convictions and how couples reacted during violent events. She stated a majority of the studies now came from the clinical

field, including "surveying victims, giving questionnaires, [and] self-measurement techniques." She explained that the studies focused on, "[f]or example, not just on gathering statistics of prevalence, but how victims cope, what the interactional dynamics are . . . [and] what factors influence trauma."

In response to the military judge inquiring about the behaviors that were identified in the studies by known victims of domestic violence, Dr. Valliere indicated that the research showed it was not atypical for a victim to fail to report, minimize or deny certain events occurred, or return to the offender. She stated victims tended to report when there was some sort of triggering event (like fear for a significant other), when there had been an escalation of violence, or when there was a need to be safe from the offender. She further stated that victims tended to be influenced by dependency on the offender, felt guilt for the offense and sympathy for the offender. As for offenders, she stated the research showed that there were certain tactics they would use to influence the victim, such as intimidation, love, persuasion, willingness to change their own behavior, and using children to influence the victim. Dr. Valliere indicated that she would be able to explain to the members certain false assumptions concerning expectations that a victim will immediately leave an abuser after an event, will report the event right away to the police, or would never recant a true allegation.

In addition to the various studies, Dr. Valliere testified that she was also relying on her own clinical experiences involving her treatment of hundreds of victims and offenders.

Finding her testimony would be reliable and relevant, the military judge ruled that Dr. Valliere could testify concerning victim recantation, delayed reporting, and the tendency of victims to either stay in a relationship or return to the offender. However, he did not permit Dr. Valliere to render an opinion about what occurred in this case.

Discussion

We review a military judge's decision regarding an expert witness for abuse of discretion. *United States v. Ellis*, 68 M.J. 341 (C.A.A.F. 2010) (citing *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005)). An abuse of discretion occurs when: (1) the findings of fact upon predicating the ruling are not supported by the evidence of record; (2) incorrect legal principles were used; or (3) an application of the correct legal principles to the facts is clearly unreasonable. *Ellis*, 68 M.J. at 344 (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). The "standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be "arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). Indeed, "[w]hen judicial action is taken in a discretionary matter, such action can not be set aside by a reviewing court unless it has a

definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *Ellis*, 68 M.J. at 344.

Mil. R. Evid. 702, which governs testimony by expert witnesses, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"Thus, an 'expert' witness may testify if he or she is qualified and testimony in his or her area of knowledge would be helpful." *Billings*, at 166.

Our superior court has extrapolated six factors a proponent must establish to qualify expert testimony under Mil. R. Evid. 702: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) that the probative value of the expert's testimony outweighs the other considerations outlined in Mil. R. Evid. 403. *Id*. (citing *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)).

Additionally, two months after *Houser*, the Supreme Court held that the trial judge serves as the gatekeeper and must make a preliminary assessment of whether the reasoning or methodology supporting an expert's testimony is scientifically sound, and whether the reasoning or the methodology properly applies to the facts at issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-593, 597 (1993). To help determine whether scientific evidence meets the requirements for reliability and relevance, the Supreme Court provided six factors to consider before ruling on the admissibility of expert evidence: "(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate in using a particular scientific technique and the standards controlling the technique's operation; (4) the existence and maintenance of standards controlling the technique's operation; (5) the degree of acceptance within the relevant scientific community; and (6) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Id.* at 593-95.

"[A]lthough *Houser* was decided before *Daubert*, the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance reliability." *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999).

Additionally, the Supreme Court has held that the trial judge's gatekeeping function applies to all types of expert testimony, even if it is characterized as technical or other specialized knowledge, rather than scientific knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1990). The *Kumho* Court further held that the trial judge may consider one or more of the specific *Daubert* factors when doing so will help determine the testimony's reliability. *Id*. The Court also noted that the trial judge must have considerable leeway in deciding how to go about determining whether expert testimony is reliable. *Id*. at 152. In fact, the Court held that "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id*. at 150 (citation omitted).

We find that there was a reliable basis for Dr. Valliere's expert opinions on recantation, delayed reporting, and the tendency of victims to stay in a relationship. Although Dr. Valliere did not specifically identify all of the studies she was relying upon, she did make it clear throughout her testimony that her opinions were based on decades' worth of a specialized body of literature and the culmination of several studies conducted in these areas. She indicated that some of the studies were empirically based and published in various journals, one of which she provided to the trial defense counsel. Furthermore, she also drew from her specialized experience in domestic violence since 1997 and her primary practices with violent offenders as well as victims of abuse.

Although the military judge did not specifically address each *Daubert* factor in his ruling, he nevertheless discussed the methodology used in studying domestic violence and the acceptability of these studies by clinical psychologists, who rely on the literature in assessing and diagnosing patients as well as in treating those patients.[3] Further, the military judge determined that the expert's testimony would be helpful to the fact finder. Finally, as mentioned above, the military judge did not permit the expert to render any opinion as to what took place in this case. We do not find the military judge's ruling "arbitrary, fanciful, clearly unreasonable, or clearly erroneous," *McElhaney*, 54 M.J. at 130, and we are not firmly convinced there was a clear error of judgment in his conclusion. *Ellis*, 68 M.J. at 344. Accordingly, we find that the military judge fulfilled his "gatekeeping" responsibilities and did not abuse his discretion in permitting the expert testimony of Dr. Valliere.

[3] Concerning the third *Daubert* factor – the potential error rate – Dr. Valliere testified that it did not apply in her field of study as it would be inappropriate to purposely subject an individual to domestic violence in order to measure her reaction.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[4] Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] We note that the promulgating General Court-Martial Order (CMO) No. 4 in this case incorrectly states that the sentence was adjudged by only officer members when, in fact, the appellant was sentenced by a panel composed of both officer and enlisted members. Accordingly, we order a corrected CMO.