UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CALVIN J. WHEELER, JR.
United States Air Force

ACM 36796

16 May 2008

Sentence adjudged 24 February 2006 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Steven Hatfield.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Judge:

The appellant was arraigned on a charge and specification of rape and adultery, in violation of Articles 120 & 134 UCMJ, 10 U.S.C. §§ 920 & 934, respectively. Contrary to his plea, a panel of officers convicted him, as charged. The panel sentenced him to a dishonorable discharge, confinement for 2 years, total forfeiture of pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts two errors. Having reviewed the briefs from both parties and reversing on the first of these alleged errors, we address only that alleged error below. In addition, we discuss the post-trial delays in this case.

Background

The appellant and the victim were friends. Over the course of several years, and two duty locations, they socialized occasionally, but regularly. The appellant, married but separated, sought more from the relationship. The victim, engaged to another, simply wanted to remain as friends.

On the day in question the victim and the appellant, both stationed at Osan AB, Korea, socialized at a barbeque hosted by a mutual friend. After an afternoon and evening of drinking by the appellant, he joined the victim in a cab ride back to the installation. Upon arriving at her dormitory, he asked if he could stay the night in her room. She agreed. Sometime during the course of the evening, the appellant had sex with the victim. She testified that it was by force and without consent. At trial, the appellant disputed this claim, primarily by attacking the credibility of the victim.

As their final witness, the prosecution called a psychologist, Dr. M, to testify. In establishing the expert's credentials, the prosecution highlighted that the expert had done extensive treatment of both victims and offenders of sexual assault. The psychologist testified that he had reviewed the record of investigation, medical records of the victim, and, in addition to conducting testing on the victim, he had met with her for three and a half hours. Dr. M then testified about the common characteristic of sexual assault. After commenting that this case was "most uncommon [because] . . . it was reported," he was asked if he had an opinion about the "possibility of false reporting in this case?" His answer was "[i]t doesn't fit the profile of what I've seen and what the literature suggests with someone who is a false reporter." Although there was no objection to this question, the trial counsel followed the response with this comment, "Well, let me stop you there real quick before you go on. You're not here to testify that what Sergeant Stevens is saying is true or not, correct?" Despite this comment and suggestion by the trial counsel that the testimony was only "profile" testimony, the trial counsel then went on to ask, "So, why do you – have you been able to at least clinically rule out false reporting?" In response to this question the expert went on to describe his research and other research projects that provide "good information in this area" and "there are distinct personality traits that's often consistent, at least in my own work, is quite consistent with false reporters."

After extensive cross examination covering the victim's personality, the impact of alcohol and reasons for false reports, the trial counsel asked the following question of Dr. M on redirect: "on cross-examination, trial defense counsel brought up about the false reporting. Again, have you ruled out false reporting just based on – I mean, clinically,

what you're able to assess based on the information that you've been provided?" Dr. M's response was, "From the information that I have, and from my assessment, and – I think – you know – [defense counsel is] correct in saying you can never fully rule out something. But, we know that only 2% to 4% is generally kind of the standard that mental health experts identify. 2% to 4% are false reporters. A woman is much, much, much more likely not to report than to false report." Again, trial counsel follows this answer with the comment that he is "not asking you to testify if she's a truthful person, because you don't know her. And I'm not asking you to testify whether or not she's telling the truth in this instance, because that is unknowable."

This time on cross-examination, the trial defense counsel sought to counter the percentage testimony with a contrary study that suggests false reporting in 41% of the cases. After the expert acknowledged the contrary study on cross, the trial counsel asked one question on redirect, "Doctor M, what is the – in the widely – in the scientific community – in your field of expertise, what is the accepted rate of percentage of false reporting?" The expert answered by explaining that the other study has "widely been contested by experts" and 2% to 4% is the percentage "generally accepted by experts."

Finally, the members were given the opportunity to ask questions. One of the members asked why this expert accepts the 2-4% study. In response to this question, the expert replied that this percentage is not *his* opinion but the "standard in the country now." After a follow up question by the member, Dr. M clarified that the 2-4% is the standard accepted by the American Psychological Association. After one final question on the impact of trauma and false reporting, the prosecution rested their case.

Throughout this testimony, the military judge never cautioned the panel on the use of this testimony or in any way limited this testimony before the members. Prior to findings argument, the military judge only gave the standard Judge's Deskbook instruction on expert testimony and credibility of witnesses. Neither party asked for additional instructions. In final arguments both agreed that this case centered on the credibility of the victim and each made passing reference to the percentage testimony.

Discussion

The appellant argues that the testimony of Dr. M was impermissible because it constituted "human lie detector" testimony in violation of the rules of evidence and improperly invaded the province of the jury. There being no objection to this testimony, the appellant also argues that the error constituted plain error to the substantial prejudice of the appellant. In support of their position, the appellant relies extensively on *United States v. Brooks*, 64 M.J. 325 (C.A.A.F 2007). [1]

[1] We do note that the *Brooks* decision was released after the appellant's trial but we consider it controlling.

It is well established in the area of expert testimony that the expert may not act as a human lie detector for a court-martial. Our superior court has long held that experts are not permitted to opine as to the credibility or believability of victims or other witnesses. *See e.g., United States v. Harrison*, 31 M.J. 330, 332 (C.M.A.1990) ("It is impermissible for an expert to testify about his or her belief that a child is telling the truth regarding an alleged incident of sexual abuse."; *United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988) ("[C]hild-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses.")

The rules of evidence only permit experts to testify about matters within his or her area of expertise where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702. But "an expert may not testify regarding the credibility or believability of a victim, or 'opine as to the guilt or innocence of an accused.'" *United States v. Cacy*, 43 M.J. 214, 217 (C.A.A.F. 1995) (quoting *United States v. Suarez*, 35 M.J. 374, 376 (C.M.A. 1992)); *see United States v. Foster*, 64 M.J. 331, 334 (C.A.A.F. 2007). Such an opinion violates Mil. R. Evid. 608(a)'s limits on character evidence and exceeds the scope of the witness's expertise.

Finally, looking specifically to the statistical evidence presented in this case, we are bound by our superior court's recent decision in *Brooks*. In *Brooks*, the Court was confronted with almost identical expert testimony which referenced the same statistical studies. In *Brooks*, the Court, after finding that the testimony did not constitute permissible "profile" testimony stated, "[t]his testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony. This testimony goes directly to the core issue of the victim's credibility and truthfulness. We conclude that admitting this testimony was error, and that the error was plain and obvious." *Brooks*, 64 M.J. at 329; *see United States v. Kasper*, 58 M.J. 314, 319 (C.A.A.F. 2003); *Powell v. State*, 527 A.2d 276, 280 (Del. 1987). Consistent with *Brooks*, we also find the testimony was error and the error was plain and obvious.

Having found that the testimony constituted plain error, we turn to the question of whether the appellant's substantial rights materially prejudiced. *See United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006); *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). In *Brooks*, the Court decided that because the case "hinged on the victim's credibility" and there were "no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony" the statistical testimony "may have had particular impact upon the pivotal credibility issue and ultimately the question of guilt." *Brooks*, 64 M.J. at 330. In our test for prejudice, we looked to the probability that the members considered this testimony significant, the judge's instructions, or lack thereof, on their use of this statistical evidence, and the fact that the case hinged on the credibility of the victim.

In this case, five different court members asked the expert questions, all of which centered on credibility of the victim's story and two of which went squarely to his testimony on statistical probability that the victim made a false report. The significance of these court member questions is further highlighted by the fact that they came at the conclusion of the prosecution's case. The questions themselves clearly reflect that the members had concerns about the credibility of the victim. Second, we find that the judge's failure to give specific guidance as to the permissible bounds of this testimony to be significant. In light of the amount of time focused on this testimony and the member's direct questions on the statistical probabilities of false reporting, the judge's failure to give a limiting instruction is significant. We would note that we disagree with the appellee's argument that trial counsel's admonishment to the members prevented error. Finally, we look to the entire case in reaching the conclusion that the appellant's fate squarely hinged on the members' assessment of the credibility of the victim.

Based upon the above assessment, we reach the same conclusion as our superior court in *Brooks*, with respect to the charge of rape. Here, "because this credibility quantification testimony invaded the province of the members, we cannot say with any confidence that the members were not impermissibly swayed and thus that they properly performed their duty to weigh admissible evidence and assess credibility." *Id.* The appellant had the "substantial right . . . to have the members decide the ultimate issue . . . without the members viewing [the victim's] credibility through the filter of an expert's view of the victim's credibility. In this case, admitting the expert testimony quantifying the victim's credibility was plain error." *Id.* Therefore, we find prejudicial error as to the rape charge.

On the charge of adultery, the only contested issue was whether the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. We do not believe that Dr. M's testimony was relevant to that question and therefore we do not find that the appellant was materially prejudiced as to that charge.

Remaining Issue

It has been over 800 days since the appellant's sentence was announced. In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), our superior court established that a presumption of unreasonable post-trial delay exists when our Court fails to complete review of a case within a total of 23 months (690 days) of trial and with 18 months (540 days) of being docketed with this Court.[2] This presumption of unreasonable delay is viewed as satisfying the first *Barker* factor and applies whether or not the appellant was sentenced to or serving confinement.[3] This presumption only serves to trigger the four-part due process *Barker* analysis -- not resolve it. *United States*

[2] This presumption applies only to those cases docketed with this Court after 11 Jun 06.
[3] *Barker v. Wingo*, 407 U.S. 514 (1972)

v. Young, 64 M.J. 404, 408-09 (C.A.A.F. 2007). The government can rebut the presumption by showing the delay was not unreasonable.

The due process analysis involves the consideration and balancing of the four factors set forth in *Barker*: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) the prejudice to the appellant. *Moreno*, 63 M.J. at 135. Each factor is analyzed and balanced to determine if it favors the government or the appellant. *Moreno*, 63 M.J. at 136. No single factor is necessarily dispositive. *Id.* If this analysis leads to the conclusion that the appellant's due process right to a speedy post-trial review has been violated, "we grant relief unless this court is convinced beyond a reasonable doubt that the constitutional error is harmless." *See Young*, 64 M.J. at 409 (quoting *United States v. Toohey*, 63 M.J. 353, 363 (C.A.A.F. 2006)). Issues of due process and whether constitutional error is harmless beyond a reasonable doubt are reviewed de novo. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006).

Under *Moreno* the entire appellate process is expected to be completed in no more than 690 days vice the over 800 days it took in this case. We note in this case that there were two periods of time that took longer than prescribed. First, the convening authority took 140 days vice 120 days to take action and second, this Court took 651 days vice 540 days to complete our review.

With respect to the first period of time we find it significant that the convening authority's action was delayed in direct response to the convening authority seeking further guidance from his SJA in response to the defense counsel's post-trial submission. Considering the extra time taken in response to defense's plea to the convening authority to carefully consider this case, we do not believe the appellant has shown any unreasonableness or prejudice regarding this period of time.[4]

The second post-trial delay involves the 651 days between docketing with this Court (4 August 2006) and this Court's decision (15 May 2008). During this time period, the appellant's brief was filed, after eleven enlargements of time, totaling 522 days, on 8 January 2008. The government then filed its reply brief 62 days after the appellant's brief was filed. This Court then took only 66 days to issue an opinion.

The numerous enlargements by the defense that delayed the appellant's case for almost the entire time period prescribed for our review by *Moreno* is problematic. This is particularly apparent when assigned counsel delayed filing his brief for five additional weeks, towards the end of the delay period, to attend Squadron Officer School. Both Appellate Government and this Court demonstrated exceptional diligence in processing

[4] Because the "action phase" of this case is not governed by the *Moreno* standard, we have not applied the presumption of unreasonableness in regards to this period of time.

this case once the appellant filed his brief. Despite the efforts by both the government and this Court, for purposes of this case, we will assume the government bears some responsibility for the appellant counsel's failure to file his brief in a more timely fashion. *See United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) (holding that an appellant will not be held responsible for the lack of institutional vigilance administered by a service court of criminal appeals); *see also Moreno*, 63 M.J. at 137 (stating that appellate counsel caseloads are "management and administrative priorities . . . subject to the administrative control of the Government.").

Having assumed that the government bears some responsibility for the delay in the appellate review of this case, we then look to see if the appellant made any assertions or requests for expedited review. He has made no requests for expedited review. We find this particularly significant in light of the fact that his brief before this Court was filed a mere three weeks before the *Moreno* prescribed 18 months had elapsed. Finally, we note that the appellant has made no claim of prejudice resulting from the delays in the post trial processing of his case.[5] Therefore, after weighing the four *Barker* factors, we conclude that the appellant has not suffered a *Barker*-type post-trial due process violation. Having concluded that no violation occurred, we grant no relief on the issue of post-trial processing delays.

Conclusion

The finding as to Charge I and its specification is hereby set aside. A rehearing on Charge I and its specification is authorized. The finding as to Charge II and its specification is herby affirmed as 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). The findings as modified are approved.

In light of our action on the findings, we cannot reliably determine what sentence would have been imposed if the error had not occurred. *See United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006). The sentence is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority.

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[5] While we note this conviction required the appellant to register as a sex offender, the appellant has made no showing to the Court that he in fact has so registered or claimed any prejudice in this regard. We also note that in light of the period of confinement imposed, the appellant has only recently been released from confinement; making his registration an issue.

A rehearing, on Charge I and its specification, as well as the sentence, may be ordered.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court