

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Justin W. DEANS
Hospitalman (E-3), U. S. Navy**

NMCCA 200400791

Decided 28 February 2007

Sentence adjudged 1 March 2003. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

Capt PETER H. GRIESCH, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT DEBORAH S. MAYER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of rape in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for forty-eight months, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's three assignments of error,¹ and the Government's answer. We

¹ I. THE MILITARY JUDGE ERRED BY PROHIBITING THE DEFENSE FROM QUESTIONING HA [S] ABOUT THE NUMBER OF SEXUAL PARTNERS SHE HAD IN THE PAST. ADDITIONALLY, THE MILITARY JUDGE ERRED BY ADMITTING THE MEDICAL EVIDENCE OVER OBJECTION BY THE DEFENSE.

II. THE MILITARY JUDGE ERRED BY PROHIBITING THE DEFENSE FROM INTRODUCING THE THEORY THAT HA [S]'S VAGINAL INJURIES WERE FROM HER USE OF A DILDO.

conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Victim's Prior Sexual History

MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), sometimes known as the "rape shield law," was intended to "safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." *Id.*, Analysis at A22-36. It is a rule of exclusion, designed to protect alleged victims of sexual offenses from undue examination and cross-examination of their sexual history. *United States v. Banker*, 60 M.J. 216, 221 (C.A.A.F. 2004). It is often invoked to prevent the accused from introducing evidence of the sexual history of the alleged victim, but its general rape-shield provisions are applicable to both parties. *Id.* at 223.

MILITARY RULE OF EVIDENCE 412 is not an absolute prohibition, however, because it provides for three exceptions. Evidence of specific instances of sexual behavior by the alleged victim is admissible to prove that a person other than the accused was the source of the semen, injury, or other physical evidence. MIL. R. EVID. 412(b)(1)(A). Evidence of specific instances of sexual behavior by the alleged victim with the accused may be offered by the accused to prove consent, or by the prosecution. MIL. R. EVID. 412(b)(1)(B). Finally, evidence the exclusion of which would violate the constitutional rights of the accused is also admissible. MIL. R. EVID. 412(b)(1)(C). When a party offers evidence under one of these exceptions, the military judge must conduct a closed hearing, on the basis of which the military judge must apply a two-part process of review to determine its admissibility. First, the military judge determines whether the evidence is relevant under MILITARY RULE OF EVIDENCE 401. If the military judge determines the evidence to be relevant, the judge conducts a balancing test to determine whether its probative value outweighs the danger of unfair prejudice. MIL. R. EVID. 412(c)(2) and (c)(3). *See Banker*, 60 M.J. at 222. In this context, "prejudice" refers, in part, to prejudice to the privacy interests of the alleged victim. *Banker*, 60 M.J. at 223.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly

III. THE MILITARY JUDGE ERRED BY PROHIBITING THE DEFENSE FROM QUESTIONING HA [S] ABOUT HER PREVIOUS EXPERIENCES WITH SEXUAL ASSAULT AND SEXUAL ASSAULT TRAINING.

applies the law. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). The test for nonconstitutional error is whether the error had a substantial influence on the findings. *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001). We determine prejudice from an erroneous evidentiary ruling using a four-part test: (1) the strength of the prosecution case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence at issue. *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985).

At trial, the appellant did not contest the allegation that he had had sex with the alleged victim at the time and place alleged. Rather, he posited that the sex was consensual. He sought permission to question the alleged victim as to the number of sexual partners she had prior to the night in question. The military judge found such information irrelevant to the only issue at trial: whether the victim consented to sexual intercourse with the appellant. The military judge further found that the proposed evidence was barred by MILITARY RULE OF EVIDENCE 412. We agree, and find that the military judge did not abuse his discretion in excluding the evidence. This type of evidence is exactly what Rule 412 prohibits. Even if it was relevant to a matter at issue (which it was not), the prejudice to the privacy interests of the victim was much greater than any possible relevance. Introduction of this evidence would have served no purpose other than to paint the victim as promiscuous.

The appellant also argued that there was an inconsistency between the victim's actual sexual history and the number of sexual partners listed in the emergency room report and other sources. He claims this was relevant to show the victim's lack of truthfulness. After an evidentiary hearing, the military judge found there was no reliable evidence of inconsistent statements. Our review of the record supports the military judge's findings of fact in that regard. Thus, the suggested line of inquiry would not impact the victim's veracity, and the third exception to the rule of exclusion is not raised by the evidence of record. MIL. R. EVID. 412(b)(1)(C).

In any event, the number of sexual partners the victim may have had in the past was not relevant as to the injuries she received at the appellant's hands, nor was it relevant to the medical treatment she sought for those injuries. It was not relevant to the issue of consent. The emergency room medical records were admitted along with the testimony of the attending physician and nurse. The appellant's counsel did not ask those medical witnesses if the number of sexual partners was relevant in this case to the victim's medical treatment. The medical records were properly admitted under MILITARY RULE OF EVIDENCE 803(4), with the improper matter redacted.

Injuries from Dildo

On appeal, the appellant claims error where the military judge did not permit the defense from introducing a theory that the victim's injuries were caused by her use of a dildo. The examining doctor testified that the dildo in question could not have caused the victim's injuries. The military judge stated that had the doctor testified that the dildo could have caused the injuries, he would have allowed the defense to pursue the theory before the members. The defense presented no evidence on the issue prior to the military judge's ruling, and has never presented any evidence that the victim's injuries could have been caused by the dildo.

Significantly, the defense affirmatively abandoned the tactic at trial. The appellant's civilian defense counsel told the trial court that the defense was not going forward with the issue of whether the dildo could have caused the injuries. The appellant himself testified that the victim's vaginal tears and the bruises on her thighs must have been caused by him. Appellate defense counsel did not inform this Court of these important facts. The issue was obviously and clearly waived at trial. The military judge did not abuse his discretion.

We admonish counsel that their duty of candor to the tribunal requires them to inform this Court of adverse facts and authorities when presenting arguments.²

Childhood Sexual Abuse

The victim in this case was sexually abused as a child. Her stepfather was convicted of the crime. The victim received counseling for the trauma she suffered at his hands. The defense wanted to offer this evidence to show that she would have therefore been given training on resisting rape. The military judge ruled against the appellant at trial. The appellant claims on appeal that the victim's behavior on the night in question was inconsistent with someone previously assaulted who had undergone rape prevention training as a result. The defense presented no expert on how such a double victim would be expected to act. The military judge did allow the defense to cross-examine the victim on whether she screamed, the thinness of the walls in her barracks room, and her Navy training on how to resist sexual assault. The defense also presented several witnesses to illustrate how sound could travel through the thin barracks walls, and that no screaming had been heard outside the victim's room.

² While set forth in summary format, this assignment of error was not noted as an issue raised by counsel pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Even if it had been, counsel's duty of candor does not change. We note further that the dildo itself was admitted into evidence. The military judge permitted the defense to show that the victim had displayed and discussed the dildo at a party about one week before the rape, and discussed it with the appellant during a visit two days prior to the rape.

The evidence of the victim's childhood trauma would serve only to embarrass and harass the victim. No proper purpose would have been served by doing so. All the information the defense sought, particularly the victim's knowledge of recommended methods of resisting rape, was put before the members through the testimony of the victim and others. The excluded evidence was cumulative, and clearly more prejudicial to the victim than probative of any matter helpful to the defense. The military judge did not abuse his discretion by excluding it.

Conclusion

Accordingly, the findings and the sentence as approved by the convening authority are affirmed.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court