

**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.

**Donald A. DOHRN
Chief Machinist's Mate (E-7), U.S. Navy**

NMCCA 200301615

Decided 26 June 2007

Sentence adjudged 5 June 2002. Military Judge: B.W. Mackenzie.
Staff Judge Advocate's Recommendation: LT B. Keith, JAGC, USN.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial
convened by Commanding Officer, USS EMORY S. LAND (AS 39).

Maj CHARLES R. ZELNIS, USMC, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel
LT ROSS W. WEILAND, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of sexual harassment in violation of a general regulation and of two specifications of indecent assault, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. He was sentenced to be reduced in rank to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

Before this court, the appellant has raised three assignments of error: (1) that the military judge improperly limited evidence pertaining to one of the alleged victim's emotional state near the time of the crime; (2) that his trial defense counsel was ineffective in not obtaining an order to compel production of certain witnesses; and (3) that the military judge abused his discretion by excluding a videotape of the crime scene and by prohibiting testimony of certain eyewitnesses. The first assignment of error pertains to only Specification 1 of

Charge II, indecent assault.¹ The third assignment of error pertains to both indecent assault specifications.

We have carefully examined the record of trial, the appellant's three assignments of error, and the Government's response. We find merit in the appellant's first and third assignments of error, and determine that the guilty findings to indecent assault must be set aside. We conclude that the remaining findings are correct in law and fact, and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The two specifications of indecent assault that are challenged in this appeal involved personnel from USS EMORY S. LAND while on liberty at a popular bar, The Green House, in Marmaris, Turkey. Both assaults were similar in that the appellant allegedly in each case put his hands on the crotch area of a young junior enlisted woman.

The first incident allegedly occurred on 31 January 2002. Twenty-two year-old Quartermaster Third Class (QM3) N claimed that the appellant, who obviously had been drinking, came up to her in the bar, hugged her, and put his hands into her pants down to the pubic hair region. She slapped his hand and the appellant walked away. She did not immediately report the incident because she thought no one would believe her as she was just an E-4 and the appellant was a chief petty officer.

Similarly, Seaman Apprentice (SA) W claimed that on 1 February 2002, the appellant came up behind her in the same crowded bar, put his arm around her waist and twice rubbed her crotch area. Turning around, SA W saw the appellant turning to walk away. One of SA W's liberty party, Machinists Mate Second Class (MM2) G, saw SA W angrily backing away from the appellant, who had his hand outstretched towards SA W's body below her waistline. SA W was crying and very upset. Ten to fifteen minutes later, he took SA W over to the appellant and told the appellant that he needed to apologize to SA W. The appellant denied he had touched anyone. The appellant had, again, been drinking that evening.

The appellant denied both incidents. He did admit that he had been drinking both evenings. He also noted that he was disliked by many on the ship due to his abrasive leadership style.

¹ The second assignment of error is moot since it relates only to language in the Article 92 specification that was excepted out by the members. Therefore, we will not further address the second assignment of error.

Exclusion of Defense Evidence

The appellant complains on appeal that the military judge incorrectly excluded three types of evidence that were crucial to the defense:

- (1) Testimony related to the victim's emotional state in the bar on 1 February 2002;
- (2) Testimony from witnesses who were with the appellant on 1 February 2002 that they did not see any inappropriate touching of SA W by the appellant; and
- (3) A videotape showing the bar.

We will address each of these types of evidence *seriatim*.

Evidence of Victim's Emotional State

On motion of the trial counsel, the military judge excluded from the members' consideration evidence that SA W had a reason to be crying in the bar other than outrage at being assaulted by the appellant. Trial defense counsel wanted to introduce evidence that on the evening in question, SA W had been counseled by one or more chief petty officers (not the appellant) for dancing provocatively in the bar, causing her to cry. Trial defense counsel stated the evidence was not offered to show sexual behavior that would fall within the notice requirements of MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The evidence was simply offered to show why she was upset - a fact central to the prosecution's case. The prosecution presented several witnesses to the members to show that SA W was upset due to the alleged assault. The trial counsel argued in closing that she was upset because she had been assaulted. The appellant wanted to show that as a matter of fact, SA W was upset for another reason entirely.

MILITARY RULE OF EVIDENCE 412, 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). Generally excluded under the rule is (1) "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" and (2) "[e]vidence offered to prove any alleged victim's predisposition." MIL. R. EVID. 412(a).

MILITARY RULE OF EVIDENCE 412 is not an absolute prohibition, however, because it provides for three exceptions. Pertinent to this case is the third exception, which allows the admission of

relevant "evidence the exclusion of which would violate the constitutional rights of the accused." MIL. R. EVID. 412(b)(1)(C). "This exception addresses an accused's Sixth Amendment right of confrontation and Fifth Amendment right to a fair trial. *Banker*, 60 M.J. at 221 (citing WEINSTEIN'S FEDERAL EVIDENCE, § 412.03[4][a] (2d. ed 2003)).

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. If the military judge finds that the probative value of the evidence outweighs the danger of unfair prejudice, it is admissible at trial "to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. MIL. R. EVID. 412 (c)(3). In other words, the admission of the relevant evidence may be controlled by the military judge in order to minimize the intrusion on the victim while protecting the rights of the accused. A hearing was not held in this case.

The Court of Appeals for the Armed Forces has provided the following guidance for military judges to follow when the evidence is offered under the third exception to exclusion under MILITARY RULE OF EVIDENCE 412:

Although this two-part relevance-balance analysis is applicable to all three of the enumerated exceptions, evidence offered under the constitutionally required exception is subject to distinct analysis. Under M.R.E. 412(b)(1)(C), the accused has the right to present evidence that is "relevant, material, and favorable to his defense." *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)(citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 73 L. Ed. 2d 1193, 102 S. Ct. 3440(1982)). While the relevancy portion of this test is the same as that employed for the other two exceptions of the rule, if the evidence is relevant, the military judge must then decide if the evidence offered under the "constitutionally required" exception is material and favorable to the accused's defense, and thus whether it is "necessary." *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993)(Gierke, J., concurring).

In determining whether evidence is material, the military judge looks at "the importance of the issue

for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)(quoting *Dorsey*, 16 M.J. at 6).

After determining whether the evidence offered by the accused is relevant and material, the judge employs the M.R.E. 412 balancing test in determining whether the evidence is favorable to the accused's defense. While the term "favorable" may not lend itself to a specific definition, we believe that based on Supreme Court precedent and our own Court's rulings in this area, the term is synonymous with "vital." *Valenzuela-Bernal*, 458 U.S. at 867 (quoting *Washington v. Texas*, 388 U.S. 14, 16, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)); *Dorsey*, 16 M.J. at 8.

Banker, 60 M.J. at 222.

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 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). The test for constitutional error is "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003). 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). After performing this analysis, "we will reverse a case only if we determine that the finder of fact would have been influenced by the evidence that was erroneously omitted." *United States v. Roberson*, 65 M.J. 43, No. 06-0611, 2007 CAAF LEXIS 664, at 13 (C.A.A.F. May 22, 2007).

The evidence in question does not fall within the restrictions of MILITARY RULE OF EVIDENCE 412. The appellant did not offer the evidence to show that SA W consented to an act of sexual touching. He did not offer the evidence to show that she was predisposed to public sexual acts. The evidence was not offered to show that SA W was a loose woman who should not be protected by the law. There was no need to safeguard the victim against stereotypical thinking. *Cf.* M.C.M., App. 22 at A22-35. The appellant merely offered the evidence to show there was an

equally plausible alternate explanation for SA W's emotional state near in time and place to the alleged assault. This evidence was vital to the appellant's defense.

This evidence was clearly relevant - relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MIL. R. EVID. 401. It went to negate an important part of the prosecution's case. It was not a collateral matter. It pertained to causation of an objectively observable reaction of SA W. The danger of prejudice to the privacy interest of the alleged victim was small. The victim's voluntary actions in the bar and the resulting counseling and crying were public, in front of several hundred people, including residents of the host foreign nation and many shipmates from USS EMORY S. LAND. In addition, the military judge could have, as requested by the defense, limited the evidence to testimony that SA W had been counseled for her behavior in the bar and was upset due to that counseling, without going into the details of the reasons for that counseling. The military judge allowed no alternative evidence, other than that offered by the prosecution.²

The prosecution's case was not overwhelming. It was based largely on SA W's testimony, and that testimony included her statement that she did not actually see the appellant touch her and she had been drinking. She arguably had a motive to punish the appellant for his actions on the ship that required her to work harder than in the past. The defense case was reasonably strong. The appellant was a chief petty officer with a very impressive military record. He testified in his own behalf and denied the assault occurred. The evidence was material to negate a critical part of the prosecution's case - it was perhaps the only evidence that could be used to negate that part of the prosecution's case. It would be odd indeed if SA W testified that she had been sexually assaulted in a public place by a senior, a superior chief petty officer, but she was not upset. The quality of the defense evidence on this point was never questioned by the trial counsel or the military judge. We conclude that the military judge's decision to exclude any part of the proffered evidence was clearly erroneous, and that the appellant was prejudiced thereby. We believe that it is more likely than not that the members would have been influenced by the erroneously omitted evidence. Both sides should have been allowed to present their respective theories as to why the alleged victim was upset. The military judge's rulings denied the appellant a meaningful opportunity to present a complete defense.

² The military judge even prevented defense counsel from asking a witness whether SA W had been upset and crying in the bar prior to the alleged assault, without reference to her dancing or to her subsequent counseling. Despite the fact that this question would in no way reference SA W's sexual behavior or predisposition, the military judge found that such evidence was excludable under MILITARY RULE OF EVIDENCE 412. This was additional clear error.

Negative Eyewitness Testimony

The military judge prevented the defense from presenting testimony from each of four chief petty officers who had been with the appellant in the bar. Each of these witnesses would have testified that they did not see the appellant assault SA W or QM3 N. We find that exclusion was error. Negative evidence may be used in defense, even if the witnesses did not observe the accused every second of the evenings in question. See *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005); *United States v. Fisher*, 24 M.J. 358 (C.M.A. 1987).

Crime Scene Videotape

We have reviewed the videotape, and while we can see no reason why it should have been excluded, without more explanation on the record as to how it would have been used, we cannot determine that the appellant was prejudiced by its exclusion.

Conclusion

The findings of guilty as to Charge I and its specification are affirmed. The findings of guilty as to Charge II, Specifications 1 and 2 are set aside. The record is returned to the Judge Advocate General with a rehearing on Charge II, Specifications 1 and 2 authorized. In the event a rehearing on Charge II, Specifications 1 and 2 is not ordered by an appropriate convening authority, a rehearing on the sentence may be ordered or if a rehearing on the sentence is impracticable, the convening authority may approve a sentence of no punishment. RULE FOR COURTS-MARTIAL 1107(e)(1)(C)(iii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Thereafter, the record will be returned to this court for completion of appellate review.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court