

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

**BEFORE**

**E.E. GEISER**

**J.G. BARTOLOTTA**

**M.W. PEDERSEN**

**UNITED STATES**

**v.**

**Aaron L. HANEY  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200600631

Decided 7 August 2007

Sentence adjudged 21 October 2005. Military Judge: S.A. Dominguez. Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Battalion, 10th Marines, Camp Lejeune, NC.

CDR LISA MACPHEE, JAGC, USN, Appellate Defense Counsel  
LCDR DEBORAH MAYER, JAGC, USN, Appellate Government Counsel  
LT JESSICA HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of carnal knowledge, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for six months, forfeiture of \$1,235.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's eight assignments of error,<sup>1</sup> and the Government's response. The

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<sup>1</sup> I. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO PROVE THE ELEMENT THAT MS. [DS] WAS NOT THE WIFE OF LCPL HANEY FOR THE ADDITIONAL CHARGE AND ITS SPECIFICATION.

Government concurs with the appellant's fifth assignment of error that the members adjudged forfeitures in excess of two-thirds pay per month for an E-1 at the time of sentencing. Government's Answer of 12 Jan 2007 at 13. We agree and will take corrective action in our decretal paragraph. Otherwise, we conclude that the findings and 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.

### **Legal and Factual Sufficiency**

The appellant's first assignment of error contends the evidence was legally and factually insufficient to support his conviction for carnal knowledge because the Government failed to prove the required element that the victim, DS, was not the appellant's spouse. Appellant's Brief of 15 Nov 2006 at 4. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found the elements of the

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II. THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE MOTION FOR A FINDING OF NOT GUILTY BECAUSE THE GOVERNMENT HAD FAILED TO PRESENT ANY EVIDENCE FROM WHICH TO DRAW A REASONABLE INFERENCE THAT MS. [DS] WAS NOT APPELLANT'S WIFE.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO FIND PLAIN ERROR WHEN THE PROSECUTION ELICITED IMPROPER CHARACTER EVIDENCE ALLOWING THE PROSECUTION TO ARGUE THAT LCPL HANEY SOCIALIZED WITH HIGH SCHOOL GIRLS AND SO SOUGHT OUT THE ATTENTIONS OF UNDERAGE GIRLS.

IV. THE COURT MARTIAL WAS IMPROPERLY CONVENED BECAUSE THE ORAL MODIFICATIONS TO THE CONVENING ORDER WERE NEVER RECORDED IN THE RECORD BEFORE AUTHENTICATION, AS REQUIRED BY R.C.M. 505(b).

V. THE MEMBERS VIOLATED ARTICLE 19, UCMJ AND R.C.M. 1003(b)(2) AND EXCEEDED THE JURISDICTIONAL LIMITS OF THE SPECIAL COURT-MARTIAL, BY ADJUDGING FORFEITURES THAT WERE GREATER THAN THE MAXIMUM FORFEITURE OF TWO-THIRDS OF PAY PER MONTH BASED ON THE REDUCED PAYGRADE OF E-1.

VI. THE STAFF JUDGE ADVOCATE'S RECOMMENDATION FAILED TO PROVIDE ADVICE ON CORRECTIVE ACTION FOR THE SIX LEGAL ERRORS RAISED BY TRIAL DEFENSE COUNSEL, VIOLATING R.C.M. 1106(d)(4).

VII. THE TRIAL DEFENSE COUNSEL COMMITTED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO CORRECTLY AND EFFECTIVELY OBJECT TO THE IMPROPER USE OF CHARACTER EVIDENCE IN THIS CASE.

VIII. THE CUMULATIVE ERRORS OCCURRING IN THIS CASE DENIED LCPL HANEY A FAIR TRIAL.

offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). Questions of legal and factual sufficiency are reviewed *de novo*. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007).

There are three elements to the offense of carnal knowledge: (1) that the appellant committed an act of sexual intercourse with a certain person; (2) that the person was not the appellant's spouse; and (3) that at the time of the sexual intercourse the person (a) was under the age of 12; or (b) had attained the age of 12 but was under the age of 16. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45b(2). The appellant contests the Government's proof of the second element only. At trial no direct evidence was offered that DS was not the spouse of the appellant, however, circumstantial evidence is a well-accepted means to prove this element. *United States v. Wilhite*, 28 M.J. 884, 885 (A.F.C.M.R. 1989); *United States v. Carver*, 12 M.J. 581, 583 (A.F.C.M.R. 1981).

At the time of the offense DS lived with her parents and 10-year-old brother, and had a different last name than the appellant; at trial she was consistently referred to as "Miss." Appellant's Brief at 5; Record at 96, 102. These facts support a reasonable inference DS was not married to the appellant. *Wilhite*, 28 M.J. at 886. Moreover, the appellant referred to DS as his "girlfriend" during an interrogation, Record at 138, and in his sworn written statement confessed to having sexual intercourse with her four times during "the time I was dating her," Prosecution Exhibit 3 (emphasis added). The relationship was extremely short, DS was only 15 years old at the time, still attending high school, apparently not emancipated, and DS's mother didn't know the appellant. Record at 94-96, 100-01; PE 3.

Taken together with the rest of the record, the appellant's written confession and the testimony above provide strong circumstantial evidence that DS was not the spouse of the appellant at the time of the offense. This court is convinced that a rational fact finder could have found the appellant

guilty of this offense. We, too, are convinced beyond a reasonable doubt of the appellant's guilt to the Additional Charge of carnal knowledge.

### **Abuse of Discretion**

The appellant's second assignment of error claims the military judge abused his discretion when he denied the appellant's motion for a finding of not guilty under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) based on the contention the Government failed to present evidence DS was not the appellant's spouse. Appellant's Brief at 8. We disagree.

After the defense rested its case-in-chief, trial defense counsel moved for findings of not guilty as to the Additional Charge under R.C.M. 917.<sup>2</sup> Record at 224-25. The motion was based on the claim the Government failed to present any evidence on the element that DS was not the spouse of the appellant. The military judge denied the motion under the standards of R.C.M. 917. *Id.* at 225-27, 231-32. The military judge also denied trial defense counsel's post-findings R.C.M. 917 motion and request for special findings as to that denial. *Id.* at 272, 275-76.

Based on the entire record and our determination regarding the appellant's first assignment of error, analyzed above, further analysis is not required. Because the evidence before the court was legally and factually sufficient, we find the military judge correctly applied the standards of R.C.M. 917. *United States v. Parker*, 59 M.J. 195, 200-01 (C.A.A.F. 2003). We conclude, therefore, that the military judge did not abuse his discretion when he denied the appellant's R.C.M. 917 motions. The appellant's second assignment of error is without merit.

### **Improper Character Evidence**

In his third assignment of error the appellant contends "the military judge abused his discretion by failing to find plain error" when the trial counsel cross-examined SM and AM about their association with the appellant, and then summarized that testimony in his closing argument on findings. Appellant's Brief at 14. The appellant claims the testimony was improper character evidence prohibited by MILITARY RULE OF EVIDENCE 404(a)(1),

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<sup>2</sup> No R.C.M. 917 motion was made at the close of the Government's case-in-chief.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Because trial defense counsel neither objected to the cross-examination of the two witnesses in question, nor to the trial counsel's closing argument based on that testimony, we review this assignment of error under a plain error analysis, rather than an abuse of discretion standard.

"We analyze a claim of plain error under the three-part standard of *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998); that is, (1) whether there was an error; (2) if so, whether the error was plain or obvious; and (3) if the error was plain or obvious error, whether it was prejudicial." *United States v. Kahmann*, 59 M.J. 309, 313 (C.A.A.F. 2004); see also Art. 59(a), UCMJ. The "[a]ppellant has the burden of persuading this Court that these elements of the plain error test are satisfied." *United States v. Moran*, 65 M.J. 178, 2007 CAAF LEXIS 827, at 5 (C.A.A.F. 2007)(citing *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)). If the appellant meets this test, the burden shifts to the Government to show that the error was harmless beyond a reasonable doubt. *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). The court reviews the application of the plain error doctrine *de novo*. *Powell*, 49 M.J. at 462. The failure to object waives this issue absent plain error. *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999); MIL. R. EVID. 103(d); see also R.C.M. 919(c) and 920(f).

During the defense case-in-chief the appellant called three 15-year-old girls, TT, SM, and AM, all schoolmates of DS, to testify as to DS's reputation and character for untruthfulness. Record at 180-93. On cross-examination SM and AM testified to knowing the appellant and that he was 23 years old. SM and AM also stated that they and TT either associated or "hung out" with the appellant at least once. SM said the appellant was friends with her 16-year-old brother and AM said she knew the appellant through her 17-year-old ex-boyfriend. Trial defense counsel did not object to any part of SM's cross-examination. During AM's cross-examination, trial defense counsel objected only to the question of whether AM associated with the appellant as being beyond the scope of direct. *Id.* at 192. The military judge overruled the objection. *Id.* During his closing argument on findings, trial counsel stated the appellant "socializes with 15 year olds knowing that they are 15 years old, just like he socialized and associated with [DS], knowing she was 15 years old." *Id.* at 236. See Record at 254. Trial defense counsel did not object to any part of the trial counsel's closing argument.

The appellant's entire defense to the carnal knowledge charge was based on a mistake of fact. In light of the appellant's written confession and DS's testimony, mistake of fact was the only possible defense. Trial defense counsel addressed it numerous times, starting with his opening statement, Record at 71-73, and cross-examination of DS, *id.* at 103-07, to his direct examination of TT, *id.* at 183, and closing argument, *id.* at 244-45. The sole reason TT, SM and AM were called was to discredit DS's credibility regarding whether, and if so when, she told the appellant she was 15 years old and, in the very least, to create some reasonable doubt. Under the circumstances trial defense counsel presented this defense as best he could in order to demonstrate that the appellant believed DS was 17 years old the entire time they were dating, or at least more specifically, when they were engaging in sexual intercourse. On cross-examination trial counsel naturally attempted to rebut the mistake of fact defense and tried to do so by showing the appellant was aware of DS's true age because he knew TT, SM and AM, that they were 15-year-old girls, and that they were friends, or had mutual friends, with their schoolmate DS.

Trial counsel's questions to SM and AM were within the realm of permissible cross-examination. The questions were used in order to connect the appellant with DS through fellow 15-year-old girls and thus show his mistake of fact defense was not reasonable. In fact, in an effort to establish the mistake of fact defense early on, trial defense counsel opened the door when he alluded twice to the appellant's association with SM in his opening statement. Record at 73.<sup>3</sup> Because of these factors we do not consider the association testimony of SM or AM "improper" character evidence under MIL. R. EVID. 404(a)(1) or 405(b). Rather, we find the evidence was relevant, probative, and not unfairly prejudicial. MIL. R. EVID. 403. Therefore, with regard to the cross-examination of SM and AM, we find no plain error. *Powell*, 49 M.J. at 463-65.

We are, however, not so convinced regarding the Government's closing argument on findings referring to the appellant's association with 15-year-old girls. The trial counsel's complete summary of the testimony was:

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<sup>3</sup> "[The appellant] was at [SM's] house, and [SM] is an acquaintance of [DS]. And [SM] and her mother were both there, and [the appellant] asked [SM], Hey, how old is [DS]? . . . You'll hear the next day [SM] and [the appellant] were at [SM's] house again, and he called [DS] and said, Look, I can't see you anymore."

Now, again, let's look at this sleight[sic] of hand and misdirection offered by the defense to refute the government's argument. Well, first they brought three 15 year olds on the stand, three 15 year olds who offer nothing much more than schoolyard gossip from Swansboro High School. I certainly ask the members to give that as much credibility as its worth. They also did offer one other thing. They offered that he associates with 15 year olds, that he socializes with 15 year olds knowing that they are 15 years old, just like he socialized and associated with [DS], knowing she was 15 years old.

Record at 236 (emphasis added).

But despite that hail Mary pass from the defense, that they were perhaps married, he also attacked - or he tried to give credit to her peer base by saying, Well [sic], that is who she hangs out with and she doesn't hang out with business executives, but rather her 15 year-old peer base. The government asked the members to give that peer base the credit its due, 15 year old tenth graders at Swansboro High School who all associate - at least the ones that testified, associate with a 23 year old Marine. Not a very credible peer group.

*Id.* at 254 (emphasis added).

As our superior Court noted in *Perry*, evidence and arguments attempting to establish "guilt by association" have "minimal" relevance. *United States v. Perry*, 37 M.J. 363, 364 (C.M.A. 1993). The testimony of SM and AM is relevant solely to rebut the mistake of fact defense, not to establish that guilt is more likely because of the age of the girls with whom the appellant associated. Trial counsel should have used this evidence in his argument, if at all, merely to draw into question the reasonableness of the appellant's mistake of fact defense, not to develop a theory of "guilt by association." *Id.*

Having found error we now turn to the question of prejudice. In determining whether this error was harmless beyond a reasonable doubt we must consider all the circumstances surrounding its presentation. Trial defense counsel apparently perceived no prejudice as he neither objected to trial counsel's closing argument, nor requested a specific instruction pertaining to it. His failure to object to the argument

"supports the inference that, even if erroneous, such allusions were deemed at the time to be of little consequence." *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993)(quoting *United States v. Grandy*, 11 M.J. 270, 275 (C.M.A. 1981)). Moreover, although the military judge provided no curative instruction, shortly thereafter, he correctly advised the members that arguments of counsel are not evidence. Record at 257. The military judge also properly instructed the members on the mistake of fact defense, circumstantial evidence, and the credibility of witnesses. Record at 260-63. See also Military Judges' Benchbook, Dept of the Army Pamphlet ("Benchbook") 27-9, ¶¶ 3-45-1 n.20 & n.22, 7-3, and 7-7-1, respectively. There were no objections to the instructions and no requests for additional instructions. Record at 231, 266; see also R.C.M. 920(f). These facts, in conjunction with mixed findings - albeit on an unrelated charge - indicate the members were not unduly swayed by the Government's arguments.

Based on the above analysis and given the evidence presented in this case, in particular the overwhelming weight of the appellant's written confession, the appellant was not unduly prejudiced by trial counsel's closing argument referring to his association with TT, SM and AM. *United States v. Walker*, 42 M.J. 67, 74 (C.A.A.F. 1995). We also find that the error was harmless beyond a reasonable doubt and that there was no prejudice to the appellant's substantial rights. *United States v. Moore*, 1 M.J. 390, 392 (C.M.A. 1976). Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt to the carnal knowledge charge beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Therefore, the appellant is not entitled to relief for this assignment of error.

### **Ineffective Assistance of Counsel**

The appellant's seventh assignment of error asserts that his trial defense counsel was ineffective because he failed to object: (1) "correctly and effectively" under MIL. R. EVID. 404 and 405, to the character evidence offered by the trial counsel to bolster DS's credibility; and (2) at all to the cross-examination of SM and AM or the trial counsel's closing argument which demonstrated the appellant's "propensity to socialize and seek relationships with 15 year old girls." Appellant's Brief at 21-23. The appellant claims trial defense counsel was further deficient when he failed to request limiting instructions on these character evidence issues. We disagree.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.* The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

We conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice. The failure to make a correct or effective objection, to make an objection at all, or to otherwise pursue a legal claim is not necessarily deficient conduct by counsel. If a claim is not shown to have a reasonable probability of being found meritorious as a matter of law and fact, the failure to pursue it is not error and certainly not ineffective assistance of counsel. *United States v. Terlap*, 57 M.J. 344, 349 (C.A.A.F. 2002).

In the instant case, the record suggests in the face of overwhelming evidence against him on the carnal knowledge charge, trial defense counsel presented the best defense possible. There is no evidence either in the record or offered by the appellant to rebut this. TT, SM, and AM discredited the victim's credibility and were the only witnesses who testified for the defense regarding the carnal knowledge offense. Failure to call them would have seriously undermined the trial defense counsel's ability to argue the appellant's mistake of fact defense. Further, absent evidence that the asserted objections would have a reasonable probability of being found meritorious, we find no error. Moreover, trial defense counsel was successful in obtaining an acquittal for the appellant on the Article 113, UCMJ, charge of sleeping on post.

The appellant's allegations regarding his trial defense counsel's conduct are without substance. On the whole, the

appellant fails to establish facts that would overcome the presumption of competence in his trial defense counsel. To the contrary, the appellant was well and fairly represented at his trial. We find this assignment of error without merit.

### Conclusion

The appellant's three remaining assignments of error are without merit.<sup>4</sup> *Reed*, 54 M.J. at 42 (citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987)). The approved findings and only so much of the sentence that extends to forfeiture of \$823.00 pay per month for six months, six months confinement, reduction to pay grade E-1, and a bad-conduct discharge, are affirmed.

Senior Judge GEISER and Judge PEDERSEN concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>4</sup> That is, assignments of error IV, VI, and VIII.