

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

BEFORE

W.L. RITTER

E.S. WHITE

J.F. FELTHAM

UNITED STATES

v.

**David B. HAWKINS
Operations Specialist First Class (E-6), U.S. Navy**

NMCCA 200501456

Decided 20 June 2007

Sentence adjudged 5 December 2003. Military Judge: D.P. Fry.
Staff Judge Advocate's Recommendation: CAPT D.L. Bailey, JAGC,
USN. Review pursuant to Article 66(c), UCMJ, of General Court-
Martial convened by Commander, Navy Region Southeast,
Jacksonville, FL.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel
LT M.H. HERRINGTON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

RITTER, Senior Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of four specifications of committing indecent acts upon a child, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for one year and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant contends that: 1) the military judge erred in conducting a perfunctory post-trial hearing that was insufficient to determine whether a court member gave a dishonest response during voir dire; 2) the evidence was not factually sufficient to support his convictions; 3) the military judge erred by permitting expert testimony without first making a determination of the reliability of the testimony; and 4) trial counsel made an improper closing argument.

After carefully considering the record of trial, the appellant's four assignments of error, the Government's response, and the appellant's reply, 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. See Arts. 59(a) and 66(c), UCMJ.

We commend both the defense and Government appellate counsel for their excellent briefs in this case. Although all four issues were ably argued, we find only one issue that merits extended discussion, and thus deal with it first. We resolve the other three issues more summarily thereafter.

Error in Admitting Expert Testimony

The appellant contends that the military judge erred by admitting expert testimony over defense objection, without first making a determination as to the reliability of the testimony, in accordance with *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We disagree, and even assuming error, find it harmless.

We review a military judge's decision to admit expert testimony for an abuse of discretion. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F. 2006). Our superior court asks the proponent of expert testimony to demonstrate an expert's qualifications by establishing the following six factors:

- (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.

United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993). Such an initial assessment is also required by *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 146-47 (1999).

During its case in chief, the Government called Captain (CAPT) Steve Brasington, Medical Corps, U.S. Navy, and after eliciting the doctor's credentials and experience, offered him as an expert in the field of child sexual abuse. The assistant defense counsel objected to CAPT Brasington's testimony both on

the grounds that he was not adequately qualified as an expert in the field of child sexual abuse, and because his proposed testimony was not based on reliable information.¹ The military judge held an Article 39a, UCMJ, session at which he allowed the defense to voir dire CAPT Brasington on these issues. After the Article 39a session, the military judge allowed the defense to cross-examine CAPT Brasington as to his qualifications. The military judge then ruled that CAPT Brasington could testify as an expert in the areas of child psychiatry and child sexual abuse, stating he believed "the appropriate standards have been met." Record at 888.

We find that the military judge reasonably exercised his discretion in determining that CAPT Brasington was qualified as an expert in the field of child sexual abuse. As for the reliability of the expert testimony, the military judge did not explicitly make an initial assessment of its reliability as is contemplated by *Daubert* and *Kumho Tire*. But our review of the record indicates that the military judge's determination to allow the testimony was based on an adequate showing of reliability, as established through the assistant defense counsel's voir dire of CAPT Brasington during the Article 39a, UCMJ, session. See Record at 867-74. Although the reliability objection became muddled with the issue concerning CAPT Brasington's general qualifications as an expert, we are convinced that the record, in its totality, demonstrates that the military judge complied with *Daubert*'s requirement to assess the reliability of the proposed expert testimony. *United States v. Quintanilla*, 56 M.J. 37, 85 (C.A.A.F. 2001). Moreover, as in *Quintanilla*, the expert testimony involved general theories that "were not particularly novel or controversial." *Id.* We thus find no error.

Assuming *arguendo* the military judge erred in not clearly making an initial assessment of the expert's reliability prior to allowing the testimony, we find the error in this case was harmless. First, the military judge conducted an Article 39a, UCMJ, session that established a reasonable basis for determining the reliability of CAPT Brasington's proposed testimony. Second, CAPT Brasington testified only generally concerning delayed disclosure, failure to resist abuse, memory fallibility, and other issues concerning victims of child sexual abuse, and gave no expert opinion as to how these theories related to the credibility of the victim in this case. Moreover, our review of the record convinces us not only that CAPT

¹ The appellant does not challenge CAPT Brasington's qualifications as an expert on appeal.

Brasington's testimony had a reliable basis in science, but that the only challenge to that basis relied on the witness' own critique that some of the studies concerning late reporting by victims of sexual offenses resulted in "discrepant findings." Record at 872. However, CAPT Brasington also noted that "these studies, when well designed, have something to offer." *Id.* at 873. We find that the expert's own candid assessment of the reliability of scientific studies did not undermine, and perhaps even enhanced, the reliability of his expert testimony.

Third, the defense thoroughly and effectively cross-examined CAPT Brasington, challenging the reliability of his testimony, and then presented its own expert witness, Lieutenant Colonel (LTC) Inouye, Medical Corps, U.S. Army. LTC Inouye provided additional testimony concerning memory fallibility, without disagreeing with any portion of CAPT Brasington's testimony. He also gave his own expert opinion that the victim in this case was suggestible and may have "confabulated" her testimony to explain contradictions and gaps in memory. Record at 951-68, 980-81. We find no apparent conflict between CAPT Brasington's testimony and that of the defense expert.

Finally, in our view, the strength of the Government's case did not hinge on CAPT Brasington's testimony, but on the credibility of the victim witness during her testimony and the apparent lack of any motive for her to fabricate the allegations. Our review of the entire record convinces us that the victim's lack of motive to fabricate was underscored both by the delay in reporting and her obvious reluctance in doing so.

We therefore conclude that the appellant was not prejudiced by the military judge's failure to clearly make a preliminary assessment of the reliability of CAPT Brasington's expert testimony. But we caution military judges that the better practice is to make such an initial assessment of an expert witness' testimony **before** allowing such testimony to be heard by the court members. To do otherwise is to risk error prejudicial to the substantial rights of the accused.

Other Assignments of Error

The appellant contends that the military judge conducted an inadequate post-trial hearing and that one of the court members, Lieutenant Border, was untruthful in his responses on voir dire. We disagree. We concur in the military judge's findings that LT Border's answers on voir dire were reasonable and truthful

responses to the questions of counsel. We find absolutely no evidence that he knowingly gave false or misleading answers.

The appellant contends that the evidence was factually insufficient to support his convictions. We disagree. Having considered all the evidence of record, we find the evidence both legally and factually sufficient as to the charge and all four specifications. See *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Finally, the appellant contends that the assistant trial counsel made improper argument on findings, during both the closing and rebuttal arguments, in that he: (1) improperly vouched for the victim's credibility; (2) made disparaging comments about the defense counsel and the defense tactics; and (3) made argument calculated to inflame the passions or prejudices of the members. We disagree.

We find the trial counsel's argument falls short of the appellant's negative characterizations in each respect. First, we view the instances of "improper vouching" in context as nothing more than reasonable inferences drawn from the evidence. Second, from our review of the trial counsel's closing and rebuttal arguments on findings, we find no attempt to malign defense counsel or their tactics as occurred in *United States v. Fletcher*, 62 M.J 175, 181-82 (C.A.A.F. 2005), a case very instructive on this issue that was cited by the appellant in his brief. While the trial counsel referred to one proposition as "ridiculous" and "absolutely ridiculous," Record at 1075, these characterizations did not refer to defense counsel, their trial tactics or strategy, or the appellant's guilt. Rather, the trial counsel aimed these remarks at his own rhetorical suggestion that the victim might have intentionally made up false details and rehearsed her allegations much as an actress would her lines. We find no indication that the defense made such an argument.² Third, while we find the trial counsel's argument to the effect that the appellant took away the victim's opportunity to choose the circumstances of her first sexually intimate experience to be somewhat ambiguous and speculative, we find nothing unduly inflammatory from this inference, which was somewhat loosely derived from the evidence.

We also note that the two defense counsel failed to object at trial to any of these alleged deficiencies and thus evidently did not view them as prejudicial to the appellant. The military

² We view the defense argument as an attack on the victim's credibility on the basis that she was suggestible and confused. See Record at 1064-68.

judge correctly advised the members that arguments of counsel are not evidence, and the mixed findings indicate the members were not unduly swayed by the trial counsel's arguments. Finding no plain error arising from the trial counsel's arguments on findings, we hold that this issue was waived by the failure to object. RULE FOR COURTS-MARTIAL 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

Missing Videotape Exhibits

As an administrative matter, we note that Appellate Exhibits XXII, LII, LIII, and LIV are not attached to the record of trial. Appellate Exhibit XXII is a videotape of the victim's statements to Ms. Nikki Wooten, a social worker. It was ruled inadmissible as evidence by the military judge while granting a defense motion *in limine*. See Appellate Exhibit XXXI. Appellate Exhibits LII, LIII, and LIV are three videotaped depositions that were played for the members and recorded verbatim in the trial transcript. Record at 1161-1203. The appellant does not contend, nor do we find, that the absence of these four videotapes from the record is a substantial omission from the record of trial.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court