

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

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**UNITED STATES**

**v.**

**Steven J. MCGINNIS  
Chief Electronics Technician (E-7), U. S. Navy**

NMCCA 200501647

Decided 30 April 2007

Sentence adjudged 12 November 2004. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

LT DARRIN MACKINNON, JAGC, USN, Appellate Defense Counsel  
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of one specification of indecent acts with a child in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for three years and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have reviewed the record of trial, the appellant's five assignments of error,<sup>1</sup> the Government's response, the

---

<sup>1</sup> I. THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO CONVICT CHIEF MCGINNIS OF INDECENTLY TOUCHING KR.

II. EITHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY DENYING APPELLANT DUE PROCESS WHEN HE FAILED TO ORDER A "TAINT" HEARING, OR, ALTERNATIVELY, IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE DEFENSE DID NOT REQUEST A "TAINT" HEARING.

III. THE MILITARY JUDGE ERRED BY FAILING TO EXCLUDE A HIGHLY PREJUDICIAL TAPE RECORDING OF APPELLANT DISCUSSING THE CASE WITH KR'S FATHER.

appellant's reply, and all related appellate pleadings. We find merit in the appellant's fourth assignment of error and will set aside the findings and sentence in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ. In light of our disposition of this issue, we need not address the remaining assignments of error.<sup>2</sup>

### **Background**

In 1992, while assigned to USS TENNESSEE in Kings Bay, Georgia, the appellant met and served with Missile Technician First Class (MT1) Robert W (MT1 W). The two men became good friends and their wives established a close friendship. MT1 W had two daughters, KR, born in January 1993, and KD, born in July 1994. Sometime in 1997, the appellant moved with his family from Kings Bay to Charleston, South Carolina. The close friendship between the two families continued, and MT1 W and his family visited the appellant and his family in Charleston numerous times.

The families remained friends when the appellant was transferred from Charleston to USS FLORIDA, home-ported in Bangor, Washington. Sometime in late December 2002 or January 2003, USS FLORIDA underwent a 30-day "refit" in Kings Bay, Georgia. During that time the appellant stayed with MT1 W, who was separated from his wife, but who retained shared custody of his two daughters. The appellant stayed in KR's room during the 30-day period. The girls stayed at their father's house daily, as he cared for them while their mother worked. On occasion, they would spend the night with their father.

Eight months later, in September 2003, Mrs. W learned that a friend of hers, Mr. Benjamin Lee Brown, had admitted to molesting children. Mr. Brown had contact with both KR and KD and, although Mrs. W testified the girls were never alone with him, she asked KR if she ever suffered a "bad touch." KR began crying and appeared shaken and scared. She indicated she had and identified the appellant as the perpetrator. Mrs. W took KR to the police station almost immediately and, per their suggestion, arranged an interview with a child forensic interviewer at a "safe house." During the interview with the child forensic interviewer, KR revealed the details of the appellant's actions. The interview was videotaped and presented to the members at trial.

---

IV. THE GOVERNMENT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY IMPROPERLY AND INCORRECTLY USING STATISTICAL EVIDENCE IN HIS CLOSING ARGUMENT TO CONCLUDE THAT FALSE ACCUSATIONS ARE MINIMAL.

V. THE PROSECUTION VIOLATED EVIDENTIARY RULES, PROSECUTORIAL ETHICS AND *BRADY* REQUIREMENTS BY NOT TURNING OVER A TAPE RECORDING OF MRS. W. CONFRONTING APPELLANT AND ACCUSING HIM OF HAVING RAPED HER.

<sup>2</sup> The Government's 15 March 2007 Motion for Reconsideration of this Court's 5 March 2007 order to produce was granted and the order to produce vacated. The Government's Motion for First Enlargement of Time to respond to the Court's 5 March 2007 Order is denied as moot.

At trial, KR testified that when she was five or six years-old, she visited the appellant in South Carolina with her family. She was watching television in the appellant's bedroom with her sister, the appellant's son, and the appellant. The children and the appellant were on the bed and under the covers. KR was located on the side of the bed next to the appellant. The appellant reached under her clothing and digitally penetrated KR. KR said nothing, and continued watching television. After touching KR, the appellant left the room to join the adults downstairs.

KR testified that when she was approximately eight or nine, she saw the appellant in Kings Bay, Georgia, when the appellant was visiting her father. One evening, she was alone with the appellant in the kitchen while her parents were in the living room watching television. KR sat on the appellant's lap as they played a game on the appellant's laptop computer. The appellant reached under KR's shirt and rubbed her breast, then reached under her shorts and underwear and digitally penetrated her vagina. KR continued to play the computer game while the appellant was touching her.

The next day, the appellant was alone with KR in her room. Her parents were in the living room. The two were playing a battleship game and both the appellant and KR were under the covers on KR's bed. The appellant pulled down KR's shorts and underwear and began digitally penetrating her while KR continued to play the battleship game. After touching her, the appellant left and joined the adults in the living room.

As it pertained to the details of these three incidents, KR's testimony at trial in November 2004 was largely consistent with the videotaped interview conducted in September 2003. Her ability to establish the time frame during which the events occurred, however, was more exact at trial. Sometime between the first and second incidents of abuse, KR started wetting the bed and wetting herself during the day. She started putting the chair under the knob of her bedroom door when she changed clothes. KR insisted on sleeping fully clothed if a non-family member was staying at her house, and her grades declined at school.

As part of its case-in-chief, the Government called Ms. Beatrice Von Watzdorf, who was accepted as an expert in child forensic interviewing and an expert in psychological trauma counseling in the area of child sexual abuse. Ms. Von Watzdorf was asked by the trial counsel: "Now, in the field of forensic interviewing of children, is it more likely that a child will make a false accusation of sexual abuse or the child would not disclose abuse when it actually was occurring?" Record at 410. Ms. Von Watzdorf responded that it is "far more likely that a child would not disclose abuse that is occurring." *Id.* There was no objection to the question or the answer. She went on to state that statistics indicate one in every three girls is

molested and one in every six boys. Ms. Von Watzdorf proceeded, uninterrupted, stating:

And also with respect to the first part of the question, with past allegations there is quite a lot of research now out about class allegations and there's two studies in particular that I think are relevant. Jones in 1987 did a fairly extensive study on 576 child sexual abuse allegations and found that *only eight of those were fictitious or 1.4 percent*. In 1988, the following year, there were studies done in Denver and in Boston where it was found that *only between two and four percent of those allegations were false and almost all of the false allegations came from older teenage girls, 16 and 17*.

*Id.* at 411 (emphasis added). Other than objecting to the leading nature of the questioning, civilian defense counsel made no objection, and the military judge failed to give a cautionary instruction with respect to this testimony, *sua sponte*.

On cross-examination, the civilian defense counsel asked Ms. Von Watzdorf, "How many children make false allegations percentage wise?" *Id.* at 421. Ms. Von Watzdorf repeated her earlier testimony that in one study 1.48 percent of children made false allegations, while in two other studies the percentages were between two and four percent.<sup>3</sup> *Id.* Again, the military judge gave no cautionary instruction with respect to this testimony.

In its case-in-chief, the defense called Dr. Susan Garvey, a doctor of clinical psychology, who was accepted by the court as an expert in the field of psychology. During cross-examination, the following dialogue occurred between the trial counsel and the defense expert:

Q. Now, also in your experience, are false accusations of child sexual abuse common?

A. No, they're not common.

Q. When false accusations are made, what age group typically makes them?

A. The older the child the more likely the potential of false allegations.

Q. Are they more commonly found in teenage girls?

A. I don't know girls more than boys.

---

<sup>3</sup> Our superior court has noted that plain error can occur even when the inadmissible testimony is in response to defense questions. *United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007)(quoting *Powell v. State*, 527 A.2d 276, 279 (Del. 1987)).

Q. Are teenagers in general?

A. Yes, the older you are the more prevalent the false allegations.

Q. [That] [t]he child sustained an accusation over a period of time, say a year, would that decrease the likelihood that it's a false accusation?

A. Yes. If they were able to sustain a credible story with all the same information, yes.

*Id.* at 548. Again, there was no objection from defense counsel. Although the military judge interrupted the trial counsel at this point for exceeding the scope of direct, he did not give a cautionary instruction to the members.

### **Statistical Evidence in Child Abuse Cases**

In his original brief, the appellant argues that the Government violated his due process rights by improperly using statistical evidence in its closing argument to conclude that false accusations in child abuse cases are rare. The appellant argues, without supporting legal analysis, that he suffered "blatant prejudice" when the Government used "bogus" statistical evidence to bolster his argument. Appellant's Brief of 31 Jul 2006 at 13. Under the umbrella of "improper closing argument," the appellant expanded his argument in his reply brief filed with this court on 22 November 2006, arguing the admission of statistical evidence was improper. In support of this argument, the appellant filed a Motion to Cite Supplemental Authority with this court on 31 January 2007, citing *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007).

We agree that the statistical evidence presented and, although not argued by the appellant, the expert testimony regarding the likelihood of false allegations of child sexual abuse by alleged victims, was improperly admitted at the appellant's court-martial. We also agree that trial counsel's repeated use of that evidence during his closing argument on the merits compounded the error. Finally, we agree that *Brooks* is controlling in this case and mandates relief.

### **Discussion**

At trial, the defense failed to raise a timely objection to the now complained of expert testimony and the trial counsel's use of this evidence in his closing argument. The absence of a timely objection works to forfeit the issue absent plain error. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and, (3) the error materially prejudiced his substantial rights. *United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006); *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

There is no prohibition against offering expert testimony in child sexual abuse cases. But when offered, the testimony must be kept within judicially-mandated limits. Our superior court has held that in child sex abuse cases, an expert may:

[I]nform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse.

*United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998) (quoting *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993))(citations and internal quotations omitted).

It is, however, impermissible for experts to act as "human lie detectors." *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003); *Birdsall*, 47 M.J. at 410. "Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, . . . , a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible." *Birdsall*, 47 M.J. at 409 (quoting *Whitted*, 11 F.3d at 785)(citation omitted). "[T]o put an impressively qualified expert's stamp of truthfulness on a witness' story goes too far. An expert should not be allowed to go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility." *Brooks*, 64 M.J. at 328 (citations and internal quotation marks omitted).

In *Brooks*, our superior court was again faced with determining whether expert testimony violated the prohibition against experts acting as "human lie detectors." The expert in *Brooks*, a clinical psychologist, provided testimony regarding children's cognitive abilities, and the impact of outside influences on a child's testimony, or "suggestibility." On cross-examination, defense counsel delved into the area of fabrication, and inquired into "how repeated interviews could result in information or belief becoming fixed in the mind of the child." *Brooks*, 64 M.J. at 327. On re-direct, the expert testified that in his practice, the rate of false allegations is approximately five percent, which was consistent with research and experiences of others in his practice area. The expert explained that the rate of false allegations ranges from five to twenty percent, but once "misinterpretation" is eliminated, it "drops even further" and "the general sense of that in the divorce business, where they tend to occur at the greatest frequency, is [sic] it's two to five percent." *Id.* at 329. There was neither an objection nor a cautionary instruction given with respect to the expert's testimony.

The *Brooks* court determined there was error, and that the error was plain and obvious. The court stated that the expert's "statement suggested that there was better than a ninety-eight percent probability that the victim was telling the truth. This 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." *Id.* The military judge in *Brooks* gave a cautionary instruction to disregard a comment made by the expert concerning the victim's "credible disclosure,"<sup>4</sup> and gave the members the standard instruction regarding credibility plus a more tailored instruction on findings. The tailored instruction stated:

Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.

*Id.* at 327. As a result of the statistical evidence that quantified the victim's credibility, even with the military judge's instructions, our superior court found that it had "substantial doubt about the fairness of the proceeding." *Id.* at 330.

In making its finding, the *Brooks* court noted that the case hinged on the credibility of the victim because "[t]here were no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony." *Id.* The court noted that evidence related to credibility "may have had particular impact upon the pivotal credibility issue and ultimately the question of guilt." *Id.* The lower court's decision was reversed, the findings and sentence were set aside, and a rehearing was authorized.

Our superior court has been resolute in prohibiting experts from acting as "human lie detectors" and thus bolstering the

---

<sup>4</sup> In response to the trial counsel's request for the expert to provide his conclusions, the expert testified: "... it was my impression that there were credible disclosures." *United States v. Brooks*, 2005 CCA LEXIS 277, No. 35420, unpublished op. (A.F.Ct.Crim.App. 30 Aug 2005). The defense counsel objected, and the military judge instructed the expert in front of the members that he was not to "comment on the credibility of the alleged victim ... that is strictly off limits, you cannot assess the credibility of the alleged victim." *Id.*

credibility of witnesses, including child-victim witnesses. *Id.* at 328, n2.<sup>5</sup> Here, the experts' testimony regarding the introduction of statistical evidence surrounding false allegations and other testimony regarding the likelihood of alleged victims making false allegations constituted error, and the error was plain and obvious. The more difficult issue is whether the "undeserved scientific stamp of approval" placed on KR's testimony by experts in this case materially prejudiced the appellant's substantial rights. *Id.* at 330 (quoting *Birdsall*, 47 M.J. at 410). In testing for prejudice, we consider: (1) the trial counsel's closing argument; (2) the judge's instructions regarding statistical evidence; and, (3) the weight of the other evidence introduced at trial.

### 1. Trial Counsel's Closing Argument

Here, unlike *Brooks*, the Government's closing argument placed significant emphasis on the testimony of the expert witnesses, with the trial counsel repeatedly urging the members to make use of their testimony to judge the victim's credibility. The trial counsel argued, in part, as follows:

To assist you in your determination of [KR's] credibility, I'd like you to consider the testimony of the experts. These are people who have educational and specialized training in this field. These are people who deal with children like [KR] on a constant basis, both as forensic interviewers and as counselors. . . . Now ultimately their opinion on whether or not this happened has no relevance. That's for you to determine. But use them as a tool in helping you consider that.

Record at 596-597. Later, the trial counsel argued, "Members, again, the expert testimony is used as a tool to assist you in making the ultimate determination of who is lying today." *Id.* at 610. Arguing that the victim should be believed, the trial counsel stated:

In fact, when it's someone you know and someone you trust, doesn't that decrease the likelihood that

---

<sup>5</sup> Citing *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (holding that an expert on the subject of child abuse is not permitted to testify that the alleged victim is or is not telling the truth as to whether the abuse occurred); *Birdsall*, 47 M.J. at 410 (holding that the expert in child abuse may not act as a human lie detector for the court-martial); *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995) (holding that an expert is not allowed to opine that a victim is telling the truth); *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990) (holding that 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) (holding that child abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses); see also *United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.").

you're going to make an allegation? Yes. False allegation? Absolutely. False allegations. Well, ultimately again it is your job as members to determine whether this is, in fact, a false allegation. Use the experts as your tool though in considering that, considering what they told you. They talk about false allegations in their field, more experience, more research. How often do they happen? And when they do happen, who's typically the ones that do it? The ten-year-old child like [KR], now eleven, a ten-year-old when she disclosed.

Record at 610-11. The defense counsel remained silent during the entirety of the Government's closing argument. Notwithstanding his argument to the members that it was their responsibility to judge the credibility of the witnesses, the trial counsel repeatedly attempted to bolster KR's credibility through reference to the expert witnesses' testimony, thereby placing a mathematical certainty on the victim's credibility. In focusing the members' attention on the improper evidence, the trial counsel compounded the error.

## 2. Military Judge's Instructions

If a witness offers human lie detector testimony, "the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony." *Kasper*, 58 M.J. at 315. Here, the improper testimony relating to the victim's credibility was heard by the members on 9 November 2004. Not until 10 November 2004, after both counsel provided closing arguments, did the military judge issue his instructions to the members. In addition to standard instructions on credibility and expert witnesses, the military judge gave the following instruction:

Now, you heard testimony that some academic studies have determined that only a small percentage of reported sexual assaults is [sic] false. *You may consider this information only for the limited purpose of determining the weight to give the expert's opinion and for no other purpose whatsoever.* Specifically, you may not consider this information for its tendency, if any, to show that the accused is statistically more likely to be guilty than not guilty. The accused must be judged guilty or not guilty only on the facts of this particular case and statistical information is irrelevant to that task.

Record at 637 (emphasis added).<sup>6</sup>

---

<sup>6</sup> The military judge went on to issue an almost identical instruction as the following instruction given in *Brooks*:

The glaring deficiency in this tailored instruction is that it instructed the members that they *could* use the impermissible statistical evidence in their deliberations, instead of clearly directing the members to disregard such evidence *in toto*. We are unable to determine how the statistical evidence, which was unequivocally linked to the credibility of the victim, could be used to determine the "weight to give the expert's opinion." *Id.* If the instruction was meant to be curative, it wholly missed the mark. We are not confident that the effect of the inadmissible evidence, provided the day before the instructions were given, had not already become fixed in the members minds by the time instructions were given. By that time, we fear, it was impossible to unring the proverbial bell.

### 3. Other evidence introduced at trial

Ultimately, this case, like *Brooks*, hinged on the victim's credibility. As in most child sex abuse cases, there were no third party witnesses to the abuse, and no physical evidence to corroborate the victim's testimony. Some aspects of KR's testimony surrounding the incidents were, however, corroborated by the appellant's recorded telephone conversation with the victim's father. That recorded telephone conversation was played for the members who, therefore, heard the tone and content of the appellant's conversation. During that conversation, the appellant admitted that, on occasion, he had watched television with the victim, she had sat on his lap, he had rubbed her back, and on one occasion they played battleship on a Palm Pilot in the victim's bedroom with the door open and her parents in the next room. The appellant told the victim's father that he had no conscious recollection of any sexual contact with the victim and wondered if he could have been so intoxicated that he could have done something without remembering such an event. However, the appellant dismissed that as a possible explanation due to the number of individual events of which he was accused. MT1 W also corroborated certain aspects of these incidents, such as KR playing the battleship game with the appellant in her bedroom and sitting on the appellant's lap in the kitchen. Evidence that KR experienced bed-wetting, a drop in grades, and behavioral changes following the date of the first alleged incident, however, helps corroborate that abuse did occur.

---

Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim or that a sexual encounter occurred. To the extent that you believed that [the expert] testified or implied that he believed the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.

*Brooks*, 64 M.J. at 327.

The members observed the victim's live testimony and watched her videotaped interview with the forensic interviewer which, except for minor deviations, mirrored her testimony at trial. They were able to watch, listen, and assess the credibility of both the victim and the appellant when they testified at trial.

### **Prejudice**

We conclude that the testimony elicited from the experts at trial equated to impermissible comments on the victim's credibility and was, therefore, inadmissible. Also, trial counsel's closing argument, in which he repeatedly urged the members to make use of that impermissible evidence to judge the credibility of the victim, compounded this error. Further, these errors were not cured by the military judge's instructions. The instructions on the experts' testimony were untimely, the tailored instruction was inaccurate as it permitted the triers of fact to take impermissible evidence, highly damaging to the appellant, with them into the deliberation room. In a case such as this, "[a]ny impermissible evidence reflecting that the victim was truthful may have had a particular impact upon the pivotal credibility issue and ultimately the question of guilt." *Brooks*, 64 M.J. at 330. Finally, the other evidence introduced at trial was not overwhelming as to guilt, and, therefore, did not, on balance, negate these errors.

We follow our superior court's reasoning in *Brooks*, finding in the instant case that, "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, like *Brooks*, 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.* ( quoting *Kasper*, 58 M.J. at 319). Thus, we find that the substantial rights of the appellant were materially prejudiced by these plain and obvious errors.

### **Conclusion**

The findings and sentence are set aside. The record is returned to the Judge Advocate General of the Navy for return to an appropriate convening authority with a rehearing authorized.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court