

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**Richard J. ROGERS, Jr.
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200600545

Decided 10 May 2007

Sentence adjudged 30 December 2004. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

Maj JEFFREY STEPHENS, USMC, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of committing sodomy on divers occasions with a child under the age of 12, two specifications of committing indecent acts with a child under the age of 16, and two specifications of taking indecent liberties with a child under the age of 16, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The military judge sentenced the appellant to confinement for life without eligibility for parole, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but, pursuant to a pretrial agreement, suspended confinement in excess of 35 years for 12 months from the date of his action.

On appeal, the appellant assigns four errors. First, he argues the military judge erroneously excluded five days in calculating the time under RULE FOR COURTS-MARTIAL 707, MANUAL FOR

COURTS-MARTIAL, UNITED STATES (2002 ed.), which, had it been counted, would have put his arraignment at over 120 days from the date he was placed in pretrial confinement. Second, he contends his sentence is inappropriately severe. Third, he argues the military judge erred by considering, over defense objection, testimony from a Naval Criminal Investigative Service (NCIS) special agent that his offenses showed a level of sophistication as a pedophile and that, as a pedophile, he could not be rehabilitated. Finally, he argues the military judge erred by admitting uncorroborated portions of a statement to NCIS.

We have carefully considered the record of trial, the appellant's four assignments of error, the Government's answers and the appellant's replies. We agree that the appellant's sentence was inappropriately severe, and take corrective action in our decretal paragraph. After taking corrective action, we conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Sentence Appropriateness

The appellant argues that both his adjudged sentence of confinement for life without eligibility for parole, and his approved sentence of 35 years confinement, are unduly harsh, and highly disparate as compared to nine child sex cases cited in his brief. The appellant cites nine Navy and Marine Corps child sex cases decided by this court over the last three years with sentences to confinement ranging from 178 days to 40 years. He also argues his misconduct was relatively limited, that there was no evidence the victims suffered long-term consequences, and that his own prior sexual abuse, remorse, and guilty plea mitigate the seriousness of his crimes. He asks this court to reassess the sentence and set aside all confinement in excess of 10 years.

This court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ. Article 66 is "'a sweeping congressional mandate to the Courts of Criminal Appeal to ensure a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005)(quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct.Crim.App. 2001)). See also *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This task requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the

offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001)(citing *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999)). Further, where the appellant demonstrates there are closely related cases with highly disparate sentences, we must examine whether there is a rational basis for the disparity. *Lacy*, 50 M.J. at 288. The appellant bears the burden of demonstrating that cases are closely related. *Id.*

The appellant fails to demonstrate that the nine cases he cites are closely related to his case. His brief contains only a brief recitation of the charges in these nine cases, with no discussion of the facts affecting the sentences. Even without those facts, it is obvious from the charges alone that five of the nine cases are materially different from the appellant's case, as they involve only indecent acts, and no sodomy charge.

Nevertheless, based on our experience and mindful of our responsibility under Article 66(c) to ensure uniformity, even-handedness, and a fair and just punishment for every accused, we find that a sentence to confinement for life without eligibility for parole is unduly harsh in this case. Accordingly, we will not affirm confinement in excess of 50 years.¹

Admissibility of NCIS Agent's Testimony

1. Factual Background

During the presentencing phase, the Government offered the testimony of NCIS Supervisory Special Agent K. L. Proffitt. Special Agent Proffitt, a 16-year veteran of NCIS, was in charge of both the General Crimes Squad and the Family and Sexual Violence Unit at NCIS's Camp Pendleton office. He had no personal interaction with the victims or the appellant, but supervised the case agent's conduct of the investigation. He

¹ We find the approved sentence appropriate. The appellant repeatedly placed his penis in the mouth of his 5 year old step-daughter, and told her to "suck the weenie". On one of those occasions, he stripped in front of his step-daughter, his own three-year-old daughter, and two of their friends, aged five and six, and had them look at and touch his penis, genitals and buttocks. Then, after sodomizing his step-daughter, took the six-year-old neighbor girl into the bathroom, stripped her, rubbed his penis on her chest and abdomen for five to ten minutes and ejaculated on her chest. These are heinous crimes that deserve harsh punishment.

himself had been involved in between 1,000 and 2,000 investigations of various types, and supervised several hundred. Many of those investigations involved confessions and admissions by the suspect. He had conducted dozens of child sex crime investigations, including multiple-victim cases. Record at 158-62, 166.

At one point the trial counsel asked Special Agent Proffitt, "[H]ave you been able to reach any conclusions about the amounts and type of preparations that Sergeant Rogers engaged in before performing these molestations?" Record at 162. The trial defense counsel objected on the basis of foundation, but the military judge overruled the objection, and allowed the witness to answer "based on [his] knowledge of crimes committed in general and the preparation that's needed." *Id.* The witness then answered:

I have conducted a number of pedophile investigations and have been involved in a number of multiple victim pedophile investigations over my years, and as well as supervised those investigations as well, but in this particular case what stands out, was the sophistication of [the appellant's] contact with the victims.

Id. Shortly later, the trial counsel asked whether the witness had formed an opinion as to the appellant's sophistication in committing this crime, as compared to other child sex cases. The witness responded:

I think [the appellant] is highly sophisticated in his methodology for sexual contact with multiple victims. It's disturbing from the standpoint that he would've allegedly carried out this level of sophistication on a chance encounter or a chance opportunity to have custody of some of the other kids. It has the appearance that this level of sophistication has been on going with his stepdaughter and that it was acceptable to him it -- would be easy for him to fall back into this is what works.

Id. at 164.

A little later, the trial counsel asked, "And based on your experience and your knowledge of this field, have you been able to form an opinion as to the rehabilitative potential of Sergeant Rogers?" *Id.* at 165. The witness responded, "My

experience with pedophiles and the interviews, they really stand out from all other interviews that you conduct. I personally do not believe that you can rehabilitate an individual with that particular disease." *Id.* The trial defense counsel objected that the answer was merely the witness's personal opinion, to which the trial counsel responded that he was an expert, and was "in any event" entitled to give an opinion about rehabilitative potential. The military judge overruled the objection, but stated:

. . . I hear the word "pedophile" banted [sic] about. Unless I get some medical evidence, I am not going to consider that. I realize that you use that term for cases involving children and adults in sexual encounters, but I am not putting a label pedophile on anything here today unless I hear medical evidence on it.

Id.

2. Discussion

The appellant contends the military judge erred in admitting these statements by Special Agent Proffitt over objection. He argues Special Agent Proffitt did not have the training or experience to qualify as an expert in the field of child sexual abuse, and that his evidence failed to meet the standards for relevance and reliability required by MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) and the relevant case law. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *United States v. Billings*, 61 M.J. 163 (C.A.A.F. 2005); *United States v. Johnston*, 41 M.J. 13 (C.M.A. 1994).

We start our analysis by noting that the Government implicitly concedes, as it must, that Special Agent Proffitt testified as an expert, rather than as a lay witness. Special Agent Proffitt had no firsthand knowledge of the events. Rather, he testified based on his experience as a criminal investigator and his familiarity with the investigation in this case from discussing it with the case agents and from reviewing the case files.

We review a military judge's decisions concerning the admission of expert testimony for abuse of discretion. *Billings*, 61 M.J. at 166. In applying the "abuse of discretion" standard,

an appellate court will not set aside a discretionary action by a trial court "unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)(quoting Magruder, J., *The New York Law Journal*, at 4, col. 2 (March 1, 1962)).

MIL. R. EVID. 702 governs testimony by expert witnesses. In order for expert testimony to be admissible, the proponent must establish: (a) the expert's qualifications, (b) that the testimony will assist the trier of fact, (c) the basis of the expert's testimony, (d) the legal relevance of the testimony, (e) the reliability of the testimony, and (f) that its probative value is not substantially outweighed by the danger of unfair prejudice. *Houser*, 36 M.J. at 397-99. Under MIL. R. EVID. 702, anyone who has substantive knowledge in a field beyond that of the average court member may qualify as an expert witness. The witness need not be an "outstanding practitioner," but only someone who can help the fact-finder. *United States v. Harris*, 46 M.J. 221, 224 (C.A.A.F. 1997); *United States v. Stark*, 30 M.J. 328, 330 (C.M.A. 1990).

We shall address separately the witness's testimony concerning the sophistication of the appellant's methodology, and his opinion of the appellant's rehabilitative potential.

A. Appellant's Sophisticated Methodology

We are satisfied that Special Agent Proffitt had sufficient experience in the investigation of crime, including child sex abuse cases, to qualify as an expert in the methodologies used by people who commit sex crimes against children, and to opine as to an accused's relative degree of sophistication. Further, we are satisfied Special Agent Proffitt's opinion was reliably derived. In *Kumho Tire Co.*, the United States Supreme Court explicitly said the test of reliability is flexible, and that the list of factors it had identified in its earlier *Daubert* decision neither necessarily nor exclusively apply to all experts or in every case. *Kumho Tire Co.*, 526 U.S. at 141. Here, it was clear Special Agent Proffitt was comparing the facts of this case, with which he was very familiar, with the facts in the dozens of child molestation cases he had worked on during his law enforcement career.

Expert testimony must also "assist the trier of fact to understand the evidence" and be legally relevant. MIL. R. EVID. 702; see *Houser*, 36 M.J. at 398-99. In this case, tried by a military judge sitting alone, and in which the standard of review is abuse of discretion, we will not second guess the military judge's determination that the testimony of Special Agent Proffitt would assist him. Further, we conclude that Special Agent Proffitt's testimony on sentencing concerning the sophistication of the appellant's methodology was at least minimally relevant. We, therefore, find the military judge did not abuse his discretion in admitting this testimony.

B. Opinion on Rehabilitative Potential

Special Agent Proffitt also offered an opinion, over defense objection, on rehabilitative potential. He said, "I personally do not believe that you can rehabilitate an individual with that particular disease," referring to pedophilia. As noted above, the military judge said he would not "put a label pedophilia on anything" unless he received medical evidence on it, which he did not. He did, however, overrule the objection and admit the testimony.

Witnesses offering an opinion on rehabilitative potential "must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include . . . information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and the nature and severity of the offense or offenses." R.C.M. 1001(b)(5)(B). Additionally, an opinion regarding rehabilitative potential must "relate to the accused's personal circumstances." R.C.M. 1001(b)(5)(C). See *United States v. Griggs*, 61 M.J. 402, 406-07 (C.A.A.F. 2005); *United States v. Armon*, 51 M.J. 83, 86-87 (C.A.A.F. 1999).

We hold that the military judge abused his discretion in admitting Special Agent Proffitt's opinion of the appellant's rehabilitative potential. First, there is no evidence the witness had expertise in the rehabilitative potential of pedophiles. Second, his opinion was irrelevant, as there was no evidence the appellant is a pedophile. Finally, if the witness is viewed as using the term pedophile in a non-technical sense (the sense in which the military judge clearly took it), his testimony was essentially that people who do what the appellant did cannot be rehabilitated. His opinion was not based on relevant information about the appellant, nor did it relate to the appellant's personal circumstances. Such an opinion is

improper aggravation under R.C.M. 1001(b)(5)(C) ("The opinion of the witness . . . regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential").

C. Prejudice

The military judge's error is, however, harmless. Special Agent Proffitt's testimony as a whole was not very persuasive, and the military judge appeared skeptical of his opinions generally. Further, with respect to the witness's opinion of rehabilitative potential in particular, the military judge explicitly indicated he would not put "a label pedophile on anything here today unless I hear medical evidence on it." Record at 165. The military judge's limitation on his use of this testimony renders the witness's opinion essentially without weight.

We do not agree with the appellant that this contested testimony by Special Agent Proffitt explains the sentence of confinement for life without eligibility for parole. The Government presented significant victim impact evidence. Parents of three of the victims, as well as one of the victim's grandmothers, testified about the effects of these crimes on them, their families, and the victims. As well, the Government introduced videotapes of forensic interviews with each of the four victims in which the victims themselves describe what the appellant did to them. This was powerful evidence and it significantly outweighs the erroneously admitted testimony of Special Agent Proffitt.

In light of the slight importance of Special Agent Proffitt's testimony, and our decision not to affirm confinement in excess of 50 years, we are convinced beyond a reasonable doubt that, absent the errors, the court-martial would have adjudged a sentence of at least 50 years confinement. We, therefore, find these errors to be harmless beyond a reasonable doubt. No relief is warranted.

Remaining Assignments of Error

We decline to grant relief on the remaining two assignments of error. Reviewing *de novo*² the military judge's decision to exclude the five days of pretrial delay occasioned by the

² *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999).

appellant's exercise of his Article 35, UCMJ, right from the calculation of time under R.C.M. 707, we conclude the military judge correctly excluded those days. See *United States v. Cherok*, 22 M.J. 438, 440 (C.M.A. 1986)(Article 35 is a shield to prevent too speedy a trial, not a sword with which an accused may attack the Government for failing to bring him to trial sooner); *United States v. Giles*, 58 M.J. 634, 636-37 (N.M.Ct.Crim.App. 2003)(accused cannot be responsible for or agreeable to delay, then demand dismissal for that same delay), *reversed on other grounds*, 59 M.J. 374 (C.A.A.F. 2004).

Likewise, we find no error in the military judge's admission of the appellant's entire 19 June 2004 statement to NCIS. An accused's admission or confession must be corroborated only when it is offered "on the question of guilt or innocence." MIL. R. EVID. 304(g). In this case, the statement was admitted in aggravation. No other rule or case requires corroboration of such statements when offered solely for sentencing purposes. The cases appellant cites are distinguishable. In *United States v. McMurray*, 6 M.J. 348, 349 n.6 (C.M.A. 1979), the court focused on the uses of uncorroborated admissions *on the merits*. In *United States v. Howe*, 37 M.J. 1062, 1065 (N.M.C.M.R. 1993), the court held that, because the uncorroborated admission was not properly admitted *on the merits*, it should not have been part of the evidence before the court on sentencing.

Conclusion

Accordingly, we affirm the findings and so much of the sentence as includes confinement for 50 years, reduction to pay grade E-1, and a dishonorable discharge.

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court