

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Phillip TORRES
Machinery Repairman Second Class (E-5), U. S. Navy**

NMCCA 200600944

Decided 31 January 2007

Sentence adjudged 29 April 2005. 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 BRIAN L. MIZER, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of members with enlisted representation, of one specification of indecent acts, on divers occasions, with a female under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to confinement for six months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's three assignments of error, and the Government's response. The appellant's first assignment of error contends that the military judge abused his discretion by not allowing trial defense counsel to raise a motion, prior to the entry of pleas, to suppress the appellant's statement made to Naval Criminal Investigative Service (NCIS) agents, alleging the statement was not voluntary. The appellant also alleges that the military judge erred when he denied the appellant the opportunity to impeach a witness with evidence of her religious bias against Mormons. Finally, the appellant avers that the military judge erred when, in response

to members' questions, he instructed them that they were not to consider treatment availability for military sex offenders. We conclude that the findings and the 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.

Background

On the evening of 20 September 2004, the appellant was arrested by the Virginia Beach Police Department after they received a call that he had allegedly committed indecent acts upon his 14-year-old stepdaughter. He was subsequently turned over to the NCIS. After interviewing the alleged victim and her mother (the appellant's wife) the appellant was taken to an interview room for interrogation. The agents read the appellant his rights under *Miranda*¹ and to memorialize that the appellant acknowledged, understood, and waived his rights, one of the agents mistakenly had him sign a "Civilian Suspect's Acknowledgment and Waiver of Rights" form, notwithstanding that the appellant was in the Navy.² The rights advisement substantively contained all of the warnings mandated by Article 31b, UCMJ, *Miranda*, and *Tempia*³. The parties agree that during most of the interrogation, the appellant was seated in a plastic chair with metal legs with his non-writing hand cuffed to one of the chair's legs. Eventually, the appellant admitted to committing indecent acts with his stepdaughter.⁴

At trial, the defense moved to suppress the appellant's admission alleging it was coerced. In the alternative, the appellant argued that portions of the statement should be redacted as unduly prejudicial, confusing, or improper character evidence. Notwithstanding that the motion was raised after the court-ordered filing date for pretrial motions, the military judge nonetheless heard the motion on its merits and made findings of fact and conclusions of law.⁵ The military judge ultimately determined that there was no basis to suppress the statement. While he stated that the motion was untimely, he went

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² NCIS Agent Metzler testified that he must have inadvertently grabbed the wrong form. Record at 468.

³ *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

⁴ There was differing testimony as to whether the statement was sworn to by the appellant. The appellant asserts he was not sworn to the statement whereas the NCIS agent says he was in fact sworn. Record at 59, 541.

⁵ The appellant was arraigned on 4 February 2005 and allowed to reserve entering pleas as long as he followed the military judge's case management order, which required motions to be submitted by 1 April 2005. Trial defense counsel, relying on MILITARY RULE OF EVIDENCE 304, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), advised the military judge that motions are due prior to the entry of pleas, and submitted the motion to suppress the appellant's statement on 20 April 2005.

on to determine that "all aspects of the defense's motion have been considered and are denied."⁶ Record at 73. After the statement was published to the members, it was noted the rights form used by the NCIS agents was drafted for civilian suspects as opposed to military suspects. Record at 468. The trial defense counsel at this point objected to the admissibility of the statement arguing that the appellant wasn't informed that he had the right to consult with and to have military counsel present at the interview. *Id.* at 477. The military judge denied the motion as having been previously waived by not objecting prior to the statement being admitted into evidence and published to the members. *Id.* at 478, 484-85.

Suppression of the Appellant's Confession

In his first assignment of error, the appellant contends that the military judge erred by not allowing defense counsel to raise a motion to suppress the appellant's statement before pleas had been entered, but after the court's deadline to submit motions had passed. We find this contention without merit. We note that this assignment of error appears to be somewhat disingenuous, misleading, and a mischaracterization of the events that transpired at trial. Initially, the military judge indicated that he was going to deny the motion as untimely, but ultimately heard all aspects of the motion and denied it as being without merit as well as being untimely. Record at 49-73. He specifically made findings of fact and conclusions of law to support his ruling. *Id.* at 68-72.

Although ambiguous and unclear, the appellant seems to additionally contend that the military judge abused his discretion by making findings of fact and conclusions of law after hearing the motion.⁷ Given that the military judge considered and ruled on the defense's motion, it is unclear how this could be error. In an abundance of caution, however, we will review the military judge's denial of the appellant's suppression motion. In reviewing a military judge's denial of a suppression motion, appellate courts apply an abuse of discretion standard. *United States v. Simpson*, 54 M.J. 281, 283 (C.A.A.F. 2000)(citing *United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998)). This standard for our review of the military judge's findings of fact is a strict one, requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120,

⁶ The military judge also reduced his findings of fact and conclusions of law to writing. See Appellate Exhibit IX.

⁷ The appellant also maintains in this assignment of error that "the military judge abused his discretion when he attempted to 'avoid prejudice to the accused' from his adverse ruling on the timeliness of the appellant's motion by concluding that the appellant's confession was admissible regardless of his denial of the appellant's motion for lack of timeliness (sic)." Appellant's Brief at 4. There was no additional explanation, amplification, or authority cited for this position. Although not specifically stated, we view this as the appellant averring that the military judge's ruling to suppress the statements was error.

130 (C.A.A.F. 2000). In short, a military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable" or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). A suppression motion is a mixed question of fact and law. The military judge's "findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record," while we review conclusions of law *de novo*. *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999)(quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

We have considered the military judge's findings of fact and conclude that they are supported by the record and are not clearly erroneous. Moreover, the military judge correctly applied the law to the facts. Therefore, we conclude that he did not abuse his discretion.

With respect to the appellant's secondary assertion that the military judge erred when he admitted the appellant's statement into evidence because the appellant was not given his Article 31(b), UCMJ, rights, we note that the trial defense counsel did not object on those grounds until after the statement was admitted into evidence and published to the members. The military judge concluded that the appellant's failure to object prior to the statement being offered into evidence, admitted and published to the members constituted waiver. We agree. Even, assuming *arguendo*, that the objection was timely made and that admission was error, we find the error to be harmless beyond a reasonable doubt. The Government's case was overwhelming and included two independent incriminating statements by the appellant.

Evidence of Bias

The appellant's second assignment of error avers that the military judge erred by not allowing the trial defense counsel to question a Government witness about her alleged bias against the appellant because he was Mormon. Mrs. C, the appellant's next-door neighbor, was called as a witness for the Government to rebut a defense inference that the victim's statement was a recent fabrication. During cross-examination, the trial defense counsel attempted to question the witness on her feelings towards Mormons. The Government objected and the military judge called an Article 39(a), UCMJ, session. The trial defense counsel proffered that during a pretrial interview with Mrs. C, she told trial defense counsel that the appellant was a Mormon and that she had done research on the Mormon religion. The military judge recalled the witness outside the hearing of the members and allowed both the Government and trial defense counsel to conduct *voir dire* on the witness. Mrs. C testified that she was previously engaged to a Mormon and had done research on the religion which revealed that many Mormon men still practice polygamy and that some men tended to migrate toward younger women.

With specific reference to the appellant, Mrs. C testified that "I thought maybe in his mind he might have thought it was okay when (sic) he was doing". Record at 390. At the conclusion of the questioning by the Government and trial defense counsel, the military judge and the witness had the following exchange:

MJ: Mrs. C., I'm talking about the day you asked your son] to ask [victim] to come over and talk to you. Was your concern based in part with your knowledge that the accused was Mormon?

A: No, not at all.

Record at 391.

After hearing argument by both sides, the military judge sustained the Government's objection noting that he did not "think 608(c) contemplates that kind of prejudice. . . . If we had an accused who was Asian, would we start asking every witness about their attitudes about Asians? If her attitude about Mormon men was the impetus for her calling [victim] over to ask her questions, maybe, but that nexus was not made. In fact, she specifically denied that." *Id.* at 394.

Our superior court has held that the rules of evidence should be read to allow liberal admission of bias-type evidence. *United States v. Williams*, 40 M.J. 216, 218 (C.M.A. 1994). MILITARY RULE OF EVIDENCE 608(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) allows for evidence to show bias and prejudice to misrepresent through the examination of witnesses. *United States v. Bahr*, 33 M.J. 228, 232 (C.M.A. 1991)(citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986)). When the military judge excludes evidence of bias, the exclusion raises issues regarding the appellant's Sixth Amendment right to confrontation. *United States v. Bins*, 43 M.J. 79, 84 (C.A.A.F. 1995). Where the Sixth Amendment's right to confrontation is allegedly violated by a military judge's evidentiary ruling, the ruling is reviewed for an abuse of discretion. See *United States v. Isreal*, 60 M.J. 485, 488 (C.A.A.F. 2005). If an abuse of discretion is found, the case will be reversed unless the error is harmless beyond a reasonable doubt. *Bahr*, 33 M.J. at 231 (citing *Van Arsdall*, 475 U.S. at 684).

Admission of bias-type evidence is still dependent upon the military judge properly evaluating the evidence's probative value against its potential for unfair prejudice. *United States v. Moss*, 63 M.J. 233, 238 (C.A.A.F. 2006). In the instant case, the military judge rejected the testimonial evidence of alleged bias because he did not find a nexus between her beliefs about the Mormon religion and her motivation to question the victim about her stepfather's possible abuse. The military judge further expressed concern that bringing the appellant's religion into this case unnecessarily may cause "prejudice to the accused or the inflaming perhaps prejudices of the members about Mormons and making them presuppose some things about his character based upon

his religion (sic)." Record at 393. Although not stated as such on the record, the military judge apparently applied a MIL. R. EVID. 403 balancing test and determined that the probative value of the testimony did not outweigh the potential for unfair prejudice. We do not find that the military judge abused his discretion. Assuming *arguendo* that the military judge erred in not allowing the trial defense counsel to question the witness regarding her alleged bias towards the Mormon religion, we find this error to be harmless beyond a reasonable doubt. *Moss*, 63 M.J. at 238 (citing *Bahr*, 33 M.J. at 234).

The appellant's remaining assignment of error is without merit. Accordingly, we affirm the findings of guilty and sentence as approved by the convening authority.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court