

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.F. FELTHAM, J.W. ROLPH, R.E. VINCENT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERT G. ZELL
CRYPTOLOGICAL TECHNICIAN OPERATOR SECOND CLASS (E-5),
U.S. NAVY**

**NMCCA 200600738
GENERAL COURT-MARTIAL**

Sentence Adjudged: 05 August 2005.
Military Judge: LCDR Robert C. Klant, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: CDR N.A. Haggerty-Ford, JAGC, USN.
For Appellant: LCDR Kelvin Stroble, JAGC, USN.
For Appellee: Maj Kevin Harris, USMC.

8 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

ROLPH, Senior Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of carnal knowledge and six specifications of taking indecent liberties with two females under the age of sixteen years of age, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for a period of 48 months, reduction to pay grade E-1, and a dishonorable discharge. Based upon the recommendation of his staff judge advocate, the convening authority ultimately disapproved and dismissed findings

of guilty to two specifications of taking indecent liberties with a female under sixteen years of age. Also, in an act of clemency, the convening authority suspended confinement in excess of twenty-four months for a period of five years from the date of his action, and mitigated the dishonorable discharge to a bad-conduct discharge.

Assignments of Error

The appellant raises three assignments of error for this court's consideration.¹ Having carefully considered the record of trial, each of the appellant's assignments of error, and the Government's answer, 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. Articles 59(a) and 66(c), UCMJ.

Background

During the summer of both 2000 and 2001, Ms. [MLT] and Ms. [LMT], who were stepsisters, visited the appellant and his then-wife, Tiffany, at their home located in Navy housing at Winter Harbor, Maine. MLT and LMT were the appellant's nieces by marriage to Tiffany (the girls' aunt), and both were 14 years old at the time of the majority of offenses for which the appellant was convicted.² The evidence adduced at trial demonstrated that, during the stepsisters' first visit to Maine in the summer of 2000, when both were just 13 years old, the appellant and his wife engaged them in a game of "Truth or Dare," during which dares posed by the appellant became increasingly sexually oriented. Eventually, this game resulted in both MLT and LMT exposing their breasts to the appellant following his specific "dares" for them to do so. It also resulted in the appellant exposing his penis in front of the girls, and feeling and caressing MLT's breasts.

The following summer (2001), MLT and LMT returned for a longer visit with the appellant and his wife. During the course of this visit, the appellant twice engaged in sexual intercourse

¹ The appellant's assignments of error are summarized as follows:

- I. The military judge erred to the substantial prejudice of the appellant when he failed to grant a defense motion for a mistrial following the improper testimony of Ms. [S], a government witness.
- II. The evidence is both legally and factually insufficient to support the appellant's conviction for the lesser included offense of Charge I, Specification 1 (carnal knowledge).
- III. The military judge erred by failing to take appropriate corrective action and summarily dismissed the defense's concern regarding alleged member misconduct (sleeping).

² MLT and LMT were only 13 years old on or about 10 July 2000, when Charge III, Specification 8 (indecent liberties with a female under the age of sixteen by having LMT expose her breasts to appellant) took place.

with MLT, then 14. On the first occasion, which occurred in a bath tub while MLT was showering, the appellant took MLT's virginity. Throughout their 2001 visit, MLT and LMT were often provided with alcohol by both the appellant and his wife. The second act of intercourse with MLT followed a night of drinking games that all participated in, and which rendered all parties intoxicated. During their stay, the appellant would routinely expose his penis to both girls, generally by pulling down his shorts in front of them. He also showed both girls adult pornography contained in four separate movies.³ Finally, during a camping trip while all of them were sleeping together in one tent, the appellant attempted to have MLT touch his erect penis by pulling her hand toward it, which she resisted.

Both MLT and LMT testified at trial, and largely corroborated each other's version of the events that took place in 2000 and 2001. LMT was not a witness to the first act of sexual intercourse (in the shower) between the appellant and MLT; however, she did witness -- and was able to corroborate the essential facts surrounding -- all other offenses of which appellant was convicted. These offenses did not come to light until January 2004, when MLT, while engaged in an argument with her parents over "remaining a virgin," blurted out that the appellant had already taken her virginity.

Failure to Grant Motion for Mistrial

In his first assignment of error, the appellant asserts that the military judge erred to his substantial prejudice when he denied a defense motion for a mistrial following the presentation of improper testimony before the members from Ms. [S], a prosecution witness.

Charge III, Specification 1, alleged that the appellant committed adultery with Ms. [S], at or near Winter Harbor, Maine, on or about "August 2002." Ms. [S] was the 18-year-old sister of a female friend of the appellant's wife, who stayed in the appellant's home as a guest. Prior to trial, the prosecution conceded that they could not establish that the adultery took place during "August 2002," as alleged in the pleading. The prosecution, after arraignment, moved to amend the date of the alleged offense to "on or about November of 2001." Record at 55. The defense objected to the proposed amendment and the military judge (MJ) denied the motion, finding that such would be an improper "major change," as defined by RULE FOR COURTS-MARTIAL 603(D), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed). Record at 57. The appellant's civilian defense counsel (CDC) then requested clarification of the impact that the ruling would have on the adultery charge.

³ Though the appellant was convicted at trial of two specifications of indecent liberties by showing MLT and LMT adult pornography (Charge III, Specifications 6 and 7), the convening authority ultimately disapproved and dismissed these findings after the trial concluded.

CDC: I just need clarification, Your Honor. Then if, in fact, the amendment is not going to issue forth, would the Government be dismissing the charge at this time or ----

MJ: Government, at this time do you know what your plans would be with regard to Specification 1 under Charge III?

TC [Trial Counsel]: Yes sir, we would like to present the evidence as it is and we would include in our proposed instructions a variance instruction.

MJ: The Court would not -- for planning purposes, the Court would not give a variance instruction, having found if this is a major change, that the members would not be able to find that November 21st, 2001 was on or about August 2002.

TC: Would we be able to be heard on this issue, sir?

MJ: Yes, at risk of the Court granting a motion under 917 [for a finding of not guilty] should the evidence not show that the offense actually occurred on or about August 2002, and at that point jeopardy would have attached for any future prosecution.

TC: As far as the later date, sir?

MJ: Yes.

TC: Would we be able to be heard on the variance issue and the case law that applies to it, sir?

MJ: Certainly, if at that point we proceed to trial and there's evidence at that point to survive a 917 issue. I mean if this issue goes to the members, then the Court would certainly hear any argument regarding any instructions, including the possibility of a variance instruction.

TC: Yes, sir.

CDC: I hate to express confusion, Your Honor, but does that mean that we're going to be hearing from Ms. [S] or not in this case?

MJ: As the Court understands it, the Government intends to go forward on the charge, notwithstanding the fact that there's no evidence that they have that this, in fact, occurred on or about August 2002.

CDC: I would object, Your Honor, as being unduly prejudicial to Petty Officer Zell's interests as relates to the other accusations from the other two witnesses, that there's no relevance to put Ms. [S] before the members except to prejudice Petty Officer Zell and to damage his reputation with the members.

MJ: Any prejudice of that nature the Court would find could be cured by the appropriate instructions.

Record at 57-59.

After ruling that the Government's proposed amendment would in fact constitute a major change, which could not be made over appellant's objection, and advising the prosecution that the court would not allow a subsequent variance instruction, the military judge nevertheless permitted the Government to call Ms. [S] as a witness before the members. Ms. [S], as represented and expected by the defense, testified with respect to a number of consensual sexual encounters that she had with the appellant in the fall of 2001, when she was 18 years old, and while the appellant was married to Tiffany Zell. These encounters resulted in an act of oral sodomy performed by Ms. [S] upon appellant, and multiple acts of sexual intercourse with the appellant in his home and, later, at a home she moved into with her sister and her husband. The defense never objected to Ms. [S]'s testimony as it was being given.

The military judge, realizing that Ms. [S]'s testimony contained acts of uncharged misconduct (oral sodomy), and multiple acts of sexual intercourse far outside the period alleged in the specification, interrupted the testimony *sua sponte* and dismissed the members. In the Article 39(a), UCMJ, session that followed, the Government was unable to persuade the military judge of the relevance of Ms. [S]'s testimony in light of the obvious variance from what had been pled, and the judge immediately dismissed her from the witness stand. After doing this, the military judge sternly reminded the Government that their motion to amend Specification 1 of Charge III had been denied. Eventually, the Government withdrew and dismissed this alleged offense. The military judge acknowledged that Ms. [S]'s testimony was improper; however, he denied a defense motion for a mistrial in favor of providing the members with the following curative instruction:

Members of the Court, it was wholly improper for you to be presented with the testimony of the last witness, Ms. [S]. You are instructed that you must completely disregard her testimony in its entirety. You may not consider it for any purpose whatsoever. You must cast it out of your minds as if it had never been said or heard. You must decide this case solely on the evidence which properly comes before you.

Is there any member who cannot follow this instruction?
Negative response from all members. Does each member agree to follow this instruction completely?
Affirmative response from all members.

Members, you are advised further that Specification 1 of Charge III has been withdrawn and dismissed

You are advised further that the withdrawal and dismissal of that specification must not influence you in any way when you consider whether the accused is guilty or not guilty of any of the remaining offenses. The dismissed - a finding of guilty may not be reached unless the Government has met its burden of establishing the guilt of the accused beyond a reasonable doubt, and whether the standard of proof has been met is a question which must be determined by you without any reference to the withdrawal and dismissal of Specification 1 of Charge III.

Does each member understand this instruction? Affirmative response from all members. Does each member agree to follow this instruction? Affirmative response from all members. Thank you.

Record at 269. A similar curative directive was later provided in the members' instructions on findings. Record at 571.⁴ The defense posed no objections to the wording of the curative instructions provided. The issue we now must decide is whether the use of curative instructions was an appropriate remedy in light of the error that occurred in admitting Ms. [S]'s testimony before the members. We find that it was.

Discussion

On appeal, the Government does not dispute the fact that Ms. [S]'s testimony was improper character and "bad acts" evidence and concedes the testimony should not have been admitted. We agree. It was error for the military judge to allow Ms. [S]'s testimony to go before the members when he was on clear notice of a potential fatal variance between the date alleged in the specification and the actual date of the alleged misconduct. The military judge had already refused a Government motion to amend the date on the charge sheet because such would constitute a "major change" not allowable after arraignment over defense objection. He had also ruled that the evidence was not admissible under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARITAL, UNITED STATES (2005 ed.). Record at 257-62. On clear notice of this defect in the pleading, it was incumbent upon the military judge to take affirmative measures to ensure that any testimony provided by Ms. [S] before the members was admissible. He should have first conducted *voir dire* of Ms. [S] in an Article 39(a) session outside the presence of the members to determine what her actual testimony was going to be *vis a vis* the allegations contained in the pleading. This relatively simple procedure would have exposed the obvious defects discussed above and prevented this improper testimony from ever being heard by

⁴ "As I have previously instructed you regarding the entirety of the testimony of Ms. [S], that testimony was improperly submitted and you must completely disregard it. You may not consider it for any purpose whatsoever. You must cast it out of your minds as if it had never been said."

the members. That said, we nevertheless find that the subsequent remedial measures taken by the military judge were sufficient, in this case, to prevent material prejudice to the appellant. See *United States v. Skerrett*, 40 M.J. 331 (C.M.A. 1994); *United States v. Balagna*, 33 M.J. 54 (C.M.A. 1991); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990).

R.C.M. 915(a) states in part: The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.⁵

A mistrial has historically been viewed as "an unusual and disfavored remedy" that should be resorted to only as a last resort in order to truly guarantee the fairness of the trial. *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993). A military judge is afforded "considerable latitude in determining when to grant a mistrial," *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)(quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)), and it is only in rare and extremely compelling circumstances that an appellate panel should reverse a trial judge's decision with respect to this issue, *Dancy*, 38 M.J. at 6. This deference to the trial judge is appropriate, as it is that individual who possesses the superior vantage point from which to assess the tenor of the ongoing proceedings, any impact the error(s) had upon such proceedings, and the members' amenability to following curative instructions. *Diaz*, 59 M.J. at 90 (quoting *United States v. Freeman*, 208 F.3d 332, 339 (1st Cir. 2000)). We review the military judge's decision to proceed with a curative instruction vice declaring a mistrial for a clear abuse of discretion. *Dancy*, 38 M.J. at 6.

We find no abuse of discretion on the part of the military judge in electing to handle this inadmissible testimony with timely and carefully crafted curative instructions, rather than by granting a mistrial. The curative instructions he provided the members were accurate, detailed, and compellingly admonished the members: 1) to completely disregard the testimony; 2) to not consider the testimony for any purpose whatsoever; and 3) to cast the testimony out of their minds as if it had never been said or heard. Record at 269. The military judge then went on to specifically ask all the members: 1) if they understood the instruction; 2) if there was any reason they could not follow the instruction; and 3) if each would agree to "follow this instruction completely." *Id.* Each member responded affirmatively. *Id.* He then went even further and advised the members that the withdrawal and dismissal of the specification

⁵ The Discussion to R.C.M. 915 warns that, "[t]he power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial conduct."

must not influence them in any way when they considered whether the accused was guilty or not guilty of any of the remaining offenses. This was emphasized by the military judge's reminder that a finding of guilty could not be reached unless the Government met its burden of establishing guilt for the remaining offenses beyond a reasonable doubt, without any reference to the withdrawn and dismissal specification. *Id.*

In *Skerrett*, a case very similar to this one, our superior court affirmed the military judge's election not to grant a mistrial, and to handle improperly admitted testimony instead with a curative instruction. The accused in that case was charged with committing sodomy and indecent acts upon a 7-year-old girl on two different dates in January 1989. In a separate specification, he was also charged with committing indecent acts upon a 14-year old girl in April 1987. During the Government's case on the merits, the 14-year-old testified extensively about the accused fondling her breasts and vaginal area in 1987 when she spent the night with the accused's daughter in the accused's home. After cross-examination revealed that the acts of molestation on the 14-year-old actually occurred in 1985 vice 1987, the military judge granted a motion for a finding of not guilty to the specification involving her. The defense then moved for a mistrial based upon the prejudicial effect the 14-year-old girl's testimony would have upon the members in determining the guilt on the remaining charges relating to the 7-year-old. The military judge denied the motion for a mistrial; instead electing to provide detailed curative instructions directing the members to "absolutely disregard" the 14-year-old's testimony. He then ensured that each member fully understood his instructions and agreed to follow them. Our superior court found that remedy to be sufficient. They noted that the military judge's instructions were clear, accurate, and repeated in findings instructions. They were also satisfied that there had been no misconduct on the part of the Government in originally adducing the testimony. *Skerrett*, 40 M.J. at 333-34; *see also United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999)(appropriate curative instruction can render serious evidentiary error harmless).

We find *Skerrett* extremely persuasive in resolving this issue. The judge in the appellant's case, once he realized that Ms. [S]'s testimony was not admissible due to the variance issue, immediately and *sua sponte* interrupted it and sent the members from the courtroom. Record at 254. He thereafter consulted carefully with counsel in deciding whether a mistrial was required, or whether prejudice could be avoided through limiting instructions. Having determined that carefully crafted curative instructions were appropriate, he gave them immediately, and without objection to form or content by either side. The instructions were firm and unequivocal in regard to each member's responsibility to "completely disregard her testimony in its entirety." He thereafter repeated this admonition in the

findings instructions, and, again, the members indicated they understood and would follow the guidance given.

We do not find the testimony of Ms. [S] so prejudicial that the members could not properly apply the military judge's instructions. Unlike MLT and LMT, Ms. [S] was not a minor at the time of her alleged sexual involvement with the appellant. Also, all sexual acts she testified about were consensual in nature, as opposed to the allegations involving MLT and LMT.⁶ Finally, the acts involving Ms. [S] were completely separate in time from those involving MLT and LMT.

We also note that the members appear to have conscientiously followed all instructions provided by the military judge, and to have carefully weighed and evaluated all the evidence in this case. This is reflected in the mixed findings that they returned in regard to the allegations involving MLT and LMT. Additionally, we can discern no intentional misconduct on the part of the Government in adducing the testimony of Ms. [S]. We are confident from our review of the entire record of trial that the appellant was not prejudiced in any way by the military judge's denial of his motion for a mistrial, and subsequent employment of curative instructions.

Remaining Assignments of Error

We have carefully reviewed and considered appellant's contention that the evidence was legally and factually insufficient to support his conviction under Specification 1 of Charge I of the lesser included offense of carnal knowledge, in violation of Article 120(b), UCMJ. We disagree. See Article 66, UCMJ; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Considering all of the evidence in the light most favorable to the prosecution, we conclude that reasonable fact-finders could have found all of the essential elements of this offense were proven beyond a reasonable doubt. Additionally, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are ourselves convinced of appellant's guilt beyond a reasonable doubt.

Finally, we have also considered appellant's assertion of member "misconduct" and find it to be without merit. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

⁶ The appellant was originally charged with raping MLT on both occasions that sexual intercourse took place, in violation of Article 120, UCMJ. He was found guilty of the lesser included offense of carnal knowledge. He was also found not guilty of one specification alleging forcible anal sodomy of MLT.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge FELTHAM and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court