

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

**Before  
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ  
Appellate Military judges**

**UNITED STATES OF AMERICA**

**v.**

**KEIR A. HARRIS  
ELECTRONICS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200700531  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 03 November 2006.  
**Military judge:** CAPT Salvador Dominguez, JAGC, USN.  
**Convening Authority:** Commander, Navy Region Hawaii, Pearl Harbor, HI.  
**Staff Judge Advocate's Recommendation:** LCDR Edward Korman, JAGC, USN.  
**For Appellant:** LT Brian D. Korn, JAGC, USN.  
**For Appellee:** LT Timothy H. Delgado, JAGC, USN.

**19 AUGUST 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

VINCENT, Senior Judge:

This case is before us for the second time. Initially, the appellant raised five assignments of error.<sup>1</sup> We resolved four of

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<sup>1</sup>I. THE MILITARY JUDGE ERRED IN ADMITTING SENTENCING EVIDENCE OF UNCHARGED SEXUAL ABUSE BY APPELLANT OF HIS DAUGHTER.

II. APPELLANT'S TRIAL DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO CONTACT APPELLANT BEFORE SUBMITTING CLEMENCY MATTERS ON APPELLANT'S BEHALF.

III. IN THE SECOND PARAGRAPH OF DETAILED DEFENSE COUNSEL'S INITIAL CLEMENCY REQUEST, APPELLANT IS LISTED AS "LT CHAPPELL" INSTEAD OF PETTY OFFICER HARRIS. NEITHER THE STAFF JUDGE ADVOCATE NOR THE CONVENING AUTHORITY COMMENTED ON THIS ERROR, DEMONSTRATING THAT THEY DID NOT PROPERLY REVIEW THE CLEMENCY REQUEST.

IV. APPELLANT WAS PREJUDICED WHEN HIS DETAILED DEFENSE COUNSEL, IN THE THIRD

these five assignments of error by our previous decision. *United States v. Harris*, No. 200700531, 2008 CCA LEXIS 95, unpublished op. (N.M.Ct.Crim.App. 18 Mar 2008). We have now again examined the record of trial, the appellant's remaining assignment of error (AOE I), and the Government's response. We conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), Uniform Code of Military Justice, 10 U.S.C. §§ 859(a) and 866(c).

## I. Background

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of unauthorized absence, sodomy with a child between the ages of 12 and 16, and five specifications of committing indecent acts upon a child under the age of 16, in violation of Articles 86, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 925, and 934. The appellant was sentenced to confinement for 25 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence, however, pursuant to the pretrial agreement, suspended confinement in excess of 20 years for a period of 21 years from the date of his action. The CA also deferred automatic forfeitures, provided the appellant established an allotment for his wife, and waived automatic forfeitures for six months from the date of his action.

The appellant entered into a pretrial agreement with the CA in this case. Appellate Exhibit I. As part of the pretrial agreement, the appellant agreed not to object to the admission of certain evidence during the sentencing portion of his court-martial. AE I at 4-5. Specifically, he agreed not to object to a videotaped interview of the victim of his crimes, his biological daughter (CH), in which she said the appellant began to sexually abuse her when she was seven years old. Prosecution Exhibit 2. Additionally, he also agreed not to object to the admission of a stipulation of expected testimony from CH, in which CH also stated that the sexual abuse began when she was "seven years old," and further alleged the sexual abuse occurred "once a day, four to five times a week." PE 14 at 1. Finally, the appellant agreed to the admission of various photographs of CH from ages six to 13. PE 7-12. However, the appellant plead

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PARAGRAPH OF THE INITIAL CLEMENCY REQUEST, STATED THAT THE APPELLANT'S CHILDREN'S LIVES HAVE BECOME FAR MORE DIFFICULT BECAUSE OF APPELLANT'S ACTIONS, IMPROPERLY FOCUSING ON APPELLANT'S UNLAWFUL ACTIONS RATHER THAN A LEGITIMATE BASIS FOR CLEMENCY.

V. THE STAFF JUDGE ADVOCATE RECOMMENDATION WAS DELIVERED TO AND RECEIVED BY LT [R], WHO NEVER FORMED AN ATTORNEY-CLIENT RELATIONSHIP WITH APPELLANT.

Assignments of Error III, IV, and V were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

guilty to committing sodomy and indecent acts with CH when she was between the ages of 12 and 15.

During the sentencing portion of the court-martial, the military judge, *sua sponte*, recognized the Government's expert witness was referring to sexual abuse that had occurred prior to the charged misconduct. Record at 102-03. The military judge initially limited the Government's inquiry to the date of the first offense to which the appellant plead guilty forward. *Id.* at 103. However, after reviewing *United States v. Tanner*, 63 M.J. 445 (C.A.A.F. 2006), the military judge reversed his prior ruling and permitted the Government to introduce sentencing evidence of the appellant's prior sexual abuse of CH. Record at 114-15. Prior to his ruling, the appellant's trial defense counsel did not object to the admission of the evidence. *Id.* Additionally, as we previously noted, the appellant expressly agreed, with the advice of his counsel, to admit PE 2, 7 through 12 and 14 in his pretrial agreement and discussed that decision on the record with the military judge. Record at 65, 78-79.

In his sole remaining assignment of error (AOE I), the appellant contends the military judge erred in admitting the evidence of uncharged sexual abuse alleged by CH. We disagree.

## II. DISCUSSION

### A. Principles of Law

When the appellant does not object to the admission of certain evidence, the issue is forfeited, absent plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citing *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); and RULE FOR COURTS-MARTIAL 905(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)). "Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Hardison*, 64 M.J. at 281.

Evidence "directly relating to" the offenses may be considered as aggravation evidence during sentencing. R.C.M. 1004(b)(4). In a case of child molestation, "evidence of a prior act of child molestation 'directly relat[es] to' the offense of which the accused has been found guilty and is therefore relevant during sentencing under R.C.M. 1001(b)(4). *Tanner*, 63 M.J. at 449 (quoting R.C.M. 1001(b)(4) and citing MILITARY RULE OF EVIDENCE 401; 1 STEPHEN A. SALTZBURG ET AL., MILITARY RULE OF EVIDENCE MANUAL § 401.02 (5th ed. 2003)); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)(a stipulation of fact containing uncharged indecent acts with the same child victims was admissible where acts "evidenced a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community, i.e., the servicemember's home.")).

## B. Analysis

Because the appellant waived objection to the evidence he now complains was erroneously admitted, we examine the admission of this evidence for plain error.

The portions of the stipulation of expected testimony, the photographs, and the videotape of CH containing evidence of the appellant's uncharged acts of child molestation upon CH directly related to offenses to which he pled guilty and, accordingly, were relevant during sentencing. The evidence demonstrated not only the depth of the appellant's sexual problems, but also the true impact of the charged misconduct upon CH. *See Mullens*, 29 M.J. at 400.

Finally, we note that consideration of MIL. R. EVID. 414 evidence, under R.C.M. 1001(b)(4), requires the military judge to balance the relevance of the uncharged misconduct against the risk of unfair prejudice. MIL. R. EVID. 403; *see Tanner*, 63 M.J. at 449. While it is preferable for the military judge to articulate this analysis on the record, he is not required to do so. *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993). A military judge is presumed to know the law and, without contrary evidence, we will assume he acted according to it. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994).

In the instant case, the record of trial conclusively demonstrates the military judge considered the applicable case law, *United States v. Tanner*, when deciding the evidence was admissible. Record at 114-15. Additionally, the appellant did not object to the admissibility of this evidence and agreed to its admissibility in his pretrial agreement.

Therefore, we have determined that the stipulation of expected testimony, photographs, and videotape were admissible pursuant to MIL. R. EVID. 414(a) and R.C.M. 1001(b)(4), so no error resulted. Since we have determined that the admissibility of this evidence was not error, we decline to grant relief.

### **III. Conclusion**

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

Senior Judge WHITE and Judge STOLASZ concur.

For the Court

R.H. TROIDL  
Clerk of Court