

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

**Before
D.E. O'TOOLE, F.D. MITCHELL, J.F. FELTHAM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MATTHEW W. MAZZA
BOATSWAIN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200400095
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 May 2006.

Military Judge: LtCol Jeffrey Meeks, USMC.

Convening Authority: Commanding General, Marine Corps Base,
Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col C.J. Woods,
USMC.

For Appellant: LCDR M. Eversole, JAGC, USN.

For Appellee: LT Craig Poulson, JAGC, USN; LT J. Dunlap,
JAGC, USN.

17 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Senior Judge:

A general court-court martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of committing indecent acts upon a female under the age of 16, and communicating indecent language to a female under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for 108 months, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

Upon review, a panel of this court found that the military judge committed reversible error and set aside the findings and sentence. A rehearing was authorized.¹ At the rehearing, contrary to his pleas, a general court-martial, composed of officer members, again convicted the appellant of the aforementioned misconduct. He was sentenced to four years confinement and a bad-conduct discharge.

We have examined the rehearing record of trial, the appellant's brief and six assignments of error,² and the Government's response. 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.

Human Lie Detector Testimony

In his first assignment of error, the appellant contends that the military judge committed plain error by allowing "human lie detector testimony" from an expert witness in the field of child sexual abuse. We find that any error was "invited error" and decline to grant relief.

The appellant was convicted of, *inter alia*, committing indecent acts upon his minor daughter, AM. The indecent acts included feeling around her vaginal area with his fingers, placing his fingers in her vagina, and feeling her breasts. These indecent acts occurred on divers occasions from 25 January 1997 until 30 January 2001.

¹ *United States v. Mazza*, No. 200400095, 2005 CCA LEXIS 265, unpublished op. (N.M.Ct.Crim.App. 29 Aug 2005)

²I. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ALLOWING A GOVERNMENT EXPERT TO PROVIDE HUMAN LIE DETECTOR TESTIMONY?

II. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ADMITTING A VIDEOTAPED INTERVIEW OF THE VICTIM AS SUBSTANTIVE EVIDENCE EVEN THOUGH THE TAPE WAS HEARSAY EVIDENCE AND IT WAS MADE AFTER THE VICTIM'S MOTIVE TO FABRICATE?

III. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ALLOWING THE MEMBERS TO VIEW THE VIDEOTAPED INTERVIEW OF THE VICTIM DURING DELIBERATIONS WITHOUT SUPERVISION?

IV. WHETHER THE CIVILIAN DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY: (1) SOLICITING HUMAN LIE DETECTOR TESTIMONY, (2) FAILING TO OBJECT TO THE ADMISSION OF THE VICTIM'S VIDEOTAPED INTERVIEW, AND (3) PERMITTING THE VIDEOTAPE TO BE VIEWED DURING DELIBERATIONS?

V. WHETHER THE FINDINGS OF GUILTY FOR INDECENT LANGUAGE AND INDECENT ACTS ARE FACTUALLY AND LEGALLY SUFFICIENT?

VI. WHETHER APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PRJUDICED BY THE UNREASONABLE DELAY IN THE POST-TRIAL PROCESSING OF HIS CASE.

After AM, her sister TM, and the appellant's ex-wife (AM's and TM's mother) testified for the prosecution, the Government called Dr. Susan Horowitz, a civilian child sexual abuse expert to testify on matters pertinent to her expertise. Dr. Horowitz's direct examination was primarily focused on the concept of "delayed disclosure," explaining why sexual assault victims, especially children, don't always immediately report abuse, and sometimes just keep it secret.

During the cross-examination of Dr. Horowitz conducted by the appellant's civilian defense counsel, the following exchange occurred:

Q. My question is: Whether it be child sexual abuse, child abuse, or adult sexual abuse, are their (sic) not, in fact, concerns about malingering and people having either primary, and/or secondary gains?

. . . .

A. The studies that have been done have shown that there are very few false accusations. In fact, there has been a study out of Canada that looked at 7600 cases of child maltreatment. Um, 800 were sexual abuse, and there was six percent false allegations; and none of those false allegations were made by the victim, or the child itself. They were all made by adults.

MJ: All right.

Wit: And that supports other research.

Record at 402-03.

The military judge at this point, *sua sponte*, stopped the expert's testimony, excused the members, and called an Article 39(a), UCMJ, session. The military judge specifically asked the appellant's civilian defense counsel if he was attempting to elicit testimony from this expert witness concerning false reporting. *Id.* at 407. The appellant's counsel responded in the affirmative. The civilian defense counsel went on to make it clear to the military judge that he was intentionally eliciting this testimony from the witness as part of his defense strategy. *Id.* at 407-09. The civilian defense counsel proceeded to elicit additional statistical data from Dr. Horowitz in an attempt to illustrate that even though the false accusation rate may be low (three to four percent), in the context of hundreds of thousands of cases, there are tens of thousands of reported cases in which persons are falsely accused.

Our superior court has made it clear that "child-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses." *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998); *see United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990); *United States v. Arruza*,

26 M.J. 234, 237 (C.M.A. 1988). Although, Dr. Horowitz did not specifically testify as to the veracity or the truthfulness of the victim in the case at bar, her testimony as to the low rate of false reporting could have had the same effect upon the members, that is, to suggest that because the rate of false reporting is very low, there is a high likelihood that the victims making the allegations are truthful. Our superior court has held that this type of statistical testimony "goes to the core issue of the victim's credibility and truthfulness" and constitutes plain and obvious error. *United States v. Brooks*, 64 M.J. 325, 329 (C.A.A.F. 2007).

Ordinarily, a lack of objection by the defense to impermissible evidence forfeits the issue and would require this court to test for prejudice using a plain error analysis. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). In the case *sub judice*, however, the civilian defense counsel actively elicited the testimony the appellant now claims as error. "[A] party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit." *United States v. Wells*, 519 U.S. 482, 488 (1997)(quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993)). This principle, commonly referred to as "invited error," has been employed by our superior court on numerous occasions to deny relief. *See, e.g., United States v. Resch*, 65 M.J. 233, 239 (C.A.A.F. 2007); *United States v. Dinges*, 55 M.J. 308 (C.A.A.F. 2001); *United States v. Eggen*, 51 M.J. 159 (C.A.A.F. 1999); *United States v. Raya*, 45 M.J. 251, 253-54 (C.A.A.F. 1996); (Stucky, J., dissenting).

We find that the "human lie detector" testimony assigned as error by the appellant was purposefully and intentionally elicited from the witness by the civilian defense counsel as part of the defense strategy. The appellant cannot create error and then take advantage of a situation of his own making. Invited error does not provide a basis for relief and we decline to grant any. Accordingly, we find this assignment of error to be without merit.

Prior Consistent Statements

In his second assignment of error, the appellant contends that the military judge erred by admitting a videotaped statement made by the victim, inadmissible as hearsay, which had the effect of bolstering her testimony. The civilian defense counsel did not object to its admissibility.³

³ The videotaped statement made by the victim, AM, to Ms. Davies of Child Protective Services on 31 January 2001, was requested by one of the members. Initially, both the Government trial counsel and the civilian defense counsel objected to this videotape being shown to the members. The military judge conducted an *in camera* review and concluded that parts of the videotape were admissible and some might be subject to objection. He neither elaborated on which parts might be subject to objection, nor stated on the record under which rule of evidence or procedure the remainder of the audiotape was admissible. In an earlier Article 39(a) session, the military judge intimated

Where the appellant has not preserved an evidentiary issue by making a timely objection, any error will be forfeited in the absence of plain error. To demonstrate that relief is warranted under the plain error doctrine, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. *United States v. Fletcher* 62 M.J. 175, 179 (C.A.A.F. 2005).

The appellant now argues that this videotaped statement did not meet the requirements of MILITARY RULE OF EVIDENCE 801(d)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), and was, therefore, inadmissible hearsay. The crux of his argument is that the event which formed the basis for the victim's motivation to fabricate happened before she made the videotaped statement to Child Protective Services (CPS), and, therefore, could not be used to rebut an allegation of recent fabrication. The following is a helpful timeline of events:

- 25 Jan 97 - 30 Jan 01, the timeframe the sexual abuse occurred.
- 13 Jan 01 - AM is struck by appellant because she had a long "pinky nail" (the appellant accused her of drug use).
- 13 Jan 01 - About an hour after the assault, AM discloses to her mother that she had been assaulted by the appellant, and discloses the sexual abuse as well.
- 27 Jan 01 - AM writes a note to MG, her friend at school, disclosing that her father had been sexually abusing her. (The note is undated, but AM testified she wrote it approximately two weeks after the assault by her father).
- 31 Jan 01 - AM has a videotaped interview with Ms. Davies of CPS.
- Feb to - AM gave multiple statements to CPS in more detail
May 01 during further therapy sessions

Normally, any statement made out of court, offered into evidence to prove the truth of the matter asserted is hearsay. Unless it falls within one of the exceptions provided by the rules of evidence or Act of Congress, hearsay is inadmissible in

that it might be admissible under MILITARY RULE OF EVIDENCE 613, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) to rehabilitate the witness. After holding a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) conference to discuss the admissibility, each counsel withdrew his objection without elaboration. Record at 493. Further, the military judge instructed the members that prior consistent statements made by AM, TM, and their mother can only be considered "for its tendency to refute the charge of recent fabrication, improper influence or improper motives." *Id.* at 627. He further instructed the members that they were not to consider these statements for the truth of the matter expressed therein. *Id.*

trials by court-martial. MILITARY RULES OF EVIDENCE 801(c) and 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Under certain circumstances, an out-of-court statement can be offered into evidence to prove the truth of the matter asserted therein and not be considered hearsay. MIL. R. EVID. 801(d)(1)(B) provides in pertinent part that a statement is not hearsay "if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. . . ." Our superior court has consistently interpreted this rule to require that a prior statement admitted into evidence as substantive evidence, precede any motive to fabricate or any improper influence that it is offered to rebut. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998). There may be, however, multiple motives to fabricate or multiple improper motives woven in the fibers of a particular case. In those cases, the statement need not precede all such motives or inferences, but only the one it is offered to rebut. *Id.*

The cross-examination of AM by the civilian defense counsel clearly implied that AM was coaxed by CPS to embellish her statements. This is evidenced by the following exchange between AM and the civilian defense counsel:

Q: And at various times in the beginning, when you were with CPS, you would have meetings with them and after those meetings they would give you a prize, a stuffed animal, a purse, and some other types of stuffed animals; correct?

A: Yes.

Q: And that was after you had the meeting, you would get a stuffed animal. Do you remember what stuffed animals you got?

A: No. I think one time I got a blanket and a little purse that was just full of little girlie stuff, that was it.

Q: And these were after you came out of the meeting with the counselor?

A: Yes

Q: During which you had disclosed something new to them?

A: That was when I was making the videotapes.

Q: In other words, you had been -- in making new disclosures, at the end of that you would get a stuffed animal, or in one instance, a purse; correct?

A. I guess.

Record at 269.

Although not articulated by the military judge on the record as the basis for admissibility, we find that AM's videotaped statement of 31 January 2001 was admissible under MIL. R. EVID. 801(d)(1)(B) to rebut the improper influence inference raised by

the defense: that her testimony was coaxed by CPS giving her trinkets. We hold that the military judge did not err in admitting this videotaped testimony into evidence.⁴ Accordingly, we do not find plain error and this assignment of error is without merit.

Videotaped Evidence in Deliberation Room

In his third assignment of error, the appellant contends that the military judge erred by allowing the members to take AM's videotaped statement into the deliberation room. A lack of an objection by the defense again triggers a plain error analysis by this court. *Fletcher*, 62 M.J at 179.

R.C.M. 921(b), provides guidance on deliberation and voting on findings. It also describes what types of materials can be taken with the members into the deliberation room. R.C.M. 921(b) provides that "Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted into evidence, and any written instructions." Other procedural and evidentiary rules, as well as case law, however, have limited the types of exhibits that members may take with them during deliberations. For example, they may not take transcripts of testimony taken at Article 32, UCMJ, hearings (*United States v. Ureta*, 44 M.J. 290, 299 (C.A.A.F. 1996)); or stipulations of expected testimony (*United States v. Schmitt*, 25 C.M.R. 822, 824 (A.F.B.R. 1958)); or depositions (*United States v. Jakaitas*, 27 C.M.R. 115, 118 (C.M.A. 1958)).

Finding no binding precedent on point in military jurisprudence, the appellant invites this court's attention to the holding in *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985) to support his contention. In *Binder*, the lower court allowed the jury to watch the videotaped testimony of the victims in a child molestation case during their deliberations. In finding reversible error, the Ninth Circuit held that permitting the replay of the videotaped testimony was equivalent to allowing a live witness to testify a second time in the jury room. The Government argues that *Binders* differs from the case *sub judice* in that in *Binder*, the videotape of the victims was prepared and substituted by both parties in place of the live, in-court testimony of the competent and available witnesses. The videotape in the case at bar was admitted into evidence not as testimony, but as a prior consistent statement to rebut an allegation of improper motive. That notwithstanding, the issue of paramount importance in this assignment of error is not the

⁴ The videotape interview of AM of 31 Jan 2001 contained allegations of uncharged misconduct committed by the appellant. AM indicated on the videotape that when the appellant wrestled with her and touched her breasts, she would cry. In an attempt to get her to "shut up," he would "smack" her or "shove [her] into the wall." Although this type of uncharged misconduct is normally not admissible and could possibly inflame the members, given the military judge's limiting instructions, we find that if this was error, it was harmless beyond a reasonable doubt.

admissibility of the substance of the videotape, but rather the medium on which the statement was contained.

While we are concerned with the prejudicial emphasis the members might have placed on this videotaped evidence, we note that the civilian defense counsel chose not to object to the military judge's decision. Furthermore, during closing argument, he actively encouraged the members to review the tape during their deliberations. Record at 603. The civilian defense counsel used the tape to the appellant's advantage and argued that the victim's statement was "inconsistent" and "didn't make sense." *Id.* Assuming, without deciding, that it is error for the military judge to allow the members to take this kind of evidence into deliberations, under the facts of this case, it was not materially prejudicial to any of the substantial rights of the appellant. If error, we find it to be harmless. Accordingly, this assignment of error is without merit.

Ineffective Assistance of Counsel

In his fourth assignment of error, the appellant avers that he was denied effective assistance of counsel. He specifically contends that his civilian defense counsel was deficient because: (1) he solicited human lie detector testimony from the Government's expert which cut against the appellant during trial; (2) he failed to object to the admission of the victim's 31 January 2001, videotaped statement, admitted into evidence at the request of one of the members; and (3) he permitted the same videotaped statement to be viewed during deliberations.

In reviewing allegations of ineffective assistance of counsel, we conduct a *de novo* review. *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004). In conducting that review we adhere to the standards set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). We note that many of the decisions made by the civilian defense counsel now claimed as error by the appellant, albeit risky, were tactical or strategic in nature. Generally, appellate courts will not second-guess strategic or tactical decisions made at trial by defense counsel. *United States v. Paxon*, 64 M.J. 484, 489 (C.A.A.F. 2007).

This court need not, however, reach the question of deficient representation if we can first determine a lack of prejudice. The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004).

Based upon our review of the record and our findings regarding the first three assignments of error, which also form the basis for appellant's claim of ineffective assistance of counsel, we find that even if the civilian defense counsel's performance was deficient, the appellant has not demonstrated

that he was prejudiced. Accordingly, we find this assignment of error to be without merit.

Factual and Legal Sufficiency

In his fifth assignment of error, the appellant asserts that the evidence presented at his court-martial was factually and legally insufficient to convict him of the charge and two specifications. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial, and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Indecent Acts

The elements of indecent acts are: 1) that the accused committed a certain act upon the body of a certain person; 2) that, at the time the person was under 16 years of age and not the spouse of the accused; 3) that the act of the accused was indecent; 4) that the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions or sexual desires of the accused, the victim, or both; and 5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁵

The evidence adduced at trial established that the appellant did engage in indecent acts with his daughter. The testimony of the victim, provided the most compelling evidence. She testified that the abuse began during the 1996-97 timeframe. AM's testimony of specific instances of indecent acts included her putting lotion on the appellant's penis at his behest when she was six years old; the appellant putting his hands down her pants and stroking her vagina while they were wrestling; and feeling her breasts. Record at 226-32. AM also testified that the appellant, on divers occasions, entered her room while she pretended to be sleeping and put his hand under her clothes to touch her vagina and bare breasts. *Id.* at 232-35. Additionally, AM's mother testified that she had witnessed the appellant wrestling with AM and TM. She indicated that when they were younger it was just wrestling, as they got older it developed into something where, in her recollection, her daughter would

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 87(b).

always ended up crying. *Id.* at 328. She also testified that during a telephone conversation with the appellant subsequent to AM's disclosures, he confessed that he molested AM. *Id.* at 342. After reviewing the evidence in a light most favorable to the Government, we are convinced that a rational trier of fact could have found the appellant guilty of indecent acts, and we are convinced of the appellant's guilt beyond a reasonable doubt.

Indecent Language Offense

The elements of indecent language are: 1) That the accused orally or in writing communicated to another person certain language; 2) That the language was indecent; and, 3) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.⁶

The explanation section under Article 134, indecent assault, defines indecent as "language [that is] grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." Again, at the appellant's trial, the primary witness against him was AM, his daughter. AM testified that when she rebuffed his advances to "wrestle," the appellant would oftentimes get irritated and would call her a "bitch." Record at 235. AM's sister, TM, additionally testified that she had heard the appellant call her sister a "bitch," but never used that word towards her. This would normally occur when they had been "wrestling." Record at 306.

We find unpersuasive the appellant's argument that the context in which he referred to his daughter as a "bitch" is not indecent. We find that the evidence of record is both legally and factually sufficient to establish beyond a reasonable doubt that the appellant communicated indecent language to AM. We find this assignment of error to be without merit.

Post-Trial Delay

In his sixth and final assignment of error, the appellant avers that his right to a speedy post-trial review was materially prejudiced by unreasonably delay in post-trial processing. In this case, a delay of approximately 333 days occurred from the date of sentencing to the date of docketing with this court.

In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. We conclude, however, that the appellant has not demonstrated prejudice. We therefore find this delay to be harmless beyond a reasonable doubt. We additionally find the delay does not affect

⁶ M.C.M., Part IV, ¶ 89(b)

the findings and sentence that should be approved in this case. *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

Conclusion

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

Chief Judge O'TOOLE and Senior Judge FELTHAM, concur

For the Court

R.H. TROIDL
Clerk of Court