

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

**Before
F.D. MITCHELL, L.T. BOOKER, J.A. MAKSYM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER L. OGLESBY
ELECTRICIAN'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200900361
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 17 March 2009.

Military Judge: CAPT James Harty, JAGC, USN.

Convening Authority: Commanding Officer, Naval Nuclear
Power Training Unit, Goose Creek, SC.

Staff Judge Advocate's Recommendation: LT S.J. Beatty, JAGC,
USN.

For Appellant: LT Brian Korn, JAGC, USN.

For Appellee: Capt Robert Eckert, USMC.

13 April 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

MAKSYM, Senior Judge:

After entering mixed pleas, the appellant was tried by a special court-martial consisting of members with officer and enlisted representation. He pled guilty to assault consummated by a battery of a child under the age of 16, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. On the contested charge, members found the appellant guilty of communicating indecent language to a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was sentenced

to reduction to pay grade E-1, confinement for six months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant's sole assignment of error alleges that the military judge erred in admitting sentencing evidence consisting of uncharged misconduct by the appellant towards the victim.¹ We disagree and affirm the findings and sentence.

Factual Background

The victim in this case, CS, was born on 25 November 1995. Record at 741. The appellant lived on the same street as CS; the appellant's wife was CS's babysitter and friends with her mother. *Id.* at 743-46. On or about 30 October 2006, CS was at the appellant's house, and the appellant asked her to help him plant flowers. *Id.* at 747. CS testified that the appellant told her, "I'm thinking of you in bra and panties." *Id.* at 751. CS testified that the evening before this incident, the appellant described her using the terms, "[g]orgeous, cutie, beautiful." *Id.* at 756. CS testified that on another occasion the appellant tried to take a picture of her against her wishes, and talked about wanting to take a picture of her wearing a swimsuit. *Id.* at 758. During the providency inquiry, the appellant stated that on the night of 31 December 2006, he placed his hand in the vicinity of CS's breast, and pulled her into his lap. *Id.* at 459-60. The appellant's right hand touched the side of her breast. *Id.* at 465. The appellant stated that CS twisted her upper torso to face the appellant and poked him and said "Knock it off. Stop." *Id.* at 463. The appellant complied, at which point CS stood up and left the area. *Id.*

During sentencing, CS testified regarding two uncharged acts that occurred in the months prior to the incident involving the fondling of her breast. CS testified that the appellant touched her on the buttocks during a fishing trip, and on another occasion showed her a picture of a naked woman on his phone, and after she said "eww," he told her she was going to have "a nice pair some day." *Id.* at 897-900. Defense counsel had previously objected, arguing that this testimony was improper evidence in aggravation. *Id.* at 882. The military judge admitted the evidence, opining that it was part of an

¹ The appellant's original brief contained two assignments of error. The second assignment of error alleges that the appellant's charge sheet is missing from the record of trial. On 7 October 2009, we ordered the Government to produce the missing charge sheet. The Government submitted the missing charge sheet on 15 October 2009, rendering the second assignment of error moot.

"ongoing course of conduct showing the depth of the behavior limited to your client and this individual over a 6-month period of time." *Id.* at 890-91. In response to defense counsel's objection under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), the military judge referred to the court's 403 balancing analysis applied to its ruling on the same evidence during findings.² *Id.* at 894.

The military judge gave the following limiting instruction to the members:

You have heard evidence of another touching and another comment that may have occurred between the accused [CS] [sic]. You may consider evidence that the accused may have touched [CS] on the butt on one occasion and on another occasion allowed [CS] to use his cell phone that had a naked woman screensaver. When [CS] expressed her dissatisfaction with seeing the image, that the accused may have said, "What is wrong with those, you will have a fine pair someday," or words to that effect. You may consider this information for its tendency, if any, to: One, explain the relationship between the accused and [CS]; Two, the level of offensive [sic] that New Year's Eve touching was under all of the circumstances; Three, whether [CS] may have indicated consent to or lack of consent to the touching; and Four, whether the accused could have mistaken [CS's] conduct to indicate some level of consent to the touching. You are advised that the accused cannot be sentenced for these acts. He can only be sentenced for offenses for which he has been found guilty.

Id. at 913-14.

Principles of Law

RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), governs what the Government may present as evidence in aggravation during the presentencing phase of

² Prior to entry of the appellant's pleas, trial counsel notified the appellant of the prosecution's intention to introduce evidence of several uncharged prior acts and statements under MIL. R. EVID. 404(b) in order to help prove that the appellant's comment to CS was indecent, and that the appellant's touching of CS was offensive. The appellant moved to suppress the 404(b) evidence. The military judge ruled that he would admit the uncharged act concerning the touching on the buttocks for the limited purpose of establishing whether the charged touching was offensive and unwanted, and the uncharged statement concerning CS's breasts to determine what the appellant intended or planned. Appellate Exhibit XXIV at 10. The appellant pleaded guilty to the Article 128 offense, and evidence of these two incidents was never presented to the members during findings.

courts-martial and provides that "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). The language "directly relating to or resulting from" has been interpreted as encompassing evidence of other crimes which are part of a "'continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community.'" *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001)(quoting *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)). This rule does "'not authorize introduction in general of evidence of . . . uncharged misconduct,' [*Nourse*, 55 M.J. at 231)] and is a 'higher standard' than 'mere relevance[,]' [*United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)]." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). The evidence of uncharged misconduct must be direct and "closely related in time, type, and/or often outcome to the convicted crime." *Id.* at 281-82. "[E]vidence of this nature appropriately may be considered as an aggravating circumstance because it reflects the true impact of crimes upon the victims." *Nourse*, 55 M.J. at 231.

Any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the balancing test of MIL. R. EVID. 403. *Hardison*, 64 M.J. at 281. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MIL. R. EVID. 403. A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Id.* (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)). Military judges "are given less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the Rule 403 balancing." *Id.*

Discussion

The military judge did not err in admitting sentencing evidence of uncharged misconduct by the appellant, as the two uncharged acts were directly related to the charged offenses and part of a continuous course of misconduct toward the same victim, and were closely related in time and type. *Hardison*, 64 M.J. at

281-82; *Nourse*, 55 M.J. at 231. The prior misconduct "reflects the true impact" of the appellant's crimes upon the victim and was properly admitted during sentencing. *Nourse*, 55 M.J. at 231.

The military judge conducted a proper balancing test under MIL. R. EVID. 403, and ruled that the danger of unfair prejudice from admission of the prior act and statement did not substantially outweigh the probative value of the evidence. Appellate Exhibit XXIV at 9. He found the evidence of the prior act and statement to be strong and highly probative, and not unfairly prejudicial. *Id.* The military judge did not find any intervening circumstances that lessened the probative value. *Id.* Finally, the military judge found that the evidence would not take a disproportionate amount of time to present, and would not distract the members from the actual charges. *Id.*

The appellant argues that the military judge failed to perform a proper balancing test because he merely referred to his analysis used for findings and did not perform a separate analysis for sentencing. Appellant's Brief of 8 Oct 2009 at 10-11. The military judge's 403 analysis during sentencing, however, is distinct from the court's analysis during findings when read in the full context of the rulings. Record at 890-94, 913-14; AE XXIV. During sentencing, the uncharged misconduct carried a different probative value - evidence of aggravating circumstances and impact on the victim, and a different danger of unfair prejudice - the potential for being sentenced for uncharged misconduct. The military judge conducted a proper 403 analysis for sentencing evidence, and limited consideration of the prior misconduct to an "appropriate purpose." *Nourse*, 55 M.J. at 232; Record at 890-94, 913-14.

We note that the appellant's sentencing was tried before members, and that members are less likely than a military judge to be able to appropriately consider only relevant material in assessing a sentence. *Hardison*, 64 M.J. at 283-84. In *Hardison*, the military judge offered no instruction and emphasized that all matters offered in aggravation be considered by the members in their sentencing analysis. *Id.* In sharp contrast, the military judge in this case properly gave a limiting instruction to the members that the accused could not be sentenced for the uncharged misconduct and could only be sentenced for offenses for which he has been found guilty. Record at 914.

We therefore hold that the military judge did not abuse his discretion in admitting evidence of uncharged misconduct during sentencing.

Conclusion

After carefully examining the briefs of the parties and the record of trial, 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. Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge MITCHELL and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court