

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**GEOFFREY L. SULLIVAN
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900148
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 June 2008.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, 1st Marine
Logistics Group (Rear), MarForPac, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol A.M. Ray,
USMC.

For Appellant: LT Dillon Ambrose, JAGC, USN.

For Appellee: LT Brian Burgtorf, JAGC, USN.

12 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Senior Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of three specifications of assault consummated by a battery and one specification each of carnal knowledge, communicating a threat, and kidnapping, violations respectively of Articles 128, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928, 920, and 934. The convening authority (CA) approved the adjudged sentence of confinement for 6 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge from the U.S. Marine Corps.

The appellant raises seven assignments of error. One assignment alleges legal insufficiency of the evidence supporting the carnal knowledge conviction. Four assignments allege that the military judge abused his discretion in ruling on various evidentiary matters. One assignment alleges that the assault convictions are multiplicitious. The final assignment alleges that the CA failed to consider clemency submissions before acting on the sentence.

We have carefully examined the entire record of trial, including its allied papers, and the parties' pleadings. We are satisfied that the findings and sentence are correct in law and in fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

On 23 September 2007, the appellant picked up the victim, EM, a cousin, at her home and then drove to Camp Pendleton. Once on the base, he went into the home of his supervisor, for whom he was house sitting, on the pretext of checking the condition of the house and the occupant's pets. Inside the home, he assaulted EM, threatened her, and held her against her will.

EM was able to escape from the house where the appellant was holding her and to make her way to a neighbor's yard where she then collapsed. While the residents of the house were attending to her, the appellant remarked that EM had missed a dosage of her medication. Record at 282, 299. The appellant tried to parlay this comment into an attack on EM's credibility during the trial.

During the course of the investigation into the September 2007 assaults, EM revealed that the appellant had engaged in sexual intercourse with her several years earlier. This allegation developed into the charge of carnal knowledge.

Sufficiency of Proof of Carnal Knowledge

We turn first to the appellant's argument that the carnal knowledge conviction cannot stand because the evidence is legally insufficient. Evidence is legally insufficient if it does not, when viewed in the light most favorable to the prosecution, permit a reasonable member to conclude that all the essential elements have been established beyond a reasonable doubt. See *United States v. Turner*, 25 M.J. 324, 325-26 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The Government was required to prove the following elements beyond a reasonable doubt to obtain a conviction for carnal knowledge: that the appellant engaged in an act of sexual intercourse with EM; that EM was not the appellant's spouse; and that at the time, EM was under the age of 16. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45b. The appellant does not challenge the basis for establishing the first and third elements of the offense, and our independent review reveals no

such basis; rather, the appellant maintains that the Government's proof is lacking as to the marital status of the parties. Appellant's Brief of 16 Jun 2009 at 27.

As the Government concedes in its brief, the trial counsel did not put on any direct evidence that EM and the appellant were not married at the time of the 2005 intercourse.¹ The members were properly instructed on the elements of the offense, Record at 527-28, and they were properly instructed on the use of circumstantial evidence, Record at 530. The members could reasonably have concluded from the testimony of EM, her mother, and a defense witness, MP, beyond a reasonable doubt that a girl, 15 years old at the time of the intercourse, living in a separate location from the appellant, who referred to the appellant as her cousin, who at the time of trial was living at home, and whose mother described the appellant at trial variously as "cousin" and "nephew," was not married to the appellant some 3 years earlier. This assignment of error is without merit. See generally *United States v. Wilhite*, 28 M.J. 884, 886 (A.F.C.M.R. 1989).

Military Judge's Evidentiary Rulings

The trial defense counsel tried to offer extensive evidence regarding EM's credibility, but the military judge limited the depth and breadth of the evidence submitted to the members. Those limitations form the basis for three of the assignments of error. The fourth assignment of error is based on the military judge's admission of a photograph of the appellant and a description of his actions with law enforcement preceding the kidnapping.

We review a military judge's evidentiary rulings for an abuse of discretion. *E.g.*, *United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994). When a military judge balances the competing interests in admitting or excluding evidence, we will give great deference to a clearly articulated basis for his decision. See, *e.g.*, *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Conversely, when there is no such clearly articulated basis, we will be less deferential in our review. As more fully discussed below, we hold in all instances that the military judge did not abuse his discretion in his evidentiary rulings.

¹ We note that the staff judge advocate's recommendation, in response to an allegation of error raised by the trial defense counsel, erroneously advised the CA that service record documents introduced on the merits establish that the appellant was unmarried; in fact, those documents were introduced in anticipation of sentencing during a brief session before the members were sent to deliberate on findings, but the documents did not accompany the members to the deliberation room until after they had reached their findings. The parties have not raised this error on appeal, and in light of our discussion of the assignment of error regarding legal sufficiency, we find that it does not constitute plain error.

EM's Emotional and Medical Conditions

Two of the assignments of error concern EM's mental state around the time of the incidents of September 2007 and the effect that the mental state would have on her credibility. In particular, the appellant wanted to demonstrate that EM's ability to perceive and interpret information in September 2007 was impaired by her prescription drugs, or her missing the doses of the drugs, and that the injuries that she exhibited were the result of either her attempts to harm herself using a combat knife or the appellant's attempts to stop her from harming herself. Tangentially, her mental state in 2005 may have had an impact on her credibility with respect to the carnal knowledge allegation.

The military judge held lengthy hearings outside the presence of the members. The hearings included both testimony and argument on the issue. He ultimately prohibited the defense from a probing exploration of EM's mental condition, e.g., Record at 496, and as well from a lengthy exploration of her various medical conditions, e.g., Record at 422, but there are no findings or conclusions that encapsulate his rulings. We therefore have conducted our own review of the record, found our own facts, and reached our own conclusion that the evidence was properly kept from the members.

EM's Medication

The appellant remarked to the neighbors seeking to assist EM that she must have missed a dosage of medicine, apparently in an effort to explain her appearance and her speech. *Id.* at 282, 299. At trial, he wished to present evidence of her past prescriptions, at least in part to explain his actions. *Id.* at 422.

As will be discussed more fully in connection with her emotional health, EM had been seeing a mental health professional intermittently for several years preceding the 23 September 2007 events. Part of EM's treatment regime in 2005 involved prescription medication. That medication was administered for only a brief period in 2005, and she was not on any other prescription medication, at least as can be determined from the Record, until after the September 2007 incident.² We note, as well, that the appellant offers no evidence that he himself knew that EM was on any sort of medication -- what, when, why, all unanswered -- to support his allegation of error. We therefore find no error in the military judge's refusal to permit extended inquiry to explain the appellant's statement to onlookers that EM was "off her meds". To the extent that the appellant was hoping to use this information to explain any properly admitted excited

² There is testimony, Record at 262, that EM might have received Vicodin, a pain reliever, at some point between 2003 and 2007.

utterances by EM, see Record at 282, 307, we are satisfied that the members had sufficient information to assess the statements.

EM's Emotional Health

Several years prior to the offenses, EM had been seen by a clinical psychologist for a variety of mental health concerns. EM had suffered the loss of two family members in an ATV accident, and had suffered the loss, through homicide, of her mother's boyfriend, both incidents occurring in 2003,³ and she may have at times competed with her siblings for her mother's attention. The psychologist's involvement with and treatment of EM continued up until around the time of the September 2007 offenses. Her principal afflictions, described in an Article 39(a), UCMJ, session held under MILITARY RULE OF EVIDENCE 513, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) and amplified by medical records under seal, were adjustment disorder with mixed emotions, depression not otherwise specified, and post-traumatic stress disorder (PTSD), with the PTSD being the most pronounced.

The psychologist's testimony alone consumed 35 dense pages of the record of trial, and argument by counsel over his testimony accounted for multiple additional pages. The appellant wished to use this mental health information to explain why he had used force on EM; essentially, he was trying to advance the idea that he was preventing her from harming herself, and that is why she was complaining that he had struck and restrained her.

The psychologist did note some episodes of self-mutilation, an attention-getting or coping mechanism, in the past, and he said that the mutilation was confined to cutting. The psychologist would have testified that EM had not cut herself since January 2007, some 8 months before the appellant's offenses, and he furthermore would have testified that he was not aware of any suicidal gestures or attempts at any time by EM. Record at 483, 486.

The house where the September 2007 offenses occurred belonged to an active duty Marine who had a Ka-Bar combat knife on the premises, and the appellant wished to show that EM had tried to cut herself with this knife. The knife was photographed at the time of the incidents and was described to the members by a Marine criminal investigator, Staff Sergeant (SSgt) S. According to SSgt S's testimony, Record at 363-64, and according to the photograph, Prosecution Exhibit 3, the sheath and handle were coated with dust. No amount of testimony from the psychologist about EM's emotional state or mental history would have changed the physical condition of the knife. From that information, the members could reasonably have inferred that EM did not attempt to harm herself with the knife. The members

³ EM testified about her "father figure's" death; her testimony about her sister's death was stopped by a Government objection. Record at 251.

could reasonably, therefore, reject the appellant's argument that he was simply trying to keep EM from harming herself.

Defense Witness's and EM's Credibility⁴

The appellant called MP, an acquaintance of EM, to give an opinion of EM's truthfulness. The appellant also sought to introduce evidence that EM had attacked MP in an effort to dissuade her from testifying, and had essentially admitted to MP that she lied about the appellant's offenses. The appellant wished to introduce this evidence for two purposes: to bolster the credibility of MP and to undermine the credibility of EM.

MP did, in fact, testify to her poor opinion of EM's truthfulness and to an encounter that she had with EM from which the members could have inferred that EM was fabricating the allegations against the appellant. Record at 452-54. MP's mother, DJ, also described the interaction for the members. *Id.* at 457-58.⁵

In connection with this appeal, the appellant attached a four-page report from an investigator who interviewed MP about the encounters with EM, and the appellant avers that the military judge ruled, off the record, that he would not admit evidence of physical attacks on MP. Appellant's Declaration of 24 Aug 2009 at ¶ 4. It is unclear how, other than through cross-examination of EM or direct examination of MP or DJ, the appellant proposed to offer the facts averred within the investigator's report.

We have carefully considered the appellant's argument in light of the evidence adduced at trial and in light of the statements contained within the attachments to his appellate pleading. While a witness's bias and character for truthfulness are relevant considerations for the finder of fact, courts recognize that a military judge may properly circumscribe the evidence on the matter. *United States v. Olean*, 56 M.J. 594, 601 (C.G.Ct.Crim.App. 2001) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986)). We are satisfied that the members received sufficient information and instruction with respect to the credibility and motivation of EM and how to weigh her testimony.

Photograph and Interaction With Law Enforcement

The appellant's final assignment of error regarding evidence alleges that the military judge prejudiced the appellant by admitting a photograph of a disheveled appellant and by permitting EM to testify about a traffic stop at the entrance to Camp Pendleton earlier in the afternoon of 23 September. The parties agree that the photograph, PE 7, admitted over defense

⁴ The appellant personally asserts this error under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

⁵ The Defense did not pursue these matters during EM's testimony.

objection, was taken after the appellant had spent the night after the events on a couch at the base police department. Furthermore, one witness who had encountered the appellant on the day of the incident explained to the members that the appellant "looks a little bit more tired here [in the photograph] than whenever I saw him. He was more lucid whenever I was talking to him." Record at 284.

As the appellant correctly argues, identification was never an issue. As the Government argues in its brief, the allegation against the appellant was one of kidnapping. The photograph and the description of the encounter with law enforcement at the gate were both relevant to EM's perceptions of the appellant's appearance, mood, and actions, as kidnapping can be committed both by physical force and by mental coercion. MCM, Part IV, ¶ 92c(3). The members were properly instructed as to this element, Record at 529-30. The evidence was therefore relevant and not unfairly prejudicial given the context in which it was presented and explained.

We would not reach a contrary result were we to adopt and apply the rationale in *United States v. Hines*, 955 F.2d 1449 (11th Cir. 1992), as the appellant asks us to do. Here, the photograph was necessary to make the Government's case for the "mental coercion" element of the kidnapping; the appellant did not appear in "prison garb" or with obvious custodial identification boards; and the photographer (SSgt S) made no statements during the introduction of the photograph from which the members could conclude that the appellant was a "man with a past" and therefore likely to engage in criminal acts. *Hines*, 955 F.2d at 1456-57.

Multiplicity

The members considered charges of assault with intent to commit sodomy, battery with a fist, and aggravated assault by choking during the incident inside the house.⁶ After hearing all the evidence and receiving their instructions, the members deliberated and returned a "not guilty" finding on the assault with intent to commit sodomy, but a "guilty" finding to the lesser included offense of assault consummated by a battery. They also returned "guilty" findings to the two assaults alleged as violations of Article 128. Record at 547-48; Appellate

⁶ Our analysis of these charges is hampered somewhat by the lack of a single cleansed charge sheet that would have been presented to the members during the initial session of the trial. We have determined, however, that the original allegation of attempted sodomy, Charge I and its underlying specification, preferred on 5 October 2007, and the allegation of kidnapping by wrongfully inveigling, preferred on 6 March 2008, were withdrawn and dismissed before the court-martial was assembled. See, e.g., Appellate Exhibits IV and V. Apparently, the remaining charges and specifications were not re-numbered. We have completed our analysis having reviewed all the charging documents (DD Form 458 of 5 October and 19 December 2007 and of 6 March 2008) and the findings returned by the court-martial.

Exhibit XXXII. The convictions for assault are not multiplicitious with one another, nor do they represent an unreasonable multiplication of charges. We are not bound by the Government's concession on this assignment of error, as it is our duty under Article 66 to reach our own independent determination as to which charges are supported in law and fact.

EM testified to three distinct episodes of assaultive behavior. Record at 213, 214, 217. The appellant was charged with having assaulted EM with the intent to commit sodomy. The members found him guilty of a lesser included offense of assault consummated by a battery. That finding was distinct from the battery that the appellant committed (grabbing her and putting her in a headlock) upon EM when she attempted to flee. Both findings are distinct from the blows that the appellant inflicted on EM (punching her in the mouth) when she screamed. Because these offenses are distinct in time, nature, and location, they are not multiplicitious with one another. See generally *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997).

The appellant also argues, in a footnote, that these three offenses represent an unreasonable multiplication of charges. Appellant's Brief at 24 n.2. We therefore apply the multi-pronged approach of *United States Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), and we determine that no corrective action is necessary. We note that the appellant did object at trial, and that factor weighs in his favor. On the other hand, the charges were aimed at distinct criminal acts as discussed above; this fact addresses the *Quiroz* factors of misrepresenting criminality and of prosecutorial overreaching as well. The appellant's punitive exposure was not unreasonably increased, as the most serious offense, kidnapping, carried a life sentence that would eclipse all other offenses.

Clemency Considerations

Finally, the appellant alleges that the CA failed to consider clemency matters. He bases this assignment of error on a sentence from the CA's action which states "I carefully considered the results of trial, the recommendation of the Staff Judge Advocate, the accused's honorable service in Iraq, and the entire record of trial." General Court-Martial Order and Action Number 04-08 of 13 Jan 2009.

The CA had received matters submitted in clemency via an addendum to the staff judge advocate's recommendation dated 09 January 2009. The appellant has not provided any basis for us to conclude that the CA was not aware of the clemency request when he took his action. On the contrary, there is information in the allied papers that clearly shows that the clemency matters were before the CA. See Commander, First Marine Logistics Group, MARFORPAC, letter 5814/SJA of 14 Jan 2009. This assignment of

error is without merit. See generally *United States v. Stephens*,
56 M.J. 391, 392 (C.A.A.F. 2002).

Conclusion

The findings and the approved sentence are affirmed.

Senior Judge GEISER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court