

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TODD E. BEENE
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000343
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 March 2010.

Military Judge: Maj S.F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol H.D. Russell,
USMCR.

For Appellant: LT Ryan Santicola, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

31 May 2011

OPINION OF THE COURT

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

REISMEIER, Chief Judge:

Contrary to his plea, the appellant was convicted by a general court-martial composed of officer and enlisted members of one specification of rape by force in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for three years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and ordered it executed, except for the dishonorable discharge.

The appellant has submitted six assignments of error: (1) that the military judge erred by allowing witnesses to improperly testify as to the appellant's guilt; (2) that the military judge abused his discretion by allowing admission of a video of a conversation between the appellant and the victim; (3) that the military judge abused his discretion by allowing admission of the appellant's confession, which the appellant contends was falsified; (4) that the evidence is factually insufficient to sustain the conviction; (5) that the appellant's civilian defense counsel was ineffective during trial for failing to seek admission of the appellant's first statement to the Naval Criminal Investigative Service (NCIS); and (6) that the appellant's trial defense counsel was ineffective for failing to properly advise him as to what he could request in his clemency request. The second through sixth assignments of error were raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). After considering the pleadings of the parties and the entire 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.

Background

The victim, Mrs. [RL], invited two friends to stay at her new house after a day of moving. Because none of the three was over the age of twenty-one, they contacted the appellant, inviting him to bring alcohol to the gathering. One of the victim's friends, Mrs. [AH], picked up the appellant and the appellant's associate, Private First Class (PFC) [F], returning with them to Mrs. [RL]'s house. The five of them consumed the alcohol over the course of the evening.

As the evening progressed and guests began to retire, the appellant and Mrs. [RL] were left alone. According to Mrs. [RL], the appellant approached her and began to kiss her. Mrs. [RL] claims that she expressed to the appellant her lack of desire to engage in any sort of sexual activity, and then blacked out. When she regained awareness the appellant was on top of her. He then proceeded to have sex with her despite her continued protests.

Mrs. [RL] soon reported the incident to the NCIS, who then worked with Mrs. [RL] to surreptitiously record a conversation between her and the appellant. During the conversation, the appellant made inculpatory statements, yet was never advised of his Article 31(b), UCMJ, rights.

The appellant was subsequently interrogated by NCIS twice. In his first statement, given on 15 April 2009, the appellant denied raping Mrs. [RL]. However, when interviewed again on 2 June 2009, the appellant admitted having sex with Mrs. [RL] despite her requests for him to stop. Both the video of the conversation and appellant's June confession were admitted into evidence. However, the appellant's initial statement to NCIS in

which he denied that he raped Mrs. [RL] was neither offered nor admitted into evidence.

At trial, Mrs. [RL] responded affirmatively when the trial counsel asked her whether the appellant did in fact "rape" her. Record at 295. Trial counsel likewise elicited from Mrs. [AH] testimony regarding a conversation she had with the appellant in which she referred to the appellant's alleged conduct as "rape." R. at 422. In neither case did the defense object to the use of the word "rape."

Discussion

In his first assignment of error, the appellant maintains that the military judge erred by allowing improper lay opinion as to guilt when he failed to prevent Mrs. [RL] and Mrs. [AH] from testifying that the appellant "raped" Mrs. [RL]. Where, as here, the defense fails to object, we review the military judge's decision to admit evidence for plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). In order for relief to be granted from plain error, three conditions must be met: (1) there must be error; (2) it must be clear or obvious; (3) and the error must have affected the substantial rights of the appellant. *Id.*

The appellant relies on this court's decision in *United States v. Sowders*, 53 M.J. 542 (N.M.Ct.Crim.App. 2000), for the proposition that a witness may not testify as to the guilt of the accused. However, in *Sowders* the testimony in question was that of an NCIS agent offering an opinion as to whether, based on the facts of that case, the accused conspired with another party. Such testimony invaded the province of the members to determine the facts as to what offenses the accused committed. In this case, Mrs. [RL] and Mrs. [AH] used the term "rape" in a common, colloquial sense, providing a shorthand description the facts at issue in the case. In both Mrs. [RL]'s and Mrs. [AH]'s testimony, the term "rape" was related to "particular facts"; it was not a legal conclusion used without explanation for the members. See *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000); *United States v. Marshall*, 6 C.M.R. 54, 58 (C.M.A. 1952) (translator's use of the word "rape" when relaying testimony of Korean nationals was used as a statement of fact as to what the witness observed, and was not prejudicial error when offered without defense objection). While the term "rape" may have been avoidable, it did not "intrude[] impermissibly on an area reserved solely for the trier of fact." *Sowders*, 53 M.J. at 551. Likewise, it did not alter the nature of the testimony regarding force that was otherwise offered. The military judge therefore did not commit plain error by allowing such testimony.

The appellant next asserts that the military judge abused his discretion by admitting the video of the appellant's conversation with Mrs. [RL] because the intercept was conducted in the absence of a rights advisement pursuant to Article 31(b).

A suspect is entitled to an Article 31(b) rights advisement when: (1) the questioner is acting in an official capacity; and (2) the person questioned perceives that the inquiry involves more than a casual conversation. *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981). A military judge's decision regarding admission of evidence is reviewed for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We review the military judge's findings of fact under a clearly erroneous standard and conclusions of law *de novo*. See *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).

The military judge properly admitted the evidence. At trial, the defense relied on *United States v. Swift*, 53 M.J. 439 (C.A.A.F. 2000), arguing that the subjective analysis in the second prong of *Duga* should not have been applied to the appellant's conversation with Mrs. [RL]. Appellate Exhibit XXI at 4. The military judge found that the appellant was not advised of his rights and that he was "apparently" unaware that the conversation was being recorded. Record at 197. He also found that the appellant was not in custody at the time of the recording and that no charges had yet been preferred against him, therefore his Fifth and Sixth Amendment rights were not triggered. *Id.* at 197-98. The military judge cited *United States v. Rios*, 48 M.J. 261 (C.A.A.F. 1998), concluding that warnings were not required and that although Mrs. [RL] may have been acting at the behest of the Government, the appellant was unaware of that fact, eliminating any suggestion of Government coercion. *Id.* at 198. The military judge ruled that the video was admissible after he determined that, under the totality of the circumstances, the appellant engaged in a voluntary conversation. *Id.* at 198. The military judge's findings of fact were not clearly erroneous; his conclusions of law were correct. Therefore, we find that the military judge did not abuse his discretion in admitting the video.

For his third assignment of error, the appellant asserts that the military judge abused his discretion by admitting the appellant's June 2009 confession. Specifically, the appellant claims his confession was falsified by the NCIS agent who took the statement. However, at trial the appellant's counsel specifically stated on the record that the defense had no objection to the admission of the statement in question. *Id.* at 393. Assuming that the defense response represents only forfeiture rather than waiver, we review any potential error on the part of the military judge in admitting this evidence under the plain error standard. See *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998); see also MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In order for relief to be granted, (1) there must be error, (2) it must be clear or obvious, (3) and the error must have affected the substantial rights of the appellant. *Powell*, 49 M.J. at 463. In this case, we find no such error. The proper foundation was laid for the appellant's confession. Record at 387-93. The appellant's suggestion to the contrary notwithstanding, the

foundation effectively established that the statement was in fact that of the appellant and not a fabrication by the sponsoring agent. The document bore the initials of the appellant throughout, the agent credibly described the taking of the statement and properly identified it as that of the appellant. The appellant's arguments to the contrary go only to the weight to be ascribed to the statement.

The appellant next avers that the facts elicited at trial are insufficient to sustain his conviction. We disagree. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). At trial, the Government was required to prove that the appellant caused Mrs. [RL] to engage in a sexual act and that he did it by force. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45a. We find that the Government met that burden in this case. It is not in dispute that the appellant and Mrs. [RL] engaged in a sexual act. Force alone was in dispute. Force was established through Mrs. [RL]'s testimony, the appellant's written confession to NCIS, and the appellant's inculpatory statements made to Mrs. [RL] during their recorded conversation. See Record at 292-344; Prosecution Exhibits 2 and 3. When viewing the evidence in its totality, we are convinced of the appellant's guilt beyond a reasonable doubt.

We address the appellant's final two assignments of error together as they allege ineffective assistance of counsel during and after trial. The Sixth Amendment to the United States Constitution and Article 27, UCMJ, guarantee an accused the right to the effective assistance of counsel. *United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995). An accused is also entitled to effective, conflict-free representation throughout the post-trial review process. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). Where an appellant claims he was denied this right in the post-trial process, we apply the well-known standard discussed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Wiley*, 47 M.J. at 159. To prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland* 466 U.S. at 689. The appellant has the burden of demonstrating that: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Wiley*, 47 M.J. at 159 (quoting *Strickland*, 466 U.S. at 694). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48

M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). We find that in both instances of the alleged deficiency counsel did in fact provide competent professional assistance.

With regard to the appellant's allegations that counsel was ineffective for not seeking to admit his initial statement to NCIS, we first note that it is unclear what theory of admissibility would have supported introduction by an accused of an exculpatory statement made by that accused that, at least on the face of the document and from the record before us, appears to be completely separate in time, place, and structure from the statement actually admitted at trial. There appears to be neither a hearsay exception nor a "completeness" argument that would support introduction of an admission made by an accused some six weeks prior to a subsequent admission actually offered at trial. See *United States v. Foisy*, 69 M.J. 562 (N.M.Ct.Crim.App. 2010). Even had there been a cogent theory of admissibility, defense counsel may have had numerous reasons for not seeking to admit the appellant's first statement, not the least of which is that admission of the prior statement may have highlighted inconsistencies in the appellant's various statements and bolstered Mrs. [RL]'s credibility. Regardless of his reasons for not seeking to admit it, we defer to the strategic and tactical decisions made at trial by defense counsel. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). Therefore, we do not find that defense counsel failed to act as the counsel guaranteed by the Sixth Amendment, particularly in light of the fact that members were well-aware of the defense strategy that sought to repudiate the appellant's June 2009 inculpatory statement.

In terms of defense counsel's alleged failure to advise the appellant that he could request deferral and waiver of automatic forfeitures, and deferral and suspension of adjudged forfeitures, we likewise find that the appellant does not surmount the high hurdle of an ineffective assistance of counsel claim. As the Government correctly notes, there is nothing before us that establishes a failure to so advise the appellant. Neither is there any indication before us that the appellant had any desire to request relief from forfeitures rather than, or in addition to, the request he did submit for relief from further confinement or from the conviction itself. We are not inclined to presume our way into a conclusion of ineffective assistance.

The record establishes that the trial defense counsel's clemency request asked the convening authority to set aside the appellant's conviction or suspend his remaining confinement. The documents attached to the record further support the conclusion that the convening authority was aware of his authority to take action on forfeitures, as the results of trial specifically note that automatic forfeitures would take effect unless the convening authority deferred them. Whether the nuances of clemency options were discussed fully with the appellant, counsel may have

rationaly concluded that his request for relief from confinement may have been weakened by a request for relief from the impact of forfeitures on the appellant's family. On this record, counsel acted within the range of competent professional assistance and was acting as the counsel guaranteed under the Sixth Amendment. We can find no prejudice to the appellant.

Conclusion

The findings and sentence are affirmed.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court