

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

**Before
C.L. REISMEIER, J.K. CARBERRY, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RALPH D. COMBEST
CULINARY SPECIALIST SEAMAN RECRUIT (E-1), U.S. NAVY**

**NMCCA 201100185
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 January 2011.
Military Judge: CDR Sherry King, JAGC, USN.
Convening Authority: Commanding Officer, USS RODNEY M.
DAVIS (FFG 60).
Staff Judge Advocate's Recommendation: LT G. Touchton,
JAGC, USN.
For Appellant: LT Daniel Napier, JAGC, USN.
For Appellee: LT Kevin Shea, JAGC, USN.

16 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A special court-martial consisting of officers and enlisted members convicted the appellant, contrary to his plea, of wrongful sexual contact, a violation of Article 120(m), Uniform Code of Military Justice, 10 U.S.C. § 920(m). The appellant was sentenced to a bad-conduct discharge from the United States Navy.

The appellant raises one assignment of error: that the military judge erred by admitting hearsay evidence over the defense's objection and failing to issue a limiting instruction to the members. We have carefully examined the record of trial and the pleadings of the parties, and 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Facts

In May 2009, the appellant and DW began communicating on an internet dating website. On 7 June 2009, the appellant and two friends drove to DW's house. This was the first time the appellant and DW met in person. They then drove with DW to a nearby beach, stayed for a short while, then left to take DW back home. During the drive, the appellant sexually assaulted DW by touching her breast and taking her hand and placing it on his penis. Soon after arriving home, DW told her sister, AH, that she had been sexually assaulted by the appellant. AH then called the police. It is DW's statement to AH that gives rise to the appellant's assignment of error.

Prior to trial, defense counsel moved *in limine* to exclude AH's recitation of what DW told her. The defense argued that her testimony would be hearsay, irrelevant, improper bolstering, and contrary to judicial economy. Record at 214-15. The military judge denied the motion, but told counsel she would instruct the members that DW's out-of-court statement to AH was only to be considered for its effect on the listener, not for the truth of the matter asserted. *Id.* at 218-19. The military judge did not give that instruction, either at the time of AH's testimony, or before the members retired for deliberation. *Id.* at 330, 454-67. It appears that this was a matter of simple neglect, as it was never again brought up by any party.¹

Discussion

We test a military judge's decision to admit or exclude evidence for an abuse of discretion. See *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). If we find error, we will take corrective action if we determine that error resulted in material prejudice to a substantial right of the accused. See *United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006). If a required instruction is not given, we test for harmlessness by considering whether it is clear beyond a reasonable doubt that the error did not contribute to the verdict. See *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

¹ After evidence had been received and before closing arguments, the military judge noted that she had just gone through the proposed instructions with counsel in a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference. The limiting instruction was not among those discussed. The military judge afforded both counsel an opportunity to object on the record, but neither party did.

Non-Hearsay, Effect on the Listener

We first address the question of whether the military judge erred in finding that DW's statement was non-hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MILITARY RULE OF EVIDENCE 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A statement not offered to prove the truth of the matter asserted is not hearsay, and it is therefore not excluded by MIL. R. EVID. 802. See *United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1987). Before admitting it, however, a judge must evaluate it under the criteria of MIL. R. EVID 401 and 403 for relevance and to prevent confusion or prejudice on the part of the members. See, e.g., *United States v. Mancillas*, 580 F.2d 1301, 1309-10 (7th Cir. 1978).² Here, the military judge found that DW's statement to her sister that DW had been sexually assaulted was non-hearsay as it was not offered for its truth but instead to show why the police were contacted and the investigation began. The appellant claims that this statement was unrelated to any of the elements of the charged offense and had no probative value other than to corroborate DW's account.

We can locate no case law from the Court of Appeals for the Armed Forces or our own court controlling the question of whether AH's testimony was properly admitted under an effect-on-the-listener theory. This question has, however, been addressed by other federal appellate courts and their treatment of the issue is instructive. See *United States v. Cass*, 127 F.3d 1218, 1223 (10th Cir. 1997); *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994); *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990). The prosecutors in each of the aforementioned cases elicited testimony, over hearsay objections, that contained out-of-court statements that heightened the culpability of the respective defendants. In each case, the Government argued that the statements were not being offered for their truth, but to elucidate the investigatory background, provide context for the jurors, and show why law enforcement took the steps it did. In addressing the admissibility of the statements, the appellate courts employed a balancing test under FEDERAL RULE OF EVIDENCE 403. The courts first looked to whether the non-hearsay purpose behind the statement's introduction was relevant to the case and, if so, whether the statement's probative value was outweighed by the danger of unfair prejudice.³ We shall employ the same framework.

² See also *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005). A military judge has a duty to determine whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. The judge should articulate the reasoning for her determination on the record. If she does not, the reviewing appellate body will accord her determination less deference.

³ See *Martin*, 897 F.2d at 1372 ("[E]ven though the hearsay rule and confrontation clause [are] not violated, when inculpatory out of court assertions name the criminal defendant in connection with 'setting the scene'

In the instant case, the Government claims that DW's out-of-court statement is not barred by MIL. R. EVID. 802 because it is not being offered for the truth of the matter asserted. Instead, it was offered to show why AH called the police and how the investigation began. The probative value of such testimony strikes us as minimal as compared to its potential for unfair prejudice. The admission appears to have principally bolstered the account of DW, who had already testified, and whose credibility, at least with regard to the question of whether the touching occurred or not, had not been undermined.⁴ In light of the minimal value of DW's statement when weighed against its potential for unfair prejudice, we find that the military judge erred by permitting AH to testify that DW said that she had been sexually assaulted.

Prejudice

Next, we consider whether the military judge's erroneous admission of AH's testimony caused material prejudice to the appellant's substantial rights. We test for prejudice resulting from the erroneous admission of evidence by examining "(1) the strength of the Government's case, (2) the strength of the defense's case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" *United States v. Durbin*, 68 M.J. 271, 275 (C.A.A.F. 2010) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

The Government's case was strong. DW testified about the assault itself, Record at 304-06; the appellant's friends testified that after DW left the car, the appellant boasted of touching her breast and grabbing her hand and shoving it down his pants "so she wouldn't have time to react or stop him," *id.* at 273, 276; AH testified that she found DW crying hysterically soon after the assault, *id.* at 333; and finally, the Government introduced a written statement made by the appellant to a Naval Criminal Investigative Service agent in which he admitted to the sexual contact and conceded that he "probably got a little carried away." Prosecution Exhibit 2. The appellant's case, on the other hand, was weak. His strategy was to show consent or

for an investigation, the question of unfair prejudice . . . almost always arises The relevance and probative value of 'investigative background' is often low, but the potential for abuse is high.") (citing McCormick on Evidence § 249 at 734 (3d ed. 1984).); *Reyes*, 18 F.3d at 70 ("[T]he mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice."); *Cass*, 127 F.3d at 1222-23 ("[O]ut-of-court statements by informants offered to explain the background of an investigation, like all evidence, must be evaluated under the criteria in FED.R.EVID. Rules 401 and 403 for relevance and to prevent confusion or prejudice on the part of the jury.'" (quoting *United States v. Freeman*, 816 F.2d 558, 563 (10th Cir. 1987))).

⁴ "The fact that a witness takes the stand to testify does not automatically create the right to offer evidence to bolster [her] credibility." *United States v. Everage*, 19 M.J. 189, 192 (C.M.A. 1985).

reasonable mistake of fact as to consent. The theme and theory were predicated on the pre-date internet exchanges he had with DW, and the possibility that his interactions with her at the beach were not as unremarkable as her testimony suggested (lending credence to the reasonableness of his mistaken belief).

As to the materiality of the objectionable portion of AH's testimony, it was not great. That DW said she had been sexually assaulted after leaving the car was neither vital to the Government's case nor fatal to the appellant's. And the quality of AH's contribution to the Government's case was laid bare by the trial defense's cross-examination, which was brief and consisted only of four questions. Applying the Kerr test for prejudice to this case, we conclude that the appellant suffered no material prejudice to any of his substantial rights as a result of the military judge's error.

Failure to Provide Instructions

Whether a jury was properly instructed is a question of law reviewed *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). Failure to object to an instruction given or omitted waives the objection absent plain error. RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). "The plain error standard is met 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." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citation and internal quotation marks omitted). Here, the military judge failed to give the promised limiting instruction. In light of the foregoing recitation of strengths and weaknesses of the parties' respective cases, however, we find that the military judge's failure to instruct the members did not materially prejudice a substantial right of the appellant. The members were aware that AH was not in the car at the time of the assault and her only contribution to their understanding of the case was what DW relayed to her after the assault. We can safely conclude that the members would have reached the same verdict if the military judge had instructed them that they were not to consider AH's account of DW's statement for its truth, but to understand why she contacted law enforcement and how the investigation began. We therefore hold that the error did not materially prejudice the appellant's substantial rights and it does not constitute prejudicial plain error.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court