

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

**Before
M.D. MODZELEWSKI, C.K. JOYCE, K.K. THOMPSON
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NATHANIEL R. HECKROTTE
ELECTRONICS TECHNICIAN (REPAIR) SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100611
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 July 2011.

Military Judge: LtCol Charles Hale, USMC.

Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.

Staff Judge Advocate's Recommendation: LCDR E.M. Baxter, JAGC, USN.

For Appellant: LT Robert Burk, JAGC, USN; Maj Jeffrey R. Liebenguth, USMC.

For Appellee: CDR Deborah Sue Mayer, JAGC, USN; LT Benjamin J. Voce-Gardner, JAGC, USN.

30 November 2012

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.**

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of conspiracy to commit aggravated sexual assault, one specification of aggravated sexual assault, two specifications of abusive sexual contact, and two specifications of committing an indecent act, in violation of Articles 81 and 120, Uniform Code of Military Justice, 10 U.S.C.

§§ 881 and 920. The members sentenced the appellant to eight years confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, and ordered it executed.¹

The appellant raises two assignments of error (AOEs): (I) that the military judge erred in permitting testimony from the Government's expert witness that the victim was substantially incapacitated because his methods were unreliable and included inadmissible human lie detector testimony; and (II) that the conspiracy conviction was factually insufficient.

After considering the pleadings 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.

I. Factual Summary

The appellant and three male friends, Electronics Technician Seaman (ETSN) Northrup, ETSN Holmes, and ETSN Ariston, went to a local bar. At the bar they met two more friends, Interior Communications Electrician Fireman Apprentice (ICFA) Wylie, and the victim, ETSN TL. The group stayed at the bar until closing, went to a diner, and then rented a room at a nearby motel. At the motel, ETSN TL laid down on one of the beds and either went to sleep or passed out due to excessive consumption of alcohol. Each of the five men took turns having sex with ETSN TL while she was in varying states of consciousness. When it was the appellant's turn, he first orally sodomized the victim while she was unresponsive and then penetrated the victim's vagina with his penis. While the appellant was assaulting the victim, the other assailants were present in the room.

II. The Testimony of Dr. Henry

The appellant's first AOE includes two distinct issues: first, whether the military judge erred by permitting the Government's expert to testify that the victim was substantially incapacitated in that the expert's methods were unreliable; and second, whether the military judge erred by permitting the same

¹ To the extent that the convening authority's action purported to execute the dishonorable discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

expert to give inadmissible human-lie-detector testimony. We address each issue in turn.

A. Reliability of Methods

At trial, the Government called Dr. Stafford Henry, M.D., and properly qualified him as an expert in the fields of general psychiatry, forensic psychiatry, and addiction psychiatry. Dr. Henry described his methodology to the members, stating that he formed his opinions in this case by first looking at collateral evidence, such as reports and statements of witnesses, then conducting a face to face evaluation of the victim, and finally combining what he learned from both the victim and the collateral evidence to address the questions presented.

After Dr. Henry described this methodology to the members, but before he offered any opinions, the military judge *sua sponte* held a session outside of the presence of the members pursuant to Article 39(a), UCMJ. The military judge requested a proffer of the opinion that Dr. Henry would offer and gave the trial defense counsel an opportunity to raise any objections to the testimony. The trial defense counsel objected to Dr. Henry's opinion that the victim was substantially incapacitated at the time of the assault because it was an opinion on the ultimate issue of the case. Relying on MILITARY RULE OF EVIDENCE 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), the military judge overruled the objection. Trial defense counsel did not object to Dr. Henry's opinion based on the reliability of his methodology, nor was such an objection fairly embraced during the Article 39(a) session.

The appellant now claims that the military judge erred by admitting the testimony of Dr. Henry because it was unreliable and asserts that the military judge had a *sua sponte* duty to articulate his analysis addressing reliability on the record. We disagree.

Arguably, trial defense counsel waived any objection to the reliability of Dr. Henry's methodology, as he had ample opportunity to challenge the testimony on these grounds and chose not to do so. When an appellant intentionally waives a waivable right at trial, it is extinguished and may not be raised on appeal. *Compare United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (applying waiver to multiplicity issue where appellant unconditionally waived all waivable motions in pretrial agreement), *with United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) *and United States v. Campbell*, 68 M.J. 217,

219 (C.A.A.F. 2009) (declining to apply waiver doctrine to multiplicity issue not raised during guilty plea). Assuming *arguendo* that the matter was not waived, we review the admission of the testimony for plain error.² Plain error can be established if (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to the appellant's substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

The appellant's argument is based on the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), in which the Court emphasized the importance of a trial judge's role as gatekeeper in assessing the reliability of expert scientific testimony. In *Daubert*, the Supreme Court articulated a number of factors to consider in determining the overall reliability of a particular technique or theory, including whether it can be tested, whether it has been subjected to peer review, its known or potential rate of error, and its general acceptance in the particular scientific community. *Id.* at 593-94.

Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that when expert testimony's "factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of (the relevant) discipline.'" *Id.* at 149 (quoting *Daubert*, 509 U.S. at 592) (emphasis added).

While the military judge is the gatekeeper charged with excluding dubious science, "[n]either *Daubert* nor *Kumho Tire* require a trial judge to *sua sponte* hold a *Daubert* hearing every time scientific evidence is offered." *United States v. Clark*, 61 M.J. 707, 710 (N.M.Ct.Crim.App. 2005) (citations omitted). Here, the testimony of Dr. Henry was "not particularly novel or controversial." *United States v. Quintanilla*, 56 M.J. 37, 85 (C.A.A.F. 2001). In fact, the defense's psychiatric expert used fundamentally the same methodology,³ which likely explains the lack of objection by trial defense counsel to Dr. Henry's technique.

² MIL. R. EVID. 103(d).

³ The defense expert relied on Dr. Henry's report and also visited the locations where the events of 14 and 15 January took place.

We conclude that the record demonstrates that the military judge did not err either by admitting the testimony or by failing to hold a *Daubert* hearing.

Even assuming *arguendo* that there was error, and that it was plain, we find any such error did not materially prejudice substantial rights of the appellant. The Article 39(a) session called by the military judge subjected Dr. Henry's methods and opinion to adversarial testing prior to going before the members. Then trial defense counsel effectively cross-examined Dr. Henry, highlighting the perceived weaknesses in his analysis, and prompting a member to ask Dr. Henry if the victim could have lied during the assessment.⁴ Additionally, the defense expert witness, Lieutenant Colonel Smith, directly contradicted the opinions of Dr. Henry, using essentially the same methodology as Dr. Henry. Finally, the additional evidence against the appellant was so overwhelming that any prejudicial effect of the testimony of Dr. Henry would have had no additional impact on the findings of the members.

We find that the military judge did not have an affirmative duty to conduct a *Daubert* hearing on this particular evidence in the absence of an objection. We further conclude that there was no material prejudice to the substantial rights of the appellant.

B. Human Lie Detector Testimony

The appellant also claims that the military judge erred by permitting Dr. Henry to offer human lie detector testimony. We concur that Dr. Henry offered human lie detector testimony, but did not constitute plain error and did not result in material prejudice to a substantial right of the appellant.

At the conclusion of Dr. Henry's testimony, one of the members asked, "In your opinion is it possible for her to just fill in the blanks of what happened and actually be lying to you because of embarrassment or regret?"⁵ Trial defense counsel affirmatively waived any objection to the written question from the member. Dr. Henry then replied:

That's a great question, and one of the things that I found so clinically relevant is that she did not do that. She was; she did not ever give me information

⁴ Record at 571; Appellate Exhibit LX.

⁵ Record at 571; AE LX.

that wasn't contained within the initial body of data. There was no exaggeration; she said things to me that were exceedingly embarrassing; she was very forth right. I found her to be a very, very, very credible reporter.⁶

The defense did not object to the answer. However, after Dr. Henry departed the courtroom, the military judge gave a curative instruction to the members, advising them 1) that only they determine the credibility of the witnesses and the facts of the case, 2) that no expert can testify that an alleged victim's account of what occurred is true or credible, and that 3) to the extent that they believed that the doctor testified or implied that he believes the alleged victim, that a crime occurred or that the alleged victim is credible, they may not consider that evidence.⁷

The Court of Appeals for the Armed Forces (CAAF) has consistently rejected the admissibility of so-called human lie detector testimony, which it describes as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case." *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003) (citations omitted).

In *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010), the CAAF held that it was error for the military judge to permit testimony that could lead a trier of fact to infer that there was a 1 in 200 chance that a child victim was lying about being sexually abused. However, the court found that the error did not materially prejudice the substantial rights of the appellant because the military judge gave a timely curative instruction, and the expert's testimony made it clear that she did not have a scientifically accurate way of proving whether a child is lying.

Although this case is similar to *Mullins*, we decline to find plain and obvious error when it is apparent from the record that neither the parties nor the military judge knew what the answer to the member's question would be and the military judge took prompt measures to cure any prejudice caused by the statements of Dr. Henry.

Again assuming *arguendo* error, the appellant has failed to show material prejudice to his substantial rights. Prejudice

⁶ Record at 571-72.

⁷ *Id.* at 574-75.

results when there is "undue influence on a jury's role in determining the ultimate facts in the case." *United States v. Birdsall*, 47 M.J. 404, 411 (C.A.A.F. 1998). We look at the testimony in context to determine if the witness's opinion amounts to prejudicial error. *Mullins*, 69 M.J. at 117 (citing *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999)). Context includes such factors as an immediate instruction, the standard instruction, and the strength of the Government's case. *Id.* The military judge instructed the members to disregard Dr. Henry's statement twice, once with a curative instruction immediately after his testimony, and then again with a standard expert witness instruction prior to deliberations.⁸ Members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990).

Important in a contextual analysis, the case against the appellant was very strong. ETSN Northrup, a co-conspirator, testified that the victim was responsive to the first assailant, then slipped in and out of consciousness, and did not participate in the sexual activity. Prosecution Exhibits 1 and 2 are video clips of ETSN Northrup and ETSN Wylie engaging in sexual activity with the victim while she did not move. In the appellant's own written statement to the Naval Criminal Investigative Service, the appellant confessed that the victim was asleep when he orally sodomized her, and that she was incapable of assisting him in the sexual activity so he had to wrap her legs around his body so that he could penetrate her vagina with his penis. PE 45. The testimony of Dr. Henry was only one piece of evidence against the appellant in a compelling Government case and was in no way the linchpin in this case.

The appellant's reliance on *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007), is unpersuasive. First, in that case the Government's case was based solely on medical evidence and on the testimony of a five-year-old child. Second, the expert gave statistical data about the rates of false reporting in child sexual abuse that suggested it was scientifically proven that it was extremely unlikely that the victim was lying. Finally, the military judge in *Brooks* did not offer a curative instruction. Dr. Henry's opinion did not have the same kind of scientific certainty as *Brooks*, and he explained that he believed the victim because her statements were consistent and she told him very embarrassing details. In direct response to a member's question, he gave his opinion that she presented as a

⁸ Record at 672-73.

credible reporter during his interview. The trial defense counsel in this case also countered the Government's expert with its own expert who, while not using human lie detector testimony, made it clear that he did not find the victim credible.

We find that the military judge did not err in permitting the member's question. And, assuming *arguendo* that there was error, in light of the overwhelming evidence and the affirmative measures taken by the military judge, we find that there was no material prejudice to the substantial rights of the appellant.

III. Factual Sufficiency

The appellant finally argues that his conspiracy conviction was factually insufficient to prove the existence of an agreement beyond a reasonable doubt. This court reviews questions of factual sufficiency *de novo* as a matter of law. Art. 66(c), UCMJ.

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, the members of the [appellate court] are themselves convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). After reviewing the record of trial and briefs of the parties, we are convinced of the appellant's guilt beyond a reasonable doubt and affirm the decision of the lower court.

Conspiracy requires: (1) that the accused entered into an agreement with one or more persons to commit an offense under the code; and (2) that, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.⁹

An agreement to commit an offense "need not be in any particular form or manifested in any formal words, [rather] [i]t is sufficient if the agreement is merely a mutual understanding among the parties." *United States v. Mack*, 65 M.J. 108, 114 (C.A.A.F. 2007) (citations and internal quotation marks omitted). "The existence of a conspiracy may be established by circumstantial evidence, including reasonable inferences derived

⁹ Art. 81, UCMJ.

from the conduct of the parties themselves." *Id.* (citations omitted).

In *United States v. Harman*, 66 M.J. 710, 715 (Army Ct.Crim.App. 2008), *aff'd*, 68 M.J. 325 (C.A.A.F. 2010), the Army Court of Criminal Appeals upheld a conviction for conspiracy to maltreat prisoners where the appellant actively participated in the abuse of prisoners and encouraged others to do so, as evidenced by a picture of the appellant smiling and giving the thumbs up signal. While not evidence of a verbal pact, the court found that the picture supported a reasonable inference of an agreement. *Id.*

Here, as in *Harman*, there is no direct evidence of an agreement between the appellant and ETSN Ariston, with whom he is alleged to have conspired. But the record is rife with circumstantial evidence. First, these five men were not casual acquaintances, but were all "good friends," who knew each other well on the night of the assault.¹⁰ According to ETSN Northrup, the five men "took turns"¹¹ having sex with ETSN TL in the following order: ETSN Holmes, ETSN Ariston, ETSN Northrup, ICFA Wylie, the appellant, and then ETSN Ariston again. After he assaulted ETSN TL the first time, ETSN Ariston announced to the others that he was "finished," thereby signaling that the victim was available for the next participant's assault. ETSN Ariston used his phone to video-record ETSN Northrup and ICFA Wylie while they assaulted the victim. During the videos, the other members of the group can be heard talking in the background as they watch their companions assault ETSN TL. PE 1 and 2. Video recordings from the hotel security system also show ICFA Wylie, ETSN Ariston, and ETSN Northrup in the hallway in their underwear. PE 40. The men appear to be having a conversation, and ETSN Northrup testified that he was discussing with ETSN Ariston his inability to become erect. It is reasonable to infer from this conduct of the parties that the men were working in concert under a common understanding.¹²

After the assaults, ETSN Ariston called a "huddle" of all the men, including the appellant, and they agreed with him that "this night never happened."¹³ During the same huddle, the men discussed who would return to base and who would stay the night

¹⁰ Record at 330.

¹¹ *Id.* at 257.

¹² *Id.* at 652-53 (military judge's instructions on the offense of conspiracy).

¹³ *Id.* at 271-72.

in the hotel. It is apparent from that conversation that none of the men expected the victim to remember the assault. We adopt the logic of the Army Court of Criminal Appeals in *Harman*, and find that the appellant's direct involvement and obvious approbation, combined with his failure to stop or report the sexual assault, support a reasonable inference that the conspirators had reached a common understanding to commit sexual acts upon ETSN TL while she was substantially incapacitated. Based on the record before us, we are convinced of the appellant's guilt of this charge beyond a reasonable doubt.

Conclusion

The findings and the sentence are affirmed.

Judge JOYCE and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court