

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

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER R. MORGAN
HULL MAINTENANCE TECHNICIAN SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201200141
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 December 2011.

Military Judge: CAPT David Berger, JAGC, USN.

Convening Authority: Commander, U.S. Naval Forces Japan,
Yokosuka, Japan.

Staff Judge Advocate's Recommendation: LCDR G. Padilla,
JAGC, USN.

For Appellant: Maj Jeffrey Liebenguth, USMC.

For Appellee: Maj Crista Kraics, USMC; LT Philip S.
Reutlinger, JAGC, USN.

27 December 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.**

WARD, Judge:

A general court-martial composed of members with officer and enlisted representation convicted the appellant, contrary to his pleas, of two specifications each of rape and aggravated sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.¹ The panel sentenced the

¹ Prior to entry of findings, the military judge dismissed one specification of forcible sodomy under Article 125, UCMJ, 10 U.S.C. § 925. Additionally,

appellant to confinement for five years, reduction to E-1, total forfeitures, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, and with the exception of the dishonorable discharge, ordered it executed.

The appellant alleges that the military judge erred when he recalled a witness pursuant to the members' request during deliberations and allowed the witness to offer "human lie detector" testimony.

After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and 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.

Factual Background

In February 2010, the appellant raped Aviation Ordnanceman Airman (AOAN) VM in the appellant's off-base apartment located in Yokosuka, Japan.

The appellant's assigned error in this case focuses our attention on witness testimony at trial. During the Government's case-in-chief, the defense adopted two witnesses and elicited their unfavorable opinion of AOAN VM's character for truthfulness.² AOAN VM's close friend, AOAN HM, also testified during the Government's case. But when it came time to cross-examine her, defense counsel did not seek her opinion of AOAN VM's character for truthfulness. Once the Government rested, defense counsel called one additional witness who similarly offered an unfavorable opinion of AOAN VM's character for truthfulness. The Government elected not to present any evidence in rebuttal.

After the court closed for deliberations, the members requested to recall AOAN HM to pose the following question: "[w]hat is [AOAN HM]'s opinion of [AOAN VM]'s truthfulness?"

the members found the appellant not guilty of one specification of assault consummated by a battery under Article 128, UCMJ, 10 U.S.C. § 928. The military judge merged all four Article 120 specifications into one specification of rape for purposes of sentencing and instructed the panel accordingly.

² For purposes of judicial economy and without objection, the military judge allowed the defense to adopt these witnesses during the Government's case-in-chief.

Appellate Exhibit LXXXVIII. Defense counsel initially objected to any additional testimony after the close of evidence. Second, the defense counsel objected to the wording of the question as a response could be construed by the members "as an opinion on the truth of this allegation, as opposed to the character for truthfulness." Record at 741.

The military judge overruled the defense objection but explained that he would not permit any follow up questions after AOAN HM offered her opinion. Then the following exchange between the military judge and defense counsel occurred:

DC: Sir, this is not a further objection, but one last point of clarification on [the members' question].

MJ: Sure.

DC: As I mentioned, the way the question is phrased, we would not be, none of us would be able to ask, "what's your opinion of her truthfulness," we would be required to say "character for?" And I just want to make sure that they're crystal clear on, that the answer to the question is not related to the allegations at trial, but rather her character for truthfulness. And I think you could just add character for truthfulness and it did, like enough to do it enough for trial. *It would be perfect.*

MJ: That's exactly what I intend to do.

Id. at 744 (emphasis added).

AOAN HM then appeared again before the panel and the military judge asked her opinion of AOAN VM's character for truthfulness. AOAN HM replied "[S]he's always truthful with me." *Id.* at 746. Defense counsel did not object to her answer or request a curative instruction. However, the military judge later instructed the panel on AOAN VM's character for truthfulness³ and advised them that no witness could testify that AOAN VM's allegation was true.⁴

³ The full instruction read: "[e]vidence has been received that [AOAN VM] has bad character for truthfulness. You may consider this evidence in determining [AOAN VM's] believability." Record at 660.

⁴ The full instruction read: "[o]nly you, the court members can determine the credibility of the witnesses and what the facts are in this case. No expert

Discussion

The appellant's claim presents us with two separate but related issues: 1) whether the appellant affirmatively waived his objection to AOAN HM's recall; and 2) whether the military judge committed plain error when he allowed AOAN HM to offer "human lie detector" testimony.

1. Waiver

The appellant alleges that the military judge erred when he recalled AOAN HM as a witness during deliberations. As a preliminary matter, we first address whether the appellant waived this issue at trial. If waived at trial, that extinguishes the matter and the appellant may not raise it on appeal. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). Waiver is the intentional relinquishment or abandonment of a known right. *Id.* To determine waiver, we consider whether the failure to raise an objection at trial constituted an intentional relinquishment of a known right. *Id.*

In this case, defense counsel originally objected to recalling AOAN HM as a witness, but then changed tack after the military judge explained the parameters of the question to be asked. Defense counsel then stated that the military judge's question "would be perfect." By doing so, defense counsel not only abandoned his earlier objection, but also consented to the proposed question. Accordingly, we find that the appellant intentionally relinquished his right to object to AOAN HM's recall and this is an appropriate case to apply the waiver doctrine.⁵

2. Plain Error

witness or other witness can testify to the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim or that a sexual encounter occurred." Record at 662 (emphasis added).

⁵ See *United States v. Campos*, 67 M.J. 330, 332-33 n.3 (C.A.A.F. 2009) (citing *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002) (finding waiver where counsel identified an issue by objecting to it at trial and then deliberately withdrew the objection) and *United States v. Mitchell*, 85 F.3d 800, 807-09 (1st Cir. 1996) (finding waiver where there was a direct inquiry from the judge on the precise issue and an unequivocal assent from defense counsel).

No witness may offer "an opinion as to whether [another] 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). Such testimony is otherwise known as "human lie detector" testimony. This prohibition applies both to expert and lay witness testimony. *Id.* Since defense counsel in this case did not object to AOAN HM's response to the military judge, we test for plain error. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007); see also MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). To prevail, the appellant must show: "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the [appellant]." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted).

Here we find no plain error. We start by examining AOAN HM's actual response. We note that she did not express an opinion on the truthfulness of AOAN VM's allegation. True, AOAN HM's earlier testimony describing how AOAN VM told her about the sexual assault, coupled with her later response to the military judge's question, may imply that she believed AOAN VM's allegation. But that same implication would lie if AOAN HM answered the question properly. Additionally, we find little qualitative distinction between her actual response, "[s]he's always truthful with me," and hypothetical responses such as "she's a very truthful person," "her character for truthfulness is outstanding," or "I believe she is very truthful." Last, we find it difficult to cast this as plain or obvious error when, immediately after discussing the dangers of improper opinion testimony, defense counsel did not raise any objection to AOAN HM's response.

Even if we found plain and obvious error, we find no material prejudice to the appellant's substantial rights. To evaluate claims of "human lie detector" testimony, we look at the testimony in context to determine whether there was prejudice, considering "such factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the government's case." *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010).

Viewing AOAN HM's testimony in this context, we find no material prejudice to the appellant's substantial rights.⁶ While

⁶ We recognize that defense counsel raised this issue in their post-trial matters to the CA. In a clemency request, defense counsel states that "during our debrief with the members immediately following the trial, it was

the military judge did not give an immediate curative instruction, during his findings instructions he correctly addressed this very issue and "[a]bsent evidence to the contrary, [members are] presumed to have complied with the judge's instructions." *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990) (citations omitted). Additionally, it would come as no surprise to the panel that AOAN VM's close friend may be biased toward believing her allegation. Finally, the Government's case was strong. Witnesses saw AOAN VM in a hysterical emotional state as she ran down the street away from the appellant's residence. They also described how she remained despondent and crying throughout the following day until she reported what happened to her command that evening. Bruising on AOAN VM's body also corroborated her physical description of what occurred. Finally, the appellant made several inculpatory admissions immediately afterward. For all these reasons, we conclude that, even assuming plain and obvious error, the appellant suffered no material prejudice.

Conclusion

Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge PAYTON O'BRIEN and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

made clear to us that they believed [AOAN HM]'s additional testimony was one of the deciding factors in their decision in finding [the appellant] ultimately guilty of the alleged offense." Clemency Request of 27 Feb 2012 at 2. Nonetheless, this assertion alone is not evidence of prejudice. See *United States v. Gosser*, 64 M.J. 93, 98 (C.A.A.F. 2006) (the appellant failed to substantiate claim of prejudice from post-trial delay where he relied solely on the assertions of his defense counsel in post-trial clemency submissions).