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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MARCOS J. HERNANDEZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200369
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 May 2012.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Col J.M. Henry, USMC.
For Appellant: Capt David Peters, USMC.
For Appellee: Maj David N. Roberts, USMC; LT Lindsay Geiselman, JAGC, USN.

18 April 2013

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 military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of abusive sexual contact and forcible sodomy, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The appellant was sentenced to a dishonorable discharge, confinement for 72 months, total forfeiture of pay and

allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.[1]

The appellant claims in his sole assignment of error that the military judge abused his discretion by considering certain evidence, offered under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), to show the appellant's motive and intent. We disagree. After considering the pleadings and reviewing the entire record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

In August of 2011, the appellant, a Marine lance corporal, was assigned to Marine Aerial Refueler Transport Squadron 152 (VMGR-152) in Okinawa, Japan, where he worked as an aviation electrician. On 20 August 2011, the appellant attended a command function at Araga Beach in Okinawa. While he was there, the appellant spent the day with the victim in this case, Lance Corporal (LCpl) W, who had just arrived on Okinawa a few days earlier. Throughout the course of the day, which involved the appellant and the victim visiting two different parties, an on-base club, and both the appellant's and the victim's barracks rooms, the appellant repeatedly gave alcohol to, or made alcohol available to, the victim, who was both underage and an inexperienced drinker. As a result of his excessive drinking, the victim became so intoxicated that he vomited outside of the on-base club and had to be helped back to the barracks by the appellant. After helping the victim into his bed, the appellant took advantage of the victim's substantial incapacitation by touching his genitals and performing oral sex on him. Further relevant facts are developed below as necessary.

Evidence of Other Crimes, Wrongs, or Acts

A. The Military Judge's Ruling

Before trial, the Government brought a motion seeking a preliminary ruling on the admissibility of evidence of similar uncharged misconduct. Specifically, the Government sought to introduce evidence, pursuant to MIL. R. EVID. 404(b), that the appellant was sexually interested in other males, especially when they were intoxicated, in order to show his motive for

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

committing the charged offenses. The Government offered evidence of the following acts by the appellant on three different occasions which the Government believed evidenced that motive:

1) In early 2011, while he was attending military occupational specialty school in Arkansas, the appellant and another Marine helped a third Marine, who was highly intoxicated, back to the barracks and placed him in his bed. Once there, the appellant suggested disrobing the drunk Marine, and reached for his belt in order to remove his pants. The appellant stopped after the other Marine pushed him away and asked him to leave the room.

2) A couple of weeks before the charged sexual assault, the appellant entered a barracks room across the hall from his own room, jumped into bed with a fellow Marine who was lying there partially disrobed in a drunken stupor, wrapped his arms around the Marine and yelled "group hug." Record at 32. The appellant left the room when he was told to get out by the drunk Marine's roommate.

3) Several nights before the charged assault, the appellant jumped into his roommate's bed as he lay sleeping, climbed halfway on top of him, grabbed his shoulders, and said that someone was coming to get him. The appellant's roommate pushed him out of the bed and told him to go to his own rack.

The appellant's trial defense counsel disputed the sexual nature of these acts, arguing that "there's nothing sexual about them whatsoever in any instance." *Id*. at 49. The military judge granted the Government's motion and considered the evidence during the judge alone contested case. In doing so, the military judge entered extensive findings of both fact and law on the record.

B. Principles of Law

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. MIL. R. EVID. 404(b).

We review a military judge's evidentiary rulings for an abuse of discretion. *See, e.g., United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). 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.

C. Discussion

The three-part test for the admission of MIL. R. EVID. 404(b) evidence at trial is set forth in *United States v. Reynolds,* 29 M.J. 105, 109 (C.M.A. 1989). First, the evidence must reasonably support a finding that the appellant committed prior crimes, wrongs or acts; second, the evidence must show a fact of consequence is made more or less probable by the existence of this evidence; and third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id. See also United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006).

In applying *Reynolds* to the case at bar, the military judge made detailed and specific findings. The military judge found that the first prong was satisfied through the affidavits and in court testimony, all of which supported the conclusion that the accused committed the acts. With respect to the second prong, the military judge found that all three acts showed motive, intent, or common plan of the accused to engage in homosexual conduct with Marines who were asleep or otherwise not in a position to consent. In making this finding, the military judge cited to *United States v. Watkins*, 21 M.J. 224 (C.M.A. 1986), for the proposition that such evidence may be admitted under MIL. R. EVID. 404(b) to show motive, intent, common plan, absence of mistake, and/or scheme. When analyzing the evidence under *Reynolds'* third prong, the military judge applied the multi-factor test set forth in *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005), and found that each of the eight factors weighed in favor of the Government.

In addition to the *Watkins* case cited by the military judge, there are several other reported military decisions where evidence of an appellant's sexual preferences was admitted under MIL. R. EVID. 404(b) to show motive or intent. *See United States v Whitner*, 51 M.J. 457 (C.M.A. 1999) (homosexual videotape and magazine evidence admissible in a male-on-male sodomy case as evidence of the accused's state of mind and motive); *United States v. Mann*, 26 M.J. 1 (C.M.A. 1988) (heterosexual

pornography depicting children and adults was admissible under Mil. R. Evid. 404(b) to prove the specific intent required for the charge of indecent acts with a minor); *United States v. Hickerson*, 71 M.J. 659 (N.M.Ct.Crim.App. 2012) (sexual conversations with minors online were probative of the appellant's motive, intent, and absence of mistake both for attempting to entice a minor to engage in illegal sexual activity and for possessing and receiving images of child pornography), *rev. granted*, __ M.J. __ (C.A.A.F. Mar. 14, 2013); *United States v. Woodyard*, 16 M.J. 715 (A.F.C.M.R. 1983) (homosexual pornography admissible in a male-on-male sodomy case to show the accused's intent under MIL. R. EVID. 404(b)). In light of those cases, and giving the military judge the deference he is due for having set forth on the record a clearly articulated basis for his decision on this issue, we do not find an abuse of discretion in this case.

Harmless Error

Even assuming, *arguendo*, that it was error for the military judge to have admitted the various prior acts under MIL. R. EVID. 404(b), any such error was harmless. The evidence in question went largely to showing that the appellant had a sexual interest in men. That evidence became significantly less important when the Government introduced the appellant's statement to the Naval Criminal Investigative Service wherein the appellant admitted to both touching the victim's genitals and performing oral sex on the victim – leaving consent as the only real issue in the trial. Moreover, given that this was a judge alone trial, any risk that the evidence might have been used improperly by the fact finder was *de minimus*, as military judges are presumed to know the law and apply it correctly. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009). Accordingly, we find that any error that might have occurred with respect to this issue did not materially prejudice the appellant's substantial rights. Art. 59(a), UCMJ.

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court