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.

THOMAS C. MOORE
CHIEF AVIATION ORDNANCEMAN (E-7), U.S. NAVY

NMCCA 201200332
GENERAL COURT-MARTIAL

Sentence Adjudged: 31 March 2012.
Military Judge: CAPT David Berger, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: LT T.L. Reynolds, JAGC, USN.
For Appellant: Duane A. Kees, Esq.; LT Kevin Quencer, JAGC, USN.
For Appellee: LT Lindsay Geiselman, JAGC, USN.

14 May 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 general court-martial, composed of officer members, convicted the appellant, contrary to his pleas, of one specification of disrespect toward a commissioned officer, two specifications of striking a petty officer, one specification of treating a chief petty officer with contempt and disrespect, one specification of treating with contempt or disrespect five petty officers in the execution of their office, three specifications

of making a false official statement, one specification of indecent act, two specifications of aggravated sexual abuse of a child, one specification of indecent liberty with a child, one specification of assault consummated by a battery,[1] and one specification of disorderly conduct, in violation of Articles 89, 91, 107, 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 889, 891, 907, 920, 928, and 934. The appellant was sentenced to confinement for six years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant submits the following three assignments of error:

(1) The military judge erred by admitting prior consistent statements of the complaining witness that were made after the motive to fabricate;

(2) The military judge erred in denying a defense motion for a mistrial after the Government introduced evidence of possession of child pornography without a sufficient basis; and

(3) The cumulative effect of the errors in this case effectively denied the appellant his right to the due process of law and to a fair trial, and thus, requires that this court set aside the conviction and sentence. [2]

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

This case arises out of two separate and distinct incidents involving the appellant while he was stationed in Atsugi, Japan. The first incident occurred in early January of 2011. The appellant had been dating a Japanese woman, R.I., for approximately one year before he met her 8-year-old daughter,

[1] The panel found the appellant not guilty of aggravated sexual contact with a child, but guilty of the lesser included offense of assault consummated by a battery.

[2] The appellant's third assignment of error was submitted to the court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have reviewed this assigned error and find it without merit. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

M.I. After introductions, the three of them spent the day at Tokyo Disneyland and, following a late night return to Atsugi, spent the night in the appellant's quarters. The following day, when M.I.'s mother left to pick up fast food, the appellant sexually abused M.I. and showed her pornographic movies. M.I. reported the abuse to her mother, and a prolonged investigation ensued.

The second incident arose out of the investigation and occurred in March of 2011. Japanese authorities contacted the appellant's ex-wife for permission to interview his children about possible abuse. When the appellant learn of this contact he became distraught and started drinking at an on-base club. A series of events then led to the appellant being verbally abusive to his executive officer, and physically and verbally abusive to base security personnel. Additional relevant facts are further developed below.

Prior Consistent Statements

Although this case was eventually assumed by the Naval Criminal Investigative Service (NCIS) and prosecuted at court-martial, the original investigation was conducted by Japanese police. As a result of the change of investigative and prosecutorial jurisdiction, M.I. underwent a number of different interviews with both American and Japanese authorities regarding the abuse. During trial defense counsel's (TDC) detailed cross-examination of M.I., he elicited the fact she had visited the Japanese police, Japanese prosecutors, and American prosecutors more than 30 times over the course of the investigation, and had retold her version of assault more than 20 times, including once where the assault was reenacted with a life-sized doll. Record at 355-58. Later, when cross-examining the Government's expert on child forensic interviewing, the TDC established that children under ten years of age are more susceptible to suggestion than adults, and that there are potential suggestibility problems when a child is interviewed multiple times, especially where leading or suggestive questions are asked. *Id*. at 383-84. It was against this backdrop that the Government offered, and the military judge admitted, as a prior consistent statement, the written statement taken from M.I. by the Japanese police during her second post-incident interview.

We review a military judge's evidentiary rulings for an abuse of discretion. *E.g., United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994). 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. *Id.*

A prior consistent statement, offered under MILITARY RULE OF EVIDENCE 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), must have been made prior to any motive to fabricate or improper influence that it is offered to rebut. *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F.1998); *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996) (citing *Tome v. United States*, 513 U.S. 150 (1995)); *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990). When it is alleged that a witness has multiple motives to fabricate, or multiple improper influences on his or her testimony, then the prior consistent statement need not precede all such motives or influences to be admissible, but only the one it is offered to rebut. *Allison*, 49 M.J. at 57.

The statement in issue in this case was made by the victim during her second visit to the Japanese police, three days after the assault. The appellant argued, both at trial and in his pleading before this court, that the alleged motive to fabricate (a desire to please her mother) arose on the day of the offense, thus precluding admission of the statement. However, as noted above, the trial defense counsel's questions emphasized that the victim had repeated her story to the police and prosecutors more than 20 times prior to appearing in court, and elicited an admission from the Government's expert that children under ten years of age more susceptible to suggestion than adults. *Id*. at 383-84. Those questions clearly implied that the victim's testimony had been improperly influenced by the repeated interviews, and in fact the trial defense counsel argued during closing that the multiple interviews, particularly the one with the anatomic doll, were "extremely dangerous" because they can cause a child to "mix fantasy with reality." *Id*. at 964. Because those interviews all occurred *after* the statement at issue was made to the Japanese police, it was admissible under MIL. R. EVID. 801(d)(1)(B). Accordingly, we find that the military judge did not abuse his discretion by admitting the statement.

Motion for a Mistrial

During a lengthy Article 39(a), UCMJ, session, the military judge carefully reviewed hundreds of transcribed pages, from

three different interrogations of the appellant, in order to redact inadmissible evidence from both the transcripts and the audio that was going to be played for the members. During that process, trial counsel alerted the military judge to a potentially inadmissible question from the NCIS agent to the appellant regarding the discovery of possible child pornography on his computer. The military judge immediately said "Delete it," however the TDC objected to the removal, and asked the judge to leave it in. Record at 119-20. The TDC argued that the appellant's "immediate and definitive" denial that he ever looked at child pornography was important to the defense's case. *Id*. at 120. The Government noted that leaving the question in "opens the door" to a discussion with the agent as to why he asked those questions. *Id*. at 122. The military judge told the defense they were on notice of the Government's position and sustained the defense's objection, thus leaving in the reference to child pornography. *Id.*

During the Government's direct examination of the NCIS agent, the trial counsel asked the agent about the child pornography question, specifically why he believed he had a good faith basis to ask the question. The agent answered that there were "two photographs of what appeared to be child pornography." *Id*. at 696. When then asked if the pictures were confirmed to be child pornography, the Special Agent said "No, sir." *Id*. at 697. The agent further explained that the images had been run against a database of know victims of child pornography, maintained by the National Center for Missing and Exploited Children (NCMEC), and that neither photograph was a "hit" for known victims. *Id*. Lastly, when asked by the military judge if he was familiar with the Tanner Scale, a method used to determine the age of children depicted in photographs, the agent testified that such testing was typically done by NCMEC, but that the pictures in this case were "not eligible" for such testing. *Id*. at 698. This led the military judge to ask:

> MJ: So they weren't child porn?
> WIT: They were not confirmed child porn, yes, sir.

Id.

Following that portion of the special agent's testimony, the TDC moved for a mistrial. The military judge denied the motion, opting instead to give the members a limiting instruction. That instruction, given to the members at the end of the special agent's testimony and before the overnight break, clearly told the members that child pornography was not an issue

in the case, that it could not be considered for any reason whatsoever, and that they should act like they "never heard that at all." *Id*. at 734.

A military judge's denial of a motion for a mistrial is reviewed for a clear abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). A mistrial is a drastic remedy to be used only sparingly to prevent manifest injustice. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). A mistrial is appropriate only when "circumstances arise that cast substantial doubt upon the fairness or impartiality of the trial." *United States v. Barron*, 52 M.J. 1, 4 (C.A.A.F. 1999) (citations and internal quotation marks omitted). "A curative instruction is the 'preferred' remedy for correcting error when the court members have heard inadmissible evidence, as long as the instruction is adequate to avoid prejudice to the accused." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

Assuming, without deciding, that it was error for the military judge to allow, pursuant to a defense request, information regarding child pornography to come into evidence, we find that, based on the facts and circumstances of this case, the timely limiting instruction given by the judge was an adequate remedy. Accordingly, we find that the military judge did not clearly abuse his discretion by denying the motion for a mistrial.

Court-Martial Order Error

Although not raised by the appellant, the court notes that the court-martial order (CMO) in this case incorrectly refers to the wrong initial convening order. The case was referred to Convening Order 3-11, as later modified, not Convening Order 1-12. In keeping with the principle that military members are entitled to records that correctly reflect the results of their court-martial proceedings, we will order corrective action in our decretal paragraph. *See United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings and sentence are affirmed. The supplemental CMO shall reflect the proper convening order used in this case.

For the Court

R.H. TROIDL
Clerk of Court