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

Before
V.S. COUCH, J.A. MAKSYM, P.D. KOVAC
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL L. HICKS
INFORMATION SYSTEMS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY

NMCCA 200800471
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 March 2008.
Military Judge: CAPT David Bailey, JAGC, USN.
Convening Authority: Commander, Naval Network Warfare Command, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR R.A. Guinn, JAGC, USN.
For Appellant: Patrick M. Flynn, Esq.; LT Gregory Manz, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

29 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KOVAC, Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of two specifications of sodomy with a child under the age of 12 years, and two specifications of indecent acts upon a child, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925, 934. The appellant was sentenced to confinement for 25 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of 20 years and waived automatic forfeitures for a period of six months.

The appellant advances two assignments of error. First, the appellant alleges that the military judge erred during sentencing when he admitted aggravation evidence that one of the child victims suffered from genital herpes. Second, the appellant alleges that his sentence is inappropriately severe.

We have carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response. We disagree with the assertion that the military judge committed error by admitting aggravation evidence that one of the child victims had genital herpes. We further find that the appellant's sentence is entirely appropriate given the severity of his criminal offenses. Accordingly, we find that the findings and 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.

Background

The appellant is a first class petty officer in the United States Navy with 16 years of service. In April 2001, he married Mrs. Hicks, who had two daughters from previous relationships. The older daughter was born in May 1994, and the younger daughter was born in May 1997.

From approximately April 2005 to May 2006, the appellant was stationed at the Recruit Training Center, Great Lakes and lived off-base with his wife and two step-daughters. The appellant would often watch his step-daughters while their mother was away at work or choir practice. During this time, the appellant would play with the girls and tickle them.

This seemingly innocent behavior eventually escalated into oral sodomy and indecent acts. The record reflects that the appellant would lead both children to the master bedroom of their home where he would ask them for "kisses," which actually meant oral sex. The evidence further demonstrates that the step-daughters would alternate between orally copulating the appellant's penis and massaging his feet. The appellant would also rub his penis on the outside of the vagina and buttocks of both children while they were partially clothed. This conduct occurred on divers occasions over the course of many months.

During sentencing, the following evidence pertinent to the first assigned error was admitted without objection. First, the stipulations of expected testimony of the two step-daughters were admitted. The stipulation of the younger step-daughter stated the following:

> A Physician Assistant by the name of Nurse Kent told me that I have genital herpes. She told me that there is currently no cure for genital herpes. I currently take prescribed medication daily (ZOVIRAX) to reduce outbreaks on my buttocks. Nurse Kent told

me that I have a healing lesion on my buttocks.

Appellate Exhibit XII. Second, the Government admitted the aggravation testimony of Mrs. Hicks, who explained that "[a]pproximately 7 years ago" the appellant tested positive for herpes. Record at 120.[1]

Sentencing Aggravation Evidence

The appellant asserts two arguments to support his contention that the military judge erred during sentencing when he admitted the aggravation evidence that the younger step-daughter had genital herpes. First, the appellant argues that there was no evidence indicating that the actual source of the child's herpes infection was the appellant and "mere speculation" regarding the source is insufficient to satisfy the requirements of RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Second, the appellant argues that admitting this evidence was improper because the military judge failed to conduct a balancing test pursuant to MILITARY RULE OF EVIDENCE 403(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

The evidence upon which the appellant now complains was introduced by a stipulation of expected testimony and the testimony of Mrs. Hicks, without objection. *See* MIL. R. EVID. 103(a)(1). Nonetheless, we must still review for plain error. MIL. R. EVID. 103(d); *see United States v. Moran,* 65 M.J. 178, 181 (C.A.A.F. 2007). To prevail under a plain error analysis, the appellant must demonstrate that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho,* 54 M.J. 63, 65 (C.A.A.F. 2000)(citation omitted).

In *United States v. Hardison,* 64 M.J. 279, 281 (C.A.A.F. 2007), the Court of Appeals for the Armed Forces (CAAF) outlined "two primary limitations" to consider prior to admitting aggravation evidence pursuant to R.C.M. 1001(b)(4). First, the "evidence must be 'directly relating' to the offenses of which the accused has been found guilty." *Hardison,* 64 M.J. at 281. Second, "any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the test of [MIL. R. EVID.] 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact." *Id.*

The primary focus in this case is on the first prong of the analysis, that is, whether evidence of the younger step-daughter's genital herpes is "directly relating" to the appellant's crimes of sodomy and indecent acts. The appellant

[1] The record reflects the parties attempted to stipulate that the appellant had genital herpes, Mrs. Hicks had genital herpes, and the younger step-daughter had genital herpes. Record 117-18. We decline to consider this evidence, however, because the military judge failed to conduct a sufficient colloquy with the appellant about the nature and permissible uses of the stipulation of fact.

contends that, although he and the younger step-daughter both had herpes, there is no direct evidence firmly establishing the link that the child's herpes infection was caused by his unlawful contact. We do not interpret the "directly relating to" language of R.C.M. 1001(b)(4) so narrowly. CAAF has characterized the meaning of "directly relating" aggravation evidence as "a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *Hardison,* 64 M.J. at 281. There is nothing within this characterization prohibiting the introduction of circumstantial evidence to establish the "directly relating" link, as long as the circumstantial evidence has a "strong connection" to the underlying offenses. Indeed, it has previously been held that R.C.M. 1001(b)(4) evidence may be direct *or circumstantial* provided that a "reasonable linkage" is established. *United States v. Witt,* 21 M.J. 637, 640-41 (A.C.M.R. 1985). Moreover, when consenting to a stipulation of expected testimony, the appellant must assume responsibility for any *reasonable inferences* that may be derived from the evidence contained in that stipulation. *See United States v. Outin,* 42 M.J. 603, 608 (N.M.Ct.Crim.App. 1995)("The defense must assume responsibility not only for specific evidence it introduces but also for the reasonable inferences which may be drawn from such evidence.")(citing *United States v. Shields,* 20 M.J. 174 (C.M.A. 1985) and *United States v. Strong,* 17 M.J. 263 (C.M.A. 1984)).

In this case, it was not error for the military judge to admit evidence regarding the younger step-daughter's genital herpes as aggravation evidence under R.C.M. 1001(b)(4) because there are sufficient facts to establish a "reasonable linkage" and "strong connection" between the appellant's offenses and the child's genital herpes. Mrs. Hicks testified that the appellant told her he had genital herpes "approximately 7 years" prior to the court-martial. Record at 120. The evidence further indicates that the younger step-daughter was only eight years old at the time of the crimes. In the absence of evidence that the victim had sexual contact with others, we therefore can reasonably infer that her only sexual contact was with the appellant. The evidence further reveals that the appellant rubbed his herpes infected penis on the child's buttocks and vagina. The stipulation of expected testimony indicates that the child now has herpes outbreaks on her buttocks -- the exact location where the appellant admitted that his penis contacted the child. This evidence provides the strong connection and necessary linkage for the military judge to reasonably conclude that the child's herpes infection was "directly relating to" the appellant's unlawful sexual contacts. Accordingly, the military judge did not err in admitting this evidence pursuant to R.C.M. 1001(b)(4).

Having established the "directly relating to" question, we now turn to consideration of the prejudicial impact of this aggravation evidence under MIL. R. EVID. 403(b). *Hardison,* 64 M.J. 281. This inquiry is easily disposed of given the fact that

sentencing was presented before a military judge-alone who "is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). As a result, we are fully confident that the admission and consideration of this aggravation evidence did not materially prejudice the appellant.

Sentence Appropriateness

In his second assignment of error, the appellant argues that his sentence is inappropriately severe. He requests the court to reassess the sentence pursuant to Article 66(c), UCMJ. We strongly disagree.

The appellant's criminal conduct included the commission of indecent acts and the sodomizing of two children on repeated occasions over the course of many months. The record reveals that while one child was orally copulating the appellant, the other was told to massage his feet. The appellant also rubbed his penis on the private parts of these two children while they were partially clothed. The younger victim (8 years old) indicated that she would sometimes cry while this sexual abuse was occurring. She further indicated that during oral sex "yellow or white stuff" would emanate from the appellant's penis smelling like "nasty rotten fish or eggs." The evidence now indicates that each child has experienced various struggles as a result of the appellant's criminal conduct.

The maximum punishment for the crimes committed by the appellant was life imprisonment. He received much less, 25 years confinement with all confinement in excess of 20 years suspended pursuant to a pretrial agreement. Given all of these factors and our careful consideration of the entire record, we find that the sentence in this case is not unjustifiably severe. Accordingly, we hold it is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Granting additional sentence relief at this point would be an act of clemency which is a prerogative reserved for the convening authority. *Healy*, 26 M.J. 395-96.[2]

[2] The appellant also alleges his sentence severity argument in terms of sentence disparity. However, there are no other closely related cases that make this argument viable. *Cf. United States v. Lacy,* 50 M.J. 286, 288 (C.A.A.F. 1999).

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court