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

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RUSSELL B. MULLINS
MASTER-AT-ARMS FIRST CLASS (E-6), U.S. NAVY

NMCCA 200200988
GENERAL COURT-MARTIAL

Sentence Adjudged: 06 April 2001.
Military Judge: CDR Robert Wities, JAGC, USN.
Convening Authority: Commander, Naval Air Warfare Center Weapons Division, Point Mugu, CA.
Staff Judge Advocate's Recommendation: LCDR D.C. Peck, JAGC, USN.
For Appellant: LT Kathleen Kadlec, JAGC, USN.
For Appellee: LT Duke Kim, JAGC, USN.

14 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Chief Judge:

Contrary to his pleas, a general court-martial composed of members with enlisted representation convicted the appellant of rape of a child under 16 years of age, sodomy of a child under 16 years of age, two specifications of indecent acts upon a child under 16 years of age, possession of child pornography that had been transported in interstate commerce, and possession of child pornography on Federal property, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced to confinement for 10 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The sentence was approved by the convening authority as adjudged.

Upon direct review, this court set aside the specification of possession of child pornography that had been transported in interstate commerce. We reassessed the sentence, and affirmed the remaining findings and sentence as reassessed. *See United States v. Mullins*, No. 200200988, 2006 CCA LEXIS 327, unpublished op. (N.M.Ct.Crim.App. 7 Dec 2006).

On 13 February 2008, the United States Court of Appeals for the Armed Forces (CAAF) granted a petition for review on two issues. *United States v. Mullins*, 66 M.J. 188 (C.A.A.F. 2008).[1] On 9 May 2008, the CAAF set aside our previous decision and, in a summary disposition, remanded the case for a new Article 66(c), UCMJ review, specifically including consideration of the first granted issue in light of *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007). *United States v. Mullins*, 66 M.J. 468 (C.A.A.F. 2008). The appellant has reasserted two assignments of error addressed in this court's earlier decision.[2] We will address these four assigned errors. As to the assignments of error not specifically discussed in this opinion, we adopt the decision of our predecessor panel. That opinion also documents the pertinent facts relevant to the appellant's current and prior appeals, including the extensive post-trial litigation in this case. We adopt those facts as our own. Other facts will be provided as needed *infra*.

Human Lie Detector Testimony

The first issue returned to us for examination is whether, in light of *Brooks*, the military judge erred in permitting the testimony of a child sexual abuse expert, which the appellant asserts included "lie detector" testimony.[3]

As our superior court noted in *Brooks*, 64 M.J. at 328:

> [A] military judge's decision to admit expert testimony [is reviewed] under an abuse of discretion standard. *United States v. Shelton*, 64 M.J. 32, 37 (C.A.A.F.

---

[1] The two issues are:

> I. WHETHER THE LOWER COURT ERRED IN HOLDING THAT THERE WAS NOTHING IMPERMISSIBLE IN THE MILITARY JUDGE ALLOWING THE GOVERNMENT TO INTRODUCE LIE DETECTOR TESTIMONY IN VIOLATION OF MILITARY RULE OF EVIDENCE 702;
> II. WHETHER THE LOWER COURT DENIED APPELLANT DUE PROCESS WHEN IT DENIED HIM RELIEF DUE TO EXCESSIVE POST-TRIAL PROCESSING DELAY AND DENIED HIS SUPPLEMENTAL ASSIGNMENT OF ERROR.

These assignments of error were originally the sixth, twelfth, Supplemental I, and Supplemental II assignments of error. *See Mullins*, 2006 CCA LEXIS 327 at n8.

[2] Factual and legal sufficiency of the child pornography offenses; and the military judge's error in allowing admission of bad character evidence, in the form a remnant of an online chat, in violation of MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

[3] This was the appellant's original sixth assignment of error.

> 2006); *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006); *Kasper*, 58 M.J. at 318 . . . . Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error. M.R.E. 103(d). To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006); *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). Our standard of review for determining whether there is plain error is de novo. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002). . . .

In cases involving allegations of sexual abuse of a child, a qualified expert is permitted to inform the fact finder of characteristics commonly found in sexually abused children, and to describe the characteristics exhibited by the alleged victim. *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998). A health care provider may also express an opinion that a victim's conduct or statements are consistent with sexual abuse, or are consistent with complaints of sexually abused children. *Id.* at 410; *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990). An expert witness may not, however, serve as a "human lie detector." *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000); *Birdsall*, 47 M.J. at 410. Child abuse experts may not offer an opinion about whether the alleged victim was subjected to sexual abuse, or whether the victim is credible. *United States v. Marrie*, 43 M.J. 35, 41 (C.A.A.F. 1995); *Harrison*, 31 M.J. at 332. Finally, "percentage testimony exceed[s] the permissible bounds of expert testimony permitted in child sexual abuse prosecutions." *Brooks*, 64 M.J. at 328 (citation omitted).

In this case, the Government presented a forensic child interviewer employed by the county prosecutor's office. In trying to determine whether a child has been coached, or whether a child has, in fact, been sexually abused, the witness said she looks for certain characteristics. For example, children of 7 or 9 years of age do not have knowledge of matters such as oral sex, masturbation, or ejaculation. The expert testified that she separately interviewed each of the two children, D and S, and that the characteristics she observed in them were consistent with children who may have been sexually abused. Record at 649-53.

There was no defense objection to this testimony, and, regardless, we conclude that this testimony did not exceed the bounds of permissible testimony. *Birdsall*, 47 M.J. at 409-10. Even so, the military judge *sua sponte* instructed the members that "no witness is a human lie detector"; and, "no one who

testifies in this courtroom can know if someone else is telling the truth or lying." He further instructed that only the members can determine credibility, and that "[n]o witness, including an expert witness, can testify that someone else's account of what happened is true or credible." Record at 653-54. There was no defense objection to the military judge's instruction, nor was there any request for additional limiting instructions.

Following the military judge's curative instruction, the expert acknowledged occasions in which she interviewed a child suspected of being abused, which "later turned out to be false." *Id.* at 656. She also testified that "cases in which a child makes up something or lies . . . is rare. I would say 1 out of 100 or 1 out of 200." *Id.* at 661. Again, there was no defense objection or request for instructions.

The Government all but concedes the expert witness' percentage reference constitutes error under *Brooks*, but asserts that the military judge cured any prejudicial impact by his prompt instructions. Government Answer of 16 Jul 2008 at 17. While we accept that the expert witness' testimony was error, it was not plain or obvious, and was harmless under the circumstances in this case.

In assessing the alleged error as plain or obvious, we have considered the fact that the *Brooks* decision was not published until six years after the appellant's trial. *See United States v. Nieto*, 66 M.J. 146, 150 (C.A.A.F. 2008). Furthermore, in *Brooks*, 64 M.J. at 329, the court cited one state case in direct support for the holding that an expert's opinion testimony is improper if it includes a statistical probability of similarly situated "victims" falsifying their complaints. *Powell v. State*, 527 A.2d 276 (Del. 1987). This case did not represent generally applicable federal criminal law, and no military case before *Brooks* directly addressed percentage estimates of false reports. Thus, at the time the military judge admitted the erroneous testimony, he did so without benefit of *Brooks* or other binding precedent regarding percentage testimony. *See Nieto*, 66 M.J. at 150.

There was, however, existing precedent that proscribed comment on the credibility of a putative victim. *See United States v. Arruza*, 26 M.J. 234, 237 (C.M.A. 1988); *Harrison*, 31 M.J. at 332; *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995); *Birdsall*, 47 M.J. at 410. Indeed, these cases were cited in *Brooks* as the underpinnings of that decision, but none extended the growing body of "lie detector" case law specifically to percentage estimates. Thus, we conclude that it was error for the military judge to admit the expert's estimate of false complaints. However, in the broader context of her testimony, when the military judge had just specifically limited her testimony with an instruction addressing "human lie detector" testimony, consistent with then-existing precedent, we do not find his error to have been plain or obvious.

Nevertheless, assuming without deciding that the error was obvious, we next determine "whether [the appellant] has sustained his burden of demonstrating that the error materially prejudiced his substantial rights." *Brooks*, 64 M.J. at 329. Analysis of the weight of the evidence and the military judge's remedial actions were the principal considerations in *Brooks*. *Id*. We will assess the same considerations here.

The expert witness made only one statement including percentage information. That testimony was placed in context by two questions related by the military judge:

> MJ: Well, counsel let me stop you there. Instead of asking the witness what she thought the question meant, let me just reread the question to the witness. And the question was: Have you ever had an interview that at first was judged to be a case of abuse but later turned out to be false?
>
> Wit: Okay. The answer again would be yes. *I need to say that when I do an interview, I do not give an opinion. I simply take the child's statement.*
>
> . . . .
>
> TC: How — what would be the frequency that this would have happened that we just described?
> A: There's certainly cases in which a child makes up something or lies; and, again, it is rare. I would say 1 out of 100 or 1 out of 200.
>
> . . .
>
> MJ: Ma'am, I have a question for you. Because you are a forensic interviewer, in the situation that you just described, do you have any forensic, that is, scientifically accurate way of proving whether the child is telling the truth or not? In other words, in a case where you say that you believe the child's not telling the truth, the only way that you typically could know that is if the child later comes forth and says, 'Yes, I made it up," or in the case where the child makes a complaint against someone that has sexually molested them, unless that person ultimately confesses, *you would ultimately never know who was telling the truth and who wasn't; is that correct?*
>
> Wit: *That's correct.*

Record at 660-61 (emphasis added).

In this context, it was clear that the percentage estimate was not the result of any peer-reviewed study, nor was it supported by any data set or reference, other than the impromptu reflection of the witness about her own experience. We conclude

that the weight of the offending reference, in the context of the expert's overall testimony, was not substantial.

Furthermore, and of paramount importance in this case, the Government presented evidence of substantially more than a "he said, she said" case. The Government introduced evidence that the appellant possessed pornography, which the children testified he had shown to them. Child pornography was also found on his computer, along with the remnants of an online chat: "anyone else have sex with their dad" and "I wasn't lucky enough to have sex with my little girl, but watching her in the shower was good enough!!!".[4] In addition, there were two child victims, both of whom testified at trial, and both directly and graphically testified about the appellant's misconduct with them. D, then ten years old, testified that once her hands were on the appellant's penis "I had to go up and down on his private[s]" and that "white stuff came out of it" onto a napkin. Record at 727-28, 735. Her younger sister, eight-year-old S, testified that the appellant "put my hands on it and made me go with my hands up and down." She also described that "white stuff came out" the top. Record at 762-63. She went on to describe that the appellant had her touch his penis "with [my] mouth" and that he "put his private into mine" which "hurt" and felt "stretched." Record at 775-76.

Additionally, the Government presented medical testimony that the children did not have any discernible physical signs of penetration, but that this was not inconsistent with the children's description of what happened. The expert testimony indicated that a description of a feeling of "stretching" without breaking the hymen would leave no discernible injury, even with some penetration. Record at 663-92. The Government's case also included testimony of the children's mother and a third-party who observed the children react in fright, running and hiding, when their father came to their mother's home unexpectedly.

The defense case included a strategy of discrediting the children's mother, ascribing a motive to fabricate the abuse in order to terminate the appellant's visitation, and to prove that the children had been coached. Though we perceive no persuasive indication in the record that the children had been coached, in the course of cross-examination, the children's mother did agree with the defense counsel's characterization that her custody battle with the appellant was, at times, "pretty nasty." *Id.* at 552-62. In his defense, the appellant also presented his current mother-in-law, who testified about the appellant's good relationship with his daughters and their desire to live with him and not go back to their mother's home. The grandfather of the appellant's wife testified similarly. Finally, the defense presented the appellant's chaplain, who testified the appellant was distraught over the charges.

[4] The admission of the pornography was the subject of a proper limiting instruction by the military judge. Record at 615-16.

In the context of these facts, the clear connection between the children's testimony and that of the forensic interviewer was not her impromptu reference to the incidence of false reports, but to her testimony that children of these ages do not know about oral sex, masturbation or ejaculation. We conclude that the appellant's possession of pornography and child pornography, combined with the children's graphic testimony in age-appropriate terms, but concerning matters about which they should not know, amounted to a strong case against him. The single reference made by the forensic interviewer about the incidence of false reports had no substantial role in the case.

With respect to the military judge's remedial actions, our superior court held that "'the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such [percentage] testimony.'" *Brooks*, 64 M.J. at 330 (quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003)). This is because a delayed instruction would impact the paradigm from which the members view other evidence. In *Brooks*, no objection was made to the offending lie detector testimony, and the military judge provided only standard cautionary instructions to the members before deliberation on findings. That was held to be reversible error.

In this case, the military judge gave prompt and specific limiting instructions during the expert's testimony, when he first detected potential error. Record at 653-54. Thus, when the witness minutes later testified as to her opinion about the frequency of false victim reports, this testimony was already in the context of the cautionary, limiting instruction about "lie detector" testimony. As such, the testimony did not affect the paradigm in which other evidence was viewed. The military judge additionally intervened to elicit clarifying testimony, and he provided instructions on the credibility of witnesses prior to the members adjourning for deliberations. At that time, he also included instructions regarding expert witnesses, specifically including the further admonition that "the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness and no other witness can testify that the alleged victim's account of what occurred is true or credible." Record at 923; *see also* Record at 927; Appellate Exhibit LXXI at 11, 13.

Based on the foregoing, we conclude that the military judge's specific instruction immediately preceding the offending testimony, his intervention in clarifying the expert's testimony, and his later repeated instructions, combined to prevent any material prejudice to the substantial rights of the appellant that otherwise might have resulted from the limited role of the improper expert testimony. We hold the military judge's error in allowing the percentage reference to false complaints was neither plain nor obvious, but if it was, it was harmless.

Speedy Review and Appellate Processing

In his fourth assignment of error the appellant claims that he was denied due process based upon excessive post-trial delay and this court's failure to consider his supplemental assignments of error.[5] In this court's original opinion, the issue of post-trial delay was extensively reviewed. We have again carefully considered the matter and we adopt our predecessor panel's disposition of that portion of delay which preceded the remand of this case. *Mullins*, 2006 CCA LEXIS 327 at 44-45. We will address, *infra*, any delay from the remand forward. First, however, we will address the supplemental assignments of error. We begin by noting that these were previously considered and denied. *See Mullins* at n.8. We do so again.

During extensive post-trial litigation, the appellant filed a petition for extraordinary relief with the CAAF regarding his appellate representation. That court issued an order to this court directing an inquiry into whether the appellant was represented by counsel, and if not, whether he desired representation. Order of June 28, 2005. In as much as the current assignment of error includes the appellant's complaint about the adequacy of this court's inquiry, it has been rendered moot. Our superior court denied his petition on September 14, 2005, after receiving the response of this court dated 22 August 2005. *Mullins v. Judges of the U.S. Navy-Marine Corps Court of Criminal Appeals*, 62 M.J. 216 (C.A.A.F. 2005).

As to the portion of the supplemental assignment of error alleging failure to ensure personal service upon the appellant, we note that the record reflects compliance with the rules of court regarding service upon assigned counsel. Many also reflect service personally upon the appellant. Even assuming an error for failure to personally serve the appellant with any particular document, he has not articulated any specific prejudice to a substantial right that resulted from his not having been personally served. He has participated directly, and with counsel, in every aspect of his appeal, and his assignments of error have received the benefit of counsel and the attention of this court. Thus, no relief is warranted.

---

[5] The appellant's 25 October 2005 Motion to File Supplemental Assignments of Error, which was denied on 3 November 2005, lists the Supplemental Assignments of error and provides a brief summary of each, as follows:

I. The NMCCA's refusal to ensure personal service of all documents on the Appellant, as opposed to Appellant's counsel denied him due process and interfered with his constitutional rights; and

II. The NMCCA erred in failing to answer the CAAF's specific questions in its 28 June 2005 order regarding the status of his representation by counsel and his petition for extraordinary relief. The appellant also filed a Motion to Reconsider in December 2005, elaborating on the substance of his complaint regarding this court's response to that CAAF order.

As to the remaining portion of this assignment of error alleging post-trial delay, we previously adopted this court's prior decision as our own. Additionally, we have considered the time required to process and dispose of the remand of this case in view of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In doing so, we first note that this matter was remanded on 9 May 2008, and docketed with this court less than one week later, on 15 May 2008. Given the ten volumes of material that now comprise this case, we conclude that the two months consumed by counsel to brief their respective positions is not facially unreasonable. *Id. a*t 135. The nine months required for a new panel of this court to master the voluminous record and to responsibly consider the appellant's multiple assertions of error is neither facially unreasonable, nor presumptively so. *Id*. at 142. Finding no unreasonable additional delay to trigger a due process analysis, we move to consider whether the delay, nevertheless, merits relief under our broad authority under Article 66(c), UCMJ.

We have reconsidered all of the delay in this case, and the facts attendant thereto, in light of the factors enunciated in *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States (Toohey I),* 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Brown*, 62 M.J. 602, 607 (N.M.Ct.Crim.App. 2005)(en banc); as well as the guidance in *Toohey I*, and *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002). We conclude that the delay in this case does not impact the findings or the sentence that should be approved and we decline to grant relief. Art. 66(c), UCMJ.

Factual and Legal Sufficiency of Child Pornography Charge

The appellant again raises legal and factual sufficiency of Specification 4 of Charge III, and alleges that since the military judge instructed the members using a definition of child pornography later held unconstitutional by the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), we cannot affirm the conviction. The Government concedes that the military judge's instruction included language later struck down in *Ashcroft*. However, citing *United States v. Cendejas,* 62 M.J. 334 (C.A.A.F. 2006) and *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), the Government argues that we may affirm because the erroneous instruction had no impact on the members. Government Answer of 16 Jul 2008 at 14. Due to the loss, subsequent to our earlier decision in this case, of Prosecution Exhibits 7-17, which contained the images at issue, we are now unable to assess the legal and factual sufficiency of the conviction, or to assess the merits of the assigned error.[6] Accordingly, we set aside the findings of guilty to Specification 4 of Charge III.

Because of the immediately foregoing action, and in light of this court having previously set aside Specification 3 of Charge

[6] Government Response to Court Order of 5 May 2009.

III, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon doing so, we are satisfied beyond a reasonable doubt that, in the absence of Specifications 3 and 4 of Charge III, relating to possession of child pornography, the sentence adjudged would have been no less than that originally adjudged for the remaining charges, which include the rape of a child under 16 years of age, the sodomy of a child under 16 years of age, and two specifications of indecent acts upon a child under 16 years of age.

Evidence of Other Acts

The appellant asserts that the military judge erred when he denied the defense motion to preclude introduction of evidence of a chat room conversation dialogue found on a computer in the appellant's home.[7] The dialogue consisted of two written sentences discovered on the appellant's computer hard drive: "anyone else have sex with their dad" and "I wasn't lucky enough to have sex with my little girl, but watching her in the shower was good enough!!!"

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004). For the reasons set forth in our predecessor panel's opinion, which we adopt, we conclude the military judge did not abuse his discretion, and we decline to grant relief.

Conclusion

We have reviewed the record, the appellant's assignments of error, the Government's response, and all pleadings and filings of the parties, including orders of our superior court. Although not specifically raised again, we have reconsidered all the assignments of error originally raised before this court, and we resolve them consistent with this court's previous decision, except as set forth above. The findings of guilty to Specifications 3 and 4 of Charge III are set aside. Following our corrective action, we conclude that the remaining findings and the sentence, as reassessed, are correct in law and fact, and that no error exists that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. The remaining findings and the sentence, as reassessed, are

[7] This assignment of error was previously the seventh assignment of error.

affirmed. The supplemental court-martial promulgating order shall reflect our action.

Senior Judge COUCH and Judge MAKSYM concur.

For the Court

R.H. Troidl
Clerk of Court