

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

**Before  
L.T. BOOKER, J.K. CARBERRY, D.R. LUTZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CURTIS C. GRANT  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000651  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 28 September 2010.

**Military Judge:** Maj Robert G. Palmer, USMC.

**Convening Authority:** Commanding Officer, Sixth Marine Corps District, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

**Staff Judge Advocate's Recommendation:** LtCol E.R. Kleis, USMC.

**For Appellant:** LCDR Brian L. Mizer, JAGC, USN.

**For Appellee:** Capt Paul M. Ervasti, USMC.

**10 May 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of violating a lawful general order and one specification of making a false official statement in violation of Articles 92 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 907. The appellant was sentenced to confinement for 60 days, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for a period of five months, and a bad-conduct discharge. The convening authority approved the sentence

as adjudged, and except for the bad-conduct discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's brief and assignments of error, and the Government's answer. We conclude that the findings and the 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.

The appellant alleges a single error: that the military judge abused his discretion when he permitted the appellant's ex-wife to testify as a victim of the appellant's violation of a general order and false official statement under RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant's trial defense counsel filed a written motion to exclude the testimony of the appellant's ex-wife during sentencing under R.C.M. 1001(b)(4) and MILITARY RULE OF EVIDENCE 401, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The military judge heard a proffer of testimony before oral argument on the motion during the presentencing phase of the trial and denied the motion making specific findings of fact articulating his MIL. R. EVID. 403 balancing analysis on the record.

The appellant argues that his ex-wife was not a victim of the crimes to which he pleaded guilty and that her testimony regarding the consequences of his adultery was not directly related to those crimes and, therefore, her testimony was not proper aggravation evidence under R.C.M. 1001(b)(4) and MIL R. EVID. 401. The Government responds that the appellant's adulterous relationship was admitted in the Stipulation of Fact and during the providence inquiry, and that the ex-wife was a victim of the orders violation, in that the basis for the orders violation was the inappropriate sexual relationship with an 18-year-old high school student recruit who was not the appellant's wife. The Government further asserts that the ex-wife's testimony regarding the consequences of appellant's adultery (i.e., divorce, financial hardship, and emotional pain) was proper in that it was directly related to the orders violation and, therefore, proper aggravation.

While we acknowledge that the abstract "administration of justice" in the case of the false official statement and "good order and discipline" may be the actual "victims" of the appellant's crimes, we decline to adopt so narrow a reading of the term "victim" as the appellant proposes. Cf. *United States v. Ashby*, 68 M.J. 108, 117 (C.A.A.F. 2009) (next-of-kin of persons killed in a gondola crash were permitted to testify about the impact on them of an obstruction of justice offense). We also note that the rule cited by the defense permits evidence directly relating to the offense of which an accused is convicted, and certainly the impact on a marriage of a recruiter's sexual misconduct with a poolee in violation of recruiting command

policy fits that description. We are furthermore persuaded by the clear statement in the rule that the examples given are not by way of limitation. The limitation, as noted, comes in the forms of due process and the military rules of evidence, both of which the military judge here considered.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006). We are also mindful, in conducting our review, that sentencing evidence is subject to the balancing test of MIL. R. EVID. 403. *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). When a military judge conducts a proper balancing test under MIL. R. EVID. 403, the ruling will not be overturned absent a "clear abuse of discretion." *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998). However, less deference is given if there is no articulation of the balancing analysis on the record, and no deference if the balancing test is not conducted. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Here the military judge conducted a detailed balancing analysis pursuant to MIL R. EVID. 403. Record at 70-71.

Even if we did decide, and we do not, that allowing the ex-wife's testimony as aggravation evidence was a clear abuse of discretion, it was not an error that materially prejudiced a substantial right of the appellant because the sentence based on the admissible evidence in aggravation would remain the same. After reviewing the evidence and colloquy in support of the guilty pleas, and the appellant's unsworn statement, we are satisfied that the adjudged sentence would have been at least the same as that adjudged.

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

For the Court

R.H. TROIDL  
Clerk of Court