

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

C.L. CARVER

D.O. VOLLENWEIDER

E.E. GEISER

UNITED STATES

v.

**Carlos R. HESTER
Information Systems Technician First Class (E-6), U. S. Navy**

NMCCA 200400718

Decided 30 June 2006

Sentence adjudged 18 July 2003. Military Judge: C.E. Schaff.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region Southeast, Naval Air Station,
Jacksonville, FL.

LT JAMES GOLLADAY, JAGC, USN, Appellate Defense Counsel
Capt BRIAN K. KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial with enlisted representation of indecent assault in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge, confinement for fifteen months, and reduction to pay grade E-3. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error. First he asserts that the evidence of indecent assault was legally and factually insufficient to prove his guilt beyond a reasonable doubt. Second, he argues that the military judge erred when he failed to exclude the testimony of the appellant's young son as irrelevant or because its probative value was substantially outweighed by the danger of unfair prejudice, confusion, and misleading the members. Third, the appellant contends that the military judge improperly allowed inadmissible tape-recorded hearsay statements into evidence. Finally, the appellant asserts that the military judge's reasonable doubt instruction inappropriately lessened the Government's burden of proof by

applying a "heightened and unsanctioned" standard to members' doubts.

We have examined the record of trial, the four assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

There are three elements to the offense of indecent assault: (1) that the appellant assaulted a certain person not his spouse in a certain manner, (2) that the acts were done with the intent to gratify the lust or sexual desires of the appellant, and (3) that under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1998 ed.), Part IV, ¶ 63b. In support of his argument, the appellant focuses primarily on the overall lack of credibility of the Government's witnesses and on factual inconsistencies between Government witnesses. Appellant's Brief of 31 Aug 2005 at 5-8.

The appellant's adopted daughter, OH, testified that in Kings Bay, Georgia, during March 1999, the appellant forcibly removed her clothing and sexually assaulted her. Record at 257-58. Her testimony covered every element of the offense of indecent assault. Taken in the light most favorable to the Government, we hold that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. The evidence against the appellant was, therefore, legally sufficient.

With respect to factual sufficiency, evidence supporting the finding of guilty to the appellant's March 1999 sexual assault on OH comes from several interlocking sources. First, the victim's testimony about the indecent assault was detailed and firm despite aggressive cross-examination by the trial defense

counsel. Supporting the victim's statements was testimony from another victim, JW, that the appellant sexually assaulted her on several occasions during the years leading up to the charged indecent assault.

Finally, the victim's little brother, CH, was present during the charged indecent assault. He was 5-6 years old at the time of the incident and 10 on the date he testified at trial. The military judge appropriately questioned the boy to confirm that the boy understood the difference between a lie and the truth, was able to accurately observe and describe events, and would only tell the truth in response to counsels' questions. While, as the appellant notes, the boy's recollection of times and locations are broad and unreliable, his description of the room where the attack occurred is substantially similar to that given by the victim. Further, the boy was very clear and unwavering that he saw the appellant touch his sister's "private part." He was asked to stand up in court and physically indicate on himself the area he was referring to avoid any confusion. Record at 347-48.

While, as the appellant observes, there were several apparent inconsistencies as to facts and circumstances leading up to the indecent assault, the evidence regarding the date, location, and conduct was sufficiently consistent and detailed to convince this court beyond a reasonable doubt of the appellant's factual guilt to Specification 2 of Charge II.

Admission of Audio Recording

OH reported the appellant's sexual misconduct to her mother who, in turn, reported the misconduct to law enforcement. Naval Criminal Investigative Service (NCIS) opened an investigation. As part of the inquiry, NCIS facilitated and taped two telephone calls from OH to the appellant in which she solicited incriminating statements. Prior to trial the tapes were "enhanced" to reduce background-humming noise and to make the voices louder and clearer. Following the enhancement there were still a few portions of the conversation that were unintelligible. The technician who conducted the enhancement testified at trial that the background humming noise was most likely caused by the turning of the tape itself and would not have been audible to either party during the telephone conversations. He further testified that the verbal content of the tapes was unchanged by his actions.

In a pre-trial motion, the defense litigated the admissibility of the tapes arguing that they were "misleading and inaccurate." The gravamen of the defense argument is that it is unclear that the appellant actually heard and understood everything the victim was saying to him over the telephone. The defense notes that, at the time the conversations took place, the appellant's attention was divided between the phone conversation and his own noisy efforts to install a sink in his kitchen.

There were also repeated instances where the appellant asked OH to repeat herself. The defense also argues that portions of the tapes, even when enhanced, are still unintelligible and therefore do not accurately reflect the complete conversation. Trial defense counsel did not, however, assert that the enhancement process in any way altered the words spoken on the tapes. Record at 17-40.

The military judge denied the motion noting that the unintelligible portions were not substantial. He also held that the probative value of the tapes was not substantially outweighed by the danger that inaudible parts would mislead the members. Appellate Exhibit XIII. Finally, the military judge found that the appellant's ability to accurately perceive what the victim was saying to him over the phone went to the weight and not the admissibility of the evidence. Record at 38.

On appeal, the appellant argues that the recorded conversation is hearsay. Alternatively, the appellant argues that even if the recording could be admitted for some non-hearsay purpose, the military judge erred by not giving an appropriate limiting instruction to the members. The appellant also argues that the military judge erred by permitting the members to listen to the tape during deliberations. Appellant's Brief at 12.

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion. His ruling will not be overturned on appeal "'absent a clear abuse of discretion.'" *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F 1997)(quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F 2000). A military judge's ruling on admissibility of evidence will only be overturned if it is "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller* 46 M.J. 63, 65 (C.A.A.F 1997)(quoting *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). In conducting our review, we are required to consider the evidence "in the light most favorable" to the "prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

The defense did not raise a hearsay objection at trial. On appeal, while raising hearsay generally, the appellant tacitly acknowledges that the complained of recording of the victim's side of the conversation was admissible to show the effect on the appellant and was not offered for the truth of the matter asserted. We agree and find that the entire tape was not hearsay. MILITARY RULE OF EVIDENCE 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant also, however, asserts that the military judge erred by not instructing the members on the limited purpose for which the victim's side of the conversation was offered. He offers no legal basis for this assertion. As there was no request for such an instruction by trial defense counsel, this assignment of error is without merit.

MIL. R. EVID. 106. Finally, the appellant's assertion that it was error for the military judge to permit the members to listen to the tape recording evidence during deliberations is without merit. We do not find that the military judge abused his discretion when he admitted the contested tape into evidence and do not find he had an obligation to instruct the members absent a request from the defense.

Conclusion

The appellant's remaining assignments of error are without merit. The approved findings and the sentence are affirmed.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court