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

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Peter T. KOGAN
Missile Technician Second Class (E-5), U. S. Navy

NMCCA 200500713 Decided 27 December 2006

Sentence adjudged 04 November 2004. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LCDR JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
Mary T. HALL, Civilian Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

WAGNER, Senior Judge:

A military judge alone, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of rape of a child under 16 years of age, sodomy on a child under 12 years of age, and indecent acts on a child under 16 years of age, 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 30 years, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended confinement in excess of 25 years and all forfeitures for two years from the date of his action. The appellant alleges in his two assignments of error that the military judge committed plain error in considering unauthenticated evidence and hearsay testimony on sentencing and that the sentence is too severe. We have examined the record of trial, the appellant's 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 materially

prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

During the military judge's inquiry into the providence of the appellant's guilty pleas, the appellant admitted to raping his ten-year-old step-daughter on three occasions, digitally penetrating her vagina on three occasions, and forcing her to perform oral sodomy on him on five occasions. In support of the guilty pleas, the appellant agreed to permit the Government to introduce Prosecution Exhibit 1, a stipulation of fact. The stipulation provided additional details regarding the offenses, including his use of force in penetrating the victim's vagina and mouth with his penis.

On sentencing, the Government offered into evidence, without objection, two sworn statements made by the appellant detailing his sexual activities with his step-daughter. In his statements, the appellant provided graphic specifics of his growing sexual desire for his step-daughter and how he covertly carried out his sexual fantasies with her, even, at times, with his step-daughter's mother in the same room with them. The Government also offered into evidence, again without objection, a hand-written statement about the sexual abuse incidents with the victim's name at the top. This statement, while unsigned, is unequivocally the statement of the victim. In addition to having the victim's name at the top of the page, the statement contains first person references to the sexual abuse and identifies her step-father, mother, and brother by name. The Government presented one witness on sentencing, the victim's sexual abuse counselor, who testified about the negative impact that the appellant's abuse had on the victim and the appellant's family. During the course of the counselor's testimony, she repeated certain statements made by the victim during counseling, without objection by the appellant. During presentation of evidence in extenuation and mitigation, the appellant requested that the rules of evidence be relaxed on sentencing, in accordance with RULE FOR COURTS-MARTIAL 1001(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

Admissibility of Aggravation Evidence

The appellant, recognizing that the evidentiary issues he raises were waived by his failure to object, now claims that the admission of the hand-written statement was plain error because it was unauthenticated and constituted hearsay and that the military judge committed plain error in considering the hearsay testimony of the counselor. These issues are wholly without merit.

Assuming, *arguendo,* that the military judge erred, we find no prejudice and need not address the issue in detail. The facts of this case are strikingly similar to those underlying a 1998

holding of our superior court. In *United States v. Flack*, 47 M.J. 415 (C.A.A.F. 1998), the appellant argued that the testimony of a social worker regarding what the child sexual abuse victim told her during counseling was hearsay and did not satisfy the exception to the rule that would allow its admissibility. The Government argued that the issue was not properly preserved at trial. The court found that the impact of the testimony in dispute paled in comparison to the details provided in the appellant's own stipulation of fact and that, consequently, in a judge alone trial, there was no prejudice to the substantial rights of the appellant. *Id.* at 416-17. In the case at bar, we have not only the detailed stipulation of fact, but the graphic statements of the appellant properly admitted in aggravation that minimize any possible impact of the disputed evidence on the sentence.

In any event, we find no plain error in the military judge considering either the hand-written statement or the testimony of the counselor. The hand-written statement contains sufficient identifying information to show without doubt that it was written by the victim. The information contained therein, as well as the information provided by the testimony of the counselor, fall squarely within the parameters of permissible victim impact evidence in aggravation under R.C.M. 1001(b)(4). Any objection to the possible hearsay nature of the evidence was waived by the appellant's failure to object. It is not only possible, but likely, that the appellant preferred withholding hearsay objections to the evidence to the possibility of the victim testifying in person on aggravation. It is also unclear whether the evidence would have been found to be hearsay evidence or whether it would have been deemed admissible under an exception to the hearsay rule. *See United States v. Rynning*, 47 M.J. 420, 421 (C.A.A.F. 1998)(child sexual abuse victim's statements made to social worker were not hearsay); *United States v. Faciane*, 40 M.J. 399, 403 (C.M.A. 1994)("Under proper circumstances, statements made to psychologists, social workers, and other health care professionals may be included under Mil.R.Evid. 803(4)."). We also note that, in light of the appellant's request to the military judge to relax the rules of evidence on sentencing, that the contested evidence, even if initially objected to, may have been admitted either at the request of the Government to reopen their case in aggravation, or in rebuttal.

Sentence Severity

Under the circumstances of this case, involving the sexual molestation and rape of a ten-year-old girl by her step-father, we find the sentence to be wholly appropriate for this offender and his offenses, even in light of his record of military service. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court