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

BEFORE

W.L. RITTER **J.F. FELTHAM** **K.K. THOMPSON**

UNITED STATES

v.

Charles K. MCWHORTER
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200301592 Decided 22 June 2006

Sentence adjudged 31 July 2002. Military Judge: P.J. Betz, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/ Western Recruiting Region, San Diego, CA.

LT J.M. LOKEY, JAGC, USNR, Appellate Defense Counsel
Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

THOMPSON, Judge:

A military judge, sitting as a general court-martial, found the appellant guilty, contrary to his pleas, of attempted forcible sodomy, violating a lawful general order, indecent assault, indecent exposure, and wrongfully making service-discrediting statements, in violation of Articles 80, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 934. The appellant was sentenced to confinement for one year, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises four assignments of error, alleging that: (1) the evidence was factually and legally insufficient to support the findings of guilt for all charges and specifications; (2) the military judge erred in not dismissing the indecent exposure as unreasonably multiplicious with the attempted forcible sodomy and indecent assault offenses; (3) the military judge erred by admitting hearsay statements as excited

utterances; and (4) the trial defense counsel was ineffective for failing to locate and obtain the testimony of a witness.

We have carefully considered the record of trial, the appellant's four assignments of error, the Government's response, and the appellant's reply.[1] We find merit in the appellant's first and third assignments of error and take corrective action in our decretal paragraph. Our decision in this regard renders moot the appellant's second assignment of error. We find no merit in the appellant's fourth assignment of error.

Legal and Factual Sufficiency

For his first assignment of error, the appellant contends that the evidence is legally and factually insufficient to sustain his conviction to all charges and specifications. We agree with the appellant's contention concerning factual sufficiency as to the specification of wrongfully making service discrediting statements and will take corrective action in our decretal paragraph. We disagree with his contention concerning the specification alleging a violation of a lawful general order. In light of our decision below concerning the specifications alleging attempted forcible sodomy, indecent exposure and indecent assault, this assignment of error concerning those offenses is moot.

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 crime 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, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

The elements of making a service discrediting statement alleged in Specification 4 under Charge III are:

(a) That the appellant did a certain act; and

(b) That, under the circumstances, the appellant's conduct was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 60(b).

[1] The appellant's Motion for Timely Review, filed with this court on 31 May 2006, is hereby granted.

The gravamen of these offenses is the adverse impact upon the military service; it is not necessary that the conduct itself be a crime. *Parker v. Levy,* 417 U.S. 733, 749 (1974). Where such conduct includes speech, the forbidden speech is measured by its tendency to damage the reputation of the military, not its actual effect. *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972); *United States v. Anderson,* 60 M.J. 548, 554 (A.F.C.C.A. 2004). The military judge must be satisfied that the appellant's verbal behavior was of a nature to bring discredit upon the armed forces based upon the evidence presented. The evidence must be sufficient to support a finding that the charged behavior constitutes criminal conduct and is not merely offensive in a moral or social sense. *United States v. Peszynski,* 40 M.J. 874, 882 n. 10 (N.M.C.M.R. 1994)(citing *United States v. Davis,* 26 M.J. 445 (C.M.A. 1988) and *United States v. Henderson,* 32 M.J. 941, 944 (N.M.C.M.R. 1991)), *aff'd*, 34 M.J. 174 (C.M.A. 1992).

In this case, the appellant and an Army recruiter, Staff Sergeant (SSG) Semarad (S), were at the Tulsa, Oklahoma Military Entrance Processing Command (MEPC) site, waiting for test results for applicants. SSG S admits she and the appellant were conversing about working out, running, exercising and working with weights. SSG S testified the appellant remarked that she had nice calves. Record at 117-18. The appellant testified that he noticed SSG S flexing her calves, and made the remark in conjunction with the conversation concerning physical fitness (PT). Record at 171-72. This is not contradicted by SSG S's testimony. After SSG S made remarks concerning the better performance by the Army compared to the Marine Corps, the appellant asked her, "Well, do you want to wrestle?"[2] Record at 172. SSG S stated that the conversation about PT could have included remarks about wrestling or lifting weights, but did not believe the remark about her calves was pertinent to that topic, stating she was angry at the latter remark and thought it unprofessional. Record at 121.

SSG S testified that she did not consider the remark concerning wrestling to be inappropriate at the time and in the context in which it was made, although she was allowed to testify that her co-workers later told her it had a sexual connotation. There was no testimony concerning the statement "If you know what I mean" as charged in the specification.[3]

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[2] There is no evidence from SSG S in the record that the appellant made the comment, "If you know what I mean" following the wrestling comment, as charged in the specification. Record at 119. This removes any inference that the appellant intentionally made his comment concerning wrestling in an inappropriate manner. However, the military judge found the appellant guilty of the specification as charged. Record at 244.

[3] Specification 4 under Charge III charged that the appellant made the remarks, "You have nice calves," "Do you want to wrestle," and "I would really like to wrestle with you, if you know what I mean."

The statements "You have nice calves" and "Do you want to wrestle," made in the context as recounted by the appellant, and uncontradicted by SSG S, are not factually sufficient to convince a rational trier of fact beyond a reasonable doubt that these statements had a tendency to bring the service into disrepute or to lower it in the public esteem. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are not convinced beyond a reasonable doubt that the appellant's conduct, under the facts and circumstances recounted above, was service discrediting. We find the evidence factually insufficient to support the finding of guilty to this specification.

As to the specification alleging violation of a lawful general order, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of this offense. Furthermore, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for this offense.

Admission of Hearsay Statements As Excited Utterances

In his third assignment of error, the appellant contends that the military judge erred in admitting two hearsay statements made by ML as excited utterances. We agree as to the second statement.

The appellant was convicted of attempted forcible sodomy of, indecent exposure to, and indecent assault of ML. The appellant met ML while he was a recruiter at Recruiting Substation (RSS) Muskogee, Oklahoma. ML worked at a cookie stand located in the same shopping mall as the RSS. ML was friendly with all of the recruiters at RSS and flirtatious with the appellant. On 5 March 2001, ML approached the appellant and asked for a ride home and the appellant agreed. On the way to ML's house, the appellant drove to a secluded, dead-end road and parked. This is when the alleged attempted sodomy, indecent assault, and indecent exposure occurred.

ML chose not to testify. The military judge ruled that she was available for trial, and refused to admit a videotaped deposition she had given prior to trial. As its only evidence of the substantive charges concerning ML, the Government called Mrs. Connie Ham, a co-worker of ML, to testify concerning two statements ML made to her shortly after the incident. The military judge admitted her testimony concerning these two statements, over defense objections, as excited utterances of ML.

Mrs. Ham testified that she arrived at her house at approximately 2130 on 5 March 2001 to find ML on her couch, crying and distraught. Initially, ML would only state that she was being harassed by a "gentleman", who forced her to have oral

sex and grabbed at her breasts. Record at 52-53. Mrs. Ham testified that she then proceeded to calm ML down, a process which took approximately two hours, at which point she found out what "really" happened. Record at 59. The defense counsel objected to the admission of any statement made by ML after Mrs. Ham stated she had calmed her down. The military judge overruled the objection and admitted the second statement as well. At this point, Mrs. Ham testified that ML told her a recruiter had pulled out his penis and made her touch it. Her testimony concerning the second statement made by ML suggests that ML was not truthful in her first statement in which she claimed she was forced to perform oral sex. The only identification of the perpetrator was made in this second statement. Both statements allege a person grabbed at her breasts.

After hearing Mrs. Ham's testimony, the military judge admitted both statements made by ML as excited utterances, and, therefore, exceptions to the rule against hearsay. We find that admission of the second statement was error.

"Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial." MILITARY RULE OF EVIDENCE 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MIL. R. EVID. 801(c).

Our superior court has held that "[a] military judge's ruling admitting or excluding evidence is reviewed for abuse of discretion." *United States v. Moolick,* 53 M.J. 174, 176 (C.A.A.F. 2000); *see United States v. Dewrell,* 55 M.J. 131, 137 (C.A.A.F. 2001); *see also United States v. Valentin-Nieves,* 57 M.J. 691, 694 (N.M.Ct.Crim.App. 2002). As such, this court "will reverse for an abuse of discretion [only] if the military judge's findings of fact are clearly erroneous or if [the] decision is influenced by an erroneous view of the law." *United States v. Vassar,* 52 M.J. 9, 12 (C.A.A.F. 1999)(quoting *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)(internal quotations omitted)). The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See United States v. McElhaney,* 54 M.J. 120, 130 (C.A.A.F. 2000)(quoting *United States v. Miller,* 46 M.J. 63, 65 (C.A.A.F. 1997)). To establish an abuse of discretion, the appellant must come forward with a conclusive argument. *See United States v. Houser,* 36 M.J. 392, 397 (C.M.A. 1993)(citing *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984)). Even if this court finds that a military judge abused his discretion, relief is only granted upon a showing of prejudice. *See United States v. Garcia,* 44 M.J. 27, 30 (C.A.A.F. 1996).

An excited utterance is not excluded under the hearsay rule, even if the declarant is available to testify. *See* MIL. R. EVID. 803(2). An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. *Id.* Neither the rules of evidence nor applicable case law has established a "bright line" rule on excited utterances. *United States v. Arnold,* 25 M.J. 129, 132 (C.M.A. 1987). However, it is universally recognized that, in order for there to be an excited utterance, "the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Id.* (quoting *United States v. Iron Shell*, 633 F.2d 77, 86 (8th Cir. 1980)(internal quotations omitted)). Further, the event must be startling, and the declarant must be under the stress of excitement caused by the event at the time the statement is made. *Id.*

The rule recognizes that statements made during a startling event or while under the stress of excitement, possess inherent reliability. The theory behind the rule is that a person who makes a statement while under the stress of excitement caused by the startling event is incapable of reflection on or deliberation and fabrication of the statement. *See United States v. Miller,* 32 M.J. 843, 851 (N.M.C.M.R. 1991), *aff'd*, 36 M.J. 124 (C.M.A. 1992). The lapse of any particular period of time is not the focus of the rule. A determination that the declarant was under the stress of excitement caused by the event vice making a reflective, deliberate statement is an explicit and fundamental criteria for applying MIL. R. EVID. 803(2). *United States v. Feltham,* 58 M.J. 470, 474 (C.A.A.F. 2003); *but see United States v. Jones,* 30 M.J. 127, 129 (C.M.A. 1990)(stating in dicta that "a lapse of time between the event and the utterance creates a strong presumption against admissibility"). Further, there is latitude given in proving contemporaneity in excited-utterance cases, but not in proving that the declarant was under distress of a startling event. *See United States v. Chandler,* 39 M.J. 119, 123 (C.M.A. 1994).

Based upon Mrs. Ham's testimony, we find the military judge did not abuse his discretion in ruling that ML's initial statement was an excited utterance. However, we find that, prior to her second declaration, and almost two hours after making her first statement to Mrs. Ham, ML had calmed down from the initial stress of the event. Thus, her second statement was not an excited utterance. *See United States v. Green,* 50 M.J. 835, 840 (Army Ct.Crim.App. 1999). Under these facts, the military judge clearly abused his discretion in admitting the second hearsay statement made by ML to Mrs. Ham.

When hearsay is improperly admitted, the reviewing court must determine whether or not the error was harmless. *United States v. Armstrong,* 36 M.J. 311, 314 (C.M.A. 1993); *see* Art. 59(a), UCMJ. Applying the four-pronged analysis for prejudice

from erroneous hearsay rulings set forth in *United States v. Weeks,* 20 M.J. 22, 25 (C.M.A. 1985), we find the following:

First, the Government's case against the appellant concerning the offenses involving ML was neither strong nor conclusive. The entire prosecution of the charges involving ML was based upon the hearsay statements made by ML to Mrs. Ham. Although available to testify, ML declined to participate in the prosecution of the case. Without admission of the second hearsay statement, the Government could not have presented evidence of identification of the person ML claimed assaulted her or the nature of the assault.

Second, the defense's theory of the case was neither feeble nor implausible. In light of the admitted second hearsay statement, in which ML contradicted her initial claim of forced oral sex, the defense theory that ML made the claim as a result of being rejected by the appellant is somewhat plausible. This was supported by the testimony of defense witnesses who testified as to: (1) ML being flirtatious with the appellant; (2) one witness' impression, after a conversation with ML about the incident, that the incident began consensually; and (3) another witness' testimony concerning the appellant's not being attracted to or interested in ML because of her physical appearance.

Third, the inadmissible hearsay was used in a material way on the central issue of the commission of an offense by this appellant. The military judge found the appellant guilty, not based upon the information imparted in ML's first hearsay statement, wherein there was no identification of the appellant as the perpetrator, but based upon the information imparted in her second hearsay statement.

Fourth, the quality of the objectionable evidence was such that there was no substitute for it in the record, so there can be no serious claim that the hearsay statement was cumulative of other evidence. The heart of the prosecution's case was the second hearsay statement of ML. There was no physical evidence and no corroborative evidence of any other sort. Without considering the second hearsay statement, the military judge could not have found the appellant guilty of any of the charges against him involving ML.

We find that the appellant has met his burden of showing the admitted evidence was materially prejudicial to his substantial rights. We further find that the military judge's abuse of discretion in this regard materially prejudiced the substantial right of the appellant to a fair trial on the attempted sodomy, indecent exposure and indecent assault allegations.

Ineffective Assistance of Counsel

In his fourth assignment of error, the appellant asserts that his trial defense counsel provided ineffective assistance of

counsel, alleging various shortcomings in his performance at trial. To establish that there has been ineffective assistance of counsel, an appellant must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. *United States v.* Scott, 24 M.J. 186, 188 (C.M.A. 1987).

We find no merit in any of the appellant's assertions of deficient performance. In reviewing the alleged deficient performance in the defense counsel's decision not to call a specific witness to attack the credibility of ML, we note the appellant has not provided any evidence, through affidavit or otherwise, to suggest that this was in opposition to the appellant's wishes at the time. *See United States v. Starling*, 58 M.J. 620, 622-23 (N.M.Ct.Crim.App. 2003). Moreover, other witnesses provided testimony similar to that which the appellant argues was lacking. Furthermore, evaluating the appellant's trial defense counsel's performance in light of all of the circumstances, we are confident that the adversarial process worked in this case. *See Scott*, 24 M.J. at 188.

Conclusion

Accordingly, the findings of guilty as to Charge I and its sole specification and Charge III and Specifications 2,3, and 4 thereunder are set aside and those specifications under those charges are dismissed. The remaining finding as to Charge II and its sole specification is approved. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who may order a rehearing on sentence, or approve a sentence of no punishment. *See* R.C.M. 1107(e)(1)(C)(iii).

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court