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

BEFORE

D.A. WAGNER **C.L. CARVER** **R.E. VINCENT**

UNITED STATES

v.

Stanley O. OTHURU
Storekeeper Second Class (E-5), U. S. Navy

NMCCA 200301631 Decided 13 June 2006

Sentence adjudged 23 November 2002. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Activities, United Kingdom, London, England.

LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

WAGNER, Senior Judge:

Contrary to his pleas, the appellant was tried and convicted by a general court-martial comprised of officer and enlisted members of making a false official statement and larceny of over $34,000.00 in Government funds, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The adjudged and approved sentence consisted of confinement for 60 days, reduction to pay grade E-3, a fine of $34,000.00, and, in the event the fine is not paid, one year of additional confinement.

The appellant claims that the military judge erred in admitting, over defense objection, the written statements of two unavailable witnesses as statements against interest. The appellant asserts that the admission of these statements violated his right to confrontation guaranteed under the Sixth Amendment, as they were testimonial in nature and the declarants not subject to cross-examination, citing *Crawford v. Washington*, 541 U.S. 36 (2004).

We have reviewed the record of trial, the appellant's brief and assignment of error, and the Government's response. We agree with the appellant that the military judge erred in admitting the statements over defense objection. Because we also conclude that the appellant suffered no prejudice as a result of the error, we decline to grant relief.

Facts

The appellant was born in 1971 in Lagos, Nigeria, to Augustine and Atim Ekete Othuru. He married Michelle Eloho Samuel in 1996 and immigrated to the United States shortly thereafter. On 8 August 1996, the appellant enlisted in the United States Navy. He collected Basic Allowance for Housing (BAH) at the with-dependents rate based on his marriage to Michelle. In 2000, the appellant became a naturalized United States citizen and began the process of obtaining visas for Michelle, Augustine, and Atim. In the course of the application for visas, all three family members were required to appear for interviews at the United States Consulate in Lagos, Nigeria. During the course of their interview with the consular officer on 27 September 2001, they were asked to participate in separate interviews with an consular fraud investigator based on discrepancies in the application packages and the familial resemblance between the appellant and Michelle.

The consular fraud investigator interviewed all three family members separately after examining the applications and supporting documentation. The fraud investigator noticed that Michelle's birth certificate did not look authentic and addressed that fact to Michelle and Atim, who thereafter both admitted, in writing, that Michelle was actually the biological sister of the appellant. Augustine Othuru refused to participate in the interview. The charges against the appellant alleged that, because marriage to a blood sibling makes a marriage under Nigerian law null and void, the appellant had collected BAH payments exceeding $34,000.00 under false pretenses and that he had then lied to the United States Government when he stated that he was legally married.

The Right to Confrontation
Crawford v. Washington

At trial, the appellant sought to have the statements made by Michelle and Atim to the fraud investigator suppressed on the basis that their admission violates the confrontation clause of the Sixth Amendment and are hearsay not admissible under any hearsay exception. The military judge found the witnesses unavailable, denied the defense motion, and admitted the statements into evidence as statements against interest under MILITARY RULE OF EVIDENCE 804(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) or, alternatively, as statements of personal or family history under MIL. R. EVID. 804(b)(4). The military judge found that MIL. R. EVID. 804(b)(3) was a firmly rooted exception

to the hearsay rule and that, although MIL. R. EVID. 804(b)(4) was not firmly rooted, the statements nonetheless bore such indicia of reliability that they satisfied the appellant's right to confrontation.

After this case was tried, the Supreme Court had the opportunity to address the issue of the admissibility under the confrontation clause of the Sixth Amendment of out-of-court statements where the declarant is not subject to cross examination. The Court reinforced the importance of cross examination as the "crucible" in which reliability is tested. *Crawford*, 541 U.S. at 61. The Court went on to require that the proponent of such an out-of-court "testimonial" statement establish that the declarant was unavailable and that there had been an opportunity for cross examination of the declarant. *Id.* at 68. The Court left "for another day" a comprehensive definition of the term "testimonial," stating:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id.

In *Crawford*, the Court established three core classes of testimonial statements:

> (1) ex parte in-court testimony or its functional equivalent;
> (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and
> (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial.

Id. at 51-52.

In the case at bar, the consular fraud investigator informed Michelle and Atim of his identity and that he was asking them questions because of irregularities in their visa documentation. The Othurus were all escorted individually to an office in another building to be questioned. Augustine Othuru, who had refused to make a statement, sternly cautioned his wife, Atim, not to say anything as they passed in the office. The stipulation of testimony of Michelle bears out the atmosphere of fear engendered in the witnesses as they were individually interrogated regarding possible violations of Nigerian law regarding the marriage to the appellant and the fraudulent documents submitted with their visa applications. While the

consular fraud investigator had no arrest authority and was not a law enforcement officer per se, his status as a Government investigator working for the United States Consulate in Nigeria certainly lend credence to the apprehension of the witnesses. There is little doubt that an objective witness would reasonably believe that any statement given under these circumstances would be available for use at a later trial, possibly their own.

Having determined that the statements were testimonial in nature, we move on to note that the appellant had no opportunity to cross-examine the declarants with regard to their statements. While the appellant had access to Michelle, enough at least to submit a stipulation of her expected testimony, and, presumably to his parents, access to the declarants does not equate to the opportunity to cross-examine them. The admission of the statements was a violation of the appellant's Sixth Amendment right to confront the witnesses against him.

Harmless Error

Whether a constitutional error is harmless beyond a reasonable doubt is a question of law that will be reviewed *de novo*. *Arizona v. Fulimante*, 499 U.S. 279, 295-96 (1991); *United States v, Hall*, 58 M.J. 90, 94 (C.A.A.F. 2003); *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001); *United States v. George*, 52 M.J. 259 (C.A.A.F. 2000). To determine whether an error was harmless, we must evaluate the importance of the witness's testimony to the Government's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on the material; the extent of cross-examination permitted; and the strength of the Government's case. *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986).

An overseas immigration specialist with the Immigration and Naturalization Service testified that the appellant submitted a petition for an alien relative visa for Michelle Othuru. The appellant listed Michelle as his wife and supported his claim with a marriage certificate, tax returns, letters, and emails. The consular fraud investigator testified that Michelle's birth certificate did not appear genuine and that there was a striking familial relationship in the appearance of the appellant and Michelle. One of Michelle's school teachers from before the marriage identified Michelle during testimony from photographs of her wedding to the appellant and testified that she was known as Michelle Othuru. A principal from another of Michelle's schools attended before the marriage also identified her from the photos and testified that she was enrolled as Michelle Othuru.

An official from the National Population Commission of Nigeria testified that Michelle's birth certificate was not genuine. The Government moved into evidence records from a hospital in Nigeria showing that Michelle was born on 30 June 1980 to Augustine and Atim Othuru. A hospital official testified

as to the maternity stay of Atim Othuru during the time that Michelle was born.

In addition, the official who presided over the marriage testified that she always warns people she is about to marry about providing false information. Evidence was admitted that marrying a sibling violates Nigerian law and makes the marriage null and void. Several military witness testified as to the appellant's application for BAH and his statements when questioned regarding the validity of his marriage.

The defense presented testimony regarding the appellant's good military character and character for truthfulness. Testimony that the appellant sent money home to support Michelle and referred to her as his wife was presented. A defense investigator testified that he had interviewed an individual in Nigeria who claimed to be Michelle's biological brother and that he had given her to the appellant in marriage as the head of his family. A stipulation of expected testimony of Michelle stated that she had been given to the Othuru family at an early age, shortly after her parents had died, and had been raised by them as if she were their daughter. She denied the veracity of her statement to the consulate fraud investigator and stated that she was forced to write the statement. The appellant did not testify.

The evidence of appellant's guilt is overwhelming, even in the absence of the statements made by Michelle and Atim Othuru. The appellant suffered no prejudice from their erroneous admission, the error having been harmless beyond a reasonable doubt.

Conclusion

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

Senior Judge CARVER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court