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.

Edwin D. WALKER
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200300242 Decided 21 June 2006

Sentence adjudged 2 August 2001. Military Judge: S.A. Folsom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

VOLLENWEIDER, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of failure to go to his appointed place of duty, violating a lawful order, making a false official statement, carnal knowledge, adultery, impersonating a Marine recruiter, indecent acts with a child, and transporting a minor in interstate commerce with the intent to wrongfully engage in sexual intercourse, in violation of Articles 86, 92, 107, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 907, 920, and 934. The members sentenced the appellant 24 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered the punishment executed.

After carefully considering the record of trial, the appellant's five assignments of error, and the Government's response thereto, 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. We find no merit in the

appellant's assertions of error: (1) that the evidence presented at trial was insufficient to convict him of adultery, a Mann Act violation, carnal knowledge, and indecent acts with a child; (2) that the military judge abused his discretion by denying a defense challenge for cause; (3) that his conviction for violating the Mann Act should be set aside; (4) that the military judge erred by admitting medical impact evidence during sentencing; and (5) that the staff judge advocate's Article 34, UCMJ, advice letter was defective.

Facts

The appellant was the married father of an infant son. He was stationed at Camp Pendleton, where he lived with his family in base housing. In the summer of 2000, the appellant was sent on temporary additional duty as a recruiter's assistant in Gary, Indiana. He was specifically instructed not to make "cold calls" on potential recruits, not to visit the homes of potential recruits, and not to form personal relationships with potential recruits. It was made clear to the appellant that he had no authority to actually complete enlistment paperwork, or enlist any person in the Marine Corps. He was a recruiter's assistant, not a Marine recruiter.

Victim A.H.

In June 2000, the appellant picked up 17-year-old A.H. as she was walking down the street in Gary, Indiana. The next day, the appellant introduced himself to A.H.'s mother as a Marine recruiter. In the ensuing weeks, the appellant would regularly drive A.H to her summer school classes. At the end of the day, the appellant would retrieve A.H. from school and spend the evenings with her. The appellant generally returned home to his wife thereafter. Over a six week period, the appellant engaged in oral sex and sexual intercourse with A.H. on at least five occasions in Gary.

By mid-July 2000, the appellant's temporary assignment was coming to a close. Not wanting to end their romance, the appellant devised a plan under which A.H. would move to Camp Pendleton and live with him. Since A.H.'s mother already believed the appellant was a Marine recruiter, the appellant and A.H. told the mother that A.H. wanted to enlist in the Marine Corps. The appellant presented A.H.'s mother with an enlistment contract and directed her to sign the parent consent section, since he knew A.H. was under 18.

With the phony enlistment contract signed, A.H.'s mother believed her daughter was to begin a career in the Marines. She accompanied A.H. to the airport where A.H. boarded a 13 August 2000 flight from Indiana to California. The appellant, who had returned to Camp Pendleton approximately one month earlier, paid for the plane ticket. Just prior to A.H.'s arrival in California, the appellant's wife made an unexpected trip to see

her ill mother, taking their infant son and leaving the appellant and A.H. alone in the Walkers' on-base residence. On the night of A.H.'s arrival in California, she and the appellant engaged in sexual intercourse. They had sex 10-12 more times before the affair was discovered in October 2000. A.H. lived in the appellant's house and slept in his bed during this time period.

Victim S.W.

While in Gary, the appellant also met 15-year-old S.W. in the recruiting office. After a conversation and lunch, the appellant gave S.W. a business card with his pager number on it. During the late mornings and early afternoons, while A.H. was in summer school, and the appellant's wife believed he was performing his duties as a recruiter's assistant, the appellant was spending time developing a relationship with S.W. The appellant knew S.W. was only 15 years old.

The appellant engaged in oral sex and sexual intercourse with S.H. on four separate occasions. Around the same time that the appellant was hatching the bogus enlistment plan with A.H., he learned that S.W. was pregnant with his child. According to S.H., the appellant reacted with happiness and pride. The appellant also tried to dissuade S.W. from having an abortion. When S.H. stood firm on her decision to terminate the pregnancy, the appellant offered to pay for the procedure.

As time went by, the appellant's various lies and schemes began to unravel. By late August 2000, A.H.'s mother became suspicious of her daughter's claim of being in the Marine Corps. After learning from the local recruiting office that female recruits attend boot camp at Paris Island, South Carolina, not Camp Pendleton, California, A.H.'s mother called the appellant and confronted him. The appellant admitted that the enlistment story was a lie and then professed his love for A.H.

In the meantime, the appellant never produced the promised funds for S.W.'s abortion. By Labor Day weekend 2000, S.W.'s pregnancy had progressed to the point where a late term abortion was necessary. S.W.'s mother also confronted the appellant who apologized for the situation and again offered to pay for the termination procedure. The delays caused by the appellant's unfulfilled promises to S.W. and her mother forced S.W. to travel from Indiana to Illinois where late term abortions were legal.

The appellant did not testify at trial.

Sufficiency of the Evidence

In his first assignment of error, the appellant challenges the sufficiency of the evidence with respect to his adultery and Mann Act convictions involving 17-year-old A.H. He argues that A.H. was angry at him, so she had a motive to lie, and that "the government's allegations of sexual intercourse were based,

primarily, on nothing more than her testimony." Appellant's Brief of 28 Feb 2005 at 4.

In a similar fashion, the appellant also challenges his carnal knowledge, indecent acts, and adultery convictions involving 15-year-old S.W. He argues that it was physically impossible for him to have impregnated S.W., and that "the Government's case was based, primarily, on nothing more than her testimony" and that she had a motive to lie. *Id.* at 4-5.[1]

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. *See 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. Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). *See also* Art. 66(c), UCMJ.

The elements of adultery are as follows: (1) the accused wrongfully had sexual intercourse with a certain person; (2) at the time, the accused or the other person was married to someone else; and (3) that the conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 62b. The appellant's wife testified that she was married to the appellant during all relevant times. Both A.H. and S.W. testified that they had sexual intercourse with the appellant, who held himself out as a Marine recruiter. Additionally, A.H. testified that she had sexual intercourse with the appellant in base housing. This testimony provided legally sufficient evidence to establish the elements of both specifications of adultery.

Under Clause 2 of Article 134, UCMJ, a violation of the Mann Act, 18 U.S.C. § 2423, is punishable if: (1) the accused knowingly transports an individual who has not attainted the age of 18 years in interstate or foreign commerce; and (2) such transportation was done with the intent that the transported individual engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense. MCM, Part IV, ¶ 60b; 18 U.S.C. § 2423(a). A.H. testified that the appellant bought her a plane ticket and brought her to California, where they lived together, slept in the same bed, and had sexual intercourse. Given the history of sexual intercourse prior to coming to California, it can be inferred that the appellant's intent when bringing A.H. to California was to continue their criminally adulterous relationship. This

1 The appellant does not contest the sufficiency of the evidence supporting his convictions for failure to go to his appointed place of duty, failure to obey a lawful regulation by having unregistered guests in his base housing, false official statement, and impersonating a Marine recruiter.

testimony provided legally sufficient evidence to establish the elements of the Mann Act violation.

Committing an indecent act with a child under the age of sixteen requires proof: (1) that the accused committed a certain act upon the body of a certain person; (2) that the person was under sixteen years of age and not the spouse of the accused; (3) that the act was indecent; (4) that the accused acted with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and (5) that the conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. MCM, Part IV, ¶ 87b(1). S.W. testified that she was 15 years old at all relevant times and that the appellant performed oral sex on her. This testimony provided legally sufficient evidence to establish the elements of indecent acts with a child.

And finally, the elements of carnal knowledge are: (1) that the accused committed an act of sexual intercourse with a certain person; (2) that the person was not the appellant's spouse; and (3) that the person with whom the accused had sexual intercourse was under 16 years of age when the intercourse took place. MCM, Part IV, ¶ 45b(2). S.W. testified that the appellant had sexual intercourse with her on four occasions. This testimony provided legally sufficient evidence to establish the elements of carnal knowledge.

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* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant challenges his convictions concerning both A.H. and S.W. on the bases that the girls' respective testimony alone was insufficient to establish the necessary sexual acts. The girls' testimony was unrebutted. It was corroborated, by the testimony of A.H.'s mother, who noted the schemes by the appellant to entice her to allow A.H. to leave home, the appellant's apology and statement that he was in love with A.H. Similarly, corroboration was present in the testimony of S.W.'s mother, who noted subterfuges of the appellant to get S.W. out of the house, the statements the appellant made with respect to S.W.'s pregnancy and the promises he made to pay for S.W. to have an abortion. The actual medical evidence establishing S.W. was indeed pregnant also corroborated S.W.'s account of their sexual liaisons.

As for S.W.'s motive to fabricate, the appellant asserts that S.W. lied about her relationship with him in an effort to conceal a sexual liaison that predated the appellant's June 2000

arrival in Gary, Indiana. Specifically, the appellant argues that S.W.'s claim to have had an abortion during her 17th week of the pregnancy is incompatible with her claim that the appellant impregnated her during the June to July 2000 timeframe. The appellant insists that the child was actually conceived sometime in May or perhaps the earliest days of June 2000. His position altogether ignores S.W.'s testimony that her doctors did not measure the age of the fetus from the presumed date of conception, but rather, from the first day of S.W.'s last menstrual cycle, which certainly could have been a week and perhaps more antecedent to the commencement of the appellant's temporary duty in Indiana. The appellant presented no evidence, expert or lay, on the issue.

After considering all the evidence, we are convinced, beyond a reasonable doubt that the appellant is guilty of adultery and violating the Mann act with A.H. We are equally convinced that the appellant is guilty of adultery, carnal knowledge, and committing indecent acts with S.W. Therefore, we decline to grant relief.

The Appellant's Challenge For Cause

The appellant's second assignment of error questions the military judge's denial of a challenge for cause leveled against Major K. M. Moore, U.S. Marine Corps. The appellant argues that Major Moore's preexisting professional relationship with the trial counsel and his prior experience with the trial defense counsel rendered the member biased in favor of the prosecution. We disagree.

RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) establishes that a member may be challenged for cause when his presence raises a substantial doubt as to the legality, fairness, and impartiality of the proceedings. Although military judges are to be liberal in granting challenges for cause (*see United States v. Miles,* 58 M.J. 192, 194 (C.A.A.F. 2003)), we review their decisions on such matters under the clear abuse of discretion standard. *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005). A military judge's ruling on a challenge for cause is given great deference. *United States v. Quintanilla*, 63 M.J. 29 (C.A.A.F. 2006). *See also United States v. Rolle,* 53 M.J. 187, 191 (C.A.A.F. 2000).

Allegations of bias fall into two basic categories: actual bias or implied bias. When testing for actual bias, we consider whether the member exhibits any bias "'such that it . . . [would] not yield to the evidence presented and the judge's instructions.'" *United States v. Napoleon,* 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds,* 23 M.J. 292, 294 (C.M.A. 1987)). In essence, a decision on actual bias comes down to a credibility determination, and we afford great deference to the findings of the military judge. *United States v. Richardson,* 61 M.J. 113, 118 (C.A.A.F. 2005); *United States v.*

Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996). In contrast, an allegation of implied bias is viewed objectively, through the eyes of the public. *Napoleon,* 46 M.J. at 283. Our task is to ensure that the public would view the proceedings as fair. *Id.* Regardless of which type of challenge is lodged against the member, R.C.M. 912(f)(3) places the burden of establishing the grounds for removal of the member squarely upon challenging party.

During individual *voir dire*, Major Moore stated that he was the executive officer for a battalion on whose behalf the trial counsel regularly prosecuted cases. He described his relationship with the trial counsel as purely professional and indicated that their past dealings would in no way cause him to favor the prosecution over the defense. Major Moore was also the direct superior of a Marine officer facing a general court-martial in a completely unrelated case. Both trial and defense counsel were assigned in that case as well. Major Moore had testified at the accused officer's Article 32, UCMJ, hearing where he was cross-examined by the appellant's trial defense counsel. The case of the accused officer was scheduled for trial in the near future and it was expected that Major Moore would once again take the witness stand and undergo cross-examination by the appellant's trial defense counsel. Major Moore stated that he would be able to follow the military judge's instructions and apply the law as required. Major Moore also denied all assertions that his prior and pending dealings with both the trial defense counsel and the trial counsel would in any way impact his ability to view the evidence in the appellant's case impartially.

Bearing in mind that the military judge observed Major Moore during the *voir dire* and thus made a determination as to this officer's credibility, we will afford the military judge the appropriate deference and accept as true the Major's denials of any bias towards the appellant. We reject any assertion that the appellant's court-martial was tainted by actual bias on the part of Major Moore.[2]

Challenges for implied bias should be invoked sparingly. *United States v.* Strand, 59 M.J. 455, 458 (C.A.A.F. 2004). Implied bias must be viewed in the military context. A pre-existing relationship between a potential member and an officer of a court-martial does not an implied bias make. *See Richardson*, 61 M.J. at 118 ("we recognize that in a close-knit

2 We further reject the appellant's assertion that Major Moore provided "perfunctory disclaimer[s] of personal interest." *See United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985). While he may have responded affirmatively to the trial counsel's standard questions concerning his ability to follow the military judge's instructions and apply the law, Major Moore also responded to the trial defense counsel's more thorough inquiry, which revealed the Major's sincere belief that no connection existed between the appellant's court-martial and other dealings the member had experienced with both counsel. *See United States v. Reichardt*, 28 M.J. 113, 116 (C.M.A. 1989).

system like the military justice system, such situations will arise and may at times be unavoidable"). The full nature of the relationships between Major Moore and both counsel was fully explored through questioning by trial counsel, trial defense counsel, and the military judge. At every turn, Major Moore denied that his prior and future involvement with courts-martial served by the trial counsel and trial defense counsel would have any bearing on the appellant's proceedings. The fully developed record suggests formal and professional relationships not marked by any particular bonding suggesting deference. The *voir dire* in this case was sufficiently developed for us to determine that given the circumstances the public would see the appellant's court-martial proceedings as fair. Thus, we find neither actual nor implied bias on Major Moore's part. The appellant's second assignment of error is denied. *See United States v. Downing,* 56 M.J. 419 (C.A.A.F. 2002)(friendship between challenged member and trial counsel). *Cf. Napoleon,* 46 M.J. at 282-83 (professional relationship with prosecution witness).

The Appellant's Mann Act Conviction

Next, the appellant argues that his conviction for violating 18 U.S.C. § 2423 (the Mann Act) should be set aside. The appellant claims that the charge sheet failed to adequately notify him of the specific Title 18, U.S. Code, offense allegedly violated, and that the military judge issued deficient instructions to the members with respect to the elements necessary to find the appellant guilty of Change V, Specification 3. The appellant's argument is without merit.

A. The Drafting of the Charge Sheet.

As to Charge V, Specification 3, the charge sheet alleged, pursuant to Clause 2 of Article 134, UCMJ, a violation of the Mann Act, 18 U.S.C. § 2423, by effecting the transportation of A.H., a girl then under the age of 18, in interstate commerce with the intent to "wrongfully have sexual intercourse with" A.H. A conviction under 18 U.S.C. § 2423(a) is permitted where the appellant effects such transportation with the intent that the child engage in "any sexual activity for which any person can be charged with a criminal offense."

The appellant argues that the difference between the offense as alleged in the charge sheet and as detailed in the U.S. Code failed to provide him with adequate notice of the suspected violation. In particular, the appellant contends that the Government's use of the word "wrongful" was more in line with a violation of paragraph (b) of 18 U.S.C. § 2423, which proscribes traveling in interstate commerce for purpose of engaging in any "illicit sexual conduct." In essence the appellant asserts, for the first time on appeal, that he was confused as to whether he was being charged with violating paragraph (a) or (b) of 18 U.S.C. § 2423.

The military justice system is a "notice pleading jurisdiction" where the specification informs an accused of the offense against which he must defend and stands as a bar to future prosecution for the same conduct. *United States v. Farano,* 60 M.J. 932, 934 (N.M.Ct.Crim.App. 2005)(quoting *United States v. Gallo,* 53 M.J. 556, 564 (A.F.Ct.Crim.App. 2000), *aff'd,* 55 M.J. 418 (C.A.A.F. 2001)). While the appellant does not identify his arguments on this particular issue with any specificity, his claim of error appears to be that Specification 3 of Charge V should be dismissed because it substantially misled him. Such a ground for dismissal is covered by R.C.M. 907(b)(3)(A), which contemplates the filing of a motion for relief with the military judge at trial. The appellant failed to do so, and he provides no reasons for not filing a motion at trial.[3] Although our research reveals no case law directly on point, the MCM analysis specifically identifies the permissive bases for dismissal as waivable if not properly aired before the military judge. *See* MCM, Appendix 21, at A21-54-55. Accordingly, the appellant's arguments that Specification 3 of Charge V substantially misled him will be deemed waived in the absence of plain error.

To prevail under a plain error analysis, the appellant must show: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho,* 54 M.J. 63, 65 (C.A.A.F. 2000). In this case, the plain error analysis ends with the first prong – there was no error. Specification 3 of Charge V alleged a violation of 18 U.S.C. § 2423. To support a conviction under 18 U.S.C. § 2423(a), the proscribed sexual activity has to be such that "any person can be charged with a criminal offense." The specification put the appellant on sufficient notice that the Government was alleging a violation of this statute because the appellant arranged for A.H. to travel in interstate commerce with the "intent to wrongfully have sexual intercourse with her." Given that the appellant was a married man, it was a violation of the UCMJ for him to have sexual intercourse with any person other than his wife. MCM, Part IV, ¶ 62b(1)-(3).

The appellant also claims that by using the word "wrongful" the specification actually alleged an offense more akin to that proscribed by 18 U.S.C. § 2423(b), which prohibits traveling in interstate or foreign commerce for the purposes of engaging in any "illicit sexual conduct." The appellant's argument is flawed because he fails to acknowledge that 18 U.S.C. § 2423(b) outlaws the accused himself from traveling in interstate or foreign commerce with the intent of engaging in illicit sexual activity. This stands in stark contrast to 18 U.S.C. § 2423(a), which outlaws the accused or defendant from transporting an underage person in interstate or foreign commerce with the intent of having the transported child engage in some sexual activity

3 The appellant supplies no evidence that his trial defense counsel was in any way confused by the charge and specification as drafted.

punishable under the law. Specification 3 of Charge V clearly alleged that the appellant committed an offense by arranging for the underage A.H.'s transportation in interstate commerce for the purpose of having wrongful sexual intercourse with her. There is no way that the specification as drafted can be read to allege a violation of any portion of 18 U.S.C. § 2423 other than paragraph (a), and the appellant's claimed confusion is the result of his own current misreading of the statute.

We are convinced that the wording of Specification 3 of Charge V did not substantially mislead the appellant. Hence, we find no error in this case, plain or otherwise.

B. The Military Judge's Instructions.

The appellant challenges the military judge's instruction that to sustain the Mann Act conviction, the members had to find that the appellant caused the transport of A.H. in interstate commerce "with the intent to wrongfully have sexual intercourse with" her. Record at 448. Again, the appellant focuses on the word "wrongful" and argues that the statute required a showing that the appellant acted with the intent that A.H. engage in "any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a).

We agree with the appellant that the military judge's instructions as to the elements of this particular offense were somewhat defective. While the "wrongfully" language used in the specification was adequate to place the appellant on notice as to the alleged offense, the military judge's use of identical language did not fully convey to the members the elements of an 18 U.S.C. § 2423(a) offense.

Such an error by the military judge will only result in relief when prejudicial. In this context, prejudice is measured by questioning whether the members could have found the necessary predicate facts from the instructions given. *United States v. Mance*, 26 M.J. 244, 256 (C.M.A. 1988). As mentioned earlier, the Government clearly intended to establish that the appellant violated 18 U.S.C. § 2423 by transporting the underage A.H. in interstate commerce with the intent of continuing their adulterous affair. Seconds before issuing the complained of instruction, the military judge correctly explained the elements of adultery to the members. Record at 447-48. Thus, based on the instructions given, and the facts revealed at trial, we are satisfied that the members could have found that the appellant engaged in an illegal adulterous act with A.H. after her arrival in California, thus establishing a violation of 18 U.S.C. § 2423(a).[4] In this case, the members correctly returned a guilty verdict as to Specification 3 of Charge V and the

4 We note that the definition of "wrongful includes "unlawful", and the definition of "unlawful" includes "illegal" and "criminally punishable." *Black's Law Dictionary* 1536, 1606 (7th ed. 1999).

appellant did not suffer any prejudice as a result of the military judge erroneous instruction.

Evidence In Aggravation

In his fourth assignment of error, the appellant argues that the military judge abused his discretion by admitting medical impact evidence during the presentencing phase of the court-martial.

This court reviews a military judge's admissibility determinations for abuse of discretion. *United States v. Dewrell*, 55 M.J. 131, 137 (C.A.A.F. 2001). This is a strict standard requiring more than a mere difference of opinion. *United States v. McElhany*, 54 M.J. 120, 130 (C.A.A.F. 2000). In short, a military judge's admission of evidence will be reversed only when his actions are "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997).

The evidence produced at trial proved that the appellant repeatedly had sexual intercourse with 15-year-old S.W. and that their liaisons left S.W. pregnant. As a direct result of the appellant's crime, S.W. was faced with the Hobson's choice of having the baby or having an abortion. As a consequence, S.W. predictably and legally chose to have an abortion. S.W. and her mother testified as to what that process entailed. The abortion involved the insertion of as many as 13 nine-inch rods into S.W.'s vagina in order to prepare her uterus for the extraction. These rods had to remain in S.W. as she traveled back and forth between the clinic in Illinois and her Indiana home during both days of the procedure. Other evidence provided to the members included documents describing the late term abortion procedure and S.W.'s own testimony discussing some of the significant risks the procedure posed to her health.

R.C.M. 1001(b)(4) allows the Government to present evidence in aggravation, which may include documents and testimony concerning financial, social, psychological, and medical impact on or cost to any victim of the appellant's misconduct. *United States v. Bungert*, 62 M.J. 346, 347 (C.A.A.F. 2006). The appellant was responsible for S.W. having to endure that particular procedure. S.W. testified that the appellant was proud that he impregnated a 15-year-old girl, and that he promised to pay for her abortion. The appellant made no MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) objection at trial, waiving the issue on appeal. The medical impact evidence was properly admitted by the military judge and the fourth assignment of error is denied.

Defective Article 34, UCMJ, Advice

The appellant claims that the Article 34, UCMJ, advice letter from the convening authority's staff judge advocate was

defective, and that this Court must therefore disapprove the guilty findings in this case. This assignment of error is baseless and completely without merit.

First, we find no factual support for the appellant's final, summary assignment of error. The staff judge advocate's Article 34, UCMJ, advice letter to the convening authority does not state that the convening authority must refer the charges against the appellant to a general court-martial. Instead, the letter actually recommends trial by general court-martial and then simply informs the convening authority that he must convene a general court-martial prior to signing the referral block on the Charge Sheet. Consequently, we reject the appellant's fifth assignment of error.

Second, defects in the staff judge advocate's pretrial advice are not jurisdictional, but are tested for prejudice. *United States v. Loving*, 41 M.J. 213, 288 (C.A.A.F. 1994). The appellant does not allege that the convening authority was confused by the pretrial advice. No prejudice is alleged at all. We find no prejudice.

Third, the appellant fails to note that prior to this appeal, he never objected to the Article 34 letter. In short, the appellant waived the issue. *See* R.C.M. 905(b)(1). *See also United States v. Murray*, 25 M.J. 445 (C.M.A. 1988); *United States v. Swan*, 45 M.J. 672 (N.M.Ct.Crim.App. 1996). The appellant neither states the applicable law nor argues for a change in the law. [5]

This assignment of error is without merit.

Conclusion

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

Senior Judge CARVER and Judge GEISER concur.

R.H. TROIDL
Clerk of Court

5 The appellant does cite R.C.M. 905(b)(1) and *Murray*, but does not set forth any facts, law, or argument to make his citation relevant.