

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

BEFORE

Charles Wm. DORMAN

C.L. CARVER

D.A. WAGNER

UNITED STATES

v.

**Kurt A. BROWNE
Machinist's Mate Third Class (E-4), U.S. Navy**

NMCCA 200100264

Decided 21 July 2005

Sentence adjudged 9 June 2000. Military Judge: J.V. Garaffa.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region Southeast, Jacksonville, FL.

LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant was tried by officer and enlisted members sitting as a general court-martial. Contrary to his pleas, he was convicted of rape and indecent assault, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to a dishonorable discharge and confinement for 1 year. There was no pretrial agreement. The convening authority disapproved the findings of guilty to indecent assault and approved the sentence as adjudged.

The appellant claims in his first assignment of error that the military judge erred by improperly limiting the assistant trial defense counsel's cross-examination of a Government expert witness. In the second assignment of error, the appellant claims that the military judge erred by denying the trial defense counsel's motion to compel the production of discoverable documents and witness statements in the possession of the Government. The appellant alleges in his third assignment of error that the evidence adduced at trial was not factually sufficient to support the finding of guilty of rape. Finally, the appellant claims in his fourth assignment of error that the

military judge erred when he failed to instruct the members on the defense of mistake of fact.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we agree with the appellant on the first assignment of error. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant and the alleged victim, Machinist's Mate Third Class (MM3) C, arranged to spend the afternoon of 7 September 1999 together. MM3 C was dating Electrician's Mate Third Class (EM3) M at the time. The appellant met MM3 C at EM3 M's apartment to "hang out" together. EM3 M came home bringing lunch for himself and MM3 C around the same time. MM3 C had told EM3 M that she was going to spend the afternoon with the appellant and EM3 M had no problem with her doing that, as she was in a liberty status and he was not. After eating lunch, EM3 M left the appellant alone with MM3 C in his apartment and returned to work.

According to the appellant's testimony at trial, after EM3 M left, MM3 C sat in the appellant's lap and began kissing him. They then engaged in foreplay for about five minutes, during which time MM3 C laid down on her back and the appellant got on top of her. MM3 C was a willing participant, moaning, responding to sexual questions, and massaging the appellant's exposed penis. The appellant and MM3 C began to have consensual sexual intercourse, but she was "not into it" and he stopped after about three or four minutes. The appellant asked what was wrong and MM3 C stated that she couldn't do this because she had a boyfriend and she asked him to leave, which he did.

According to MM3 C's testimony at trial, after EM3 M left the apartment, she and the appellant started to watch a movie. After a few minutes, the appellant began trying to kiss her and put his arm around her. She told him she wasn't interested. The appellant persisted with his romantic advances in spite of her protestations, eventually pulling her over his lap and onto her back beside him. The appellant then pushed her dress up and inserted his penis into her vagina, against her will. After several minutes, the appellant stopped and asked her what was wrong, saying that he hoped she didn't think he raped her. She responded by saying "whatever" and asking him to leave, which he did.

Immediately following the incident, MM3 C paged her former boyfriend, MM3 M, with whom she had remained close friends. In response to her page, MM3 M telephoned MM3 C and she asked if they could meet and talk. They met at the base exchange, where MM3 C told MM3 M only that the appellant had tried to force himself on her. MM3 C asked MM3 M if they could rent a movie and

watch it together. At her suggestion, they returned to EM3 M's apartment and began watching the movie. Shortly thereafter, MM3 C began kissing MM3 M and they engaged in consensual sexual intercourse.

MM3 C later told EM3 M that she had been raped, but did not want to report it. Still later in the day, she also told MM3 M that she had been raped and that she did not want to report it. MM3 M then spoke with EM3 M and they tried together to get her to make a report. When she refused, MM3 M reported the alleged rape. The next day, MM3 C informed EM3 M that she had engaged in consensual intercourse with MM3 M after the alleged rape.

At trial, MM3 C testified that she had called her former boyfriend, MM3 M, because EM3 M was in class and she trusted MM3 M. The consensual sexual intercourse with MM3 M was a result of her seeking comfort with him over the incident that had occurred less than two hours before. She testified that, instead of comforting her, the infidelity made her feel worse.

The Government called a forensic psychiatrist, Commander (CDR) T, who had evaluated the behavior of MM3 C in the aftermath of the incident to determine if treatment or hospitalization was required and to assess the potential impact that a subsequent trial would have on her. Included in CDR T's evaluation was a mental health history of MM3 C. In response to the questions of the trial counsel, CDR T opined that MM3 C engaging in consensual sexual intercourse within two hours of the alleged rape was in keeping with her past behavior of finding comfort from stress through her sexual relationship with her former boyfriend, MM3 M. CDR T further stated that her actions were in keeping with her character and her past psychiatric difficulties.

During cross-examination, the assistant trial defense counsel sought to inquire into MM3 C's characteristics such as impulse control and impulsivity in areas of sexual activity that were contained in CDR T's diagnostic notes. Trial counsel objected based on MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). In an Article 39(a), UCMJ, session, the military judge sustained the objection. During subsequent examination by both sides, CDR T reiterated that unusual behavior is typical in the aftermath of trauma, and that self-destructive behavior or behavior not in her own best interests were characteristics of MM3 C's personality disorder.

Military Rule of Evidence 412

In his first assignment of error, the appellant claims that the military judge erred to his substantial prejudice by sustaining the trial counsel's objection to the assistant defense counsel's cross-examination of CDR T regarding MM3 C's history of impulsive behavior and, specifically, impulsive sexual behavior. We agree.

In sustaining the objection to the evidence, the military judge relied on MIL. R. EVID. 412, which generally states that evidence of a victim's past sexual behavior is not admissible unless such evidence is constitutionally required to be admitted, is offered to show other source of semen or injury, or is past sexual behavior between the victim and the accused offered on the issue of consent. There is no doubt that the diagnostic history of MM3 C regarding her past impulsive sexual behavior qualifies as "past sexual behavior" within the meaning of MIL. R. EVID. 412. It is also clear that this past behavior did not involve the appellant and was not being offered as another source of semen or injury. The evidence was prohibited under MIL. R. EVID. 412 unless it was constitutionally required to be admitted.

Our superior court provided a thorough overview of the analysis required under MIL. R. EVID. 412 in *United States v. Banker*, 60 M.J. 216 (C.A.A.F. 2004). In writing the opinion for the court, Judge Baker reiterated the principle laid down in the court's earlier decisions that, in order to defeat the exclusionary function of MIL. R. EVID. 412, the appellant must "demonstrate why the general prohibition in [MIL. R. EVID.] 412 should be lifted to admit evidence of the sexual behavior of the victim(.)" *Id.* at 222 (quoting *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997)). Judge Baker further stated that the burden is on the proponent of the evidence to show that the evidence fits one of the enumerated exceptions. *Id.*

Considering the evidence during a closed hearing at which the victim has a right to be present, the military judge applies the two-prong test contained in MIL. R. EVID. 412(c)(3) to determine admissibility. The first part of the test is relevance, whether the evidence has "any tendency to make the existence of any fact" more or less probable than that fact would be without the evidence. MIL. R. EVID. 401. If the evidence is relevant, the military judge must then determine whether "the probative value of such evidence outweighs the danger of unfair prejudice[.]" MIL. R. EVID. 412(c)(3).

For evidence offered under the "constitutionally required" exception to MIL. R. EVID. 412, the proponent must also demonstrate that the evidence is material and favorable to the defense. *Banker*, 60 M.J. at 222; *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)(citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). In doing so, the military judge must make a finding that the evidence is "necessary." *Banker*, 60 M.J. at 222; *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993).

The military judge, in determining whether the evidence is material, must first determine the relative importance of the issue in dispute and compare it to the other issues in the case. *Banker*, 60 M.J. at 222; *Williams*, 37 M.J. at 361; *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983); *Dorsey*, 16 M.J. at 6. The military judge then must apply the MIL. R. EVID. 412

balancing test to determine whether the evidence is favorable to the defense. *Banker*, 60 M.J. at 222. The term "favorable" is essentially synonymous with the term "vital." *Id*; see *Valenzuela-Bernal*, 458 U.S. at 867 (quoting *Washington v. Texas*, 388 U.S. 14, 16 (1967)); *Dorsey*, 16 M.J. at 8.

As Judge Baker stated in *Banker*, while the MIL. R. EVID. 412 balancing test "bears resemblance" to the MIL. R. EVID. 403 balancing test, they are, in fact, distinct. *Banker*, 60 M.J. at 222. MIL. R. EVID. 403 allows a presumption of admissibility, while MIL. R. EVID. 412 places the burden on the proponent to demonstrate admissibility, making MIL. R. EVID. 412 a rule of exclusion vice inclusion. *Id.* (citing *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994)). Also, in determining the admissibility of the evidence the military judge is required to weigh the probative value of the evidence against the victim's privacy interest. *Id.* at 223 (quoting *United States v. Sanchez*, 44 M.J. 174, 178 (C.A.A.F. 1996)).

Judge Baker sums up the required MIL. R. EVID. 412 analysis by stating:

As a result, when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interests.

Id.

Finally, we note that we are required to review the military judge's decision to exclude evidence under MIL. R. EVID. 412 for abuse of discretion. *Id.*

The issue of whether MM3 C's consensual sexual intercourse with MM3 M within two hours of the alleged sexual assault by the appellant would be admissible at trial was litigated during a closed hearing with the victim present. After hearing the evidence, the military judge determined that, under the circumstances of this case, the fact that MM3 C engaged in consensual sexual intercourse with MM3 M would be admissible under MIL. R. EVID. 412 for the limited purpose of showing that the actions of MM3 C following the sexual assault amounted to behavior inconsistent with someone who had been raped less than two hours before. We note that, under MIL. R. EVID. 412, the evidence of consensual sexual intercourse with MM3 M would also have been admissible to show another source of a vaginal abrasion entered as evidence of force by the Government.

During the Government's case-in-chief, MM3 C testified as to the consensual sexual intercourse with MM3 M and stated that she did so in a vain effort to seek comfort from the earlier trauma. The Government then presented the testimony of CDR T to substantiate that the victims of trauma often react in unusual ways and that MM3 C's reaction to trauma was not inconsistent with her history of seeking comfort in stressful situations through sexual contact with MM3 M. The appellant was provided a copy of CDR T's notes from his assessment of MM3 C.

CDR T testified that MM3 C had told him that she had, in the past, turned to her relationship with MM3 M "in a sexual way as a way of comforting her stress" and that she had done so in the aftermath of the incident with the appellant. Record at 687. CDR T then testified that "She used that sexual relationship with [MM3 M] for comfort." *Id.* He further testified as follows:

In my examinations of [MM3 C], it is my opinion that that pattern of behavior, that particular sequence of actions, is in keeping with her previous patterns of behavior. It is keeping (sic) with some of her psychiatric difficulties. . . .

Record at 688. CDR T also testified that MM3 C's pattern of behavior with MM3 M "would be in keeping with her character" and that it was "an understandable reaction to trauma." *Id.*

The assistant trial defense counsel cross-examined CDR T on his assessment and diagnosis of MM3 C. CDR T stated that he had diagnosed MM3 C as suffering from a personality disorder. The assistant trial defense counsel then sought to elicit from CDR T answers to questions involving MM3 C's history of impulsive behavior and, specifically, impulsive sexual behavior. These questions were based on CDR T's notes regarding the personality disorder diagnosis and MM3 C's diagnostic history. The trial counsel objected and the military judge called an Article 39(a), UCMJ, session out of the hearing of the members.

In a rather cursory Article 39(a) session, the military judge asked the assistant trial defense counsel to state the relevance of the evidence. Following a brief recess, the assistant trial defense counsel stated that the evidence was admissible "for constitutional reasons" because CDR T had testified as to why MM3 C engaged in consensual sexual intercourse less than two hours after the alleged rape. Record at 727.

In sustaining the objection, the military judge focused solely on the fact that CDR T had stated that MM3 C's behavior was "not inconsistent" with her history and rejected the assistant trial defense counsel's argument that the evidence was relevant to provide an alternate reason for the behavior, other than seeking comfort following a trauma. The military judge then stated that, assuming the evidence was relevant, he determined

that the danger of the members using the evidence to infer that MM3 C engaged in impulsive sexual activity with the appellant exceeded any possible relevance. Record at 729.

On redirect examination by the trial counsel, CDR T then testified further as to his diagnosis of MM3 C's personality disorder. The following exchange took place:

TC: Doctor, you talked about destructive behavior a moment ago, and then you also discussed the diagnosis of [MM3 C], the personality disorder during cross-examination. This personality disorder that she has, is that one of the characteristics that she engages in self-destructive behavior?

CDR T: She certainly -- it's one of the characteristics that she would engage in behavior that would not help her, that would not further her interests, that in the end would cause more harm than good.

Record at 747.

In response to additional questions from the assistant trial defense counsel, CDR T reiterated that MM3 C's behavior following the alleged rape was unusual for rape victims in general, but not unusual for her because of her "previous patterns and behaviors." Record at 753. He also reiterated that his diagnosis was based on those same previous patterns and behaviors.

The members were left with the impression that MM3 C's explanation of her behavior following the alleged rape was not only not inconsistent with unusual behavior normally seen in post-traumatic situations, but that her behavior was in keeping with her past behavior and characteristics. The appellant sought to advance an alternative theory for her unusual behavior by having CDR T testify as to her history of impulsive behavior, specifically impulsive sexual behavior. By doing so, the appellant hoped to rebut the Government's theory of the case, that MM3 C had been raped and had then sought comfort through consensual sexual intercourse with MM3 M.

The military judge should have conducted a closed Article 39(a), UCMJ, session and given the parties a full opportunity to address whether the evidence was relevant, necessary, and not outweighed by possible prejudice, including the right to privacy of the victim. We will apply that analysis to the facts contained in the record.

This case involved two diverging versions of the events leading up and encompassing the sexual intercourse between MM3 C and the appellant. The behavior of the alleged victim in the time immediately following the incident is relevant for the members' consideration regarding the believability of her version

of those events. Likewise, evidence explaining why MM3 C may have behaved in a certain way is equally relevant.

We turn next to the question of whether the evidence was necessary. MM3 C's credibility as a witness and the veracity of her version of events was challenged by the appellant at trial. MM3 C placed her behavior following the alleged rape before the members during her testimony on direct examination. In an effort to explain what appears to be unusual behavior for a victim of trauma, MM3 C explained that she was seeking comfort as a result of the trauma. CDR T's testimony not only corroborated the plausibility of such a reaction to trauma generally, it also bolstered her explanation through his opinion that such behavior was "in keeping" with MM3 C's character and past behavior. Under the circumstances, evidence of her diagnostic history that would provide an alternate explanation for her behavior was necessary for the appellant to rebut the Government's theory of the case. It goes without saying that such evidence is also beneficial to the appellant.

The sole remaining issue involves the balancing that must be conducted between the probative value of the evidence and the risk of undue prejudice or deprivation of privacy accompanied by its admission into evidence. In this case, the evidence was the only available evidence probative of an alternate theory on why MM3 C engaged in consensual sexual intercourse with MM3 M. The members were already aware that MM3 C had exhibited sexual behavior following the alleged rape that was, on its face, somewhat unusual, and, again on its face, somewhat impulsive. Under these circumstances, allowing cross-examination of CDR T as to MM3 C's tendency to engage in impulsive sexual behavior would have had a minimal impact on MM3 C's right to privacy. Any concern regarding the members' misuse of the evidence could have been dealt with in a limiting instruction.

Under the circumstances of this case, we conclude that the military judge abused his discretion in preventing the assistant trial defense counsel from cross-examining CDR T as to MM3 C's diagnostic history of impulsive behavior, specifically impulsive sexual behavior. We also conclude that the appellant was materially prejudiced by the error.

Factual Sufficiency

The appellant alleges that the evidence adduced at trial was factually insufficient to sustain a finding of guilty to rape. 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. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c). Our determination is based only on the evidence contained in the record of trial and we cannot speculate as to what effect, if any, the use of the improperly excluded MIL. R.

EVID. 412 evidence would have had on the members or our own factual determination. Based solely on the evidence that was admitted at trial, we conclude that the evidence was factually sufficient to sustain the appellant's conviction of rape.

Conclusion

Accordingly, the findings of guilty and sentence are set aside and the record of trial is returned to the Judge Advocate General for remand to the convening authority, who may order a rehearing. Having decided the first allegation of error in the appellant's favor, we need not address the remaining assignments of error.

Chief Judge DORMAN and Senior Judge CARVER concur.

For the Court

R.H. TROIDL
Clerk of Court