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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Jason L. GARCIA
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200200687 Decided 21 November 2005

Sentence adjudged 28 September 2000. Military Judge: S.A. Folsom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Expeditionary Force, FMF, Camp Pendleton, CA.

LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of carnal knowledge in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The adjudged and approved sentence consists of confinement for 12 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge.

The appellant asserts that the military judge erred in (1) denying a defense challenge for cause; (2) sustaining prosecution objections to proffered questions for two witnesses regarding the appellant’s out-of-court statements; and (3) refusing a defense request for a viewing of the crime scene. The appellant also contends that the evidence is factually and legally insufficient to sustain his conviction of carnal knowledge.

We have carefully considered the record of trial, the assignments of error, the Government’s response and the appellant's reply. 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.

Waiver of Denial of Challenge for Cause

The appellant contends that he was prejudiced by the military judge's failure to grant his challenge for cause against Master Gunnery Sergeant (MGySgt) Savinovich for implied bias. We hold that the appellant waived the issue.

During voir dire, MGySgt Savinovich indicated that he thought of his 17-year-old daughter when he saw the charges and specifications. He also remembered a female applicant he met when he served as a Marine Corps recruiter and the applicant's explanation of a past sexual assault. The trial defense counsel (TDC) cited these matters as the basis for a challenge for cause against MGySgt Savinovich. The military judge denied the challenge.

The TDC then exercised his peremptory challenge against MGySgt Savinovich: "the defense would liked [sic] to have [MGySgt] Savinovich dismissed for cause, since it was not granted, the defense would use that peremptory challenge to excuse MGySgt Savinovich." Record at 84. No other explanation was offered. The military judge granted the peremptory challenge without comment or inquiry.

We conclude that the TDC waived the issue as to MGySgt Savinovich by failing to state that he would have exercised his sole peremptory challenge against another member if the challenge for cause had been granted. RULE FOR COURTS-MARTIAL 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Eby*, 44 M.J. 425, 426-27 (C.A.A.F. 1996). This assignment of error lacks merit.

Appellant's Out-of-Court Statements

The appellant complains that the military judge erred by refusing to permit questions to be asked of two prosecution witnesses regarding out-of-court statements made by the appellant. Specifically, the appellant argues that the expected responses were admissible under the residual hearsay rule. We disagree.

The Government called Mr. R. J. Cope to testify in its case-in-chief. Following examination by both sides, a member submitted a question: "Did [the appellant] tell you later that night that he had sex with [victim LB]?" Appellate Exhibit XXII; Record at 190-91. The trial counsel objected based on hearsay. During the ensuing Article 39a, UCMJ, session, the TDC contended that the expected answer was admissible as the admission of a party-opponent under MILITARY RULE OF EVIDENCE 801(d)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The military judge ruled

that since both sides anticipated a negative response to the question, it could not be considered an admission.

The appellant does not question the military judge's ruling under MIL. R. EVID. 801(d)(2)(A). Rather, he essentially argues that once he determined that said rule did not permit the question and answer, the military judge should have permitted it under the residual hearsay rule found in MIL. R. EVID. 807. Other than the rule itself, the appellant cites no persuasive authority for this argument.

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004).

We first conclude that the military judge did not abuse his discretion in declining to ask the member's question of Mr. Cope because the expected answer was not an admission offered against the appellant. Were we to hold otherwise, the defense could elicit self-serving denials of culpability from witnesses without the accused having to take the stand and subject himself to the crucible of cross-examination. We are satisfied that such was not the intent of the drafters of the rule against hearsay. *United States v. Schnable*, 58 M.J. 643, 654 (N.M.Ct.Crim.App. 2003)(citing *United States v. Condron*, 38 C.M.R. 165, 170 (C.M.A. 1968)(Quinn, C.J. dissenting)), *set aside on other grounds,* 60 M.J. 343 (C.A.A.F. 2004). As to the appellant's argument of residual hearsay, we note that the trial defense counsel mentioned MIL. R. EVID. "803.24", or similar MIL. R. EVID. 807, in passing during the Article 39a, UCMJ, session, but never developed his theory of admissibility under that rule. We conclude that the residual hearsay rule is inapplicable.

We now turn to the military judge's ruling that precluded cross-examination of Sergeant (Sgt) NB. According to the TDC, Sgt NB, who was the older brother of LB, cooperated with investigators in setting up a telephone call to the appellant. Sgt NB called the appellant and said "Hey, why did you have sex with her. She is pregnant and what are you going to do about [it]?"[1] Record at 256. The appellant angrily responded, "that was a bunch of nonsense" and hung up on him. *Id.*

The TDC proffered that he would ask the witness about the telephone conversation, but only ask for the general nature of the appellant's reaction, not for the specific spoken response. Among other reasons, the trial counsel objected on the basis of hearsay. The military judge concluded that the question called

[1] The record reveals that LB was not pregnant. The telephone call was an investigatory ruse.

for hearsay, and that even if otherwise admissible, the probative value was substantially outweighed by the confusion of the issues, namely whether LB was pregnant. We find that the TDC sought to use the expected response to argue that the appellant was upset because he did not have sex with LB.

Assuming, for our analysis, that the testimony would merely be that the appellant became angry, the question becomes whether such an expression of anger is a "statement." Implicit in the military judge's ruling was a finding that such anger was a "statement," for only out-of-court "statements" are prohibited by the hearsay rule. The rule defines "statement," in pertinent part, as "nonverbal conduct . . . if intended by the person as an assertion." MIL. R. EVID. 801(a)(2). Since the defense obviously intended to argue that the appellant responded in anger because he was innocent, we conclude that the proffered evidence was an assertion, and, therefore, a statement. As an out-of-court statement, the evidence was barred by the hearsay rule absent some applicable exception. We reject the appellant's argument that the evidence fits the residual hearsay exception. Even if the evidence is not hearsay, or fits a hearsay exception, we conclude that the military judge correctly applied the MIL. R. EVID. 403 balancing test. This assignment of error has no merit.

Sufficiency of Evidence

The appellant next contends that the evidence is legally and factually insufficient to support his conviction. We disagree.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So, too, may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Applying these tests, we conclude that the Government presented credible evidence that established beyond a reasonable doubt the appellant's guilt of carnal knowledge. This assignment of error is without merit.

Conclusion

We have considered the remaining assignment of error that the military judge erred by denying a defense motion for a viewing of the crime scene and find it without merit. The findings and the sentence, as approved by the convening authority, are affirmed.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court