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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Kevin C. BROWN
Aviation Ordnanceman Airman Apprentice (E-2), U.S. Navy

NMCCA 9901754 Decided 23 June 2005

Sentence adjudged 23 July 1999. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Region Northwest, Silverdale, WA.

LT THOMAS P. BELSKY, JAGC, USNR, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

Officer members serving as a general court-martial convicted the appellant, contrary to his plea, of carnal knowledge on one occasion,[1] in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925. The appellant was acquitted of sodomy, conspiracy to obstruct justice, and obstruction of justice. He was sentenced to a bad-conduct discharge, confinement for 3 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 12 months as an act of clemency. There was no pretrial agreement.

We have carefully considered the record of trial, the appellant's 9 assignments of error,[2] and the Government's

[1] The appellant was acquitted of committing carnal knowledge "on divers occasions."

[2] The appellant raises the following assignments of error (AOEs):

> I. The military judge denied the appellant's 6th Amendment right to present evidence from his stepfather that the appellant said the victim was "19 or 20 years old."

response. 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.

Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to sustain his conviction for carnal knowledge. We disagree.

The evidence at trial established that the appellant admitted engaging in sexual intercourse with the victim, "KB," who was age 13 at the time of the incident. The only disputed issue for the members to decide was whether the appellant honestly and reasonably believed KB was 16 when he engaged in sexual intercourse with her. We conclude that the members properly rejected the appellant's assertions of ignorance concerning his knowledge of KB's age prior to engaging in sexual intercourse with her. We further find that the evidence is both legally and factually sufficient to support the appellant's conviction for carnal knowledge.

On the merits, several prosecution witnesses testified that the appellant was told that KB was 13 or 14 years old on or before the night of the incident. Mrs. "CB," who employed KB as

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II. The appellant was denied his 6th Amendment right to confrontation and to present a defense when prevented from questioning a witness about another witnesses' prior attempted sexual contact with the victim.

III. The evidence is factually and legally insufficient to sustain the appellant's carnal knowledge conviction.

IV. The military judge abused his discretion by failing to grant a mistrial after a sentencing witness violated an order not to mention the appellant's statement that he would be "going away for three years."

V. The military judge committed plain error by not interrupting the trial counsel's closing argument suggesting that the appellant had to prove mistake of fact beyond reasonable doubt.

VI. The military judge committed plain error by not instructing the members to disregard trial counsel's sentencing argument comparing the maximum authorized sentence for carnal knowledge to the maximum authorized sentences for manslaughter and robbery.

VII. The sentence of three years confinement and a bad-conduct discharge is inappropriately severe.

VIII. The military judge abused his discretion by not ordering the victim to appear in the same clothes, makeup and jewelry as she wore on the night in question.

IX. Cumulative error mandates disapproval of the findings and sentence.

See Appellant Brief of 23 April 2002.

We will address several of these AOEs out of order.

her babysitter, testified that she, the appellant, and others (including KB and her sister, "FB") were drinking at her home on the night of the incident when the topic of KB and her sister came up. Mrs. CB testified that she specifically told the appellant that KB was 13 and FB was 16. Record at 144-45. Of greater import was the testimony of Mrs. "AA," a disinterested witness who testified that she had met the appellant, his roommate (and co-accused), and Mrs. CB at a local bar several days before the incident. Mrs. AA testified that during the course of their conversation, the topic of Mrs. CB's babysitter (KB) came up and the appellant asked how old she was. In response, Mrs. AA told the appellant that the babysitter was age 14. *Id.* at 411, 421-22.

In the appellant's defense, his trial defense counsel vigorously cross-examined Mrs. CB and impeached her through use of prior inconsistent statements. He also suggested that Mrs. CB had a motive to fabricate because she was under civilian charges for providing alcohol to minors (namely, KB and FB) and further feared that she would lose custody of her children.

The appellant elected to testify in his own defense and adamantly denied any knowledge of KB's true age until when he was interrogated by agents from the Naval Criminal Investigative Service (NCIS). He vividly described KB's sexually aggressive behavior toward him, her smoking and drinking, her "mature" body, and her provocative attire. All this, he testified, led him to believe that KB was "not under the age of 16." Record at 453-56, 464-65.

However, the appellant himself suffered from significant credibility problems. Many of his answers to probing questions were evasive or professed an inability to remember crucial conversations. Record at 521, 523. In response to a member's question, for example, the appellant testified that "I *would say* I became aware of the girls ages at NCIS." (emphasis added) *Id.* at 525. Furthermore, he admitted he lied, or failed to disclose, his drug abuse history before entering the Navy. He also admitted he repeatedly lied when initially interviewed by agents from the NCIS. In fact, he conceded that his sworn statement to NCIS was composed of "8 lies." *Id.* at 511. Contrary to his claim that he thought KB was older than her sister, FB, he used (or adopted) diminutive terms to describe KB in his NCIS statement. His claim that he fabricated engaging in oral sex with KB in his statement to NCIS because he thought it was okay to engage in sodomy with a minor was simply incredible.

Moreover, the appellant denied that he ever discussed with Mrs. AA anything about Mrs. CB's babysitter. He also made inconsistent statements about where he was sitting in relation to Mrs. AA when the discussion about the babysitter purportedly took place. He did not remember asking FB about her age. Although the appellant testified that KB and FB were smoking and drinking beer, this alone was insufficient to reasonably conclude they

were over 16 given the other circumstances presented at trial. Multiple witnesses opined that KB could not pass for 16 in January 1999 when the incident occurred. A medical expert testified about KB's sexual development, concluding that KB was a 4 out of 5 on the Tanner scale.[3] Record at 271-72. Finally, the members had an opportunity to observe both FB and KB in court and weigh their observations against the appellant's contentions concerning his perception of KB's apparent age.

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 (C.M.A. 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 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. 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 had the burden to prove his belief of KB's age was an honest and reasonable mistake of fact. We are convinced, as were the members, that he failed to do so. The Government amply met its burden of proof in this case, and the evidence is both factually and legally sufficient to sustain the appellant's conviction. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of carnal knowledge. This assignment of error lacks merit.

Admissibility of Hearsay Evidence

The appellant further contends he was denied his 6th Amendment right to present evidence. Specifically, he asserts that the military judge improperly excluded offered testimony from the appellant's stepfather that on the day after the incident the appellant said KB was "19 or 20 years old." We find no basis for relief.

Essentially, the day after the incident, the appellant told his stepfather he had sex with some "gal or gals" and he believed the young women were within the age of consent. At an Article 39(a), UCMJ, session the appellant's stepfather testified that he spoke to the appellant the day after the incident by phone. He asked what the appellant was doing, and the appellant said he was out partying the night before with his roommate (co-accused) and

[3] The Tanner Scale is utilized by experts to describe the development of the human body. A "5" on the Tanner Scale represents a fully-developed adult.

Mrs. CB. The appellant also told his stepfather that there were two other gals at Mrs. CB's house and they had sex. The stepfather asked "Well, how old's the gals?" The appellant responded that they were '19 or 20.'

We are convinced that the military judge's decision to preclude the defense from offering the appellant's hearsay statement as "state of mind" evidence or as a "prior consistent statement" was not an abuse of discretion. Thus, we decline to provide relief on the basis of this assignment of error.

Prior Sexual Conduct of the Victim

The appellant contends that he was denied his 6th Amendment right to confrontation and to present a defense when the military judge prevented his trial defense counsel from questioning a witness about another witnesses' prior attempted sexual contact with victim. We decline to grant relief on the basis of this assignment of error.

During cross-examination, the trial defense counsel began to ask the NCIS case agent, Special Agent "K," about a statement Mrs. CB made regarding the weekend prior to the incident when KB was babysitting for her. Apparently, CB admitted to having "inappropriately" touched KB. After the trial counsel raised a timely objection based on MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) the military judge held an Article 39(a) session. Record at 328-29. At that hearing, the trial defense counsel made the following proffer:

> DC: "That's exactly what I'm getting at, Your Honor. The proffer is more than that. There is more than just [Mrs. CB] may have touched [KB]. It's that [Mrs. CB] had [KB] stay in [Mrs. CB's] bed. They were both very intoxicated, and that [Mrs. CB] had fondled [KB]. That's the evidence we believe will be offered."
>
> MJ: "And the relevance?"
>
> DC: "Your Honor, the relevance of that, first of all, as we've said before, impeachment on a non collateral issue. The second reason for relevance, Your Honor, is that we intend to offer her sexual contact with [KB] the week before to show that it makes it more likely that when she invited [KB] back the next weekend, she did so with the intention of having more sex with her. That's relevant, Your Honor, to show, first of all, that she never told my client the age because she clearly wouldn't have been telling people ages of girls that she wanted to have sex with.
>
> But, secondly, and more constitutionally important, Your Honor, it goes to my client's reasonable and honest mistake as to [KB]'s age. If we can establish that [Mrs. CB] was having sex with [KB] or attempting to have sex with

> [KB], the members can more likely believe that she did not tell my client the age of [KB], and right now that's the only evidence out there my client knew [KB]'s age, was coming from [Mrs. CB]."

Record at 329-30.

The military judge ruled this line of questioning was a collateral issue and irrelevant to any issue in the case. He also ruled that MIL. R. EVID. 412 barred the proffered testimony due to the trial defense counsel's failure to file a written motion at least five days prior. No good cause was provided for the trial defense counsel's late request. Record at 336-37.

Assuming, without deciding, that the military judge erred by ruling that the proffered testimony was procedurally barred, we decline to grant relief. Based on the exchange between the military judge and the trial defense counsel, we find no nexus between the offered testimony and the appellant's purportedly mistaken belief as to KB's age. The trial defense argued that prior sexual activity between CB and KB would corroborate the appellant's claim that they were doing "adult like" things and, thus, it was reasonable for the appellant to assume KB was over 16. But the appellant's own testimony is that he did not know of the earlier sexual activity alleged between Mrs. CB and KB, nor did he see any sexual contact between Mrs. CB or KB until after he had engaged in sexual intercourse with KB. The trial defense counsel's claim of admissibility stretches the limits of reason, as well as relevance.

Putting the relevance issue aside temporarily, we find that the disputed evidence does not rise to the level of being constitutionally mandated. MIL. R. EVID. 412(b)(1) provides that evidence of a victim's past sexual behavior with persons other than the accused is not admissible unless constitutionally required to be admitted. The rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." *United States v. Hurst*, 29 M.J. 477, 480 (CMA 1990); *see* Analysis of MIL. R. EVID. 412, Appendix 22 at A22-35.

> "Whether evidence is 'constitutionally required to be admitted' is reviewed on a case-by-case basis." *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996). "Relevance is the key to determining when the evidence is 'constitutionally required to be admitted.'" *United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987); *see also United States v. Knox*, 41 M.J. 28 (C.M.A. 1994); *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The test for relevance is whether the evidence has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.

> To overcome the prohibition of Mil.R.Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as "testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case. . . ." *United States v. Moulton*, 47 M.J. 227, 229 (1997). "Defense counsel has the burden of demonstrating why the general prohibition in Mil.R.Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim. . . ." *Id*. at 228.

United States v. Eurico D. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

In *Carter*, the accused claimed that the victim was bisexual and, thus, was using allegations of rape to hide a lesbian affair. The trial defense counsel attempted to cross-examine the victim about an instance where the victim and another woman were "groping" each other at a club. The defense was unsuccessful in its claim that MIL. R. EVID. 412 did not bar the evidence because "groping" was not necessarily a sexual activity.

Here, as in *Carter*, the defense has failed to demonstrate that the protections of MIL. R. EVID. 412 should be lifted. We find that the relevance of the offered evidence to prove "plan" or "motive" was tenuous at best. And the evidence itself was hearsay within hearsay. Specifically, the trial defense counsel was attempting to introduce a prior out-of-court statement that Mrs. CB made to Special Agent K to the effect that she previously fondled KB. The trial defense counsel, however, never asked Mrs. CB or KB about these matters while they were on the stand.

Even if the trial defense counsel could have overcome a hearsay objection, as well as his procedural default by failing to provide the required notice under MIL. R. EVID. 412, the offered evidence is cumulative. Evidence of Mrs. CB's sexual conduct towards KB's sister, FB, was clearly established at trial. Some evidence of Mrs. CB's sexual interest in KB was also introduced. Evidence that Mrs. CB may have had ulterior motives in bringing KB back to baby-sit was placed before the members. Mrs. CB's credibility was repeatedly attacked. She had made several inconsistent or deceitful statements, including her sworn statement to Special Agent K. She had a significant motive to lie to escape the consequences of her own misconduct, including loss of her children and criminal prosecution. She had an undisputed bias against the appellant. Two friends of Mrs. CB opined that Mrs. CB was an untruthful person. Lastly, the military judge gave the standard accomplice and prior inconsistent statement instructions concerning Mrs. CB, further limiting the value of her testimony. Record at 636-38.

Even if the trial defense counsel had complied procedurally with MIL. R. EVID. 412 and could have overcome a hearsay objection, the military judge's decision to preclude the defense

from launching an additional attack on Mrs. CB's credibility was not prejudicial.

Denial of Mistrial Motion

The appellant asserts that the military judge abused his discretion by failing to grant a mistrial after a prosecution witness violated an order not to mention the appellant's admission that he was "going away for three years." We find no abuse of discretion under the circumstances presented here.

Testifying for the prosecution on the merits, Senior Chief Aviation Electronics Technician (AECS) "S" stated that he encountered the appellant in the barracks several weeks prior to trial and saw the appellant "crying." Record at 391-92. AECS S added, contrary to an earlier instruction from the trial counsel, that the appellant told him he was "going away for 3 years." *Id.* at 393. The military judge immediately interrupted the testimony and provided this instruction: "Members, I'm going to instruct you to disregard the phrase '3 years.' It's completely irrelevant. Can each of you disregard that? Please indicate that you can positively by raising your hand. All members have affirmatively indicated." *Id.*

Following the military judge's curative instruction, the trial defense counsel asked for an Article 39(a) session. The trial defense counsel then indicated an intent "to explore the possibility of a motion for mistrial." Record at 394. The mistrial motion was denied by the military judge, who instead granted the trial defense counsel's alternative request to strike all of the witness' testimony. Upon reassembling the court, the military judge further instructed the members to disregard the challenged testimony, and all the members affirmatively indicated they understood the instruction by raising their hands. Record at 404-06.

We note that RULE FOR COURTS-MARTIAL 915 (a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) provides:

> The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.

Further, our superior court has said that a mistrial is a "'drastic remedy'" that the military judge should order only when necessary to "'prevent a miscarriage of justice.'" *United States v. Taylor,* 53 M.J. 195, 198 (C.A.A.F. 2000)(quoting *United States v. Garces,* 32 M.J. 345, 349 (C.M.A. 1991)). Curative instructions, rather than declarations of mistrial, are the preferred remedy to correct error when court members have been exposed to inadmissible evidence. *Id.; United States v. Barron,* 52 M.J. 1, 4-5 (C.A.A.F. 1999). Finally, an appellate court

should not reverse a military judge's decision to deny a mistrial motion absent a clear abuse of discretion. *Taylor,* 53 M.J. at 198.

After careful review of the entire record, we conclude that the witness' improper testimony did not cast substantial doubt on the fairness of these proceedings. We reach this conclusion in light of the military judge's prompt intervention, immediate curative instruction, and ultimately, his final instruction to disregard the witness' entire testimony. We further conclude that the military judge's denial of the request for a mistrial does not rise to the level of manifest injustice required by R.C.M. 915(a). Therefore, we decline to grant the requested relief

Improper Argument

The appellant contends that the military judge committed plain error by not interrupting the trial counsel's closing argument suggesting that the defense had to prove the appellant's mistake of fact as to KB's age beyond a reasonable doubt. This contention is without merit.

We begin by noting that the Government had the burden to prove that the appellant had sexual intercourse with a girl less than 16 years of age beyond reasonable doubt. This burden remained with the prosecution, but in this case, these matters were not in dispute. On the other hand, the defense had the burden to prove, by a preponderance of the evidence, that the appellant's purported mistake was both honest and reasonable under the circumstances.

Here, any misstatement of law arguably begins with the trial defense counsel, who argued that if there was reasonable doubt that the appellant knew the girls ages "you've got to give [the appellant] the benefit of the reasonable doubt." Record at 589-590, 614. In response, the trial counsel argued:

> "I've got to bring up the fact that Lieutenant [K], the defense mentioned a number of times, 'Benefit goes to my client. Benefit of the doubt goes to my client. Benefit of the doubt goes to my client when it goes to this whole mistake of fact as far as age.'
>
> Wrong. Benefit of the doubt goes to the government. He's got the burden to prove to you by a preponderance of the evidence that he not only subjectively thought she was over the age of 16 years or older, but that a reasonable person would.
>
> I've got no burden here. This is a prosecutors dream. I've got no burden. If you do have some doubt, it is resolved in favor of the government. If you have some

> doubt, then you're not convinced that an ordinary prudent person . . . .

Id. at 620-21.

In raising this assignment of error, the appellant lifts the quoted language out of its proper context. In the body of his closing argument, the trial counsel properly stated the law. And we note that the trial counsel's statements partially quoted above were in response to the trial defense counsel's initial misleading statements of the law concerning mistake of fact. We also note that the trial defense counsel made no objection to the argument at the time it was made, and most importantly, the military judge correctly instructed the members on the law. Record at 626-29. This assignment of error is without merit.

Sentence Appropriateness

The appellant contends that his sentence is inappropriately severe for his offense. We disagree.

Sentence appropriateness involves the *individualized* consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the evidence introduced at trial on the merits, evidence in aggravation and mitigation, including the appellant's statement, and the briefs of counsel, we conclude that appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003)(citing *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). Here, the appellant received substantial clemency from the convening authority in the form of suspension of confinement in excess of 12 months. We decline to grant the requested relief.

Remaining Assignments of Error

We have also carefully considered the appellant's remaining assignments of error, including his contention that the military judge should have ordered KB to appear in court attired in the same makeup and clothing she wore on the night of the incident, that the military judge committed plain error by not stopping the trial counsel's sentencing argument, and that cumulative error requires disapproval of the findings and sentence. We find no merit in these contentions and decline to provide the requested relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court