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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Ivor G. LUKE
Hospital Corpsman Second Class (E-5), U.S. Navy

NMCCA 200000481 Decided 28 September 2004

Sentence adjudged 22 February 1999. Military Judge: C.A. Porter. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, Pearl Harbor, HI.

LT THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of two specifications of indecent assault in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A general court-martial comprised of officer and enlisted members sentenced the appellant to confinement for two years and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the assignments of error,[1] and the Government's response. We

[1] As summarized, the assignments of error are:

I. THE GOVERNMENT FAILED TO DISCLOSE BEFORE TRIAL A MEDICAL RECORD ENTRY;
II. THE MILITARY JUDGE APPLIED THE WRONG STANDARD OF ADMISSIBILITY FOR EVIDENCE THAT SN N INTENDED TO ABORT HER PREGNANCY;
III. THE GOVERNMENT FAILED TO DISCLOSE EVIDENCE OF DNA PROBABILITY RATIOS;
IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN FAILING TO INTERRUPT TRIAL COUNSEL'S IMPROPER ARGUMENT ON FINDINGS;
V. THE MILITARY JUDGE COMMITTED PLAIN ERROR IN ALLOWING A GOVERNMENT DNA EXPERT TO OFFER OPINION TESTIMONY IN THE ABSENCE OF EVIDENCE OF THE RELIABILITY OF THE DATA BASE; AND
VI. THE EVIDENCE AS TO BOTH SPECIFICATIONS IS FACTUALLY INSUFFICIENT.

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.

Background

The appellant served as a hospital corpsman aboard ship. One evening, while the ship was in homeport, the victim in this case, Seaman (SN) N, came to the ship's medical spaces for an examination for a possible sexually transmitted disease (STD). The appellant had previously examined SN N's boyfriend, Fireman (FN) A, who told the appellant that his skin rash had grown worse after sexual activity.

Instead of examining SN N on the examination table normally used for physical exams, the appellant directed SN N to go into the back room containing two racks. The lights were off. The appellant closed the only door to the space, leaving a small crack of light from the main office area. He ordered SN N to take off her clothes, then pushed her down on a rack.

The appellant placed his fingers into SN N's vagina and asked her questions about her sexual stimulation. He handed her some lubricating jelly to apply to her vaginal area and continued to ask her about her sexual experience, particularly with FN A.

Claiming that she was still "too dry," the appellant slid her bra down and placed his mouth on her breast. At this point, SN N pushed him off, dressed and left. As she was leaving, the appellant asked SN N not to tell anyone what happened.

SN N and FN A were both assigned to the ship, which had a regulation prohibiting dating between members of ship's company. Both SN N and FN A knew of this regulation and realized that they were in violation of it. Both wanted to keep their relationship quiet so as to avoid punishment for their disobedience. At the time of the appellant's assault upon SN N, she knew that she was pregnant with FN A's child.

Admissibility of Victim's Abortion

The appellant contends that the military judge erred as a matter of law in precluding the defense from cross-examining SN N about the abortion of her pregnancy. Specifically, the appellant asserts that the military judge misapplied MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) in his ruling on the issue. We disagree.

During litigation of a defense motion to compel disclosure of various medical tests and records, the Government contended that the defense was seeking to examine SN N's medical record for the purpose of smearing SN N through evidence of an abortion she obtained after the appellant's assaults upon her. Citing MIL. R.

MIL. R. EVID. 412, the Government argued that the defense motion should be denied. After extended discussion, the defense stated that it would not raise the issue of the abortion unless it believed the Government had opened the door for the introduction of such evidence.

Following the conclusion of SN N's direct examination on the merits, the defense requested that the military judge reconsider the issue. The request was premised upon this part of SN N's testimony:

> TC: [SN N], why did you think you had to go to Medical on 12 August 1998?
> A: Because I was so concerned for my health. I was afraid that I might have an STD.

Record at 370. The defense argued that cross examination on her intent to have an abortion was now relevant and material because such an intent would be inconsistent with concern for the health of the fetus. The Government countered that she did not testify she had any concern for the fetus, only that she was concerned for herself. After much discussion and argument, the military judge announced his ruling:

> All right. I am going to reconsider, and I am going to affirm the prior ruling. And I will state for the record that I believe this is a collateral issue. *I do not believe that the probative value of this information substantially outweighs its prejudice.* And I would point out that, at least in my mind, the prejudice is two fold.
>
> One is to the character of the witness and potentially to the character of the state's--one of the state's additional witnesses, which is [FN A].
>
> But secondly, it seems to me inappropriate to litigate in this case the reasons for this termination and to allow the panel to speculate as to whether the reasons for this termination may have had to do with this incident and to unfairly--if it occurred, to unfairly hold that against the accused. And I'm therefore concerned that this matter, which is clearly collateral, overwhelm[s] the real issues in this case, which, as outlined in opening statements, have to do with the credibility of these two people and what actually happened on August 12th.
>
> *So I'm going to affirm my 412 ruling* and not allow cross-examination or further re--or further direct examination on the issue of the termination.
>
> Now, at this point, the record is silent as to what happened to this child. I would expect that silence to

> remain. But if it is broken by the government, we're back on it again.

Record at 378-79 (emphasis added).

MIL. R. EVID. 403 allows for exclusion of relevant evidence "if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A similar balancing test in MIL. R. EVID. 412 mandates the admission of relevant evidence if "the probative value of such evidence outweighs the danger of unfair prejudice." Of course, this provision in the rule must be applied in the context of the intent of the drafters to shield alleged victims of sexual assault from embarrassing and degrading cross-examination. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), App. 22, at A22-35.

The standard of review for a military judge's evidentiary ruling is abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). To be reversed on appeal, the ruling must have been "arbitrary," "clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

This assignment of error is premised upon one assertion: the military judge relied on MIL. R. EVID. 403 (*not* 412) in ruling on the motion. The appellant apparently asserts that premise because the military judge mistakenly used the word "substantially" in conducting his balancing test. We conclude that the premise is incorrect and that the military judge inadvertently misspoke in using the word "substantially." Based on our review of the record, we are convinced that the military judge considered the admissibility of the abortion to be controlled by MIL. R. EVID. 412, not 403, and that the parties concurred in that approach. Even if we err in our conclusion, we hold that the military judge did not abuse his discretion in precluding the evidence of abortion. The assignment of error is without merit.

DNA Databases and *Daubert*

The appellant contends that the military judge committed plain error by allowing a Government expert witness, Dr. Chris Basten, to offer opinion testimony on the probability that DNA found on the bed sheet and SN N's bra matched the appellant's DNA, vice the DNA of some unknown person. In particular, the appellant argues that the expert witness did not identify or explain what databases he used in formulating his opinions. According to this argument, because he had no information about the databases, the military judge could not perform his "gatekeeper" function to screen unreliable evidence from the

members. *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We disagree.

In *Daubert*, the U.S. Supreme Court "clarified the admissibility requirements for expert scientific testimony." *United States v. Elmore*, 56 M.J. 533, 537 (N.M.Ct.Crim.App. 2001). The Court held that trial judges must act as gatekeepers in verifying the relevance, validity, and reliability of proferred expert scientific testimony. In a case that followed and expanded upon *Daubert*, the Court emphasized that the test of reliability is "flexible" and that trial judges have broad latitude in determining how to assess the reliability of such evidence. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42. The *Kumho* court also explained that a *Daubert* hearing is not required every time an expert witness is called to testify. Rather, the military judge is obligated to take an active "gatekeeper" approach only when the proferred evidence is "called sufficiently into question." *Kumho Tire*, 526 U.S. at 149. "Thus, *when the issue is raised*, a trial judge must apply flexible *Daubert* analysis in evaluating the admissibility of proferred expert testimony, whether it be scientific, technical, or other specialized knowledge." *Elmore*, 56 M.J. at 538 (emphasis added).

With those legal principles in mind, we begin our analysis by noting that the defense failed to object to the foundation for the expert's opinion testimony. When the Government offered Dr. Basten as an expert witness in the field of statistical genetics, the defense offered no objection. When Dr. Basten briefly explained what the data bases were and how they were constructed, the defense offered no objection. When Dr. Basten offered his opinions on DNA probabilities, the defense offered no objection.

Significantly, the defense had not ceded the field of expert DNA testimony to the Government without a fight. During litigation of a number of pretrial motions, the defense moved *in limine* against the admission of some of the proffered DNA evidence. The military judge granted the motion. Record at 180-191. Also, following the conclusion of redirect testimony of Dr. Basten, the defense objected to the Government's failure to disclose the foundational evidence for the final statistical opinion offered by the witness. Record at 689-94. Thus, the defense team clearly sat on the edge of their seats in vigilantly evaluating the relevance and reliability of the DNA evidence in this case.

Because the defense failed to object, the issue of the reliability of the DNA databases was waived in the absence of plain error. MIL. R. EVID. 103(a)(1); *see United States v. Youngberg*, 43 M.J. 379, 387 (C.A.A.F. 1995). The general acceptability of the validity of DNA analysis, and its use in criminal trials, is beyond cavil. *See Youngberg*, 43 M.J. at 386. While expert testimony incorporating DNA analysis and statistical probabilities should include a description of the databases used,

the extent of that testimony is primarily a matter of tactics or strategy for trial practitioners to judge for themselves. Dr. Basten preceded his opinion testimony with an explanation, albeit brief, of the databases he used in his calculations. Record at 675-76. Thus, the reliability of the databases was not "called sufficiently into question" requiring intervention by the military judge. *Kumho Tire*, 526 U.S. at 149. In this case, given the close attention paid to the proffered DNA testimony by the defense, generally speaking, we are satisfied that any weakness in the database foundation would have drawn an immediate objection. Given the absence of such an objection, we conclude that the risk of prejudice was negligible, if any. We find no plain error. The assignment of error is without merit.

Findings Argument

The appellant contends that the military judge committed plain error by not interrupting the assistant trial counsel's closing argument on findings and instructing the members. Specifically, the appellant argues that the prosecutor misstated the evidence and improperly shifted the burden of proof to the defense. We disagree.

After the civilian defense counsel finished his argument on findings, the assistant trial counsel gave a brief closing argument occupying three pages in the record. In pertinent part, he said:

> The judge will instruct you on reasonable doubt later on, in addition to the other instructions, and he will tell you that reasonable doubt is intended not as a fanciful, speculative, or ingenious doubt or conjecture. It's got to be honest and actual. And if you have it, it has to be based on a reason, and the reason and the logic that the defense presents to you to explain what was supposed to at the beginning be hard to explain, an inaccurate scientific data, is this: the government found DNA on the bra and DNA on the sheet, but they didn't find DNA in a whole lot of other places. They didn't find it on the wall. They didn't find it on the clothes, which she wasn't wearing at the time of the assault.
>
> CDC: Objection. Misleading evidence.
> MJ: Sustained.
>
> ATC: The government didn't find it in a lot of other places, but they haven't addressed this. *They haven't addressed the fact that vaginal fluids and saliva were found on the sheet* and that three people's DNA were found on the inside of the bra corroborates Seaman [N's] account of events.

Record at 969-70 (emphasis added). For the first time, the appellant now complains that the reference to vaginal fluids on

the sheet was not supported by the evidence of record, and that this reference essentially shifted the evidentiary burden of proof to the defense, at least as to the scientific evidence in the case.

We will first address the burden of proof. Significantly, this reference occurred in the closing argument on findings in which the trial counsel responded to the defense argument. The defense argument understandably attempted to denigrate the impact of the Government's scientific evidence that suggested that the appellant's DNA had been found in SN N's bra cup and in the center of the sheet where SN N had been lying. The civilian defense counsel repeatedly emphasized that the Government did not test several items of physical evidence that were seized from SN N and taken from the crime scene. He also emphasized that, of the items tested, many of the samples were negative for anyone's DNA. Thus, when the Government referred to the presence of vaginal fluids on the sheet, we conclude that it was merely an attempt to rebut, and place in context, the defense argument. *See United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000)(analysis of argument should focus on context, as well as actual language). We also note that the military judge later instructed the members on the presumption of innocence and the Government's burden of proof.

As to the appellant's argument that the trial counsel misstated the evidence, even assuming *arguendo* that the trial counsel erred, the defense waived the issue by failing to object. R.C.M. 919(c). Thus, the appellant's only appellate recourse is a claim of plain error. We decline to hold that the military judge committed plain error in not interrupting the argument to give a curative instruction. First, it is not altogether clear that the trial counsel misstated the evidence. The expert witness testified that it was possible that stains found in the center of the sheet contained vaginal secretions. SN N testified that she was lying on the sheet in a position where she could have left such secretions in that spot. The trial counsel could easily have concluded that a fair inference was that the stains did contain vaginal secretions, based on all the evidence. Second, the trial defense counsel failed to object to the argument or request a curative instruction, thus indicating to us that any error committed was of little or no consequence. *See United States v. VanDyke*, 56 M.J. 812, 817 (N.M.Ct.Crim.App. 2002)(citing *United States v. Grandy*, 11 M.J. 270, 275 (C.M.A. 1981)). This is particularly true when the trial defense counsel had just successfully objected to the trial counsel's argument on precisely the same basis. Finally, the military judge instructed the members that argument was not evidence and that the members had the duty to determine the issues based on the evidence as they remembered it.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. We specifically find that the evidence is legally and factually sufficient. The findings and the sentence, as approved by the convening authority, are affirmed.

Judge HEALEY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court