UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class PHILIP D. SOLA
United States Army, Appellant

ARMY 20210322

Headquarters, Fort Drum
James A. Barkei and Troy A. Smith, Military Judges
Colonel Robert C. Insani, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Christian E. DeLuke, JA; Major Thomas J. Travers, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt, JA (on reply).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Melissa A. Eisenberg, JA; Captain R. Tristan C. De Vega, JA (on brief).

12 May 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PARKER, Judge:

Appellant raises three assignments of error before this court, one of which merits discussion and relief.[2] Appellant alleges that the military judge erred in

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[1] Judge EWING decided this case while on active duty.

[2] Given the relief we provide in our decretal paragraph, we need not address appellant's two other assignments of error. We have also given full and fair

(continued . . .)

admitting doctor's statements pursuant to Military Rule of Evidence [Mil. R. Evid.] 803(4). We agree with appellant and provide relief in our decretal paragraph.

BACKGROUND

Appellant was tried by a military judge alone at a general court-martial located at Fort Drum, New York. Contrary to his plea, appellant was found guilty of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice 10 U.S.C. § 920 [UCMJ]. Appellant was sentenced to reduction to the grade of E-1, twelve months of confinement, and a dishonorable discharge.

Appellant and the victim, Specialist (SPC) [redacted] knew each other from their unit where they only briefly interacted with one another. In November of 2018, appellant and the victim found themselves at the same off post party hosted by another soldier. Appellant and the victim were talking and dancing together at the party and both were drinking. While dancing together, appellant and the victim kissed several times and then headed upstairs to appellant's bedroom with an implied understanding they may engage in vaginal intercourse. The victim testified that she went with appellant into his bedroom, they removed their clothes and engaged in consensual vaginal intercourse. She also testified that while she consented to vaginal penetration, she and appellant never discussed, and she did not consent to, anal penetration. The victim stated that despite her telling appellant "no" several times, he penetrated her anus with his penis in multiple sexual positions without her consent. She testified that she was numb and terrified while appellant was anally penetrating her and that while appellant was holding her on top of him by holding his hands on the back of her knees, he hit her on the left side of her face with his hand causing her eyeglasses to fall and hang around her nose.

Specialist [redacted] testified that she was eventually able to get up, get dressed, and go downstairs. She further testified that when she came downstairs one of the partygoers asked her what was wrong to which she replied, "he hit me, he took it too far, he hit me," and that a friend was going to pick her up. She testified that by saying "he took it too far" she was referring to the anal penetration.

When the victim's friend, SPC JW, arrived to pick her up from the party, he stated the victim was crying, did not want to move, and that he guided her to his vehicle with his arm around her. Once in the truck, the victim started to break down

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(. . . continued)
consideration to matters submitted personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit and warrant neither additional discussion nor relief.

and "blubber," a term SPC JW used to describe the victim as crying and sobbing. Specialist JW testified that the victim said to him, "He put it in. I told him not to. He put it in," and that she repeated this statement two or three times. Specialist JW took the victim to the military police station and from there she was taken to a civilian hospital where a medical exam was conducted. Both the victim and appellant admitted to consensual vaginal penetration. Appellant contacted civilian law enforcement to provide a statement during which he denied engaging in anal penetration. Laboratory DNA testing on evidence collected from the victim revealed no male DNA on the victim's rectal swabs but revealed male DNA on the victim's external vaginal and anal swabs.

At trial the government introduced, and the military judge admitted, multiple pieces of evidence. Pursuant to Mil. R. Evid. 803(4), the military judge admitted portions of the medical record pertaining to the victim's sexual assault examination from the civilian hospital titled "Emergency Medical Record Reported Sexual Assault."[3] At issue in this appeal are three pages of this medical exam completed by the doctor who evaluated the victim and contain the doctor's statements and assessments of the victim. Specifically, on page twenty-six, under the "Pelvic Exam/GU" section, the doctor wrote "rectal tone is normal there are rectal fissures at 12 and 6 o'clock." On this same page he also wrote "anoscope exam disclose small[4] rectal mucosal fissure along the floor of rectum for approx. 1.5 cm" and "antibiotic and viral prophylactic treatment begun." The defense counsel objected to these statements as testimonial in nature and the parties engaged in a colloquy regarding the application of Mil. R. Evid. 803(4). The military judge ruled that

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[3] Prosecution Exhibit 6 originally consisted of fifty-six pages of medical records from the civilian hospital that conducted SPC BV's sexual assault exam. Of those fifty-six pages, the government did not offer pages 53-56. We note that even though the government did not offer, and the military judge did not admit, pages 53-56, these pages are contained in Prosecution Exhibit 6 as if they were admitted rather than being excised from the exhibit as should have been done prior to admission. Given that these pages are contained within Prosecution Exhibit 6 in the record, it appears these extraneous pages went back with the military judge during his deliberations. We are thus left with the uncertainty whether the military judge erroneously considered these pages during deliberations.

[4] Although this word was not clearly legible and was argued by counsel to be indiscernible, we surmise this is the word "small," but the doctor was deceased at the time of trial and did not testify so his handwriting could not be confirmed.

these statements and observations by the doctor were admissible under Mil. R. Evid. 803(4) as an exception to hearsay.[5]

While the doctor did not testify at trial, his statements in the medical records were discussed during the testimony of Ms. RC, the government's expert in sexual assault medical forensic evaluations. The expert testified that she had never personally conducted rectal exams as part of her sexual assault forensic examinations, and that she was not credentialed to conduct rectal exams, although she had observed qualified providers perform them. Merely based upon her having observed rectal examinations, the military judge allowed Ms. R.C. to testify about the procedures of a rectal examination and use of an anoscope over defense objection. Although Ms. RC did not evaluate or treat the victim the night of the offense, she reviewed the medical records from the victim's treatment that night, including the three pages containing the doctor's statements. Ms. RC testified that in her opinion, after having reviewed the medial records, there was evidence of injury consistent with penetration of the victim's anus and noted that her opinion was based on the doctor who performed the exam, noting "in his record that there was a 1.25-centimeter fissure on the rectal floor of the victim." Ms. RC then testified as to some follow up care she provided the victim as the care coordinator on the installation.

LAW AND DISCUSSION

A. Standard of Review and Military Rule of Evidence 803(4)

"We review a military judge's decision to admit evidence for an abuse of discretion." *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008) (citing *United States v. Donaldson*, 58 M.J. 477, 482 (C.A.A.F. 2003)). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (cleaned up).

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[5] The military judge also stated that that although the doctor had passed away, and the defense had no opportunity to cross-examine this witness, there was no confrontation issue under *Crawford*. The judge stated that the *Rankin* factors analysis tipped the scales in favor of these statements being nontestimonial in nature since the records custodian testified the form was mainly for billing and insurance purposes despite the title. *See United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007). As stated above, we need not address this issue due to the relief provided in our decretal paragraph.

Military Rule of Evidence 803(4) is an exception to the rule against hearsay that allows admission of statements that: (1) are "made for—and [are] reasonably pertinent to—medical diagnosis or treatment" and (2) describe "medical history; past or present symptoms or sensations; their inception; or their general cause." Mil. R. Evid. 803(4)(A),(B). Our superior court established a two-part test in *United States v. Edens*, 31 M.J. 267 (C.M.A. 1990), which must be applied when evaluating statements offered under Mil. R. Evid. 803(4). *United States v. Cucuzzella*, 66 M.J. 57, 59 (C.A.A.F. 2008). "First the statements must be made for the purposes of medical diagnosis or treatment; and, second, the *patient* must make the statement with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought." *Id.* (quoting *Edens*, 31 M.J. at 269) (internal quotation marks and citation omitted). "This exception to the hearsay rule is premised on the theory that the declarant has an incentive to be truthful because he or she believes that disclosure will enable a medical professional to provide treatment or promote the declarant's own well-being." *Cucuzzella*, 66 M.J. at 59.

We emphasize that the *Edens* test specifically requires that the statement be made by the *patient*. As noted by our superior court, statements patients make in this context are more likely to be truthful because the patient wants to receive proper medical treatment and care to promote their own well-being. However, we can find no such authority, from our superior court or any other authority from our federal counterparts, that allows statements made by the *medical provider* to come in under this same medical diagnosis or treatment exception to hearsay. In fact, these cases support the opposite conclusion. *See Field v. Trigg County Hosp., Inc.*, 386 F.3d 729, 736 (6th Cir. 2004) (concluding the hearsay exception under Fed R. Evid. 803(4) only applies to statements made by those seeking or receiving medical care; statements made by the treating physicians are inadmissible hearsay); *Bombard v. Fort Wayne Newspapers*, 92 F. 3d 560, 564 (7th Cir. 1996) ("Rule 803(4) does not purport to except, nor can it reasonably be interpreted as excepting, statements made by the person providing the medical attention to the patient."); *Bulthuis v. Rexall Corp.*, 789 F. 2d 1315, 1316 (9th Cir. 1985) ("Rule 803(4) applies only to statements made by the patient to the doctor, not the reverse."). As such, we decline to adopt the government's argument that Mil. R. Evid. 803(4) should be broadened to allow statements from medical professionals about the patient's treatment and diagnosis into evidence. We disagree that the incentive of a patient is the same as that of a medical provider in this context – the notes of medical provider do not offer the same guarantee of truthfulness, but instead offer insight as to whether or not the medical provider was competent in their diagnosis and treatment.

We therefore find the military judge's ruling to admit the doctor's hearsay statements referenced above under Mil R. Evid. 803(4) to be an abuse of discretion due to an erroneous view of the law. Put simply, these statements are the doctors' recording of his own observations made while providing treatment to the victim and in no way reference any statement or description provided by the victim to the

doctor. We agree with appellant that these statements regarding "rectal tone," "rectal fissures," and the centimeter length of any fissure, as well as observations made by the doctor during the anoscope exam, have nothing to do with any statement by the patient, SPC [redacted] at all. Therefore, we find these statements fall outside the hearsay exception carved out by Mil. R. Evid. 803(4) and that the military judge erred in admitting them. Additionally, we highlight the purpose of this hearsay exception is to provide an avenue to admit statements that have an indicia of reliability, mainly because a patient is incentivized to provide truthful statements to a medical provider for treatment. It does not apply equally in reverse to capture the notes made by a medical provider who is documenting his or her own observations and patient diagnosis. This is not to imply the doctors' statements are untruthful, but instead to emphasize that this rule exists not to protect the doctor's statements of his observations at all, but to protect statements the patient makes to the doctor in the hopes of receiving accurate medical care.[6]

Additionally, we find two issues with Ms. RC's testimony regarding the doctor's statements. One, instead of merely relying on the doctor's statements to provide her opinion, Ms. RC quoted the doctor's statements during her testimony as a basis for her opinion, which we find to be error. While an expert can rely on hearsay, and in this case, Ms. RC could have relied on the deceased doctor's statements in providing her opinion, that does not mean a witness can recite and quote the deceased doctor's statements from the medical records into the record at trial. *See, e.g., United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012) (where expert witness simply "parrots" inadmissible hearsay, they are "little more than a backdoor conduit for an otherwise inadmissible statement"). Two, even if Ms. RC could have relied on these statements as a basis for her opinion, she was admittedly not properly qualified to provide such testimony on rectal exams given her lack of proper credentialing. These two issues, combined with the military judge's failure to clarify whether he considered Ms. RC's testimony as lay witness testimony as to rectal exams and injuries based on her lack of credentialing, since she had some experience in observing rectal injuries, leaves us with the impression the military judge considered the entirety of her testimony as expert testimony. *See* Mil. R. Evid. 701 (a lay witness' testimony may not be based on scientific, technical, or other specialized knowledge that would be within the scope of expert witness testimony

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[6] The military judge found the government did not comply with Mil. R. Evid. 803(6) and Mil. R. Evid. 902(11) and did not lay the proper foundation for these records to be admissible under this exception. The military judge then stated the records custodian laid an adequate foundation for admissibility, and continued into a Mil. R. Evid. 803(3) & (4) analysis, leaving this ruling under Mil. R. Evid. 803(6) unclear. In light of the state of the trial record we do not analyze the business records exception here.

covered by Mil. R. Evid. 702); *United States v. Fulton*, 837 F.3d 281, 291 (3d Cir. 2016) (a lay witness may only give their opinion if it is based on personal knowledge of that event; lay opinion testimony that merely instructs the fact finder on what conclusion to reach is excluded by Rule 701).

B. Appellant Was Prejudiced

In finding the admission of the doctor's statements to be error, we next turn to whether the government has met its burden in demonstrating that the admission of these erroneous statements was harmless. *United States v. Finch*, 79 M.J. 389, 398 (C.A.A.F. 2020). "This Court reviews the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (cleaned up). "For preserved nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Id.* (cleaned up). "[I]n conducting its prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id.* at 398-99 (cleaned up). Applying these factors, we find the government has failed to meet their burden and agree with appellant that these admissions were prejudicial.

First, the government's case was not particularly strong. The evidence of anal penetration in this case is centered on the victim's testimony, the doctor's statements in the victim's medical records, and Ms. RC's testimony, which in part, was a recitation of the doctor's statements at issue. The DNA evidence also failed to corroborate the victim's testimony, as appellant's DNA was not found inside the victim's rectum. The doctor's statements in Prosecution Exhibit 6 were the main piece of medical evidence as to whether anal penetration occurred, and without this evidence, this appears to be a credibility case centering around the victim's narrative and appellant's narrative. The narratives as to what happened the night of this offense differed, including whether there was even any confrontation in appellant's closet as the victim attempted to leave the room, and made this an otherwise close case as to whether the government could meet their burden of proof. In a close case, medical evidence is significant if it assists the government in meeting the "beyond a reasonable doubt" standard. Especially when the government relied on this medical evidence and the victim's documented injuries in their closing argument, using almost verbatim language from the doctor's statements. Without this medical evidence of anal penetration, we are not convinced the government could meet their burden of proof beyond a reasonable doubt.

We find it also relevant to our prejudice analysis to note our uncertainty over exactly what evidence the military judge considered during his deliberations. As an example, Prosecution Exhibit 10 contained twenty-three photos, three of which were not admitted by the military judge. One of the photos, photo #20, the non-admitted

photo of the victim's rectum, is contained in the exhibit as if it was admitted rather than being excised from the exhibit as should have been done prior to admission. Given that this photo is contained within Prosecution Exhibit 10, it appears it went back with the military judge during his deliberations, so we are left with uncertainly as to whether the military judge erroneously considered it during deliberations.

Second, in addition to the government's case not being particularly strong, the defense presented a strong defense. They argued that the victim and appellant engaged in consensual vaginal intercourse and that anal penetration did not occur, or if it did, it was inadvertent and not by appellant's initiation. The DNA evidence found on the victim's anus and not in her rectum lends credibility to the defense's theory. Third, we find the materiality and quality of the doctor's statements to be high, as it is the most significant piece of evidence the government relied upon to prove anal penetration occurred. As stated above, we are not convinced the government could have proven that anal penetration occurred without it.

Therefore, we find the introduction of this evidence prejudiced appellant, as it was the main corroborating evidence to the victim's testimony. We simply cannot find that the introduction of the erroneous statements did not have a substantial influence on the findings in this case, and we must take action accordingly.

CONCLUSION

The finding of guilty to the Specification of The Charge and the sentence are set aside. A rehearing may be ordered by the same or different convening authority.

Senior Judge WALKER and Judge EWING concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court