CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, GALLAGHER, and BORGERDING
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class TED C. SQUIRE
United States Army, Appellant

ARMY 20091106

Headquarters, 8th Theater Sustainment Command
Donna M. Wright, Military Judge
Colonel James W. Herring, Staff Judge Advocate (pretrial)
Colonel Lisa Anderson-Lloyd, Staff Judge Advocate (post-trial)

For Appellant: Mr. William E. Cassara, Esq. (argued); Captain John L. Schriver, JA; Mr. William E. Cassara, Esq. (on brief).

For Appellee: Captain Edward J. Whitford, JA* (argued); Lieutenant Colonel Amber J. Roach, JA; Major Ellen S. Jennings, JA; Captain Bradley M. Endicott, JA (on brief).

17 August 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BORGERDING, Judge:

A panel composed of officers and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of rape of a child in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2006) [hereinafter UCMJ]. The panel sentenced appellant to confinement for twenty years and to be reduced to the grade of E-1. The convening authority approved a reduced amount of confinement of 238 months and otherwise approved the adjudged sentence.

* Corrected

This case is before us for review pursuant to Article 66, UCMJ. Before this court, appellant has raised four assignments of error, two of which merit discussion, but warrant no relief.[1]

FACTS

On 16 September 2008, Sergeant First Class (SFC) Pamela Whitlock left her home at around 0600 for physical training (PT). She left her eight-year-old daughter, SL, in the home with appellant, who was asleep on the couch, wearing a jersey and jean shorts. Although SFC Whitlock normally returned home from PT between 0745 and 0800, she was released early on this date and arrived back at her house at approximately 0635. Upon her arrival, she found SL coming out of the master bedroom wearing a long t-shirt, but no pants or underwear. SL gave SFC Whitlock a hug and said "mommy, I love you."

Sergeant First Class Whitlock then found appellant covered up in the bed in the master bedroom. She subsequently discovered he was no longer wearing his jean shorts, which she later found folded up in SL's room. Sergeant First Class Whitlock also found SL's sleep pants and underwear "intertwined" in SL's bed.

Concerned, SFC Whitlock locked the door to SL's room and asked SL why she was not wearing pants or underwear. SL, at first, indicated that the tags were bothering her, but after examining the tags, SFC Whitlock could not determine how they would irritate SL. Sergeant First Class Whitlock then asked SL if appellant had

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[1] Assignment of Error I alleges:

I

> APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE PERMITTED TESTIMONIAL HEARSAY IN THE FORM OF SL'S STATEMENT TO A PHYSICIAN.

Assignment of Error III alleges:

III

> APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT WHEN HIS CIVILIAN DEFENSE COUNSEL FAILED TO IMPEACH SL'S CREDIBILITY WITH EVIDENCE THAT SHE RECANTED THE ALLEGATION AND FAILED TO IMPEACH SPECIAL AGENT ESPITIA'S CREDIBILITY WITH EVIDENCE THAT HE LIED AT THE ARTICLE 32, UCMJ INVESTIGATION.

touched her and SL answered, "yes." Sergeant First Class Whitlock asked where and SL pointed to her vagina.[2]

Later that day, SFC Whitlock took SL to the emergency room at Tripler Army Medical Center (TAMC), and told personnel there that SL may have been molested. At the TAMC ER, SL was examined by Dr. Mary Montgomery. During the exam, in response to a question about whether anybody hurt her, SL essentially told Dr. Montgomery that appellant put his penis in her privates. Dr. Montgomery then did a "head to toe" physical examination of SL but found no evidence of trauma to SL's external genitalia.

Because Dr. Montgomery did not feel she had the expertise to do an internal exam of SL's genitalia, she contacted Navy Captain Grigsby, the Pediatric Sexual Abuse expert at TAMC. However, Captain Grigsby was not available to do an exam that day, so Dr. Montgomery referred SFC Whitlock and SL to the Sex Abuse Treatment Center at Kapiolani Medical Center. Later that same day, Dr. Philip Hyden, the Director of the Sex Abuse Treatment Center at Kapiolani and the on-call doctor, did a pediatric sexual assault exam on SL.

During the exam with Dr. Hyden, SL gave further details about what happened to her. She told Dr. Hyden that appellant came into her room, took his clothes off and asked her to get undressed. She related that he then "put his wee wee inside me and it hurt. I told him no and pushed him away." Dr. Hyden did a physical examination and also performed the "rape kit" on SL, collecting, among other things, a vaginal swab and dried secretions from her thigh. A crisis worker also collected SL's underwear.

Sergeant First Class Whitlock never contacted any law enforcement officials. She took SL to TAMC on her own initiative and, although personnel at TAMC called the military police (MP) after speaking with SFC Whitlock, no one from law enforcement spoke to Dr. Montgomery, SFC Whitlock or SL prior to Dr. Montgomery's examination of SL. Likewise, although agents from the U.S. Army Criminal Investigation Command (CID) were sent to Kapiolani Medical Center, Dr. Hyden had completed his examination of SL before CID spoke to him about the case.

Mr. Jeffery Fletcher, the forensic DNA examiner from the U.S. Army Criminal Investigations Laboratory (USACIL), analyzed the contents of the rape kit and found that 1) there was semen on the vaginal swab taken from SL, in SL's underwear, and on the dried secretions swab taken from her thigh and 2) appellant could not be excluded as a potential contributor to the DNA found on the vaginal

[2] The military judge allowed this testimony to explain why SFC Whitlock took the actions she did with regard to SL; it was not admitted for the truth of the matter asserted. The military judge provided a proper limiting instruction to the panel.

swab and the dried secretions swab and was a match for the semen found on SL's underwear.

A. Appellant's Sixth Amendment Right to Confrontation

LAW

Whether the statements made by SL to Dr. Montgomery and Dr. Hyden are inadmissible hearsay under the Sixth Amendment of the U.S. Constitution and the U.S. Supreme Court's decision in *Crawford v. Washington* is a question of law we review de novo. *United States v. Gardinier*, 65 M.J. 60, 65 (C.A.A.F. 2007).

The Sixth Amendment to the U.S. Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36 (2004). "In *Crawford*, the Supreme Court addressed the intersection between hearsay exceptions and the Confrontation Clause, holding 'testimonial' statements of witnesses not testifying at trial are admissible 'only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *United States v. Russell*, 66 M.J. 597, 603 (Army Ct. Crim. App. 2008) (quoting *Crawford*, 541 U.S. at 59). The *Crawford* Court set forth "[v]arious formulations of [the] core class of 'testimonial statements,'" to include "ex-parte in-court testimony or its functional equivalent" such as "affidavits, custodial examinations [or] prior testimony that the defendant was unable to cross-examine." *Crawford*, 541 U.S. at 51. The Court in *Crawford* also found that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" also fell within the "core class" of "testimonial" statements. *Id.* at 52.

In *United States v. Rankin*, our superior court set out three factors to be considered in distinguishing between testimonial and nontestimonial hearsay. *Gardinier*, 65 M.J. at 65 (citing *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007)). These factors include: "(1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?;[3] and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?" *Rankin*, 64 M.J. at 352; *Gardinier*, 65 M.J. at 65.

[3] With respect to this second factor, although SL's statements may have involved "more than a routine and objective cataloging of unambiguous factual matters," we will focus on the first and third factors. *Rankin*, 64 M.J. at 352; *Gardinier*, 65 M.J. at 65; *see also Russell*, 66 M.J. at 604, n. 3 ("[T]his second factor has little import in the factual scenario presently before us.").

The goal in analyzing these factors is "an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial." *Gardinier*, 65 M.J. at 65, citing *Davis v. Washington*, 547 U.S. 813 (2006).

DISCUSSION

At trial, the government sought to introduce SL's statements to both Dr. Montgomery and Dr. Hyden as exceptions to hearsay pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 803(4): "Statements for purposes of medical diagnosis or treatment." As an initial matter, we have no trouble concluding that the military judge did not abuse her discretion in admitting these statements under this theory. We find that, when she was talking with both physicians, SL understood that she was at the medical facility for purposes of medical diagnosis or treatment and that she had some expectation of receiving medical benefit from the diagnosis or treatment. *United States v. Marchesano*, 67 M.J. 535 (Army Ct. Crim App. 2008).[4]

"Although the 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' they do not completely 'overlap.'" *Russell*, 66 M.J. at 602 (quoting *California v. Green*, 399 U.S. 149, 155 (1970)). Thus, even if a statement falls squarely under an exception to hearsay, its admission may still constitute a violation of the Confrontation Clause of the Sixth Amendment. *Id.* Accordingly, we must conduct a separate analysis of the military judge's admission of SL's statements in light of the Confrontation Clause and our superior courts' decisions in *Crawford* and *Gardinier*.

Dr. Montgomery

In applying the first *Rankin* factor, we find that SL's statement to Dr. Montgomery was neither elicited by nor made in response to any law enforcement or prosecutorial inquiry. *Rankin*, 64 M.J at 352; *Gardinier*, 65 M.J at 65. Sergeant First Class Whitlock took SL to the TAMC ER on her own, without first calling the police. Although personnel at TAMC did contact the Military Police once SFC Whitlock indicated why they were there, Dr. Montgomery was not aware of any law enforcement involvement prior to her exam. She testified that she was not asked by law enforcement to conduct the exam, to ask questions or to make any referrals for SL. As law enforcement played no role in Dr. Montgomery's medical examination of SL, we answer the first *Rankin* question in the negative.

[4] Although we note that SL was present in the courthouse and was available to testify, her availability was not an impediment to the admission of her statements under Mil. R. Evid. 803. *See Russell*, 66 M.J. at 605-06.

With regard to the third *Rankin* factor, we find that SL's primary purpose for making the statement and Dr. Montgomery's primary purpose for eliciting SL's statement, was *not* to produce evidence with an eye toward trial. *Rankin*, 64 M.J. at at 352. To the contrary, Dr. Montgomery testified that the primary purpose for her examination of SL was to do a history and physical exam and to make sure SL was "medically stable." The record supports this conclusion. SL came to the emergency room and Dr. Montgomery treated her as she would any other patient. She took a history and she did a physical exam based on the information she received from the triage nurse and from SL. She did not ask follow up questions to SL's accusations, nor did she focus her exam solely on the main complaint of sexual abuse. She did a "head to toe" medical examination, not a forensic exam. Although Dr. Montgomery was familiar with sexual assault exams and did know that, in part, her exam and findings could be of evidentiary value, her *primary* purpose in eliciting the statement was for medical diagnosis and treatment and not to produce evidence with an eye toward trial. *Gardinier*, 65 M.J. at 65. Thus, the third *Rankin* factor is also not met.

Based on the totality of the circumstances, SL's statement to Dr. Montgomery was not elicited or made to "preserve past facts for a criminal trial." *Id.* Thus, we find that SL's statement to Dr. Montgomery was non-testimonial and the admission of this statement against appellant did not violate the Confrontation Clause of the Sixth Amendment.

Dr. Hyden

As with Dr. Montgomery, SL's statement to Dr. Hyden was not elicited by or made in response to a law enforcement or prosecutorial inquiry. *Id.* To the contrary, Dr. Hyden conducted his medical examination of SL in response to a request from Dr. Montgomery, who referred SL to Kapiolani for medical and logistical reasons. Dr. Hyden saw SL immediately after she left TAMC and within twenty-four hours of the assault. Further, Dr. Hyden was very clear in his testimony that his examination and evaluation of SL was in no way influenced by law enforcement and there is no indication in the record that SL, SFC Whitlock, or Dr. Hyden had any contact with any law enforcement official prior to the exam. Thus, the first *Rankin* factor is answered in the negative with respect to Dr. Hyden.

With respect to the third *Rankin* factor, we find that although Dr. Hyden did conduct a forensic examination of SL, his *primary* purpose was still the diagnosis and treatment of SL and not to produce evidence "with an eye toward trial." *Rankin*, 64 M.J. at 352; *Gardinier*, 65 M.J. at 65.

We recognize that there was a forensic purpose to Dr. Hyden's examination of SL. He collected evidence as part of a "rape kit" and completed a form entitled "Medical-Legal Record and Sexual Assault Information Form." Both actions were unquestionably done to "preserve past facts for a criminal trial." *Gardinier*, 65 M.J.

at 65. In addition, Dr. Hyden testified that he was well aware of the legal and forensic aspects of his examination.

However, these aspects of Dr. Hyden's examination of SL do not necessarily require a finding that the *primary* purpose of the exam was "with an eye toward trial." *Id.* Although Dr. Hyden was the medical director at the Kapiolani Child Protection Center and Sex Abuse Treatment Center, he also happened to be the on-call doctor available when SFC Whitlock and SL arrived. Despite his position and experience in dealing with sexual abuse cases, he was, in his interactions with SL, still a doctor whose primary interests lay with treating his patient. His actions support this. He introduced himself as "Doctor Hyden" or "Doctor Phil;" he told SL he was there to do an exam and to ask questions; he tried to explain what instruments he would be using and what they did; and he told her to let him know if she had any concerns.

He then began his examination with his standard practice of first getting the patient's medical history. In taking the medical history, Dr. Hyden asked SL open-ended questions related to her medical history, as opposed to questions that "reflect . . . more of a law enforcement purpose." *Id.* at 66. It was at this point of the examination that SL stated (after telling Dr. Hyden that she had pain when urinating) that appellant had "put his wee wee inside me and it hurt." Dr. Hyden then conducted a physical exam of SL, made a diagnosis, and recommended treatment based on his findings.

Dr. Hyden's examination of SL had a clear medical purpose with only a secondary function of preserving evidence. Based on the facts of this case, the primary purpose for making and eliciting SL's statement to Dr. Hyden was medical, not forensic, and therefore not for the production of evidence with an eye toward trial. *Gardinier*, 65 M.J at 65; s*ee generally State v. Miller*, 264 P. 3d 461, 479-82 (Kan. 2011) (summarizing a number of state jurisdictions' holdings, and determining that "generally where there is a clear medical purpose to the examination—often evidenced by the treating physician's or nurse's testimony that the question of 'what happened' was necessary for treatment of medical issues—the statements are nontestimonial even if there is a secondary purpose of preserving evidence.").

Accordingly, we conclude that, based on the totality of the circumstances, SL's statement to Dr. Hyden was not "made or elicited to preserve past facts for a criminal trial." *Gardinier*, 65 M.J. at 65. Therefore, we find that SL's statement to Dr. Hyden was not testimonial and that the military judge did not err in admitting it as an exception to hearsay.

Harmless Beyond a Reasonable Doubt

Assuming, *arguendo*, that the military judge erred in admitting Dr. Hyden's testimony as to SL's statements, we find this error to be harmless beyond a reasonable doubt. *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007).

First, we find Dr. Hyden's testimony regarding SL's statements to be of little "importance . . . in the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The vaginal and dried secretion swabs taken by Dr. Hyden, along with SL's underwear, were later tested for the presence of semen and DNA at USACIL.[5] Mr. Jeffery Fletcher testified that he did, in fact, find semen on the vaginal swabs and the dried secretion swabs taken from SL and that appellant could not be excluded as the contributor of this semen. Further, Mr. Fletcher testified that he found semen in four places on the interior of SL's underwear. The DNA in this semen matched appellant with the frequency of occurrence of this profile among unrelated individuals being 1 in 1 septillion in the Caucasian population, 1 in 210 sextillion in the Black population and 1 in 160 sextillion in the Hispanic population.

Second, after waiving his rights, appellant told the CID agent who interviewed him that "if his DNA was found on or in the victim, then his penis did penetrate her, but it was accidental not deliberate."

Finally, Dr. Hyden's testimony about SL's statements was, to a certain extent, cumulative with Dr. Montgomery's similar testimony that SL stated appellant put his penis in her privates. Sergeant First Class Whitlock's detailed description of how she came home early from PT and found her daughter coming out of the bedroom wearing no pants or underwear and appellant in the bed with his shorts off created a stark mental image for the panel of what had happened to SL and appellant's involvement. Thus, Dr. Hyden's testimony concerning SL's statements to him had already been, at the very least, presented to the panel in other forms.

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[5] Prosecution Exhibit (PE) 1 (DA Form 4137) and PE 3 (Rape Kit collected from SL) were admitted over defense objection. "[T]he Government bears the burden of establishing an adequate foundation for admission of evidence against an accused." *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993). "The Government must show that there is a reasonable probability the sample which was tested was in fact from the purported source *and* that it was not altered. This means the 'chain-of-custody evidence must be adequate—not infallible.'" *Id*. (quoting *United States v. Ladd*, 885 F. 2d 954, 957 (1st Cir. 1989)) (emphasis in the original). "The Government is not required to exclude every possibility of tampering." *Maxwell*, 38 M.J. at 150 (citing *United States v. Courts*, 9 M.J. 285, 290 (C.M.A. 1980)). Despite the civilian defense counsel's vigorous attacks on the chain of custody for SL's rape kit, the Government has met its burden in this case and we hold that the military judge did not abuse her discretion by admitting PE 1 and PE 3 into evidence.

We find that any error in admitting Dr. Hyden's testimony as to SL's statements was harmless beyond a reasonable doubt and that even without this testimony, the panel would have found appellant guilty of raping SL beyond a reasonable doubt. In addition, disregarding Dr. Hyden's testimony as to SL's statements, we are convinced of appellant's guilt beyond a reasonable doubt pursuant to Article 66, UCMJ.

B. Ineffective Assistance of Counsel

Appellant alleges in his third assignment of error that his civilian defense counsel at trial was ineffective when he failed to present evidence that, prior to trial, SL purportedly recanted her allegations against him.

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J 360, 361-62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In *United States v. Polk*, our superior court's predecessor set out three basic questions to be answered in these cases:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
> 2. If they are true, did the level of advocacy "fall[ ] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
> 3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the factfinder [sic] would have had a reasonable doubt respecting guilt?"

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

Even assuming appellant's assertions are true, we find that there is a reasonable explanation for counsel's failure to present evidence of SL's recantation to the panel. Our review of the entire record of trial reveals significantly more evidence pertaining to SL's original allegations of sexual abuse than what was presented at appellant's court-martial. Moreover, SL was present and available to testify at trial, yet neither side called her as a witness. We decline to speculate as to what SL would or would not have said and hold only that under the facts of this case, we find trial defense counsel's decision to avoid evidence of recantation reasonable when faced with the prospect of further incriminating evidence becoming admissible and an unpredictable child witness standing by available to testify.

Accordingly, defense counsel's advocacy did not fall "measurably below the performance ordinarily expected of fallible lawyers." *Polk*, 32 M.J. at 153.

Finally, appellant has not shown a reasonable probability that "but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Even had trial defense counsel presented evidence of recantation, the government's case against appellant still included DNA evidence that his semen was inside SL's vagina and on the interior of her underwear. In addition, appellant made a partial admission to CID that if his semen was found inside SL, he had penetrated her, but that it was an "accident." The evidence against appellant was overwhelming, and would still be so in light of evidence of a recantation. There is no "reasonable probability" that, even after hearing evidence of recantation, the members "would have had a reasonable doubt respecting guilt." *Polk*, 32 M.J. at 153. We decide this issue adverse to appellant.

CONCLUSION

Upon consideration of the entire record, the submissions of the parties, to include those matters raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and oral argument, we hold the findings of guilty and the sentence as approved by the convening authority to be correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge COOK and Judge GALLAGHER concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court