

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
KERN, YOB, and KRAUSS
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class KELLY A. STEWART
United States Army, Appellant

ARMY 20090751

Seventh U.S. Army Joint Multinational Training Command
Charles Kuhfahl, Military Judge
Lieutenant Colonel William R. Martin, Staff Judge Advocate (pretrial)
Lieutenant Colonel Francisco A. Vila, Staff Judge Advocate (recommendation &
addenda)

For Appellant: Mr. William E. Cassara, Esquire (argued); Captain Kristin B. McGrory, JA; Mr. William E. Cassara, Esquire (on brief, reply brief, petition for new trial, & reply brief for petition for new trial); Captain E. Patrick Gilman, JA.

For Appellee: Captain Edward J. Whitford, JA (argued); Major Amber J. Roach, JA; Major Ellen S. Jennings, JA; Captain Edward J. Whitford, JA (on brief & petition for new trial); Captain Stephen E. Latino, JA.

26 July 2012

MEMORANDUM OPINION
AND
ACTION ON PETITION FOR NEW TRIAL

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

YOB, Judge:

A panel of officers and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of aggravated sexual assault, kidnapping, forcible sodomy, and assault consummated by a battery, in violation of Articles 120, 134, 125, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 934, 925, 928 (2006) [hereinafter UCMJ], respectively. Appellant was sentenced to a dishonorable discharge, confinement for eight years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

In his post-trial matters submitted to the convening authority pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 1105, appellant included unsworn statements from two individuals about the victim in the case. Appellant characterizes these statements as new evidence that attacks the credibility of the victim and specifically calls into question statements made by the victim in her testimony during the presentencing phase of the trial. The convening authority ordered a post-trial hearing pursuant to Article 39(a), UCMJ, for “the purpose of making findings of fact and conclusions of law regarding the defense counsel’s claim that the victim lied while testifying under oath during presentencing.”

At this post-trial hearing, the victim and two individuals that questioned her credibility and truthfulness testified. At the conclusion of the hearing, the military judge issued findings that the victim did not lie during her presentencing testimony, based on her understanding of the questions asked at the time, but his findings noted the victim’s testimony was “less than forthcoming.” Applying the closely analogous standards contained in R.C.M. 1210(f), the rule governing petitions for new trials, the military judge found that even if this error in the victim’s testimony was not present, there would not have been a substantially more favorable result for appellant. Therefore, the military judge provided no relief and specifically held that “were this request styled as a request for a new trial under R.C.M. 1210, this court would deny that request.”

The convening authority took action after the post-trial hearing, and after considering post-trial addenda to the staff judge advocate’s recommendation, additional submissions from appellant commenting on the post-trial hearing, and the military judge’s findings. In his action, the convening authority disapproved the finding of guilty for the kidnapping charge that had been brought under Article 134, UCMJ. In reassessing the sentence, the convening authority reduced appellant’s term of confinement by two years.¹ The convening authority then approved only so much of the sentence as provides for a bad-conduct discharge and three years’ confinement. The convening authority deferred the adjudged forfeitures prior to action, and waived the automatic forfeitures for a period of six months with direction they be paid to appellant’s spouse.

On appeal, appellant submitted a Petition for New Trial to this court pursuant to Article 73, UCMJ. The basis for this petition is substantially the same as that raised in appellant’s R.C.M. 1105 matters that led the convening authority to order the post-trial Article 39(a) hearing discussed above. Appellant’s Petition for New

¹ The convening authority noted in his action that he specifically applied principles of sentence reassessment in making this reduction, as was his obligation under the law. *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991). See *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986); *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006).

Trial does not contain any evidence of a fraud on the court. The new evidence alleged by appellant either does not contain any information in the form of an affidavit, or a form otherwise sworn, or it simply references the evidence that was addressed at the post-trial Article 39(a), UCMJ, hearing. We concur with the findings of the military judge that the information developed in the post-trial Article 39(a), UCMJ, hearing would not have produced a substantially more favorable result for appellant, and therefore, we deny appellant's Petition for New Trial. *See* UCMJ art. 73; R.C.M. 1210.

This case is now before this court for review pursuant to Article 66, UCMJ. Appellant raises seven assignments of error, two of which merit comment, and none of which merits relief. For the reasons set forth below, we affirm the findings and sentence as approved by the convening authority.

BACKGROUND

On 22 August 2008, appellant, a thirty-seven year-old Sergeant First Class in the U.S. Army, went to a club near Stuttgart, Germany, where he met a young German woman named KH. At this time, appellant was living temporarily in a nearby hotel as he was completing in-processing to an assignment in Germany. At the club, appellant spoke with KH in German and danced with her. There was no factual dispute at trial that appellant and KH left the club together and wound up in appellant's hotel room where sexual acts occurred between them.

KH testified that when they left the club, she believed they were going to her apartment where she would feel safer as opposed to an unfamiliar location. She reluctantly went to appellant's room after he directed their cab to his hotel and told KH they would only stop there to have a drink and then go to her house. Once inside his hotel room, appellant ordered KH to undress, and when she hesitated, he struck her with his hand on her cheek and head. When KH finally complied and got undressed, appellant pushed her onto the bed and continued to push her down from behind with his knee as he forced his penis into her anus. Afterward, when KH said she wanted to leave, appellant grabbed her by the neck, pushed her to her knees, and forced his penis into her mouth where he ejaculated. He later placed his fingers into KH's anus and vagina, and struck her face, breast, buttocks and hip. Before KH was allowed to leave, appellant again grabbed her hair and forced his penis into her mouth where he ejaculated. KH maintained that at no time did she consent to these sexual acts. Two months later, KH reported the sexual assault to the German police, who then informed military authorities of the incident.

Appellant testified during the merits phase of his trial that KH willingly went to his hotel room, and nothing that happened in his hotel room was by way of force.

Prior to trial, appellant's defense counsel submitted a discovery request to the government pursuant to R.C.M. 701 which, in part, requested all mental health or counseling records for KH, not limited to the time period of the offense. The trial counsel responded that KH had consented to release of all her mental health records for periods of time after the assault that led to the charges. The trial counsel noted that KH did not consent to release her mental health records for the time period preceding the assault, and that the government was seeking a German court subpoena for these documents. The trial counsel also noted that a German prosecutor, with whom they were consulting on the issuance of the subpoena, indicated one was not likely to be issued.

At trial, the trial counsel made a motion in limine to prohibit appellant's defense counsel from cross-examining KH about her stay at a mental health facility in 2004 and 2005. In an Article 39(a), UCMJ, session to litigate this motion, appellant's defense counsel noted that he made a pretrial discovery request for KH's mental health records for the time she spent in this facility. The defense counsel acknowledged that these records were not in the possession of the U.S. Government, and the trial counsel had assisted in attempts to obtain the records by forwarding the defense counsel's request to German authorities and by seeking a court order for release from German prosecutors, who declined to issue the order. The defense counsel stated that they were informed KH refused to issue her consent to release the records.

Appellant's defense counsel also stated, "we obviously acknowledge we'll be limited to her answers--we have no independent evidence; we have no ability to challenge her statements-but we believe that her acknowledgement of having been in an institution-psychiatric institution--for her response to stress, which is her own version of it, is something the panel should be aware of." The defense counsel further agreed that they were "stuck with her answers," on this issue. The trial counsel countered that KH's treatment as far back as 2004 had no relevancy to her credibility, or ability to recall events.

The military judge granted the trial counsel's motion in limine, in part, finding that whether or not KH was in a mental health facility in 2004 and 2005 was not relevant. However, the military judge denied the motion, in part, finding, "whether or not the victim was treated for some type of mental health care issue is relevant as to her ability to recall, her ability to remember, or, potentially, her motive or ability to fabricate." The military judge's ruling allowed the defense to cross-examine KH about her prior mental health history so long it could be tied to these relevant issues. The defense counsel acknowledged he understood he could not ask the victim if she was institutionalized in 2004 and 2005, but that he could inquire into KH's prior mental health issues, and noted that if KH answered

questions they believed “expanded or opened doors” to more questioning, they would seek another Article 39(a), UCMJ, session.

In a later Article 39(a), UCMJ, session, appellant’s defense counsel sought to further clarify the parameters of the military judge’s ruling and asked whether they would be able to cross-examine KH on her declination to provide her mental health records from this period of time. The military judge reaffirmed that the defense could ask KH about her mental health history for the purposes of showing how it affected KH’s ability to recall, ability to remember, or motive to fabricate. The military judge held that whether KH was institutionalized in 2004 and 2005 and whether she had declined to release her mental health records was not relevant. Appellant’s defense counsel then concluded by stating, “But—all right. I think I understand the limits, Your Honor. I will attempt to live within them, and if I don’t, I’m sure the government will jump up, and we’ll have a hearing.”

During his cross-examination of KH, the defense counsel asked a series of questions about KH’s psychotherapy treatment after she reported the incident that gave rise to the charges in this case. The defense counsel then proceeded to ask KH, without objection from the trial counsel, about past psychotherapy treatment to which KH answered she was a psychotherapy patient, as opposed to an outpatient, at a clinic from October 2004 through February 2005 because she had “burn-out.”

The defense counsel then requested another Article 39(a), UCMJ, session in which he argued that asking KH about her declination to release her prior mental health records was relevant to her credibility and candor to the tribunal. The trial counsel argued that KH should not have to answer for why the German prosecutor refused to issue an order to release the records. The military judge noted that he did not know why KH did not agree to turn over the records and that he would not assume anything. The military judge then held that he would not allow the defense to question KH about her declination to release her records, because it would not address any matter of consequence. When defense counsel resumed his cross-examination of KH, he inquired further about the mental health treatment she received in 2004 and 2005 and then moved on to ask about mental health treatment KH received after the incident that led to the charges.

Later in the trial, defense counsel cross-examined a physician serving as the chief of outpatient behavioral health at Landstuhl Regional Medical Center, who was called to testify by the government. The physician acknowledged he had previously interviewed KH for two to three hours and that during the interview he had talked to her about her psychotherapy in 2004 and 2005. The defense counsel made no inquiry with the witness about the substance of the prior treatment as described by KH, but only asked briefly whether KH produced any records of that prior treatment to verify what she told the witness, to which the witness responded that KH did not

have any records when he interviewed her. The defense counsel's questioning then moved on to another topic and he did not refer to the issue of KH's 2004 to 2005 treatment again with this witness.

In closing argument, the defense counsel stated KH was in therapy for four months in 2004 to 2005, and that "we only have her word that she was there for a burnout syndrome as opposed to something else; whatever burnout syndrome means in that context." At no time did appellant's defense counsel ever move for production of KH's prior mental health records pursuant to R.C.M. 703(f)(1) or seek to invoke R.C.M. 703(f)(2) provisions related to unavailable evidence.

LAW AND DISCUSSION

Appellant now argues that the military judge erred by denying him the opportunity to (1) obtain relevant and necessary evidence in the form of KH's mental health records from 2004 to 2005; and (2) cross-examine KH on her declination of consent to release her mental health records from 2004 and 2005. Attendant to the former allegation are claims that the military judge erred in failing to find this evidence was of such central importance to KH's credibility that it was essential to a fair trial, thus requiring production or abatement of the proceedings.

Under R.C.M. 703(f)(1), each party in a court-martial case is entitled to the production of evidence which is relevant and necessary. Military Rule of Evidence 401 contains a broad definition of relevance, noting that it includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule for Courts-Martial 905(b)(4) requires any motion for production of evidence to be brought before trial and R.C.M. 905(e) states that failure to make such a motion before pleas are entered constitutes waiver.

Rule for Courts-Martial 703(f)(2) addresses unavailable evidence, which includes evidence destroyed, lost, or otherwise not subject to compulsory process. Under this rule, a party is not entitled to the production of unavailable evidence. If unavailable evidence is determined to be of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the rule requires a military judge to grant a continuance or other relief in order to attempt to produce the evidence or to abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

It appears clear from our review of the record that the defense counsel's failure to make a timely pretrial motion for production of KH's mental health records from the 2004 and 2005 time period or to request relief under R.C.M.

703(f)(2) constituted a conscious strategic decision not to fully litigate the issue and amounted to waiver of the request for production or other relief, leaving no error for us to correct on appeal. *See United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009).

If defense counsel had made a motion for production or invoked R.C.M. 703(f)(2), the court could have developed issues and arguments and issued findings and orders. A potential order from the military judge could have been to continue the proceedings and direct the government to coordinate further with the German authorities in an attempt to persuade them to issue the subpoena.² If this issue had been litigated, the military judge could have provided findings containing relevant reasons the records were necessary.

Another possible outcome of a defense motion would have been a finding by the judge that the evidence could not be produced because it was not amenable to process, thereby rendering it unavailable under the provisions of R.C.M. 703(f)(2). This would have required further findings by the military judge as to whether these records were of such central importance to an issue that they were essential to a fair trial, and if so, whether a continuance, abatement, or other relief was the appropriate remedy. In the absence of such a defense motion, none of these options was developed or addressed on the record.

Appellant cites *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987), for the proposition that mental health records of victims can be relevant to the issue of credibility of a victim. In *Reece*, there was no waiver issue as the defense made a timely motion for production of the records and litigated the issue of whether the records were relevant, which, under the facts of that case, the military trial judge erroneously denied. *Id.* at 94. In addition, *Reece* dealt with the very broad “relevant

² Appellant’s brief references the specific, written response German prosecutors provided to the trial counsel in response to its request for a German subpoena ordering KH’s prior mental health records. The German prosecutor appeared to have viewed the request for a subpoena as a mere fishing expedition. In the response they noted KH’s privacy interests and concluded, “In the absence of a . . . concrete claim of evidence and basis in fact, such an action would only serve the non-permissible purpose of baseless inquiry of the victim and hoped for discovery of relevant circumstances” The written denial also contained the name and address of the clinic where KH had received treatment in 2004 and 2005. Far from supporting appellant’s position that this response rendered these records demonstrably unavailable, the response clearly left the door open to issuance of a subpoena by the Germans if the relevance of the requested material could be communicated to them. Thus litigating this issue would not have been futile. The written response from the Germans was not presented to the court-martial or included in the record of trial until it was enclosed as part of appellant’s R.C.M. 1105 post-trial submissions.

and necessary” standard for discovery contained in R.C.M. 703(f)(1) as opposed to the significantly more stringent R.C.M. 703(f)(2), consideration of which is equally necessary to the resolution of this matter on appeal. *Id.*

In the present case, the military judge denied the trial counsel’s motion in limine, in part, to provide the defense leeway to cross-examine KH about her prior mental health history. The military judge limited this cross-examination to the extent the defense counsel could tie the inquiry about her mental health history to relevant issues, such as her ability to recall or remember events, or her motive or ability to fabricate. Appellant never demonstrated to the military judge, either through cross-examination of KH or the government expert witness or argument, that KH’s 2004 and 2005 mental health records contained relevant information. Appellant’s contention that the military judge had a sua sponte duty to presume these records were not only relevant, but of such central importance to an issue that they were essential to a fair trial, fails in light of the defense counsel’s decision not to pursue this issue at trial through a motion for production or request for relief under R.C.M. 703(f)(3). Appellant offers no authority, nor do we find any, for the propriety of a sua sponte duty under these circumstances.

Appellant cites *United States v. Daniels*, 23 U.S.C.M.A. 94, 48 C.M.R. 655 (1974), as an example of a case where a military trial judge erred in proceeding with a case when an important witness, a young girl who engaged in carnal knowledge with the accused, was not amenable to compulsory process. In *Daniels*, the issue of this critical witness’ appearance at trial was not waived because it was the subject of a motion for appropriate relief by the defense, requesting the military trial judge to order the witness’ appearance at trial.

The defense counsel in *Daniels* argued there were no alternatives to this critical witness’ testimony. In contrast, appellant’s defense counsel in the instant case never made such an argument, and the military judge never had an opportunity to address this issue. Appellant’s case provided potential alternatives if these records could not be obtained. KH, the victim of the sexual assault, testified at trial and was subject to cross-examination. There is no indication in the record that appellant’s defense counsel ever requested a mental health expert or requested an independent mental health examination of KH to determine whether KH had any psychiatric issues or history that would call into question her ability to recall or remember events or her motive or ability to fabricate. Given the differences in these cases, we do not find *Daniels* controlling or persuasive.

Therefore, we do not find that appellant was denied the opportunity to obtain relevant and necessary evidence in this case, nor do we find error in the military judge’s failure to sua sponte order the records to be produced or to abate the proceedings. The military judge allowed the defense counsel to cross-examine KH

about her prior psychotherapy treatment, and appellant's defense counsel did not move the court for production of KH's prior mental health records nor did he request relief under R.C.M. 703(f)(2) in the event they were not produced.

Appellant also argued that the military judge erred when he granted the government's motion in limine, in part, to prevent the defense counsel from questioning KH about her refusal to release her medical records. Given appellant's waiver by not moving for production of these records and failure to establish the relevancy of KH's prior mental health records through other means, we conclude the military judge did not abuse his discretion or otherwise err in precluding defense counsel from asking KH why she refused to release the records. Based on the information contained in the record of trial, any questioning of KH about why she declined to voluntarily provide these records would likely invoke responses related to her privacy interests, as opposed to supporting an attack on her credibility. Defense counsel cannot consciously decide not to pursue the relevancy of these records and then attack the witness for refusing to voluntarily forfeit her privacy by providing them.

CONCLUSION

We have considered the record of trial, the assigned errors, the briefs submitted by the parties, the oral arguments by both parties on the assignments of errors raised, and the Petition for New Trial. The Petition for New Trial is denied. On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge KERN and Judge KRAUSS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court