

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
SIMS, COOK, and GALLAGHER  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Private First Class ROGER CRUZ**  
**United States Army, Appellant**

ARMY 20100132

21st Theater Sustainment Command  
Wendy Daknis, Military Judge  
Colonel Claes H. Lewenhaupt, Staff Judge Advocate (pretrial and addendum)  
Lieutenant Colonel J. Harper Cook, Acting Staff Judge Advocate (recommendation)

For Appellant: Captain Richard M. Gallagher, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Imogene M. Jamison, JA; Major Laura R. Kesler, JA; Captain Richard M. Gallagher, JA (on brief).

For Appellee: Captain Daniel H. Karna, JA (argued); Major LaJohnne A. White, JA; Major Thomas E. Brzozowski, JA (on brief).

9 July 2012

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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

GALLAGHER, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of absence without leave, disrespect toward a superior commissioned officer, disobeying a superior commissioned officer, making a false official statement, adultery, and breaking restriction in violation of Articles 86, 89, 90, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 889, 890, 907, and 934 (2006) [hereinafter UCMJ]. An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of aggravated sexual assault and forcible sodomy in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920 and 925. Appellant was sentenced to a dishonorable discharge, confinement for ten years, total forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved nine years and six months of confinement, credited appellant with 158 days of confinement credit against the sentence to confinement, and otherwise approved the adjudged sentence.

This case is before this court for review pursuant to Article 66, UCMJ. Appellant has raised three assignments of error, one of which merits discussion, but no relief.<sup>1</sup>

### **BACKGROUND**

Appellant and Mrs. MM's husband served in the same unit and deployed together. Appellant returned early from the deployment for medical reasons. Prior to the deployment, appellant purchased a computer from Mrs. MM's husband and picked it up from Mrs. MM's apartment. However, appellant did not encounter Mrs. MM while in the apartment.

On one occasion in April 2009, while her husband was still deployed, Mrs. MM went out drinking at several bars with friends. Over the course of several hours, Mrs. MM consumed approximately four glasses of beer and shared in the consumption of two pitchers of beer. Although this was not an unusual amount of alcohol for her to consume, Mrs. MM became intoxicated. Mrs. MM spoke briefly to appellant while at the final bar but her memory of her time at that final bar was incomplete. Subsequently Mrs. MM got into an argument with a former co-worker and Mrs. MM and her friends left the bar, dropping Mrs. MM off at her apartment. Mrs. MM successfully entered her apartment, put the leash on her dog, and took her dog outside to relieve itself.

While outside, Mrs. MM became upset about the argument, its possible ramifications, and her husband's absence. Appellant, who lived in an apartment building approximately 250 meters away from Mrs. MM's building, came upon Mrs. MM standing outside with her dog and inquired whether she was all right. Mrs. MM began to cry and he approached her, put his arms around her as if to comfort her, and then guided her to her apartment. At about this point she felt like she was observing these events from outside of her body. He took the key out of her hand and unlocked the door. Both entered the apartment where she took the leash off the dog, dropped it, took off her flip flops, and sat down on the couch. Appellant looked around the apartment and then used the bathroom. Mrs. MM remembers appellant leaving the apartment after using the bathroom and the door closing behind him. While in the apartment she felt as if another part of her was following appellant around the apartment while she remained seated on the couch. The next thing she remembers is being on her knees with appellant's penis in her mouth. Again she felt

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<sup>1</sup> DR. DAVID LISAK'S INADMISSABLE TESTIMONY VOUCHING FOR THE CREDIBILITY AND BELIEVABILITY OF THE ALLEGED VICTIM, MRS. MM, HAD A SUBSTANTIAL INFLUENCE ON THE FINDINGS WHERE THE GOVERNMENT'S CASE HINGED ON THE CREDIBILITY OF MRS. MM'S TESTIMONY BEFORE THE PANEL MEMBERS.

like she was an observer while he instructed her to keep performing oral sex. When she paused, he pulled her hair hard and pushed her mouth back onto his penis. She shut her eyes tightly and did not remember anything else until she woke up the next morning lying on the couch. She immediately contacted a friend and reported she had been sexually assaulted.

While testimony from other witnesses established that appellant spoke Spanish to Mrs. MM at the bar, Mrs. MM never identified the man who spoke Spanish to her at the bar as her assailant. Although Mrs. MM did not know who her assailant was, she was able to give a detailed description and assist in the development of a composite sketch. Eventually, appellant was identified when DNA test results from Mrs. MM's sexual assault kit were run through a national DNA database. Appellant was placed in a line-up and identified by Mrs. MM as her assailant. Appellant's DNA was present in both Mrs. MM's vagina and anus. Appellant stipulated as fact that he put his penis in Mrs. MM's vagina. In a sworn statement to the Criminal Investigation Command (CID), taken before appellant was a suspect, appellant described seeing Mrs. MM at the bar and stated that she appeared to be really drunk or on drugs. He also stated that after leaving the bar, he went home, woke up his wife and told her about the bar.

Mrs. MM had no recollection of the events which resulted in appellant's DNA being present in her vagina and anus. To help the members understand Mrs. MM's lack of memory, the government called Dr. Lisak, a clinical psychologist, as an expert witness in the area of psychological and neurobiological effects of trauma. Dr. Lisak testified about dissociation, fragmented memory, Post-Traumatic Stress Disorder (PTSD), and the "neurobiological response of freezing." On the basis of Military Rule of Evidence [hereinafter Mil. R. Evid.] 403, the military judge sustained objections to Dr. Lisak's testimony on behaviors and characteristics of sexual offenders and on behavior of rape victims. The defense specifically stated "[W]ith regard to a diagnosis of PTSD, whether the diagnosis is a proper diagnosis or not; he is a person who can make such a diagnosis, and the defense doesn't object to that." The defense did object to testimony about Mrs. MM demonstrating symptoms as being an impermissible comment on truthfulness. The military judge overruled the objection, stating

It is appropriate for Doctor Lisak to discuss these psychological phenomena and whether or not the victim appears to be displaying them. Of course, it is not appropriate for him to go to the ultimate conclusion to say that then because she displays those she therefore must have been sexually assaulted. So, please steer clear of going to that ultimate conclusion. But if we're talking about simply discussing what those phenomena are and whether or not she displays those, I'm going to allow it.

At trial, the defense did not object to testimony on the subject of malingering or the assessment method used to detect malingering. Dr. Lisak provided extensive testimony about his diagnosis of PTSD, including the different criteria and the symptoms Mrs. MM related experiencing that met those criteria.<sup>2</sup>

Finally, the following exchange occurred during the direct examination of Dr. Lisak in the government's case-in-chief:

Q. And, Doctor Lisak, just one other thing on PTSD. When you interviewed [Mrs. MM], did you make an assessment of malingering and that possibility?

A. Well, certainly, when I-- I spent 7 hours with her assessing her entire experience and everything that she could recall happening to her since that time. And part of that, of course, is assessing the credibility of what she is telling me. And there are many ways of doing this. There's the -- I think the primary one and the one that is really sort of the gold standard is-- [PTSD] is as-- You know, I've just spent an hour, more than an hour, probably going through all of the different symptoms and the different criteria that a person has to meet, you know, in order to meet this diagnosis. And even at that, I really haven't covered everything, there's more in my notes; and if we, you know, want to spend more time here, we could go over even more exhaustively. And that really is the benchmark of how you want to assess whether or not somebody is malingering because for somebody to malingering PTSD at that level of detail; to spend 7 hours describing not sort of going through "Here I have these symptoms," but describing their life and describing their behavior; and, me sitting there thinking, because I know PTSD, "That's a symptom. That's a symptom. That's a symptom." So that would be-- You know, you would have to have somebody who has, you know, made a-- I don't know how long you would have to study if you're not a clinical psychologist and not been trained; you would have to spend months studying the diagnosis and then coming up with a 7-hour narrative of how you're going to slip in these symptoms as you're talking about

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<sup>2</sup> The defense requested and received a limiting instruction on consideration of the out-of-court statements.

your life over the course of 7 hours. So that is the gold standard method of determining whether or not somebody is malingering, and she wasn't.

TC: One moment.

CDC: Your Honor----

MJ: Members of the panel, the testimony you've just heard from Doctor Lisak about his opinion as to whether or not [Mrs. MM] was truthful in her explanation of what she was experiencing should not in any way affect your decision and determination as to whether or not Mrs. MM was truthful on the stand today. Doctor Lisak cannot testify as to her credibility; that is a determination solely for you to make. And his opinion as to her credibility that day certainly does not go to her truthfulness, untruthfulness, or anything of the type. That is a determination for you to make alone. Do you understand that?

MEMBERS: [Affirmative responses.]

MJ: Defense, does that satisfy?

CDC: Thank you, Your Honor.

The defense extensively cross-examined Dr. Lisak on the fact that his testimony relied on his personal observations, experience and conclusions based primarily on her descriptions of her experiences and that he did not conduct any psychological testing even though pertinent psychological tests were available that could suggest malingering. Also on cross-examination, the defense explicitly elicited testimony as to what traumatic event formed the predicate for Dr. Lisak's PTSD diagnosis. Although hesitant to state a sexual assault was the traumatic experience because it was a legal determination, Dr. Lisak eventually agreed with defense that "her statement that she was sexually assaulted against her will is your predicate to even get into PTSD, correct?" Dr. Lisak rejected defense's attempt to specify that Mrs. MM said it was a "violent sexual act." All he would commit to was that "she described very specific reactions that she was feeling. She didn't characterize the act that way, she just described what happened." Dr. Lisak then concluded that what she told him was trauma that would qualify for PTSD. Defense also elicited testimony that Dr. Lisak's conclusion based on his research was that one in four women would be subjected to rape or attempted rape during their lives.

Lieutenant Colonel (Dr.) Marshall Smith, a forensic psychiatrist, testified for the defense as an expert in forensic psychiatry and refuted much of Dr. Lisak's testimony. Specifically, Dr. Smith testified about the occurrence of volitional acts while in an "alcoholic blackout"; his rationale for non-concurring in the use of dissociation in this case; the value of psychological testing and verification of traumatic events before a PTSD diagnosis; the need to assess malingering of symptoms when legal proceedings were involved; and the need to question whether a self-reported event occurred. Importantly, he testified that he did not concur in the diagnosis of PTSD and explained his rationale. He also testified that he had no opinion, one way or the other, as to whether Mrs. MM was malingering because she did not present with PTSD symptoms so there was no need to test for malingering. Dr. Smith criticized Dr. Lisak's "gold standard" method of assessing malingering and disputed Dr. Lisak's determination of the traumatic experience that formed the underlying basis for the PTSD diagnosis. Specifically, Dr. Smith noted that the point at which Dr. Lisak found Mrs. MM to begin dissociating due to the terror of "the event" was while outside during the comforting stage when Mrs. MM describes being comforted by appellant. Dr. Smith also noted Mrs. MM's memory loss began at the bar and the alleged dissociation began before even entering the apartment.

During her instructions to the members on findings, the military judge gave, *inter alia*, the following instructions on expert testimony:

You heard testimony from Doctor Lisak and Lieutenant Colonel Smith that Mrs. [MM] and her husband, Specialist [M], reported certain symptoms Mrs. [MM] was experiencing to Doctor Lisak and Lieutenant Colonel Smith. You may consider this information only for the limited purpose of evaluating the basis of the experts' opinions and for no other purpose whatsoever. Specifically, you may not consider this information for its tendency, if any, to show that Mrs. [MM] actually suffered from the reported symptoms. Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness can testify that the alleged victim's account of what occurred is true or credible, that the expert witness believes the alleged victim, or that a sexual assault occurred. To the extent that you believed that Doctor Lisak testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible. It may, however, be considered only for the limited

purpose of explaining why Doctor Lisak made the diagnosis he did of Mrs. [MM].

### LAW AND DISCUSSION

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007). The issue of whether the members were properly instructed is a question of law, which we review de novo. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003) (citation omitted). We review a military judge's decision to give an instruction for abuse of discretion and the correctness of instructions actually given de novo. *U.S. v. Ivey*, 53 M.J. 685, 699 (Army Ct. Crim. App. 2000).

There was no objection to the question posed by the trial counsel to Dr. Lisak about whether he had done an assessment for malingering pertaining to his PTSD diagnosis. However, immediately following the now complained of testimony, anticipating the defense counsel's budding objection to Dr. Lisak's testimony, the military judge provided a cautionary instruction to the members of the panel that Mrs. MM's credibility and truthfulness or untruthfulness were for them alone to decide. The defense acknowledged that the instruction satisfied their concerns and did not request to have the testimony stricken. Assuming the defense was objecting, any potential error was cured by the military judge's instructions.<sup>3</sup> *United States v. Eggen*, 51 M.J. 159 (C.A.A.F. 1999). Finally, assuming that admission of the complained of testimony was erroneous, we find that such admission did not materially prejudice appellant's substantial rights. Mil. R. Evid 103.

This is not a case where Mrs. MM's credibility was the only critical factor in the case. Substantial incapacitation, identity of the assailant, and the presence of appellant's DNA in Mrs. MM's anus were all contested issues that relied primarily on evidence independent of Mrs. MM's credibility. Strong independent evidence of appellant's guilt was introduced: appellant lied about his actions that evening, appellant stipulated he penetrated Mrs. MM's vulva with his penis between the hours of 0001 and 0130 at her apartment, appellant's DNA was found in Mrs. MM's vagina and anus, there was no evidence Mrs. MM had any prior relationship with appellant, and there was ample evidence Mrs. MM was intoxicated. Additionally, aside from the complained of testimony as to malingered symptoms of PTSD, testimony on dissociation, fragmented memory, PTSD and the "neurobiological response of freezing" was before the members to explain Mrs. MM's memory loss and actions.

The defense was not surprised by the testimony pertaining to Dr. Lisak's assessment of malingering and did not attempt to preclude such testimony. They were amply prepared to conduct an effective cross-examination and presented their

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<sup>3</sup> We are unconvinced that the defense was objecting to all of the now complained of testimony.

own expert to strongly contradict Dr. Lisak's diagnosis of PTSD and opinion on malingering. The government elicited very general testimony about "the experience" and "the event" which Dr. Lisak found induced terror, helplessness, fear, and a risk of either death or bodily injury necessary for Criterion A of the PTSD diagnosis. On cross-examination defense counsel introduced the express link that in Dr. Lisak's opinion the qualifying traumatic event was a sexual assault against Mrs. MM's will. Defense counsel continued that line of cross-examination, even after Dr. Lisak initially resisted such effort by stating it was a "legal determination." He declined to say that she said she was a victim of a nonconsensual sexual act.

Finally, the military judge provided repetitive, unobjected to, tailored cautionary and limiting instructions throughout the trial and again on final instructions as to determinations of credibility, truthfulness, expert testimony, intoxication, and use of statements made out of court for truthfulness. The defense challenged the correctness of the military judge's instructions about use of the expert's testimony for the first time during appellate oral argument. Accordingly, we find the defense waived any error in the instructions, absent plain error. *See* Rule for Courts-Martial 920(f); *Ivey*, 53 M.J. at 701. In the context of a plain error analysis, appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citation omitted).

We disagree that the military judge's instructions were in error. The military judge's instructions follow the guidance provided in *United States v. Arruza*, 26 M.J. 234, 238 (C.M.A. 1988) (testimony that an expert's opinion was premised on an assumption of victim truthfulness should be accompanied by cautionary instructions that the opinion is only relevant as it pertains to the diagnosis and truthfulness is for the members' determination). However, even if the military judge's instruction were in error as to the ability to consider Dr. Lisak's testimony for the limited purpose of explaining his diagnosis, we still do not find material prejudice to appellant's substantial rights for the reasons stated above. Article 59(a), UCMJ.

Dr. Lisak's testimony and the military judge's instructions, placed in context, did not materially prejudice appellant's substantial rights.

## CONCLUSION

On consideration of the entire record, the submissions of the parties, and oral argument, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge SIMS and Judge COOK concur.

FOR THE COURT:



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE  
Deputy Clerk of Court