

**UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Before  
**TOOMEY, RUSSELL, and CARTER**  
Appellate Military Judges

**UNITED STATES, Appellee**  
v.  
**Staff Sergeant PATRICK J. COSTELLO III**  
**United States Army, Appellant**

**ARMY 9500014**

**25th Infantry Division (Light)**  
**C. J. Tichenor (arraignment) and R. J. Hough (trial), Military Judges**

**For Appellant: William E. Cassara, Esq. (argued); Captain Norman R. Zamboni, JA (on brief).**

**For Appellee: Major Lyle D. Jentzer, JA (argued); Colonel John M. Smith, JA; Lieutenant Colonel Eva M. Novak, JA (on brief).**

**21 April 1997**

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**MEMORANDUM OPINION**  
and  
**ACTION ON PETITION FOR NEW TRIAL**  
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**RUSSELL, Judge:**

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of committing an indecent act with another<sup>1</sup> in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (1988)[hereinafter UCMJ]. The approved sentence is confinement for sixty months, forfeiture of \$300.00 pay per month for sixty months, and reduction to Private E1.

<sup>1</sup>The victim in this case is a ten-year-old girl. The appellant was charged with committing an indecent act with a child "with intent to arouse or gratify his lust or sexual desires." However, the panel members, excepting the language "with intent to arouse or gratify his lust or sexual desires," found him guilty of the lesser included offense of committing an indecent act with another.

This case is before the court for automatic review pursuant to Article 66, UCMJ, and on the appellant's Petition for New Trial. We have considered the record of trial, the petition, the briefs and oral arguments of the parties, and matters personally raised by the appellant pursuant to *United States v. Grostefon*.<sup>2</sup> The appellant asserts, inter alia, that the military judge twice erred to the prejudice of the appellant by allowing the panel to consider uncharged misconduct and by refusing to allow a defense expert to testify. We agree and reverse.<sup>3</sup>

### I. The Uncharged Misconduct

Over defense objection, the military judge allowed testimony that, six years prior to the alleged offenses, the appellant admitted he licked his three-year-old daughter's vaginal area.<sup>4</sup> We agree with the government's theory that this uncharged misconduct evidence may tend to disprove the defense of accident or to prove that the appellant acted with the intent to gratify sexual desire. However, we are satisfied that the limited probative value this evidence may have does not flow from any relevant similarity between it and the charged misconduct. Rather, its probity flows from its tendency to suggest that the appellant possesses a propensity to commit the type of crime described in the charged offenses, for the purpose of satisfying ingrained sexual curiosity or desire.

Moreover, we believe that whatever legitimate probative value this evidence might have is so slight that it is substantially outweighed by the danger that the uncharged misconduct would unfairly prejudice the appellant by depicting him as a pedophile acting in conformity with a character flaw. Inasmuch as we find this evidence is not legally and logically relevant to the facts at issue, it was barred under

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<sup>2</sup>*United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>3</sup>In light of our disposition of these issues, we need not address the other matters raised by appellant.

<sup>4</sup>On cross-examination, the appellant offered an innocent, albeit strange, explanation. He testified that he had licked his daughter's vaginal area after she had reported to him that someone, unnamed, had licked her "puddy." He explained that, after hearing her allegation, he licked his daughter in order to clarify exactly what had happened by demonstrating what he believed his daughter was alleging and then asking her if that was what had happened.

military rules of evidence in effect at the time of trial. Military Rules of Evidence [hereinafter Mil. R. Evid.] 403 and 404; cf. *United States v. Miller*, 46 M.J.63 (1997); and *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).<sup>5</sup>

## II. The Expert Witness

The military judge refused to permit the testimony of Dr. Ralph Underwager, a potential expert witness offered for the purpose of opining that children, in general, are susceptible to various forms of suggestion, and that the questioning techniques used by the investigators and counselors in this case were so suggestive that the child victims' statements were either embellished or fabricated.

Rather than focusing on the witness' qualifications or the relevance and reliability of the science underlying his opinion, the prosecutor mightily attacked his character. Her zealous personal attack was based on the witness' writings and interviews in which he voiced considerable reservation about the reliability of child witnesses in general and advocated relaxation of criminal sanctions imposed by child consent laws. The prosecutor buttressed her ad hominum arguments with examples of other child psychology experts who believed strongly that the defense witness' relatively libertine views were not supported by scientific studies.

To his credit, the military judge did not base his adverse ruling on the points made by the main thrust of the prosecutor's argument. Rather, he found that the possible defense expert testimony should be excluded because the conclusions of the scientific community regarding the effect of suggestive interview techniques on children were so lacking in consensus that the probative value of such testimony would be outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. However, we are satisfied that there is no basis in fact for the judge's finding. Such expert evidence is widely recognized as relevant, reliable evidence that is "helpful" to juries evaluating the coerciveness of factors to which

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<sup>5</sup>A different determination might be made under Mil. R. Evid. 414. Mil. R. Evid. 414 arguably mitigates the effect of Mil. R. Evid. 404 to allow evidence of the accused's "propensity to commit . . . child molestation offenses." 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994)(statement of Rep. Molinari). However, Mil. R. Evid. 414 did not take effect until 6 January 1996, after the trial of this case.

<sup>6</sup>The appellant was acquitted of committing indecent acts upon other children.

children had been subjected. Such information is generally beyond the knowledge of nonprofessionals. See *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992); *United States v. Rouse*, 100 F.3d 560 (8th Cir. 1996). This is similar in scientific validity to "syndrome" testimony associated with rape and sex abuse trauma, which enjoys wide judicial acceptance.

Contrary to the government's claims, we are completely satisfied from this record that the defense did not offer their potential expert for the purpose of testifying regarding his personal belief that child consent laws should be relaxed, that all child victims were liars, or that the child victims in this case were liars. Even if it were also offered for some of these unlawful purposes, the correct remedy would be for the military judge to limit the scope of Dr. Underwager's testimony to permissible matters, rather than to exclude it completely. See *United States v. Brown*, 45 M.J. 514 (Army Ct. Crim. App. 1996).

Finally, we do not agree with the government's contention that Dr. Underwager's testimony should have been barred because cross-examination of his controversial views would have depicted a man with profound bias against child victims of sex crimes. While it is theoretically conceivable that a qualified expert may be shown to be so inherently biased that he cannot form a legitimate unbiased expert opinion, the fact that an expert has reached a scientific conclusion that is popularly repugnant is not relevant to the issue of admissibility. We believe that the issue of whether an expert's opinion may have been tainted by his personal view of the universe is a matter best left to cross-examination.

### III. The Decision

The military judge abused his discretion by allowing unfairly prejudicial uncharged misconduct into evidence. Moreover, inasmuch as the government's evidence centered on the credibility of a single child witness whose testimony was not clear and consistent, the exclusion of Dr. Underwager's testimony challenging suggestive questioning techniques materially prejudiced the appellant. The individual and cumulative effect of these errors resulted in an unfair trial. Accordingly, the findings of guilty and the sentence should not be affirmed. Article 66, UCMJ.

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The findings of guilty and the sentence are set aside.<sup>7</sup> The same or a different convening authority may order a rehearing. If the convening authority determines that a rehearing is impracticable, he may dismiss the Charge and Specification.

Senior Judge TOOMEY and Judge CARTER concur.

FOR THE COURT:

  
WILLIAM S. FULTON, JR.  
Clerk of Court

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<sup>7</sup>In light of our decision, we need not decide the merits of appellant's petition for a new trial.