UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman AARON K. BLACKMAN
United States Air Force

ACM 35862

22 February 2006

Sentence adjudged 6 January 2004 by GCM convened at Lackland Air Force Base, Kelly Annex, Texas. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was tried by officer members sitting as a general court-martial at Lackland Air Force Base, Texas. Contrary to the appellant's pleas, he was found guilty of attempted carnal knowledge and attempted sodomy of a child under the age of 16 years, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The members sentenced the appellant to a bad-conduct discharge, confinement for 12 months, and reduction to E-1. On 9 March 2004, the convening authority approved the findings and sentence as adjudged. The appellant has submitted one assignment of error: That the military judge erred by failing to properly instruct the members during sentencing in accordance with

Rule for Courts-Martial (R.C.M.) 1005(e)(4). Finding no prejudicial error, we affirm the findings and sentence.

Background

The appellant engaged in Internet and telephonic conversations with an individual whom he believed to be a 13-year-old girl named "Josie" on 23 and 24 April 2003.[1] These conversations included several references by the appellant indicating that he wanted to meet "Josie," engage in sexual intercourse with her, and perform cunnilingus upon her. During the course of an Internet conversation, the appellant sent "Josie" a picture of what he claimed was his penis inserted into the vagina of his ex-girlfriend. Additionally, during Internet and telephonic conversations, he described for "Josie" what the phrase "going down on her" meant and shared his fondness for performing that sexual act upon a female. These conversations eventually led to the appellant driving to a location in San Antonio, Texas, where he planned to meet "Josie" and begin an evening he hoped would result in sexual intercourse and cunnilingus with her. Unbeknownst to the appellant, "Josie" was not an actual person, but a fictional persona adopted by two San Antonio police officers, in the course of their duties investigating Internet crimes targeting minors. When the appellant arrived at the agreed upon meeting place on 24 April 2003, he was arrested by the San Antonio police. At the time of his arrest, the police found four condoms in his possession.

At trial, the military judge instructed the members on the law and procedures they were to follow in determining an appropriate sentence; however, the military judge failed to instruct the members that they should not impose a higher punishment in reliance on the possibility of any mitigating action being taken by the convening or higher authority. The trial and the defense counsel had no objections to the sentencing instructions given and requested no additional instructions.

Sentencing Instructions

This Court reviews the completeness of required instructions de novo. *United States v. Miller*, 58 M.J. 266 (C.A.A.F. 2003). Required instructions on sentencing includes, "[a] statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." R.C.M. 1005(e)(4); *see also* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (15 Sep 2002). Although trial defense counsel did not object to the military judge's instructions, or call the missing instruction to the military judge's attention, the waiver rule is "inapplicable to certain mandatory instructions," such as the one required under R.C.M. 1005(e)(4). *See Miller*, 58 M.J. at 270. We therefore conclude that the military judge

[1] The appellant was 21-years-old at the time of these conversations.

erred by failing to instruct the court members as required by R.C.M. 1005(e)(4). That, however, does not conclude our inquiry, for we are required to examine the sentencing instructions in their entirety and test for prejudice. *Miller*, 58 M.J. at 271. We note the appellant faced a maximum punishment of a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, a fine, and reduction to E-1. The prosecution argued for a bad-conduct discharge, confinement for 30 months, and reduction to E-1. Given the serious nature of the appellant's misconduct and the facts and circumstances of this case, including the matters submitted in extenuation and mitigation, we find the sentence adjudged by the members to be favorable. The appellant was not prejudiced by the absence of the instruction required by R.C.M. 1005(e)(4). *See Miller*, 58 M.J. at 271 (no prejudice where sentence was "favorable" to the appellant).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator