UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KOREY A. BOYD
United States Air Force

ACM 37924

18 January 2013

Sentence adjudged 24 February 2011 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Donald R. Eller Jr.

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

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

At a general court-martial composed of officer members, the appellant pled guilty to indecent acts, indecent exposure, enticing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, receiving child pornography, possessing child pornography, and communicating indecent language to a child, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. After the military judge accepted his guilty plea and entered findings of guilty, the court sentenced him to a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the specifications of communicating indecent language fail to state offenses because each omits the required terminal element for Article 134, UCMJ, offenses. Finding no error that materially prejudices the appellant, we affirm.

Background

During December 2008, the 20-year-old appellant began communicating over the Internet with CB, a 12-year-old girl living with her mother and active duty Army stepfather. Her profile on a social networking site indicated she was 17 years old, as did her emails to him. The email conversations were initially causal, but eventually progressed to expressing feelings of love for each other and discussing sexual matters. They exchanged photographs of each other, with the appellant eventually sending her nude photographs of himself and asking her to reciprocate. She did, by sending him photographs of herself in her underwear.

By May 2009, the appellant was concerned CB was younger than 17 years old, due to her appearance in the photographs and the fact that her parents were frequently "grounding" her. He looked CB up on another social networking site, where she was identifying herself as 13 years old. She admitted this was her current age and that she had lied to him. When she apologized, he told her she would have to earn back his trust.

The two then began communicating via text messages. These started casual but progressed to the appellant discussing marriage and both expressing love for each other. The appellant again began requesting explicit photographs from CB. In response, she sent him photographs with her appearing fully nude. Although initially hesitant to comply with his request for close-ups of her vaginal area, she did so. The appellant also sent CB photographs of his erect penis, including several where he appeared with his Airman Battle Uniform pants pulled down.

The appellant next requested that CB make video-recordings of herself. She was hesitant but he eventually talked her into making one of her masturbating. After receiving it, the appellant, in crude, sexually explicit language, critiqued the act. He then asked her to modify her actions and make another video-recording, which she did. Soon thereafter, the appellant and CB also engaged in a "phone sex" conversation, where the appellant led her through a graphic series of descriptions of sexual activities.

Sufficiency of the Article 134, UCMJ, Specification

For his conduct during the "phone sex" conversation and his sexually explicit critique of the video-recording, the appellant was charged with five specifications of communicating indecent language to CB.[1] Each specification omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.

[1] Four of the specifications covered four sentences that the appellant spoke during the same telephone call. After the Government "merged [these] specifications . . . for the purposes of sentencing," the parties agreed the maximum sentence for these four specifications was two years of confinement. The appellant acknowledged he was waiving any further multiplicity claim by entering into a pretrial agreement that required him to "waive all waivable

Whether a charged specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). The failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). However, in the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id.* at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offenses at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct was "service discrediting," given the subject matter of the conversations and CB's age. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

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motions." The members were then told to consider these four specifications as "one offense" when fashioning their sentence.

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court