UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER J. CLARK
United States Air Force

ACM 37499

30 April 2010

Sentence adjudged 20 May 2009 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: William E. Orr, Jr.

Approved sentence: Bad-conduct discharge, confinement for 18 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Nicholas W. McCue (argued), Colonel James B. Roan, and Major Shannon A. Bennett.

Appellate Counsel for the United States: Captain Joseph Kubler (argued), Colonel Douglas P. Cordova, and Lieutenant Colonel Jeremy S. Weber.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial convicted the appellant of one charge and specification of attempting to communicate with a child under the age of 16 certain indecent language and one charge and specification of using the internet to knowingly transfer sexually explicit electronic images to a person he believed had not attained the age of 16, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. The convening authority approved a sentence of a bad-conduct discharge, confinement for 18 months, reduction to

E-1, and a reprimand.[1] The appellant asserts: (1) it was plain error for the trial counsel to elicit testimony that the appellant did not respond verbally when arrested and then to rely on this testimony during closing argument and (2) the military judge committed constitutional error that was not harmless beyond a reasonable doubt when he overruled the defense counsel's objection during the trial counsel's improper rebuttal argument.[2] Finding no error, we affirm.

Background

The Investigation

The appellant was an aircraft structural maintenance journeyman assigned to Holloman Air Force Base (AFB), New Mexico (NM). On 25 April 2008, while in his on-base house, the appellant accessed Yahoo instant messenger and contacted a person identified as a 13-year-old student named "Suzie" from Clovis, NM. Within the first 20 seconds of chatting, "Suzie" told the appellant she was 13 years old and the appellant responded "cool." The appellant was actually chatting with Detective PN, a law enforcement agent from Clovis, NM, who was working online in an undercover capacity posing as "Suzie." The appellant and "Suzie" chatted online for the next 75 minutes. During the course of their conversation, the appellant talked with "Suzie" in a sexual manner, asked if she had a web cam, and sent her seven electronic images which included one photo of the appellant blowing a kiss, two sexually suggestive photos of a woman, and four photos of external male and female genitalia and sexual intercourse.[3] Toward the end of their chat, the appellant asked "Suzie" where her parents were, and she responded they were gone for the weekend. The appellant asked "Suzie" for her address and phone number in Clovis, NM and asked if he could come over to her house. The appellant asked "Suzie" if she wanted to have sex. The address "Suzie" provided was actually for a decoy house in Clovis, NM used by law enforcement in the undercover operation. After the appellant signed off of Yahoo instant messenger, Detective PN traveled to the decoy house and waited for the appellant to arrive. The appellant did not show up at the decoy house and did not call or contact "Suzie" again.

Later that night, the Air Force Office of Special Investigations (AFOSI) at Holloman AFB received a call regarding the appellant's internet activities. Special Agent (SA) BG obtained a search authorization from the military magistrate to search the appellant's on-base house. When SA BG and other law enforcement agents went to the appellant's house to execute the search authorization, the appellant answered the door and was taken outside where he was placed in hand restraints and detained. Prior to

[1] The panel adjudged a sentence of a bad-conduct discharge, one year and six months of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.
[2] On 6 April 2010, this Court heard oral argument on both issues at Hamline University School of Law in St. Paul, Minnesota as part of our Project Outreach Program.
[3] The sexual intercourse photographs were of the appellant and an unidentified woman.

rights advisement but while being detained by law enforcement, SA BG told the appellant he was under investigation for sexually communicating with a minor. The appellant slumped his shoulders and dropped his head, chin to chest. He did not say anything.

As the agents conducted the search, the appellant was left with Senior Airman (SrA) EC, one of the security forces patrolmen who accompanied SA BG to the appellant's home. The appellant made a number of unsolicited comments to SrA EC, saying he knew he communicated with a minor on the internet, he knew she was underage, and he suspected she was a cop because of the way she was talking. SrA EC told the appellant that he needed to keep quiet.

After searching his on-base house, AFOSI agents escorted the appellant to their detachment on Holloman AFB. SA BG read the appellant his rights under Article 31, UCMJ, 10 U.S.C. § 831. The appellant waived his rights, elected not to request an attorney, and agreed to answer questions. SA BG again explained to the appellant why he was under investigation. The appellant did not say anything. Next, SA BG asked the appellant if he had been online that night. The appellant responded he had been online with four or five individuals and then said he "knew who [the agent] was talking about; a 13-year-old girl." The appellant discussed his online chat with the 13-year-old girl and described the sexually explicit photographs he sent along with one photograph of him blowing a kiss. Several times during the interview the appellant stated that "Suzie" was 13 years old. At no point during the interview did he say that he thought "Suzie" was a cop.

After the interview, the appellant agreed to write a statement. In his statement he wrote:

> The 25th of April 2008 I was talking to a 13 yr old from Clovis NM. I started of [sic] talking about who is she and where she's from. Then I asked sexuall [sic] questions such as you ever been with a guy. She said yes and I asked how old was he. Then I asked more questions such as you want to see pictures. She said sure. So I showed her 7 to 8 pictures. 3-4 were of a girl on a bed. Covered in 2 and showing in the other 2. Then I also showed 3 intercourse pictures. 1 nonintercourse but still nude pics. Then I asked here [sic] where she lived and her phone number. . . . Of the pics I showed the 13 yr old only one was of me blowing a kiss.

SA BG contacted the appellant's first sergeant to escort the appellant from the detachment following the interview. As they waited for the first sergeant to arrive, the appellant spontaneously remarked to SA BG that they "had caught him red-handed" and that "he knew the person he was talking to was a cop."

The Trial Proceedings

At the court-martial, the defense theory was the appellant knew he was not communicating with a child; rather, he believed he was chatting with a cop. The government's position was the evidence overwhelmingly established that the appellant believed he was talking to a 13-year-old child. The government called SA BG to discuss the investigation and interview of the appellant. At one point in the testimony, SA BG described the appellant's response to being informed that he was being investigated for sexually communicating with a minor. SA BG testified "he didn't say anything, he kind of just put his head down and kind of just looked down." SA BG demonstrated how the appellant's shoulders slumped, how he dropped his head and his chin hit his chest. The trial counsel asked SA BG if the appellant said anything and SA BG responded, "No." The defense did not object.

Later, SA BG described the interview of the appellant at the AFOSI detachment. SA BG testified that after the appellant waived his rights, elected not to request an attorney, and agreed to answer questions, he again explained to the appellant why he was under investigation. The trial counsel questioned SA BG: "And did [the appellant] say anything in response to you this time?" SA BG responded, "No, he didn't."[4] However, SA BG testified that after he asked whether or not the appellant had been on the internet that night, the appellant began to discuss his internet chat with the 13-year-old girl.

Because both issues raised by the appellant on appeal deal with comments made during opening statements and closing arguments, the relevant portions of such arguments are highlighted below.

The trial counsel's opening statement covered seven pages in the record. When describing the search by SA BG, the trial counsel made the following statement: "You will hear how when confronted with being suspected of criminally speaking or communicating with a minor with sexual language, the accused's shoulders slumped and his head dropped; chin to chest."[5] The defense counsel made no objection.

The defense counsel's opening statement covered three pages in the record. He stated:

> And I ask you to pay very close attention to what he said, what he did, and what they're going to talk about throughout this investigation; about what

[4] On appeal, the appellant highlights this question and response as one example of how his constitutional rights were violated. Based on our review of the record, this question and answer occurred after rights advisement and the appellant's waiver of those rights. Assuming, arguendo, this question occurred prior to rights advisement, we note the defense did not object to this question or answer at trial.

[5] During opening statement, the trial counsel made no comments such as the appellant said nothing or the appellant did not respond.

> Senior Airman Clark thought. And what the evidence is going to show is that repeatedly they relied a lot and they talked about—a lot about what Senior Airman Clark talked about. What he told investigators and whatnot. But they left some parts out. And those parts are key and I ask you to pay close attention to that. What the evidence is going to show is that every time he talked to anyone about this he explained he thought it was a cop. Sounded like a cop. I thought it was a cop. Repeatedly he talks to investigators about that.

The trial counsel's findings argument covered 14 pages in the record. In discussing the search by SA BG, the trial counsel argued:

> And before he's interviewed with [AFOSI], they go to his house. Remember that testimony? They go to his house, [SA BG] walks up to the accused, and quite clearly the accused was looking into his eyes. They looked. [SA BG] walked up to him and said, you are under suspicion of criminal communication with a minor. What is the accused's response when he's confronted with this fact? Does he say, what? Does he say, no? What does he do? Sometimes body language is just as powerful as verbal confessions. When he was confronted with this disgusting crime that he just committed, his shoulders slump and he puts his head down. That is a defeated position. He's confronted and he's caught. . . .
>
> He's taken to [AFOSI], he's placed in a room, agents walk into the room, and again they confront [him]. You are under suspicion for criminally communicating with a minor in a sexual manner. Second time. Hours later at this point he's confronted with what he had just done. And what is his response? Nothing. He doesn't respond to that comment. But what he does say, with very general questions by the agents, that he was chatting online that night. I know who you're talking about. And quite clearly, on more than one occasion, he identifies cuti3pi3 as how old? 13.

The defense counsel made no objections during this argument by the trial counsel.

The defense counsel's findings argument covered seven pages in the record. The argument was peppered with "I thought it was a cop" and "It sounded like a cop."[6] The relevant section for the issues is as follows:

> Again look at all the evidence. What is it that Airman Clark said right from the start? "I thought it was a cop." And he didn't say that because

[6] From our review of the entire record, we note there were only two spontaneous statements made by the appellant despite the defense counsel's reference to "I thought it was a cop" and "sounded like a cop" seventeen different times during closing argument.

> someone told him that really was a cop you were chatting with. Because what he was being told is that really was a 13-year-old girl. That really was a 13-year-old girl and what is his response? "It sounded like a cop; I thought it was a cop." And you know what, he was right. He really was.

The trial counsel's rebuttal argument covered five pages. The relevant section for the issue raised is as follows:

> Come on, members. Nobody asked you to leave your common sense at the door. No one. The defense says the first thing he says is, "I knew it was a cop." Was that the first thing he said? Or was the first thing he said by body language, a defeated position when he's confronted with speaking with a minor. Does he say, wait a minute [SA BG]? Hold on there, just a sec. I was just kidding. I actually knew it was cop when I sent that language. Does he say that? I accuse you of speaking sexually with a child. I accuse you of speaking sexually with a child. No comments, no denial, no response. What he does give—

At that point, the trial defense counsel interjected, "I am going to object, Your Honor. [The appellant's] been informed that he's accused of a crime and [the trial counsel] is holding it against him that he invokes his rights to remain silent." The military judge overruled the objection based on context, but cautioned the trial counsel to be careful. The trial counsel then continued by stating, "Yes, sir. In the context, members, is when confronted with a crime he puts this head down and his shoulders slump."

Discussion

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. "The law generally discourages trial counsel's presentation of testimony or argument mentioning an accused's invocation of his constitutional rights . . . ." *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (citing *United States v. Robinson*, 485 U.S. 25, 32 (1988)) (noting the Supreme Court has recognized the mention of an accused's invocation of rights is a fair response to claims made by the defendant or his counsel); *see also United States v. Paige*, 67 M.J. 442, 448 (C.A.A.F. 2009) (finding it is permissible for the trial counsel "to comment on the defense's failure to refute government evidence or to support its own claims"); *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (noting the trial counsel "is permitted to make 'a fair response' to claims made by the defense, even when a Fifth Amendment right is at stake"). It is a constitutional error to present evidence of an accused's post-apprehension silence as substantive evidence of guilt and then to comment on this evidence in closing argument. *United States v. Alameda*, 57 M.J. 190, 198-99 (C.A.A.F. 2002).

We examine a trial counsel's remark "within the context of the entire court-martial." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (noting "the focus of [an appellate court's] inquiry should not be on words in isolation, but on the argument as 'viewed in context'" of trial developments). *Cf.* Mil. R. Evid. 304(h)(3) ("A person's failure to deny an accusation of wrongdoing [while] . . . under official investigation . . . does not support an inference of an admission of the truth of the accusation."); Rule for Court-Martial 919(b) ("Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.")

"Fifth Amendment protection extends to testimonial communications. Certain acts are considered to be non-testimonial communications and are unprotected. . . ." *United States v. Cook*, 48 M.J. 64, 66 (C.A.A.F. 1998). The Supreme Court has distinguished demeanor evidence from testimonial evidence, holding the former does not engender Fifth Amendment protections. *See Pennsylvania v. Muniz*, 496 U.S. 582, 591-92 (1990); *see also Alameda*, 57 M.J. at 199 (recognizing demeanor evidence differs from mere silence). Demeanor evidence may be admissible to show the accused's consciousness of guilt and non-testimonial acts are subject to comment. *United States v. Blaney*, 50 M.J. 533, 548-49 (A.F. Ct. Crim. App. 1999) (recognizing as demeanor evidence testimony that the appellant dropped his head and nodded several times when the appellant was informed he was under apprehension for sexual assault); *see generally United States v. Wright*, 47 M.J. 555, 558 (N.M. Ct. Crim. App. 1997) (holding demeanor evidence is admissible and comment on such evidence does not violate the Fifth Amendment.)

"Whether there has been improper reference to an accused's invocation of his constitutional rights is a question of law that we review de novo." *Moran*, 65 M.J. at 181. "Issues involving argument referring to unlawful subject matter are reviewed *de novo* as issue of law." *Alameda*, 57 M.J. at 198. When there are no objections at trial, this Court reviews for plain error. *Paige*, 67 M.J. at 449. The plain error standard is met if the appellant establishes: "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Id.* (quoting *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007))). Once the burden is met, the burden then shifts to the government to demonstrate the constitutional error was harmless beyond a reasonable doubt. *Id.* When the defense counsel objects to comments made by the trial counsel during argument, this Court first must determine whether the alleged error was of constitutional magnitude to properly assess the effect of those comments. *Alameda*, 57 M.J. at 199. If we find there was constitutional error, then "we must be satisfied beyond a reasonable doubt that the error was harmless." *Id.* at 199-200 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

In this case, the testimony that the appellant's shoulders slumped and his head dropped, chin to chest, in response to being told of the investigation for his sexual communication with a minor is proper demeanor evidence. This non-testimonial communication does not engender Fifth Amendment protections. Unlike the accused in *Alameda*, the appellant's response was not mere silence, but instead was a clear physical reaction without words. As our superior court noted in *Cook*, such demeanor evidence is admissible to show the accused's consciousness of guilt and it is a proper subject of comment by counsel. *See Cook*, 48 M.J. at 66. However, the trial counsel in this case went one step further and asked the witness if the appellant said anything. This question and the witness's response went beyond demeanor evidence; therefore, we must determine whether this exchange was a comment on the appellant's Fifth Amendment right to remain silent. Arguably the question "what did he say" crossed the line. The trial counsel also made passing reference to the appellant's lack of verbal response during his argument; however, it is clear from the context of the argument that the comment was in fact focused on the demeanor evidence.

The defense counsel aggressively argued the defense theory that the appellant thought "Suzie" was a cop. The defense counsel remarked that "right from the start" the appellant said "he thought it was a cop." During rebuttal, the trial counsel made a fair response to the defense claims. The trial counsel argued the first thing the appellant said when confronted with his crime was through his body language when "he puts his head down and his shoulders slump." Six lines out of a five page rebuttal skirt possible Fifth Amendment implications, but it is clear the trial counsel's focus was on the demeanor evidence, not on the appellant's exercise of his right to remain silent. The military judge acknowledged as much when he overruled the defense objection. We find the military judge did not err in his ruling. In the context of the entire record, we conclude the testimony and argument of counsel was not error.

Assuming, arguendo, that the testimony and argument by the trial counsel crossed into the area protected by the Fifth Amendment, we must examine the record to determine if the constitutional error was harmless beyond a reasonable doubt.[7] After thoroughly reviewing the entire record, we are satisfied beyond a reasonable doubt that any such error is clearly harmless. We find there is no possibility that any such error contributed to the appellant's conviction.

The evidence in this case is overwhelming. The appellant went online and chatted with "Suzie" for 75 minutes. Within 20 seconds of chatting, "Suzie" told the appellant she was 13 years old and the appellant responded "cool." The appellant used sexually explicit language and sent "Suzie" sexually explicit photographs. He sent her a picture of

[7] We need not conduct a plain error analysis for testimony and comments to which the defense did not object because we conclude the issue can be resolved by moving directly to the ultimate issue of whether the constitutional error is harmless beyond a reasonable doubt. Additionally, we are not addressing whether or not the issues would be waived entirely by the appellant's failure to object at trial.

himself blowing a kiss. The photographs of the sexual intercourse were of the appellant and an unidentified woman. He asked if her parents were home, got her phone number and address, and asked if he could come over for sex. When told he was being investigated for sexually communicating with a minor, his shoulders slumped and his head dropped, chin to chest. He waived his right to remain silent. During the hour-long interview by the AFOSI agents, he never once stated he thought "Suzie" was a cop. Instead, he stated on at least three occasions that he thought he was talking to a 13-year-old girl. He wrote a sworn statement admitting his crimes. He referenced the 13-year-old girl two times in the one-page handwritten statement. He spontaneously stated "I thought she was a cop" or "she sounded like a cop" only twice.

We are not persuaded the appellant believed he was talking to a cop. Given the length of the conversation, the sexually explicit content of the conversation, the photographs sent by the appellant, and the appellant's confession, it simply is incredulous that he could have believed "Suzie" was a cop. He believed he was talking to a 13-year-old girl. The testimony and argument regarding the appellant's lack of a verbal response during apprehension and investigation were isolated comments in this two-day hotly litigated trial. Testimony and comments about the appellant's physical response was proper demeanor evidence. The trial counsel made only passing references to the appellant's lack of verbal responses in his argument and rebuttal, which covered 19 pages of the record. The defense counsel's argument covered six pages and in those six pages he referred to the two spontaneous comments made by the appellant 17 different times. After reviewing the entire record of trial, including the witness testimony and trial counsel's entire argument in context, we find these limited references did not impact the conviction of the appellant. Therefore, we find any such error to be harmless beyond a reasonable doubt.

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). The approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court