UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant STEPHEN P. GUEDRY
United States Air Force

ACM 37998

21 March 2013

Sentence adjudged 08 July 2011 by GCM convened at Travis Air Force Base, California. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane McCammon.

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

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, consistent with his pleas, of wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 2 years, forfeitures of all pay and allowances, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority reduced the confinement to 18 months and approved the remainder of the sentence as adjudged. On appeal, the appellant asserts plain error occurred when the military judge took judicial

notice of a Senate Judiciary Committee report. Finding no error that materially prejudices the appellant, we affirm.

Background

The appellant pled guilty to wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct, in both photographic and video-recording form, on divers occasions between 1 November 2009 and 8 October 2010. Using a peer-to-peer file sharing program, the appellant searched other users' hard drives for image and video files, using terms descriptive of children engaging in sexual activity, intentionally trying to find this material. When his search yielded images and video files containing child pornography, he downloaded them onto his own computer. The appellant also conducted Internet searches to successfully find additional images of child pornography.

Using a software program, a civilian detective working on a multi-state task force in California discovered that someone at a particular Internet Protocol (IP) address was viewing or downloading images of child pornography. Using a search warrant issued to the Internet service provider, the detective determined the IP address was assigned to the appellant and surveillance of his residence revealed the appellant was in the Air Force. As a result, in October 2010, the appellant was interviewed under rights advisement by agents from the Air Force Office of Special Investigations (AFOSI). He consented to a search of his laptop computer.

Following a forensic analysis, 75 files were found on his laptop that were matched to known depictions of actual minors engaged in sexually explicit conduct, according to records maintained by the National Center for Missing and Exploited Children, along with over 700 other images that appeared to the investigators to be child pornography but were not matched to known victims. The appellant admitted that when he possessed these images, he knew they were visual depictions of minors under the age of 18 engaged in sexually explicit conduct. He also admitted that possessing these images was both prejudicial to good order and discipline and of a nature to bring discredit on the armed forces.

Admission of Senate Report

During the Article 39(a), UCMJ, 10 U.S.C. § 839(a), session where sentencing evidence was discussed, the prosecution moved the military judge to take judicial notice of a two-page document entitled, "Senate Report 104-358 – Child Pornography Prevention Act of 1995," contending this report constituted "legislative facts" which can be judicially noticed as "domestic law" pursuant to Mil. R. Evid. 201A(a). The Senate Report included statements that the children used in the pornographic images will suffer current and future physical and psychological harm, all children will suffer current and

future harm due to its representation of children as sexual objects, child pornography presents an even greater threat to the child victim than sexual abuse or prostitution and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of their children, and "child pornography is a particularly pernicious evil, something that no civilized society can or should tolerate."

The trial defense counsel, stating he had read this Court's decision in *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), did not raise an objection. The trial counsel marked the Senate Report as a prosecution exhibit and provided it to the members. The military judge advised that because the trial counsel had done that, he would not provide a judicial notice instruction to the panel. Neither party objected.

As part of the Government's sentencing case, the trial counsel called the lead AFOSI agent to testify about how the appellant's misconduct was discovered and how his computer was examined by the forensic lab. In response to a question from trial counsel about "the nature of child pornography" and "the victim impact . . . on the people who are in the videos," the agent testified:

> Every time a video is watched, a victim is re-victimized every time. There are some victims out there that choose to be contacted every time their video is viewed or when someone goes to trial, they want to know about it. They have Victim Impact Statements out there where they will describe what they went through when they were victims. . . . The videos or pictures are on the internet and they never come off. Every time someone views it, it is traded between a lot of different people. People trade videos every day; they never come off the internet.

The trial counsel successfully admitted into evidence the names of nine victims who had been identified as appearing in the images possessed by the appellant. Additionally, the panel members were given affidavits signed by several of those victims (or their family members) which described the impact these victims suffered from having their images forever available and accessible on the Internet.

In his sentencing argument to the panel, the trial counsel referenced the Senate report several times. Noting the Senate had found child pornography presents "a clear and present danger to all children and no civilized society should tolerate it," he argued "[t]his conduct should be punished and it must be deterred . . . two years confinement will deter others." The trial counsel also noted the report's statements that the children in the images suffer an impact from the sexual molestation and the availability of the images on the internet, and the images are used as a tool to seduce children into performing sexual acts. The trial counsel also argued, inter alia, the appellant should be punished for receiving sexual gratification from what was happening to these children.

The trial defense counsel also referenced the Senate Report in his sentencing argument:

> Now I want to point out the Senate report that you have in front of you . . . and once again I'm not trying to minimize, but it says in that document that the things that happened in those videos [are] a photographic record of a crime in progress. Some child is getting molested, exploited, and so on and so forth. Not trying to minimize what he did, but he was not the predator in that room. That sick person that's with those kids, not the same level. Sergeant Guedry . . . didn't do those things to those kids. And so as much as the government wants to put him in the same exact category and say that he victimized the kids the exact same amount, Sergeant Guedry is not that person. . . . [H]e has been found guilty of possession of child pornography. He is not being convicted of child molestation, rape of a child, so on and so forth. . . . Yes, we know there is victim impact. There is absolutely victim impact. I don't know how much victim impact from those girls being out there other than the fact that . . . they know for the rest of their lives that there's pictures out there of them. Absolutely. And that's wrong, that's bad that it's out there . . . - - but you can't necessarily hold him responsible for the molestation. He's not the same person as that.

Discussion

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error. *United States v. Kasper*, 58 M.J. 14, 318 (C.A.A.F. 2003) (citation omitted). In the context of a plain error analysis, the 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. *See United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). We test the admission of evidence by the military judge for plain error based on the law at the time of appeal. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). *See United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal -- it is enough that an error be plain at the time of appellate consideration") (citations omitted)).

This Court recently held this Senate Report is inappropriate for judicial notice under the Military Rules of Evidence. *United States v. Lutes*, __ M.J. __, ACM 37665 (A.F. Ct. Crim. App. 31 January 2013). Thus, admitting this document through the use of judicial notice was error that was clear and obvious. We find further plain error in the military judge's failure to issue a limiting instruction advising the members they could use this document only in considering the direct impact these pornographic images had

on the child victims portrayed in them. *United States v. Anderson*, 60 M.J. 548, 556-57 (A.F. Ct. Crim. App. 2004) (holding evidence of child pornography's impact on the children used in its production is admissible under Rule for Courts-Martial 1001(b)(4)).

Under the plain error test, after finding plain or obvious error, we test for prejudice. That is, "We test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citation omitted). Here, we find the erroneous admission of the document and the trial counsel's argument did not have a substantial influence on the adjudged sentence in the present case, and thus there was no material prejudice to the appellant's substantial rights.

Here, the trial counsel submitted affidavits from several of the individuals who appeared in the images possessed by the appellant, describing the negative impact the continued downloading of these images have on them and their well-being. The majority of the language in the Senate Report exhibit was similarly about the impact such children suffer from participating in the making of such pornography and the effects of its existence on them. Additionally, the trial defense counsel muted the impact of the Senate Report when he pointed out the appellant was not responsible for the production of these images. Given this and the images the appellant possessed, we are confident the erroneous admission of this document and trial counsel's argument did not substantially influence the panel's judgment on the appellant's sentence. Furthermore, having considered the character of this offender, the nature and seriousness of his offenses, and the entire record of trial, we find his sentence appropriate. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[1]

[1] 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)). *See also 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).

Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court