UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BENJAMIN J. HUBBLE
United States Air Force

ACM 35519

28 February 2005

Sentence adjudged 12 February 2003 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

We have examined the record of trial, the assignments of error, and the government's reply thereto. The appellant's initial assignment of error alleges that his pleas of guilty to possession and transmission of child pornography were improvident for three reasons. First, he contends that the military judge did not establish a factual predicate for the pleas. Among other things, the appellant alleges that the military judge's failure to define the word "transmit" left him with "a lack of understanding of the meaning and effect of his pleas." We have examined the entire record and conclude that, despite this failure, the appellant "knew the elements [of the offense], admitted them

freely, and pleaded guilty because he was guilty." *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992). *See also United States v. Fisher*, 58 M.J. 300 (C.A.A.F. 2003); *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2003). We conclude that the appellant provided facts to the military judge sufficient to support the pleas of guilty. *See United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

Second, the appellant alleges that the plea is improvident because the military judge did not clear up inconsistencies that arose during the providence inquiry. One such inconsistency is in the manner in which the two specifications were drafted. Specification 1 of the Charge alleged divers possession of "visual depictions of *a minor* engaging in sexually explicit conduct." Specification 2 of the Charge alleged divers transmission of "visual depictions *of minors* engaging in sexually explicit conduct." The appellant states that because the same evidence underlies both offenses, the two specifications are "inconsistent with each other" and "are mutually exclusive."

While there is no obvious reason for the difference in wording of the two specifications, we find that trial defense counsel did not seek a bill of particulars or otherwise object to the specifications prior to entering a plea of guilty for the appellant. We conclude that this aspect of the appellant's assignment of error has been waived. Rule for Courts-Martial (R.C.M.) 905(e). Even if not waived, however, we conclude that the specifications are sufficient to place the appellant on notice as to the offenses charged and to preclude subsequent prosecution for the same offenses. *United States v. Gallo*, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 418 (C.A.A.F. 2001). After examining the entire providence inquiry and the stipulation of fact, we find no inconsistency that "reasonably raised the question of a defense . . . or [that was] patently inconsistent with the plea in some respect." *United States v. Roane*, 43 M.J. 93, 98 (C.A.A.F. 1995) (citations omitted).

Third, the appellant alleges that the pleas are improvident as being contrary to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). However, unlike the accused in those cases, this appellant was not charged with violating 18 U.S.C. § 2252A(a)(5)(B), popularly known as the Child Pornography Prevention Act (CPPA). Rather, his misconduct was alleged to have violated clauses 1 and 2 of Article 134, UCMJ, 10 U.S.C. § 934. We conclude, therefore, the fact that the appellant never stated during the providence inquiry that the victims in the pictures were actual children does not affect the sufficiency of his plea. *See United States v. Mason*, 60 M.J. 15, 19-20 (C.A.A.F. 2004); *United States v. Irvin*, 60 M.J. 23, 25-26 (C.A.A.F. 2004). *See also United States v. Anderson*, 60 M.J. 548, 554-55 (A.F. Ct. Crim. App. 2004), *pet. denied*, No. 04-0670 (22 Nov 2004).

In light of the above, we find no "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997)

(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). We hold that the military judge did not abuse his discretion by accepting the guilty plea. *See United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

The appellant's second assignment of error asserts that the number of errors alleged to have been committed during the trial require setting aside the findings and sentence under the doctrine of cumulative error. *United States v. Walters*, 16 C.M.R. 191, 209 (C.M.A. 1954). We conclude, however, that none of the errors, either individually, or in their "combined effect," was "so prejudicial so as to strike at the fundamental fairness of the trial." *United States v. Dollente*, 45 M.J. 234, 236 (C.A.A.F. 1996) (citing *United States v. Parker*, 997 F.2d 219, 222 (6th Cir. 1993)). *See also United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). Therefore, we hold that the doctrine of cumulative error does not require setting aside the findings or sentence in the case sub judice.

Next, the appellant alleges that the trial counsel's sentencing argument was erroneous in two respects: (1) by arguing in favor of a bad-conduct discharge on the ground that the appellant "cannot fulfill the military standards"; and (2) by describing one of the minors depicted in the prosecution's evidence as looking like she "does not want to live anymore." The trial defense counsel did not object to either comment; such failure to object constitutes waiver. R.C.M. 1001(g). Accordingly, we test for plain error. *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

We conclude the first comment was improper, but the second was not. After having examined the photograph in question, we conclude the second comment was a reasonable characterization of the evidence. However, even if both were erroneous, we conclude that they did not operate to the material prejudice of the substantial rights of the appellant, especially in view of the fact that this was a judge alone case. *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004); *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Therefore, we conclude that neither of these comments constituted plain error. *See Powell*, 49 M.J. at 464.

The appellant's final assignment of error urges this Court to modify the findings as to Specifications 1 and 2 of the Charge to conform to the proof. Both specifications allege that the misconduct in question occurred "at or near Buildings 627 and 648" on the installation. However, neither in the providence inquiry nor in the stipulation of fact is there any reference to this first building—rather, all the misconduct was said to have occurred at or near Building 648. To the extent that this is error, we conclude that we can correct it by excepting from the findings of both specifications the phrase "Buildings 627 and 648," substituting therefor the phrase "Building 648." To the excepted words, we find the appellant not guilty. To the substituted words, we find the appellant guilty. We affirm the remainder of the specifications and the Charge.

Having modified the findings, we must now reassess the sentence. We conclude that, even if the military judge had excepted the language referenced above, he would have imposed the same sentence as the one he actually adjudged. *See United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Therefore, we conclude that we do not need to reduce the sentence, which we find appropriate for the offenses committed. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c).

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court