UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON E. MEGUIN
United States Air Force

ACM 37966

26 July 2013

Sentence adjudged 09 March 2011 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Katherine Oler.

Approved Sentence: Dishonorable discharge, confinement for 5 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James; Captain Shane A. McCammon; and William E. Cassara (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial, the appellant was convicted, contrary to his pleas, of abusive sexual contact of a child and communicating a threat, in violation of Articles 120 and 134, UCMJ; 10 U.S.C. §§ 920, 934. Officer and enlisted members sentenced him to a dishonorable discharge, confinement for 5 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends the evidence is factually and legally insufficient to prove his guilt of both specifications and that his sentence is inappropriately severe. We also specified the issue of whether the threat specification brought under Article 134, UCMJ, fails to state an offense because it fails to allege the terminal element.

Background

In 2009, before he joined the Air Force, the appellant met JG, a 14-year-old boy from Georgia, while playing an on-line interactive game that allowed players to talk to each other and send messages. The appellant was 18 years old and living in New York. JG told the appellant that he was 14 years old. The two communicated through this game on a daily basis, often for 4-5 hours per day. The two talked about sports, games, and women. The appellant described some of his sexual encounters. He also bought JG items related to the Internet game.

After the appellant enlisted in the Air Force in 2009 and was assigned to an Air Force base near JG's home, the two met in person and spent time together for several months, with the knowledge of JG's divorced parents. The charges in this case stemmed from two incidents that occurred during the summer of 2010 while the appellant was with JG in his parents' homes.

Based on an allegation that the appellant had touched JG's penis, he was charged with aggravated sexual abuse of JG and abusive sexual contact with JG. These specifications were charged in the alternative and the appellant was ultimately convicted of the latter offense. He was also convicted of communicating a threat to JG.

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant contends the evidence is not factually and legally sufficient to sustain his conviction for engaging in sexual contact with JG because the conviction is based solely on the testimony of an untrustworthy witness who only caught a glimpse of the alleged misconduct.[1]

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (quoting *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a

[1] The appellant also alleges the evidence is factually and legally insufficient to sustain his conviction for communicating a threat. Because we are setting aside that specification on other grounds, we do not address this issue.

presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *Turner*, 25 M.J. at 324). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The elements of abusive sexual contact with a child are that, during the pertinent time frame: (1) the appellant engaged in sexual contact with JG by using his hand to touch JG's penis; and (2) JG had attained the age of 12 but had not yet attained the age of 16. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.b.(9) (2008 ed.). In pertinent part, "sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia . . . [or] groin . . . of another person . . . with an intent to . . . arouse or gratify the sexual desire of any person. *Id.* at ¶ 45.a.(t)(2).

During the pendency of their interactions, the appellant told JG he felt like JG was the his "little brother," frequently told JG he loved him, and sent him what JG felt were "love poems." JG believed the appellant wanted to be more than friends with him, but JG was not interested in anything besides friendship.

At some point prior to his enlistment in the Air Force, the appellant sent JG a nude photograph that showed him holding his penis. Telling JG he wanted to visit and would set him up on a date with a girl, the appellant asked JG to send a picture of his penis. JG sent the photograph to the appellant's phone but never agreed to the appellant's offer for an all-expenses-paid trip to New York. At one point, JG talked to the appellant about trying to "get laid" and the appellant told JG that if he was still a virgin when he turned 18, "you'll always have me, little buddy."

The appellant's first duty assignment was to Moody Air Force Base, Georgia, near where JG lived. JG moved between his divorced parents' homes on an alternating basis. During his first month in Georgia, the appellant stayed with JG in one of the homes almost every weekend. Refusing the offer of a guest bedroom, the appellant slept on the floor of JG's room and once asked to sleep in JG's bed, but the child refused. During these visits, the appellant and JG would spend almost the entire weekend together with the knowledge of JG's parents. The two would play games, go to the movies, bowl, or walk around the mall. The appellant subsidized all their activities.

In May 2010, the appellant was at JG's father's home with JG and his 14-year old cousin, TG. The appellant and children stayed up late playing video games in the living room. TG fell asleep on the couch. At around 0200-0300 hours, JG and the appellant lay down on separate mattresses on the floor near the couch where TG was sleeping.

JG fell asleep wearing shorts, underwear, and a T-shirt. He awoke sometime later to find the appellant had his arm around JG. JG then became aware he had ejaculated in his underwear while he was asleep, something he had not experienced before. (To explain this, the defense expert in pediatrics testified that males often experience nocturnal emissions without any stimulation and while staying asleep.)

TG testified that he awoke at some point in the night and saw the appellant's hand "resting on" JG under the blankets "around his waist area." He went back to sleep then got up later in the night to use the bathroom. Two semi-lit televisions shone some light into the room. When he left the bathroom, TG saw JG lying asleep on his back with the appellant close to him, lying on his side. The two were covered by a blanket and it appeared to TG that the appellant was masturbating JG with a "shallow" up and down motion. TG asked the appellant what he was doing, and the appellant giggled and pulled his arm back. TG laid on the couch for 10-15 minutes to make sure the appellant went to sleep before he did. TG testified that he did not wake JG up because he was afraid of the appellant and that he waited several weeks before telling JG what he had seen.

The defense counsel extensively cross-examined TG on several areas: what he claimed to have witnessed, several inconsistent and false statements he made to investigators and at the Article 32, UCMJ, 10 U.S.C. 832, investigation, his role in selling prescription medication he stole from his mother, and falsely implicating a friend in that scheme. The defense aggressively cross-examined JG in a similar manner.

In addition to the two boys, the Government called a board-certified psychologist as an expert in sexual abuse. She testified that children react in a variety of ways when they have been subjected to sexual abuse, depending on their age, developmental level, and relationship with the abuser. According to the expert, children with a relationship with their abuser almost always delay reporting the abuse, children who report abuse often make piecemeal disclosures about the abuse, and boys generally disclose less than girls. She also described "grooming" behaviors where a perpetrator conditions a child to accept sexual contact, sometimes starting by giving a child attention and time in a way that bonds the child to the adult and decreases the likelihood the sexual contact will be reported.

Given the totality of the evidence presented at trial, including the history of the appellant's interactions with JG prior to the incident, and, after making allowances for the fact that we did not personally observe the witnesses (including JG and TG), we are convinced beyond a reasonable doubt that the appellant engaged in abusive sexual

contact with JG. We find the evidence sufficient to convince us, and the reasonable fact finder, that the appellant did indeed engage in this conduct.

Failure to State an Offense

The appellant was charged under Article 134, UCMJ, of wrongfully threatening JG to "go outside or I will put you in the dirt" approximately a week after the sexual contact. The panel convicted the appellant of the following substituted threat: "If you say that again I will break your neck." The appellant alleges that the specification should be set side and dismissed because it failed to allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2). We agree.

Whether a charge and specification state an offense and the remedy for such error are questions of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); Rule for Courts-Martial 307(c)(3).

Because the appellant did not complain about the missing element at trial, we analyze this case for plain error and in doing so find that the failure to allege the terminal element was "plain and obvious error that was forfeited rather than waived." *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012). *See also United States v. Gaskins*, 72 M.J. 225, 232 (C.A.A.F. 2013). In the context of a plain error analysis of defective indictments, 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. *Id*. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). In the plain error context, "the defective specification alone is insufficient to constitute substantial prejudice to a material right." *Id*. at 215 (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)).

Therefore, to find sufficient notice of the element and thus no prejudice, reviewing courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (quoting *Cotton*, 535 U.S. at 633; *Johnson v. United States*, 520 U.S. 461, 470 (1997)). If so, the charging error is considered cured and material prejudice is not demonstrated. *Id*. at 217.

Our superior court has stated we cannot find sufficient notice of the terminal element on such bases as: (1) witness testimony describing the underlying conduct of the

offense, even if it does so in a manner that would be legally sufficient to prove the terminal element; (2) the Government's theory of criminality being introduced during its closing argument or the findings instruction; (3) evidence of defense counsel's general awareness of the terminal element. *United States v. Goings*, 72 M.J. 202, 208 (C.A.A.F. 2013). Without more, affirming on any or all of these bases is error under both *Fosler* and *Humphries* because these scenarios do not answer the relevant question of whether the accused was on notice as to which clause or clauses of the terminal element he needed to defend against. *Id.* at 208.

Here, the Specification as charged did not allege either terminal element. The Article 32, UCMJ, Investigating Officer's report lists both clauses of the terminal element as a requirement for the offense but contains no discussion of what evidence does or could support that element in this case. The trial counsel did not mention its theory of criminality in its opening statement and the first mention of the terminal element clauses occurred in the military judge's instructions.

Early in JG's mother's testimony, the trial counsel asked whether she felt uncomfortable about her son talking to the appellant. She responded affirmatively, saying she was concerned because of the appellant's age and because he did not know the appellant. When the defense objected on hearsay and relevancy grounds, the trial counsel responded that her testimony relates to how she felt about the two interacting with each other. Although the military judge sustained the hearsay objection and directed the trial counsel to move on, the trial counsel returned to the topic several minutes later, asking JG's mother why she let the appellant spend time with her son. JG's mother replied: "At first I was skeptical about it, but when I learned he went into the military—into security forces—I allowed him to come to the house."

After the military judge instructed the panel on the elements of the offenses, the trial counsel argued the following:

> [Element] five that under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces. The relevant commission [sic] here is of a nature to bring discredit upon the armed forces.
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> We have an active duty member who is spending time with a child in this community. Her [sic] parent testified that part of the reason she felt safe letting him come over and spend time with her son was that he was in the Air Force. And how does he use that trust? He abuses that trust. He had access to this child, and threatened and now the parent, a member of the community has had to come and turn to the Air Force for protection. What the accused did in threatening [JG] was service discrediting conduct.

The record does not clearly demonstrate that the appellant was put on notice prior to findings argument that the Government intended to prove that his conduct was service discrediting or that the defense knew it was defending against that theory of criminality. *See Gaskins*, 72 M.J. at 234.

When considered in context, we do not find JG's mother's testimony to be sufficient direct evidence of the terminal element so as to notify the appellant of the Government's theory of criminality. To the contrary, the trial defense counsel's objection to this line of questioning indicated his belief that the mother's feelings about the appellant spending time with her son were irrelevant, the trial counsel's response to that objection did not notify the defense that this "fact" was going to be the proof of the Government's theory of criminality for the threat specification, and the military judge's sustaining of the defense's objection validated the trial defense counsel's belief that the evidence was not relevant to any issue that would be decided by the panel.[2] Furthermore, JG's mother did not testify that she believed the appellant's conduct in communicating a threat to her son brought discredit to the armed forces, or that she even understood that the reputation of the Air Force was relevant to any offense in the case. Under the circumstances of this case, we decline to extrapolate from her testimony that she would also have testified that she believed the reputation of the Air Force had been discredited by the appellant's action.[3] *See Gaskins*, 72 M.J. at 233 (a claim that it is "intuitive that the bad act discredited the military runs contrary to long-established principles of fair notice").

In sum, we can find nothing in the record that reasonably placed the appellant on notice of the Government's theory as to which clause of the terminal element of Article 134, UCMJ, he violated. Given the mandate set out by our superior court in *Humphries* and *Gaskins*, we are compelled to set aside and dismiss the Article 134, UCMJ, Specification.[4]

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[2] We recognize that, while questioning JG's mother during the sentencing phase of the trial, the civilian defense counsel elicited from her that she had told him during an interview the weekend before trial that her opinion of the Air Force had declined "not so much because of the offenses but because of the runaround [she felt] like the government's given [her]" and that her disenchantment with the Air Force "wasn't so much an effect of the offense" but "more of just feeling like the government had not handled this case very well." The government argues we should consider this exchange as proof the defense counsel was "well aware of direct evidence of 'service discrediting' conduct before trial and was prepared to address this issue." We decline to adopt that position. We note the record is not clear on the circumstances of this pretrial exchange between the witness and the defense counsel. We find this equivocal reference to a pretrial interview is, at most, evidence of the defense counsel's general awareness of the terminal element and, as such, is insufficient notice of the terminal element and cannot serve as a basis for affirmance of the finding of guilt. *United States v. Goings*, 72 M.J. 202, 208 (C.A.A.F. 2013).

[3] *See supra* note 2.

[4] Because we are setting aside the communicating a threat specification, we do not address his contention that this specification is multiplicious with the assault specifications or constitutes an unreasonable multiplication of charges.

Sentence Reassessment

Having found error regarding the threat specification, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, our Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1988). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08. Under this standard, we have determined that we can discern the effect of the error and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

Here, the members were informed that the maximum sentence for the appellant's offenses included 18years of confinement. Three years of that maximum sentence was attributable to the Article 134, UMCJ, Specification, so this is not a "dramatic change in the penalty landscape." *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Under the circumstances of this case, we are convinced that, absent this error, the panel would have imposed and the convening authority would have approved a sentence no less than a dishonorable discharge, confinement for 4 years and 6 months, reduction to E-1 and forfeiture of all pay and allowances.

Additionally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, his record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. Ap. 2006), *aff'd*, 65 M.J. 35, (C.A.A.F. 2007). We find that this reassessed sentence is appropriate in this case and is not inappropriately severe.

Conclusion

The finding of guilt as to Additional Charge II and its Specification is SET ASIDE AND DISMISSED. The remaining findings and sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.

Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).[5] Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[5] 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, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (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).