UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JOSHUA M. O'FARRELL
United States Air Force

ACM 37630

18 June 2013

Sentence adjudged 17 October 2009 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Vance H. Spath.

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

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Major Andrew J. Unsicker.

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

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of three specifications of attempting to commit an indecent act with a person he believed to be under the age of 16 and one specification of attempting to communicate indecent language to a person he believed to be under the age of 16, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 1 year, reduction to the grade of E-1, and a reprimand.

The appellant raises 14 issues for our consideration, only four of which merit specific discussion: (1) Whether the military judge erred by allowing the prosecution to introduce uncharged evidence that the appellant possessed child pornography on his computer and engaged in chats with persons under the age of 16 to prove the charged offenses; (2) Whether the trial counsel improperly argued that the burden of proof should shift to the appellant; (3) Whether the military judge erred by refusing to give a mistake of fact instruction as requested by the trial defense counsel; and (4) Whether the appellant was deprived of his right to speedy post-trial review.[1] Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

Detective ES was an adult police officer responsible for investigating individuals who solicit sex from minors over Internet. As part of her duties, Detective ES created a Yahoo profile with the name Ashley Baker and portrayed herself as a 15-year-old girl from Molalla, Oregon. Using the screen name "funner4ashlie," Detective ES would enter various Yahoo adult chat rooms and respond to individuals who contacted her. Detective ES testified that in order to enter the adult chat room, she was required to certify that she was over the age of 18, although she did not have to provide independent proof of her age.

Beginning 31 January 2008, the appellant entered a Yahoo adult chat room entitled "Romance and Relationships" using the name "americanfun4u" and initiated a private chat with "funner4ashlie." The chat logs introduced at trial showed that within approximately 4 minutes of beginning their conversation, "funner4ashlie" indicated that she was a 15-year-old female. At one point, the appellant asked "funner4ashlie" to send him a picture. Detective ES sent the appellant a photo of an adult woman that had been age regressed to appear as if she were 15. The conversation continued off-and-on for several hours and included numerous comments of a sexual nature. Eventually, the appellant invited "funner4ashlie" to view his webcam. After Detective ES accepted the invitation, the appellant began to masturbate on the webcam, such that Detective ES could observe the appellant's conduct. The appellant and Detective ES engaged in five other chat conversations over the next two months. On two of these occasions, Detective ES observed the appellant masturbating. During each incident, Detective ES was able to see what the appellant was doing and documented his actions through a screen capture recording program.

[1] Issue 4-14 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Uncharged Misconduct

The appellant argues that the military judge abused his discretion by permitting trial counsel to discuss evidence that the appellant may have had a prior online discussion with a 14-year-old girl and also possessed teen-related pornography. We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if it's decision is influenced by an erroneous view of the law. *Id.* Based on the circumstances of this case, we find the military judge did not abuse his discretion by permitting the trial counsel to discuss these issues in order to test the basis of the expert's opinion.

Trial counsel gave the appellant pre-trial notice that it intended to offer evidence showing the appellant had engaged in prior online sexual conversations with women of varying ages, including girls under the age of 18, as well as evidence of teen-related pornography found on the appellant's computer. Trial defense counsel objected to introduction of the evidence. The military judge did not admit the evidence pursuant to Mil. R. Evid. 404(b), but stated the Government would be given wide latitude to introduce the evidence to show predisposition if the defense raised the issue of entrapment as part of its case.

Ms. Carol Peden, a forensic computer expert testified for the defense and stated that she examined the appellant's computers for evidence indicating the appellant communicated with minors. Trial counsel objected after the defense counsel asked the witness:

> Now in regards to this particular case, the chats of "funner4ashlie," "americanfun4u," in other words, the two identifiers, one, Ashley, one being, Sergeant O'Farrell, I'm going to ask you, did you find anything on either one of those computers that would indicate that Sergeant O'Farrell is out hunting down [cut off by trial counsel's objection] anybody under 16 . . . years old.

The military judge ordered an Article 39(a), UCMJ, 10 U.S.C. § 839(a), hearing before the witness could answer the question. Trial counsel stated:

> I have no problem for the witness to identify what is on the computer. My problem is, I've seen other evidence that's been provided by the computer expert that may make opinions as to the character of the accused, likelihood of trolling for minors, basically, characteristics of whether this person was out actively looking for minors or not looking for minors. . . .

> . . . The other thing is, and I'll make the motion now, is if some of this evidence does get out there potentially as 404(b) evidence that has been provided notice to the defense and which we will obviously cross-examine if it does come out, and we can take that up once the defense counsel is done with their direct examination, specifically, what the [G]overnment will likely or obviously get into.

The military judge responded in part, "With regard to the 404(b), counsel, you've both prepared your case, if the door is opened, trial counsel, you are welcome to ask questions about it, just ask for a 39(a) [s]ession beforehand so we can address it without court members here."

After the witness returned to the stand, the defense counsel asked, "Did you find anything . . . to be child pornography?"

> A. No, I did not.
>
> . . . .
>
> Q. Did you find any evidence at all that he was going to children's chat lines?
>
> A. No, I did not.
>
> . . . .
>
> Q. . . . [D]id you find any other evidence that he was chatting with any individuals younger than 16 years old?
>
> A. I didn't see chats between "americanfun4u" and any other user that stated they were under 16, but I saw a chat by itself, "bp4unow," which was also identified in the discovery. And in that one "bp4unow" states they, I believe, were 14. But it didn't show it as an interactive chat. It was also in unallocated file space, so I had just a fragment of the chat, so I did not see who the interaction was actually with.
>
> . . . .
>
> Q. And "bp4unow," on that particular chat, did you see any chats between Sergeant O'Farrell and that person in the computer?
>
> A. I do not believe that I did. I believe . . . I just saw the fragment showing "bp4unow."

During cross-examination, Ms. Peden was asked:

> [TC:] . . . You just mentioned that one of the other forensic experts that looked at the computer found what they believed to be child pornography.
>
> A. Correct.
>
> Q. . . . Would you agree that he found approximately eight images that were suspected of being child pornography?
>
> A. I personally did not see which images he selected, so my knowledge came from reading his forensic report.
>
> Q. And you would agree there were eight in his forensic report.
>
> A. I believe so.
>
> . . . .
>
> Q. And moving on, Ms. Peden, I want to talk to you a little bit about the other chats that the accused had, in particular, as you referenced, "bp4unow." In that chat you said that you saw pieces of the chat; is that correct?
>
> A. Correct.
>
> Q. And you would agree with me, though, in the pieces of the chat, she identified herself as a 14-year-old girl from Mississippi?
>
> A. That's what the text said.
>
> Q. And, although, I think the defense counsel asked you, you didn't see responses from "americanfun4u," the accused, there were a number of posts from "bp4unow."
>
> A. Correct.
>
> . . . .

> CIV DC: Your Honor, I would object to asking the witness what somebody else is thinking and proposing who would be talking on something that the [G]overnment has not presented.
>
> MJ: Defense counsel, I'm going to overrule the objection. Unfortunately or fortunately, you presented it during your direct examination. You asked her what she searched for on the computer. You asked her specifically about the "bp4unow" fragments. The [G]overnment is testing the basis for her opinion. At this point, I'm overruling your objection.
>
> I will instruct the members on how they can consider this testimony when we do get to instructions.

The testimony then continued:

> [TC:] . . . in the chats, in your understanding of "bp4unow," does it indicate at any time that she said she wasn't a 14-year-old girl?
>
> A. [] the fragment that I saw, I don't know how many lines, but it was a fairly short amount of text, and it was in the unallocated file space, so I don't know very much detail about it, other than I saw "bp4unow" and the textual data that was there. I can't say much more about it.
>
> . . . .
>
> Q. You indicated that there wasn't child pornography images on the computer, did you -- but you did find teen-related pornography.
>
> A. Teen, but there was no way to determine exactly the age. It could have been 18, 19, 17 ----

Immediately following Ms Peden's testimony, the military judge gave the members the following instruction:

> I'm going to give you a couple of preliminary instructions to assist, though. And that is, one, based on the charge sheet, Staff Sergeant O'Farrell is certainly not charged with the receipt of or any charge to do with child pornography in the legal sense. I will instruct you later on how to deal with the testimony about that.
>
> In large part, what you're going to hear is, because Ms. Peden is an expert, counsel are allowed to test the basis of her opinion in a variety of

> ways that they might not necessarily be able to do with another type of witness, to help explain or cross-examine her findings.
>
> During her testimony she also referenced having read things in discovery and in various reports. Again, expert witnesses can do that as they prepare for trial to give you their expert opinions. But what they're reading is hearsay and you can't consider it for the truth of the matter, you can only consider it as it supports or contradicts her opinions.
>
> Now I'm going to put that in a much better framework for you later, but I want you to keep those in mind, given the nature of the testimony we just heard.

The military judge and both counsel later engaged in extensive discussions concerning instructions to the members. The issue of predisposition was debated at length and the military judge accepted input from both counsel. Ultimately, without defense objection, the military judge instructed the members as follows with regard to permissible use of the uncharged misconduct:

> You heard testimony from Ms. Peden that she relied on things she read in paper discovery for the basis of some of her opinions. You may consider this information only for the limited purpose of evaluating the basis of the expert's opinion and for determining the weight to give this expert's opinion and for no other purposes whatsoever.
>
> . . . .
>
> You may consider the evidence offered, if any, that the accused . . . may have had fragments of another on-line screen name's chat messages on his computer that indicated the person was 14 years old; may have had some images on his computer of individuals who were approximately 17 and 18 year olds; and may have visited web pages with the term "teen" in them for the limited purpose of its tendency, if any, to prove that the accused specifically intended to engage in chats or masturbate on a web camera in front of a person under the age of 16 years of age, and to rebut any contention that the accused's participation in the offense charged was the result of entrapment.
>
> You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged.

We find the military judge did not abuse his discretion in allowing the trial counsel to discuss the appellant's prior online discussions and his possession of teen-related pornography. Trial defense counsel brought up the issue of entrapment and disposition solely through the direct examination of the defense's computer expert. Prior to Ms. Peden's testimony, the Government had not elicited information regarding chats the appellant may have had with minor children or the existence of teen-related pornography on his computer. The defense attempted to show that the Government lured the appellant into committing a crime by showing that he did not look at child pornography or have other discussions with minors. This opened up the door for the prosecution to use specific evidence to refute the claim. *United States v. Pruitt*, 43 M.J. 864, 869 (A.F. Ct. Crim. App. 1996) (recognizing that "[i]f an accused asserts an entrapment defense, the prosecution may offer specific instances of the accused's conduct to show predisposition"), *aff'd*, 46 M.J. 148; *United States v. Bryant*, 3 M.J. 9, 10 (C.M.A. 1977) ("There is no question that evidence of acts of uncharged misconduct, if accompanied by appropriate instructions, is admissible to demonstrate an individual's predisposition to commit the given offense once the defense of entrapment is interposed."). Moreover, the military judge made it clear that if the appellant raised an entrapment defense during trial, the prosecution would be given wide latitude to introduce this predisposition evidence.

The military judge properly instructed the members regarding the use of predisposition evidence. The members were told they could consider the evidence the accused may have had an on-line chat with a person who was 14 years old and possessed pictures of teenagers on his computer only to evaluate the expert's opinion and for determining the weight to give her opinion and for no other purposes. The military judge did not abuse his discretion on this matter. We further note that in his findings argument, the trial counsel made only a brief mention of the uncharged misconduct, focusing instead on whether the appellant believed he was conversing with a 15-year-old girl. The record of trial makes clear the legal and factual sufficiency of the appellant's conviction on the charged offenses. If, in fact, the military judge erred by permitting discussion of the uncharged misconduct, we find the error harmless beyond a reasonable doubt.

Improper Burden Shift

At the conclusion of the Government's sentencing case, trial defense counsel requested a mistrial, belatedly claiming that the trial counsel's findings argument had improperly shifted the burden of proof when the trial counsel looked at the appellant and said "the government is not on trial, Staff Sergeant O'Farrell is." The military judge denied the defense motion. On appeal, the appellant resurrects this contention. He points to other trial counsel statements to support his claim: "Normal people can commit crimes." When referencing the appellant's demeanor, trial counsel stated during the court-martial: "I'm sure you've observed him throughout the court for the last few days -- he has a lot to lose; the other witnesses don't. He is on trial here, the other witnesses aren't." The appellant argues that the trial counsel's comments "convey a two-fold

message to the members. First, that [the] appellant's testimony was not credible and [second] that Appellant has something to prove here through his witnesses and the [G]overnment does not." We do not find the appellant's argument persuasive.

Because trial defense counsel did not make a timely objection, the issue is waived absent plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). Under the plain error standard, an appellant must show, "(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.* (internal quotation marks and citation omitted). An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009).

We do not find error in this case, plain or otherwise, therefore the issue is waived.

First, the appellant testified at trial, putting his credibility at issue before the members. Trial counsel could properly comment upon his credibility and any potential bias that could impact his testimony. *See United States v. Ruiz*, 54 M.J. 138, 144 (C.A.A.F. 2000) ("Trial counsel was not focusing on appellant's silence but instead was attacking the credibility of what appellant claimed he did say. This was perfectly appropriate cross-examination and argument.")

Second, the military judge properly instructed the members that the Government always carried the burden of proving the appellant's guilt beyond a reasonable doubt. He further explained that if the members found any inconsistency between counsels' argument and the instructions, the members were required to follow the military judge's instruction. After a thorough review of record, we are convinced that the trial counsel's remarks when taken in context did not shift the Government's burden.

Mistake of Fact

At trial, the appellant testified that he thought he was engaging in role-playing with "funner4ashlie" and that throughout the chat sessions he believed she was an adult. He informed the members that he knew "funner4ashlie" was an adult based on the context of the chats and the fact the chat room was listed for "adults only." Dr. James Herriot testified for the defense as an expert in "sexology" and described adult chat rooms as a sort of "recreational medium" where people take on different persona and engage in role playing.

Trial defense counsel asked the military judge to provide a mistake of fact instruction to the members, stating that the appellant held a mistaken belief that Detective ES was an adult or that the persona of "Ashley" or "funner4ashlie" was an adult. The military judge declined to give the requested instruction, finding that no mistake of fact

was raised by the evidence. The military judge stated "either the members believe Staff Sergeant O'Farrell had the intent to engage in the conduct [as alleged] with a child under the age of 16 beyond a reasonable doubt or they don't. And if they don't, it's not a mistake of fact. He's not mistaken. He's not guilty of what's been charged. He didn't do it."

The appellant resumes his argument on appeal, maintaining that mistake of fact is not negated because "funner4ashlie" was in fact an adult. He maintains that the mistake of fact defense lies in the wording of the underlying specification and that the indecent acts alleged in the specification contemplates a "large variety of sexual immorality." We fail to find merit in the appellant's argument and conclude the military judge did not err by refusing to give a mistake of fact instruction.

Whether a jury was properly instructed is a question of law we review de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). While a military judge has substantial discretionary authority to decide whether to issue a particular jury instruction, *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010), the military judge must instruct the members on any affirmative defense that is in issue. *United States v. Schumacher*, 70 M.J. 387 (C.A.A.F. 2011). A matter is considered in issue when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. *Id.*

When an accused is charged with a crime in which knowledge or intent is material as to an element, it is a defense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would be not guilty of the offense. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). The test for determining whether an affirmative defense of mistake of fact defense has been raised is whether the record contains some evidence of a mistake to which the members could have attached credit if they had so desired. We look to the totality of the circumstances at the time of the offense when applying this test. *Id.*; Rule for Courts-Martial 916(j).

In the case before us, the evidence presented at trial precluded a mistake of fact instruction from being given. The appellant was charged with attempting to commit indecent acts and attempting to communicate indecent language with someone he believed to be a minor.[2] Therefore, the Government bore the burden of proving beyond a reasonable doubt that the appellant believed the persona created by Detective ES was a minor when he was communicating with her.

The salient question for the members to resolve was whether the Government met its burden of proving that, at the time the criminal acts took place, the appellant thought

[2] The crime was charged as an "attempt" because "funner4ashlie" was not a minor.

he was conversing and interacting with a minor. Detective ES testified, and the chat logs confirmed, that she portrayed herself as a minor. In contrast, the appellant testified that he knew "funner4ashlie" was in fact an adult. In short, the members either believed the appellant (which would lead to his acquittal) or they believed Detective ES (which would lead to his conviction), but there was no mistake of fact because Detective ES was in fact an adult. *See United States v. McDonald*, 57 M.J. 18 n.3 (C.A.A.F. 2002). In the final analysis, the members did not believe the appellant's testimony and concluded that at the time of the offenses, he engaged in various acts with someone he thought was 15 years of age.

Post-Trial Delay

The appellant contends his due process rights have been violated, where more than 120 days elapsed between his court-martial and action by the convening authority, and more than 18 months have elapsed between the time the case was docketed and completely reviewed by this Court. He requests such relief as this Court determines is appropriate, citing *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

We note that these delays are facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno,* 63 M.J. at 136. When we assume error but are able to directly conclude it was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Although the convening authority's action was taken more than 120 days after sentence was announced in the appellant's case, the record contains no evidence that the post-action delay has had any negative impact on the appellant beyond the normal anxiety experienced by any individual awaiting an appellate decision. *Moreno*, 63 M.J. at 139–40. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt, and relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006).

Remaining Issues

We have considered the appellant's remaining assignments of error raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A.1987) (noting that

there is no requirement to specifically address each assigned error so long as each error is considered).

Conclusion

The finding 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). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court