UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DONNY R. STAFFORD
United States Air Force

ACM 35807

31 March 2006

Sentence adjudged 25 November 2003 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, in accordance with his pleas, of willfully disobeying a lawful order from his superior commissioned officer, carnal knowledge, and sodomy with a child under the age of 16 years, in violation of Articles 90, 120, and 125, UCMJ, 10 U.S.C. §§ 890, 920, 925. A military judge, sitting alone as a general court-martial, sentenced him to a bad-conduct discharge, confinement for 36 months, forfeiture of all pay and allowances, and reduction to E-1. In accordance with a pretrial agreement, the convening authority reduced the adjudged period of confinement to 30 months and

approved the remainder of the sentence as adjudged. The appellant now asserts two errors: (1) Whether his convictions for carnal knowledge and sodomy, Charges II and III, respectively, should have been considered multiplicious for sentencing, and (2) Whether certain portions of the trial counsel's sentencing argument were improper.[1] We find both arguments to be without merit and affirm the findings and sentence.

Background

The appellant was assigned to the 58th Aircraft Maintenance Squadron at Kirtland Air Force Base, New Mexico, and lived in an off-base apartment with his brother. In early January 2002, the appellant (who was 23 years old at the time) moved from his apartment into a double-wide trailer home owned by his aunt, Mrs. K. Mrs. K was raising five children in the home and was having trouble paying bills. The appellant promised to pay her $400 per month to live in her home. At first, the appellant slept in the living room of the home. After about a month, with the permission of Mrs. K, he began sleeping in the bedroom occupied by RLK, Mrs. K's 15-year-old daughter. RLK was the appellant's biological first cousin. A sexual relationship between the appellant and RLK began in mid-March 2002. The accused admitted he and RLK had a sexual encounter almost every day of the week. According to the stipulation of fact, the cousins had sexual intercourse on an average of four days per week, and oral sex approximately three days per week. Prior to this relationship, RLK was a virgin. In July 2002, RLK became pregnant and the appellant helped her get an abortion. After she recovered from the abortion, the sexual encounters continued. The sexual relationship between the appellant and RLK continued until Mrs. K discovered their activities. On 22 August 2002, AFOSI apprehended the appellant and removed him from Mrs. K's home.

On 23 August 2002, the appellant's commander issued the appellant a direct written order to have no further contact with RLK. Despite the order, the appellant frequently contacted RLK by phone, e-mail, and America Online's Instant Messenger service. According to the stipulation of fact, this contact occurred, on average, "at least daily" from September through December 2002.

Unreasonable Multiplication of Charges

Failure to raise the issue of unreasonable multiplication of charges at trial waives the argument on appeal. *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87 (C.A.A.F. 2001). In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces endorsed the Navy Court's proposed non-exclusive list of factors to consider in weighing a claim of unreasonable multiplication of charges. Those factors include: (1) Whether the accused objected at trial, (2) Whether each charge and specification is aimed at a distinctly separate criminal

[1] Both issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

act, (3) Whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality, (4) Whether the number of charges and specifications unreasonably increase the appellant's punitive exposure, and (5) Whether there is any evidence of prosecutorial overreaching or abuse in drafting. *Id*. at 338.

Prior to trial, the appellant entered into a pretrial agreement (PTA) with the convening authority. In paragraph 2(d) of the PTA, the appellant agreed to "waive any motion regarding the multiplicity of Charge II and Charge III for sentencing." During the colloquy with the military judge regarding the PTA, this provision was specifically discussed. The appellant indicated that he understood he "gave up the right to have this Court or any other appellate court determine whether or not [he is] entitled to any relief based on that potential motion," and had freely and voluntarily agreed to this term of the PTA. The military judge then asked the trial defense counsel to put the factual basis of the motion on the record, but the defense counsel stated that it was just a "potential motion of the fact that there may have been occasions where the accused engaged in carnal knowledge as well as sodomy immediately thereafter . . ." Later, the accused told the judge he was satisfied with his defense counsel and their advice. In order to obtain a deal with the convening authority (which ultimately proved to be a wise tactical decision) the appellant clearly and unequivocally waived his right to argue that Charges II and III should have been considered multiplicious for the purposes of sentencing. Therefore, his claim of error is without merit. *See Butcher*, 56 M.J. at 93.

Even assuming *arguendo* the appellant did not waive his right to this claim, we would not find Charges II and III multiplicious for the purposes of sentencing. Applying the *Quiroz* factors to this case, we note the following: First, the appellant did not object to the military judge's consideration of the two charges separately for sentencing purposes. Second, the appellant admitted that both the carnal knowledge and sodomy offenses occurred during the charged time period. The appellant told the judge that on some nights he and RLK engaged in oral sodomy exclusively; on other nights they engaged in carnal knowledge exclusively; and on still other nights they engaged in both acts. Thus, on many separate and distinct occasions during this five-month period, the appellant committed either one crime or the other. Third, the number of charges does not in any way misrepresent or exaggerate the appellant's criminality. The government charged all of the numerous acts of carnal knowldege as one specification on divers occasions. Likewise, the government charged the numerous offenses of sodomy as one specification of divers oral sodomy with a child under the age of 16. Fourth, while charging carnal knowledge and oral sodomy separately did increase the appellant's punitive exposure by 20 years, we do not find this unreasonable based on the ongoing course of criminality engaged in by the appellant. Finally, we do not see evidence of prosecutorial overreaching or abuse in the government's attempt to fairly capture the essence of the crimes committed by the appellant.

In summary, we find that the appellant waived his right to argue that Charges II and III were multiplicious for purposes of sentencing. Further, we find that Charges II and III are not, in fact, multiplicious for the purposes of sentencing. Therefore, we find the appellant's first assignment of error to be without merit.

Trial Counsel's Argument

We review questions involving argument of counsel referring to unlawful subject matter de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). When a proper objection to comments in arguments is made at the trial level, those comments are reviewed for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). Failure to object to improper argument waives any error, absent plain error. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Ramos*, 42 M.J. 392, 397 (C.A.A.F. 1995). Plain error occurs when, (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right to an accused. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)). Trial counsel may argue any reasonable inference derived from the evidence and may strike forceful blows, as long as they are fair ones reasonably based on the evidence. *United States v. Robinson*, 43 M.J. 501, 506-07 (A.F. Ct. Crim. App. 1995); *United States v. Conway*, 40 M.J. 859, 863 (A.F.C.M.R. 1994).

First, the appellant claims the trial counsel's argument was improper because "he repeatedly and erroneously stated and implied that the activities between the appellant and RLK were nonconsensual and that the sexual contact would cause her harm for the remainder of her life." The evidence presented at trial included admissions by the appellant that RLK was under 16 years of age at the time of the crimes, was a virgin who had never had a boyfriend, and who viewed the appellant as a father figure. As to the issue of harm, the prosecution presented an expert who described the short and long-term effects of the appellant's crimes against RLK. Both statements made by the prosecutor, therefore, were fair inferences reasonably based on the evidence presented to the military judge. No plain error occurred when the military judge allowed the trial counsel to make these arguments. *See Powell*, 49 M.J. at 463.

Second, the appellant also complains that he was improperly described as a "sexual predator," a "pervert," a child "molester," someone who "took advantage" of and "victimized" RLK, and who committed "one of the most serious violations out there." Trial defense counsel did not object to any of these characterizations, except when the term "pervert" was used. As to the terms used by the prosecutor that were not objected to by the defense, we do not find plain error. *See Id.* While the trial counsel may have again struck hard blows, the blows were fairly inferred from the evidence presented. The military judge, sitting alone as the sentencing authority, was free to accept or reject these inferences as she saw fit. As for the "pervert" remark by trial counsel, we do not find prejudicial error in the judge's decision to overrule the trial defense counsel's objection.

Conclusion

The 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). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court