UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant RAFAEL VERDEJO-RUIZ
United States Air Force

ACM 37957

18 July 2013

Sentence adjudged 25 February 2011 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: W. Thomas Cumbie.

Approved Sentence: Dishonorable discharge, confinement for 25 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shane A. McCammon (argued); Major Scott W. Medlyn.

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

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

At a general court-martial comprised of officer and enlisted members, the appellant was convicted, contrary to his pleas, of one specification each of: rape of a person between the ages of 12 and 16, carnal knowledge with a person between the ages of 12 and 16, sodomy of a person between the ages of 12 and 16, and indecent acts upon the body of a female under the age of 16, in violation of Articles 120, 125, 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. He was sentenced to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, the appellant raises eight issues:[1] (1) The military judge erred by denying his motion to suppress involuntary statements made after law enforcement agents promised him confidentiality; (2) His convictions are factually insufficient; (3) The Article 134, UCMJ, specification fails to state an offense; (4) Trial counsel committed reversible error by making false assertions of material fact and prosecutorial misconduct; (5) His Fifth[2] and Fourteenth Amendment[3] rights were violated when the alleged victim committed perjury and fraud on the court during her testimony; (6) The findings and sentence should be set aside under the cumulative error doctrine; (7) The U.S. Disciplinary Barracks' refusal to allow him visitation with his children is illegal considering (a) he did not commit any offense against his own children, (b) he was issued a meritless no-contact order, and (c) the U.S. Disciplinary Barracks' administrative system improperly lists him as single with no dependents; and (8) His court-martial wrongfully included charges of carnal knowledge and indecent acts.

Background

In July 2004, CL was thirteen years old. During that time, she visited family in Oklahoma, including her step-father's cousin and cousin-in-law, Mrs. Verdejo and the appellant. CL became close with Mrs. Verdejo and spent a lot of time with her and the appellant watching movies, visiting, and going to the pool. CL claimed that, during this visit, the appellant committed the acts that led to the charges against him. These acts occurred in the house, either when Mrs. Vedejo was sleeping or not at home, and once in a car.

CL did not tell anyone about these acts until approximately six years later when she told a friend. The Air Force Office of Special Investigations (OSI) investigated and interviewed the appellant on 9 September 2010. The resulting confession is the subject of his first issue on appeal.

The interview was videotaped and transcribed. The agents read the appellant his Article 31, UCMJ, 10 U.S.C. § 831, rights from a printed card and allowed him to read along. The appellant acknowledged his rights, declined a lawyer, and agreed to answer questions. After a rapport building session, the agents confronted the appellant about an allegation that he sexually assaulted CL. The appellant initially maintained that he didn't remember doing anything sexual with CL because it was a long time ago, but eventually admitted that he "did commit a stupid action" in that he "was going to sleep with somebody." The appellant eventually stated that he cheated on his wife but couldn't remember with whom.

[1] Issues 4, 5, 6, and 8 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982).
[2] U.S. CONST. amend. V.
[3] U.S. CONST. amend. XIV.

After more questioning, the appellant admitted that he had sex with someone in his Cadillac, and it was either CL or a Senior Airman named Amanda. Eventually, after some more prodding, the appellant admitted that it was CL who he had sex with in his car. In his post-interview written statement, the appellant wrote that he "ran out in [his] car with [CL] and had brief intercourse inside the car." He also admitted that he was going to tell his wife about the incident until he learned of CL's age. The appellant only admitted to having sex with CL on the one occasion in his car. Other than that, he only admitted to kissing her a few times.

At trial, the defense motioned to suppress the confessions because they'd been given under a promise of confidentiality by the two OSI agents. The appellant points to five specific instances during the interview to exemplify where one or the other agent made the promises:

> "Like I said, what you say here stays with us. We don't go around telling everyone what you say and everything else."
>
> "You don't have to worry about anything you say with us. Like I said, we are not trying to throw you up by a stake or anything else."
>
> "Everything that stays in this room, stays in this room."
>
> "I am not going to tell your wife about it either, you know. . . . I am not going to tell anybody. . . ."
>
> "See, the thing about our office here is when we talk to people, we don't share information with other people."

On the motion to suppress, the appellant testified that he believed these comments convinced him that no matter what he said to the OSI agents, they would keep it to themselves. He further testified that he believed that the OSI agents would only submit a report to his commander indicating whether he was being honest or not, and nothing more. According to the appellant, he also believed that the agents promised him confidentiality, so he merely agreed with their allegations in order to leave the interview and get on with his life.

The military judge denied the motion and made findings of facts. Regarding the appellant's testimony, the military judge stated, "[t]he court finds this testimony to be totally, completely, and unequivocally without merit." The military judge went on to acknowledge the possibility that the agents' statements, standing alone and taken out of context, might have reasonably implied a promise of confidentiality, but not when taken in the context of the entire conversation and under the totality of the circumstances. Pointing out that three of the statements were made in response to the appellant's concern

about his wife learning of the details of his infidelity with CL, the military judge did not construe from them a promise of confidentiality. Additionally, he viewed the other two statements as "tiny snippets of a lengthy discourse by the agents, which given the context of the conversation, could not reasonably be construed as a promise of confidentiality." Ultimately, the military judge concluded that "the defense [] cherry picked five very short innocuous statements . . . [which] . . . taken individually, or collectively, cannot reasonably be construed as a promise of confidentiality."

Appellant's Motion to Suppress Involuntary Statements

We review a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Whether a confession was voluntary is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005); *United States v. Bubonics*, 45 M.J. 93, 94 (C.A.A.F. 1996); *United States v. Martinez*, 38 M.J. 82, 86 (C.M.A. 1993). A military judge's findings of fact are reviewed for clear error. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002).

Freeman is instructive on the issue of whether a confession is voluntary. The *Freeman* Court stated that "a confession is involuntary, and thus inadmissible, if it was obtained 'in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.'" *Id*. at 453 (citing Mil. R. Evid. 304(a), (c)(3); Article 31(d), UCMJ). The prosecution bears the burden of establishing a voluntary confession by a preponderance of the evidence. *Id*. (citing *Bubonics*, 45 M.J. 93).

To determine the lawfulness of a confession, we must examine "the totality of the surrounding circumstances." *Freeman*, 65 M.J. at 453 (citing *Bubonics*, 45 M.J. at 95). In assessing whether a defendant's will was "over-borne in a particular case," the Court assesses "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id*. (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Some factors taken into account in determining voluntariness have included the youth of the accused, his lack of education, his low intelligence, the lack of advice on his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id*. (citations omitted). The Court must determine the factual circumstances surrounding the confession, assess the psychological impact on the accused, and evaluate the legal significance of how the accused reacted. *Id*. *See also Schneckloth*, 412 U.S. at 226.

If a confession is found involuntary, the Court must set aside the conviction unless it is determined that the error in admitting the confession was harmless beyond a reasonable doubt. *Freeman*, 65 M.J. at 453 (citing *Fulminante*, 499 U.S. at 285).

Further, the Court in *Freeman* stated that there has been considerable controversy over the treatment of threats and promises in assessing the voluntariness of a confession. *Id*. at 455. Before *Fulminante*, a confession "'obtained by any direct or implied promises, however slight,'" was not voluntary. *Id.* (quoting *Bram v. United States*, 168 U.S. 532, 542–43 (1897)).

Since *Fulminante*, though, "promises are considered only a factor in the equation; they are not of themselves determinative of involuntariness." *Id*. (citing *United States v. Gaskin*, 190 Fed. Appx. 204, 206 (3d Cir. 2006); *United States v. Jacobs*, 431 F.3d 99, 109 (3d Cir. 2005)).

We have reviewed both the video recording of the confession and its transcript. These items as well as our review of the record convince us the military judge did not abuse his discretion when he denied the appellant's motion to suppress his confession.

It is clear that the OSI agents' statements were made in response to the appellant's express concerns about his wife finding out about his actions. In the context of the interview, it is obvious the OSI agents' comments were limited to that specific concern and were not general commitments that they would forever keep his statements in confidence, never to be revealed to anyone. The military judge also rejected, as do we, the appellant's stated belief that the OSI agents would only submit a report to his commander indicating whether the appellant was being honest or not and nothing more. Not only did the agents read the appellant his Article 31, UCMJ, rights at the beginning of the interview, they also had him read along. Moreover, they had him read and initial those same rights on the written statement form as well, and had him hold up his hand and swear that the written statements were the truth before he signed it. Both times he was advised that he could remain silent and any statement he made could be used against him in a trial or other disciplinary or administrative forum. He said he understood both warnings. Additionally, towards the end of the interview he asked if he would be facing a court-martial because of what he confessed to. This question conflicts with his assertion at trial that he thought everything he said during the interview would be kept confidential.

Further, the appellant was a Technical Sergeant with 10 years of active duty experience and had an excellent performance record. The entire interview lasted approximately three and one half hours and the appellant was offered breaks, food, and water. He was never handcuffed and, in fact, was merely asked to come to the OSI office on his own. He was not escorted or told he could not leave. He was allowed to type his own written statement and was left alone while he did so. At the end of the interview he

even complimented the OSI agents for not being rude or overbearing.[4] These facts simply do not square with his assertions at trial and now on appeal that he thought anything he said during his OSI-conducted interview would remain confidential and his confession was involuntary. Given the context in which the OSI agents made the statements at issue, we are convinced they did not overcome the appellant's will or cause him to provide his statement involuntarily. They were limited in nature to assure the appellant that the agents would not tell his wife what he told them during the interview. Applying the standards cited above, we agree with the military judge's ruling. We find that the appellant's will was not overborne and his confession was voluntarily given.

Factual Sufficiency

The appellant also avers that his convictions for rape, carnal knowledge, forcible sodomy, and indecent acts with a child are factually insufficient.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Having reviewed the entire record, including the appellant's confession and the victim's testimony, we are convinced the appellant's convictions are factually sufficient.[5] The victim provided detailed testimony of the events that transpired. The defense tried to show these events were implausible, but in the end the members, who heard all of the witnesses, believed the victim's account. Her testimony, and the appellant's confession, provided sufficient facts to support the conviction.

Failure to State an Offense

Notice of the terminal element of an Article 134, UCMJ, offense is an essential part of due process as an accused must know and fully understand the offenses against which he must defend. *See United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

---

[4] These were not the exact words used by the appellant, but they convey his sentiment.

[5] Though not specifically raised, we also find that the appellant's convictions are legally sufficient. *See United States v. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

Charge III and its Specification alleged a violation of Article 134, UCMJ, in that the appellant committed indecent acts upon the victim, a female under the age of 16, not his wife, by committing certain acts upon her with the intent to gratify his sexual desires. The Specification did not allege one of the three possible terminal elements: prejudice to good order and discipline, service discrediting; or a crime or offense not capital. The appellant did not contest this specification at trial.

The only mention of any of the terminal elements during the trial was by the prosecutor during closing arguments when, after recounting the facts alleged in the Specification, he argued to the jury that, "It should take you about five seconds to realize that committing these horrible acts on an Air Force Installation on a 13-year-old child is prejudicial to good order and discipline in the United States Air Force." The defense did not address this point during their argument.

The Government argues that the prosecution cited the terminal element during its closing argument, which "was simply understood to be necessarily inherent in an offense where a military member sexually assaults a 13-year-old civilian on base and against her will." It also argues that the appellant had notice because the Article 32, UCMJ, investigator spelled out the elements and the evidence used to support them. However, the Article 32, UCMJ, report states that the conduct involved "was to the prejudice of good order and discipline *or* of a service discrediting nature." (Emphasis added.). It never focused on one theory or the other. We do not believe this constitutes notice of the terminal element for an Article 134, UCMJ, offense as our superior court requires in *Humphries*, *Fosler*, and *Ballan.* Further, the Government does not explain why the "prejudicial to good order and discipline" element is any more "necessarily inherent" than the "service discrediting nature" element.

Under *Humphries*, notice of the missing element must be "somewhere extant in the trial record, or [ ] the element [must] be 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-216 (citing *United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461 (1997)). Here, the appellant pled not guilty. This left the Government to prove all of the elements of the offense, including the terminal element. But the question left open was which terminal element should the appellant defend against? The Government relies on the prosecutor's mention of the terminal element in the closing argument to show that notice is "extant on the record." However, as this was addressed only after the close of evidence during closing argument, it is hard to see how this can constitute notice. Notice is a due process device that enables the preparation of a defense. As our superior court alluded to in *Humphries*, it is impossible to accept an argument that mentioning the terminal element for the first time after the evidence has been submitted to the members enabled the appellant to know which Clause he had to defend against. *Id*. at 216 n.9.

Under the guidance provided by our superior court, we hold it was plain and obvious error to omit the terminal element from the Specification alleging indecent acts under Article 134, UCMJ, and that error prejudiced the appellant's substantial right to notice. *See Id*. at 213-17 (citations omitted). Accordingly, we must dismiss the finding of guilty for Charge III and its Specification.

Prosecutorial Misconduct & Perjury

We have considered the appellant's fourth and fifth assigned errors, raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A 1982), and find them meritless.

We have reviewed the appellant's claim of prosecutorial misconduct under the standards of *United States v. Halpin*, 71 M.J. 477 (C.A.A.F. 2013), *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006), and *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). In doing so we have examined the fairness of the trial and not the culpability of the prosecutor. We have paid special attention to the "overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). Having examined the prosecutor's conduct as well as the fairness of this trial, we find the appellant's claim to be meritless.

Regarding the victim's testimony, the appellant claims she committed perjury by pointing to statements in the Article 32, UCMJ, investigation which he claims could be used to contradict her. He then relates this back to his argument that the evidence was insufficient to support a conviction. We have already addressed the issue of factual sufficiency above and there is no need to rehash it a second time. The members heard the testimony of all of the witnesses including any cross-examination by the opposing side. It was their duty to determine the facts and that is what they did. *See United States v. Stoneman*, 57 M.J. 35 (C.A.A.F. 2002); *United States v. Garwood*, 20 M.J. 148 (C.M.A. 1985), Rule for Courts-Martial 502(a)(2). The appellant's essentially argues that the victim should not be believed because she was lying. However, at trial the defense subjected her to a fierce and tough cross-examination. The members simply believed her. We find no merit to the appellant's claim.

Cumulative Error

The appellant avers that the cumulative errors that occurred at trial should compel us to set aside the findings and sentence. In this argument, the appellant raises eight errors, some with several subparts, which were made during the trial.

As our sister court observed, the law "requires us to evaluate the fairness of the appellant's trial using the cumulative error doctrine." *United States v. Parker* 71 M.J. 594, 630 (N.M. Ct. Crim. App. 2012) (citing *United States v. Dollente*, 45 M.J.

234, 242 (C.A.A.F. 1996); *United States v. Banks*, 36 M.J. 150, 171 (C.M.A. 1992)). As the *Parker* court stated, *Dollente* requires us to evaluate the errors "against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy—of any remedial efforts); and the strength of the government's case." *Id.*

Some of the errors alleged by the appellant include supposed errors by the military judge in his instructions, misstatements of the evidence by the prosecutor, the denial of the right to an educated jury due to the prosecutor's failure to present expert testimony on child behavior that would favor the appellant's case, and that a testifying OSI agent was allowed to give human lie detector testimony. We have reviewed the appellant's allegations and find no error, but merely rulings and decisions made well within the sound discretion of the military judge, which the appellant would have made differently had he been the judge. There was ample evidence of the appellant's guilt, and there were no errors that materially prejudiced his substantial rights. Under these circumstances and applying the law as discussed above, the appellant was not denied a fair trial and the cumulative error doctrine is not applicable. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011); *Dollente*, 45 M .J. at 242.

Visitation Rights

Citing *United States v. Ouimette*, 52 M.J. 691 (C.G. Ct. Crim. App. 2000), the appellant claims the Fort Leavenworth Disciplinary Barracks' (USDB) refusal to allow him visitation rights with his children was illegal as constituting a "harsher, excessive sentence and punishment" because (1) he did not commit any offense against his own children, (2) he was issued a meritless no-contact order, and (3) the USDB administrative system improperly lists him as single with no dependents. The appellant has submitted documents indicating he is under a blanket restriction from having any visitation and from making any contact with his own children (even indirectly through contact via his wife).[6] He sent a request to the Commandant for an exception to this policy but was denied. He filed a complaint with the Inspector General, and although he states he has filed a complaint pursuant to Article 138, UCMJ, 10 USC § 938, the record lacked any other indication or evidence of this assertion.[7]

We review de novo whether alleged facts constitute cruel and unusual punishment. *United States v. Lovett*, 63 M.J. 211 (C.A.A.F. 2006). As our superior court in *Lovett* noted, "the Eighth Amendment prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a

---

[6] The Fort Leavenworth Disciplinary Barracks' regulations prevent him from seeing any children without first obtaining an "exception to policy."

[7] Even assuming he has submitted an Article 138, UCMJ, 10 U.S.C. § 938, complaint, our opinion addressing the other issues remain the same.

maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.' We apply the Supreme Court's interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the UCMJ." *Id.* at 215 (citations omitted). Except for specific situations not applicable to this case, Article 55, UCMJ, 10 U.S.C. § 855, is coterminous with the Eighth Amendment,[8] and we will apply that standard to both provisions. *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983).

A violation of the Eighth Amendment is shown by demonstrating: "(1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [the appellant's] health and safety; and (3) that he has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ." *Lovett*, 63 M.J. at 215 (omission in original) (citations omitted).

Applying these standards, we find no violation of the Eighth Amendment or Article 55, UCMJ. The appellant's complaint does not amount to a serious act or omission resulting in a denial of necessities. Typically, these are things such as denial of needed medical attention, proper food, or sanitary living conditions. Physical abuse may also qualify. *See United States v. Avila*, 53 M.J. 99, 101 (C.A.A.F. 2000). The appellant's deprivation is not of the caliber that triggers Eighth Amendment protection. It is more akin to routine conditions associated with punitive or administrative segregation such as restriction of contact with other prisoners, of exercise outside a cell, of visitation privileges, of telephone privileges, and/or of reading material. *Id.* at 102. We also note that not all visitation or outside contact was withheld from the appellant, just a certain segment of it. This partial, rather than full, restriction on the appellant's ability to communicate with friends and family also supports the [G]overnment's case. *See Turner v. Safley*, 482 U.S. 78 (1987); *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004). Also, the appellant has not shown the Commanding Officer acted with a culpable state of mind. The commander did not arbitrarily select the appellant and deny him contact with minors. He was acting pursuant to, and enforcing, the Brig rules.

We emphasize that the USDB rules about visitation with children are enforced for the protection of minors. That the appellant has to undergo a strict screening policy before being granted permission to visit his children is an administrative safeguard to protect minor juveniles from those convicted of child sex crimes. It is not an additional punishment or a method of enhancing the sentence already adjudged. Accordingly, we find no merit to the appellant's claim.

[8] U.S. CONST. amend. VIII.

Propriety of Charges

The appellant argues that the offenses of carnal knowledge and indecent acts were improperly charged and should be dismissed because the legal actions to bring him to trial on these offenses occurred after 1 October 2007. According to the appellant, Executive Order 13447 and the 2006 National Defense Authorization Act amended the *Manual for Courts Martial* (*MCM*), *United States*, and eliminated these two offenses. He argues that because the Executive Order states that nothing in the amendments would invalidate certain legal actions, to include investigations and referral of charges, that began prior to 1 October 2007, and the legal actions that preceded the appellant's trial occurred after that date, they were rendered invalid by the Executive Order because they occurred too late.

This argument is without merit. Executive Order 13447 and the 2006 National Defense Authorization Act did not eliminate these two offenses in the sense that no one could be prosecuted for them if legal action began after 1 October 2007. The Executive Order merely incorporated the amendments to Article 120, UCMJ, and other provisions. It did not bar prosecution of violations of the law as it was written prior to the amendments and the Executive Order.

These offenses were all alleged as perpetrated against a child between the ages of 14 and 16 years old. As such, each has a 25 year statute of limitation and may be prosecuted any time with in that period. *Cf. United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008). *See* Article 43, UCMJ, 10 U.S.C. § 843; Drafter's Analysis, *MCM*, A21-57, A27 (2012 ed.). The language cited by the appellant in the Executive Order does not bar the offense from being prosecuted.

Sentence Reassessment

Having dismissed the Specification under Charge III, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and carefully considering the entire record, we conclude that there has not been a "dramatic change in the 'penalty landscape.'" *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). At time of the appellant's conviction, the maximum sentence was life in confinement, forfeiture of all pay and allowances, and reduction to E-1. Our dismissal of the Charge and Specification does not change the maximum sentence.

Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the

sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we "cannot determine that the sentence would have been at least of a certain magnitude," we must order a rehearing. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000); *see also United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988). Because the change to the appellant's charges or sentencing landscape is not dramatic, we are confident in our ability to reassess the sentence. The dismissed Charge and Specification carried the smallest maximum punishment of the four with which the appellant was charged: seven years. Even with the dismissed Charge and Specification the appellant is still guilty of rape, forcible sodomy, and carnal knowledge, all with a child between the ages of 12 and 16. These offenses carried the same maximum punishment even without the dismissed offense: a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to the grade of E-1.

We are confident that the convening authority would have approved the same sentence. Furthermore, we find, after considering the appellant's character, the nature and seriousness of his offenses, and the entire record, that the reassessed sentence is appropriate.

Conclusion

We set aside and dismiss Charge III and its Specification and affirm the remaining findings and the sentence as approved by the convening authority. The approved findings, as modified, and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant regarding the affirmed charges and specifications occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and the sentence, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court