UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant RONNIE WILSON
United States Air Force

ACM 37486

15 December 2011

Sentence adjudged 14 February 2009 by GCM convened at RAF Alconbury, United Kingdom. Military Judge: William E. Orr, Jr.

Approved sentence: Dishonorable discharge, confinement for 4 years and 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Frank J. Spinner, Esquire (argued); Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Darrin K. Johns; Captain Nicholas McCue; Captain Luke D. Wilson; and Major David P. Bennett.

Appellate Counsel for the United States: Major Deanna Daly (argued); Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Darrin K. Johns; Major Naomi N. Porterfield; Major Kimani R. Eason; and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and WEISS
Appellate Military Judges

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant contrary to his pleas of one specification of wrongful sexual contact with a child under the age of 16 years and two specifications of committing indecent acts on a child under the age of 16 years in violation of Articles 120 and 134, UCMJ, 10 U.S.C. § 920, 934. The court-martial sentenced the appellant to a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The

convening authority approved the dishonorable discharge, confinement for 4 years and 9 months, and reduction to E-1.

The appellant assigns five errors. In the first he argues that the evidence is legally and factually insufficient to support conviction. In the other four assigned errors, each raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), he argues that the military judge erred by permitting human lie detector testimony, excluding evidence of prior inconsistent statements, and permitting improper sentencing argument; lastly, he argues that the cumulative effect of these assigned evidentiary errors requires reversal. We specified an additional issue after oral argument concerning the legal sufficiency of the Article 134, UCMJ, specifications in light of *United States v. Fosler*, 70 M.J. 225(C.A.A.F. 2011). Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Sufficiency of the Evidence

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 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 *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). "[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 sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a 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. In this case both parties cite *United States v. Ryan*, 21 M.J. 627 (A.C.M.R. 1985), for the general proposition that a victim's testimony alone may be sufficient to support conviction of a sexual offense if the testimony is not inherently improbable or incredible, a determination made as a matter of fact rather than a conclusion of law. *See United States v. Payne*, 41 C.M.R. 188, 191 (C.M.A. 1970) (question of whether alleged victim's testimony was improbable is one of fact for the members of the court).

The victim in this case is ELC, the daughter of TW. The appellant and TW began seeing each other when ELC was about four years old. They married in 1998, and the family was assigned to the United Kingdom in 2005. ELC testified that after they moved to the UK her relationship with the appellant changed when he "felt down [her] leg" while she was in the shower. She was 12 years old.

Specification one of Charge III is based on this incident and alleges that the appellant committed an indecent act on ELC's naked body with his hand while she was in the shower. ELC testified that school started on 28 August 2005. A few weeks later, appellant came into the bathroom while she was taking a shower. ELC grabbed a towel, got out of the shower, and asked the appellant why he was in the bathroom. The appellant replied that he was looking for something, grabbed his hair clippers, and left. ELC then got back in the shower. The appellant returned to the bathroom a few minutes later. He opened the shower door, reached his hand in, and "feels down" her thigh. ELC backed away and the appellant left.

In January 2007, the family moved from Thetford, UK, to RAF Lakenheath. ELC testified that during the move her mother made her go with the appellant back to the Thetford home to gather a few items. While ELC was packing, appellant came up behind her, put his arms around her, unbuttoned her pants, then pulled down her pants and underwear and played between her legs for "like, a minute or so." Appellant stopped when ELC stepped away to answer her phone. After pulling down ELC's pants and underwear, the appellant felt between her legs around her groin area. When asked specifically if the appellant touched her legs, she responded "no." Specification five of Charge III is based on this incident, alleging that the appellant committed an indecent act on ELC by pulling down her pants and underwear and touching her legs with his hands.

The last incident of which the appellant was found guilty occurred later in the same year that the family moved to Lakenheath. ELC testified that in November 2007, when she was 14 years of age, she asked the appellant if she could use the computer. The appellant pulled her toward him, turned her around, and undid her pants. He pulled down both her pants and underwear and started feeling between her legs with his hands. He instructed her to open her legs and when she refused, he tried to force them open. She then pulled away and again asked if she could use the computer. At that point, the appellant signed ELC onto the password protected computer and allowed her to use it. Specification two of Charge II alleges this incident as wrongful sexual contact with ELC by pulling down her pants and underwear, and touching her groin with his hand.

After the November 2007 incident ELC told a male school friend, AF, what happened because the appellant had "never tried to open [her] legs before." AF testified that ELC told him in Spanish class sometime in November or early December 2007 "that she was being felt up by her stepfather." She also told another school friend who responded by telling ELC that if she did not tell her teacher about it, then he would. ELC

then told her teacher, RC, that "her stepfather was touching her." RC described ELC as "hesitant" to tell her about the abuse. RC informed the school counselor, and ultimately, the Air Force Office of Special Investigations (AFOSI) and TW were notified.

TW testified that she learned of her daughter's allegations when OSI contacted her to report a situation with her daughter at school. She testified that the call made her scared because she did not know what was going on and, in fact, contacted the appellant to ask if he knew anything. A co-worker confirmed her reaction to the phone call. TW asked the appellant to go to the school because she was at the doctor's office with another child. The appellant called her back to say that the school would not let him in. She "broke down" when OSI agents told her that her daughter made a statement that the appellant "was touching her."

After leaving OSI, TW took her children to get something to eat at Subway. She saw the appellant in the Subway parking lot. She went after him, hitting him and asking him why. The appellant later called her, admitting what he had done and stating that he was sorry.

TW admitted she told the appellant's defense counsel that she had persuaded ELC to make up the allegations. She told the appellant that she had "saved him" and wanted him to sign an agreement of what he agreed to do in exchange. The appellant initialed beside each promise or condition. When she told ELC what she had done, ELC started crying, saying that "he needs to pay for what he done to me." TW later recanted what she told the defense counsel.

The appellant argues that ELC "was not and is not worthy of belief," essentially arguing that ELC fabricated the "sweeping and generalized allegations" because she did not like her stepfather. Contrary to this argument of sweeping false allegations, ELC expressly denied certain allegations against her stepfather. For example, when asked why she did not include a certain incident in her statement to OSI, she replied, "He didn't touch me in North Carolina; and that's why I didn't write it in my statement when I wrote the last time that it happened." She said that describing what happened to her was difficult because "it's not something you want to talk about" and "not something you want to happen to you." She testified that life was better with her stepfather gone because she no longer had "to worry about my stepdad; like, I don't have to go home and wonder if he's going to be home or not." Rather than sweeping and generalized allegations, ELC testified to specific, limited acts which she could have easily embellished into greater allegations if, as appellant claims, she fabricated everything.

We do not find persuasive the appellant's argument that the transcript undermines the validity of the findings. For example, the appellant cites an exchange between ELC and trial counsel to argue that the members erroneously found the appellant guilty of touching ELC's leg as alleged in Specification 5 of Charge III:

Q. Did he touch you anywhere else?
A. No
Q. Did he touch you on your legs?
A. No

Taken in isolation, this brief exchange would support the appellant's argument, but placed in the context of the remainder of the testimony it simply shows that the appellant did not touch ELC anywhere on the leg not already described:

> Q. So, he comes up behind you, and then puts his arms around you?
> A. Yes.
> Q. And does he do anything with his hands?
> A. He just unbuttons my pants and pulls down my pants and underwear, and he was feeling between my legs.
> . . . .
> Q. How far did he push [the pants] down?
> A. To, like, my thigh.
> . . . .
> Q. And, when you say "feeling between your legs," what do you mean?
> A. My private area.

The record clearly shows that the appellant touched ELC between her legs and that the answer cited by the appellant indicates that he did not touch her anywhere on the leg not already described.

The appellant attacks the finding of guilty of touching ELC in the shower as "simply another generalized allegation that is easy to make, hard to prove, and harder to disprove." The testimony, however, contains significant details such as the reason the appellant entered the bathroom while ELC was in the shower, how he left when she confronted him, how he returned to reach into the shower and touch her, and how this incident changed their relationship. Moreover, the appellant's argument that such allegations are difficult to disprove tends to support ELC in that if she were fabricating the whole incident to harm the appellant she would not likely limit her allegation to just touching her leg but would have alleged far more serious misconduct. The same logic applies to the other specifications, and, having considered the testimony as a whole with particular attention to the matters cited by appellant we do not find ELC's testimony improbable or incredible and are convinced that the evidence proves the appellant's guilt beyond a reasonable doubt.

Legal Sufficiency of the Article 134 Specifications

As discussed above, the appellant was convicted of two specifications of indecent acts with a child alleged under Charge III as a violation of Article 134, UCMJ.[1] Article 134, UCMJ, criminalizes three categories of offenses not specifically covered in other articles of the UCMJ: Clause 1 offenses require proof that the conduct alleged be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital federal crimes made applicable by the federal Assimilative Crimes Act. As the specifications at issue do not reference the Assimilative Crimes Act, they necessarily involve clause 1 or 2. The language of each specification complies with the model specification in effect at the time but does not expressly allege the terminal element that such conduct was either prejudicial to good order and discipline or service discrediting. Because the specifications do not expressly allege the terminal element, we will review, de novo, whether specifications alleging indecent acts with a child under Article 134, UCMJ, survive in light of *Fosler*. *See United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010).

In *Fosler* the Court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either clause one or two. *Fosler*, 70 M.J. at 233. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232.

While narrowly construing the specification in the posture of the case, the Court reiterated that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id*. at 229 (citations omitted). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990); *see also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

[1] The acts occurred before the effective date of the new Article 120, UCMJ, 10 U.S.C. § 920, which reclassified the offense of indecent acts with a child under the new Article 120, UCMJ. *See Manual for Courts-Martial, United States* (*MCM*), Appendix 27 (2008 ed.).

Here, the appellant did not at any stage of the proceedings object to the specifications alleged under Article 134, UCMJ, did not object to the military judge's instructions which defined both prejudice to good order and discipline and service discrediting as necessary elements of the offenses, and concedes in his brief on the specified issue that where the sufficiency of a specification is challenged for the first time on appeal it will be liberally construed in favor of validity, citing *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). Unlike the adulterous conduct at issue in *Fosler*, which may not be criminal without the terminal element, we find that a specification alleging indecent acts with a child provides sufficient notice of criminality. Indeed, in the language of *Fosler*, this specification contains language "the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces.'" *Fosler*, 70 M.J. at 229. Few would argue that specifications charging an adult male noncommissioned officer with touching a young girl for the purpose of gratifying his sexual desires failed to notify him that such conduct is prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. As the Court stated in *Watkins*, we are confident that the appellant "was not misled." *Watkins*, 21 M.J. at 210. We therefore conclude that the specifications alleging indecent acts with a child for which the appellant was convicted are legally sufficient under *Fosler*: each specification fairly informs the appellant of the charge against him, enables him to prepare a defense, and protects him against double jeopardy.

The Remaining Assigned Errors

The appellant assigns four additional errors pursuant to *Grostefon*. He first argues that the military judge erred by "allowing human lie detector testimony favorable to the government but prohibiting similar testimony favorable to the defense." The victim's brother, MMC, testified for the government. On cross-examination he gave an opinion that the victim is not truthful. On redirect and without objection, trial counsel clarified the opinion by asking about specific things the victim had lied about to show that they were all "kid lies." Trial counsel concluded this line of questioning by asking, without objection, if she had ever "made anything up so large like the size of sexual abuse," and the witness answered that she had not. The military judge sustained an objection to a follow-up question by defense counsel: "[Y]ou think she is lying about this don't you?" We find that the questions of trial counsel were all proper inquiries into specific instances of past conduct concerning the victim's character for truthfulness after defense counsel elicited an opinion on that characteristic. Mil. R. Evid. 608(b). However, defense counsel's follow-up improperly goes to the ultimate issue for the factfinder, and the military judge promptly and correctly instructed the members on their duty to judge credibility. *See United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003).

The appellant next argues that the military judge erred by excluding evidence of prior inconsistent statements by TW, the victim's mother. TW admitted telling defense

counsel in a pretrial interview that she persuaded her daughter to make up the allegations against the appellant. She also admitted that those statements were false. Defense counsel sought to introduce testimony concerning her prior statements, but the military judge properly excluded it because the witness admitted that she made the inconsistent statements. Extrinsic evidence of an inconsistent statement is not admissible under Mil. R. Evid. 613(b) if the witness admits the inconsistency. *See United States v. Harrow*, 65 M.J. 190, 199 (C.A.A.F. 2007).

Third, the appellant argues that the military judge erred by overruling an objection to trial counsel's sentencing argument. Trial counsel argued that the panel should consider the impact on the victim, an impact "that she will carry for the rest of her life." Defense counsel objected that such a lifelong impact was not in evidence. The degree of impact argued by trial counsel is a reasonable inference from the evidence which shows that the victim had considered the appellant her father for most of her life and tearfully told her mother that "he needs to pay for what he done to me." The military judge was within his discretion in overruling the objection. *See United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).[2]

Appellate Delay

We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is 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. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error 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. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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.

[2] In his last assigned error, the appellant argues that the cumulative errors in the case require reversal of his conviction, but we find no error that materially prejudiced the substantial rights of the appellant.

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); *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court