UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MORGAN A. WINN
United States Air Force

ACM 37772

15 May 2013

Sentence adjudged 4 August 2010 by GCM convened at Joint Base Lewis-McChord, McChord Field, Washington. Military Judge: Don M. Christensen.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowance, and reduction to E-1.

Appellate Counsel for the appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Luke D. Wilson.

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

Before

ROAN, ORR, and HECKER
Appellate Military Judges

OPINION OF THE COURT

HECKER, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of indecent acts with another, indecent exposure, and transferring obscene materials to a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, the appellant asserts that: (1) the indecent acts and indecent exposure specifications fail to state an offense because they do not allege the terminal element of Article 134, UCMJ; (2) the military judge improperly instructed the panel on the elements of all three offenses; and (3) the evidence is factually and legally insufficient to sustain his conviction for indecent acts and indecent exposure.

Background

During the summer of 2007, a 13-year-old girl living near Chicago, Illinois, encountered the 19-year-old appellant while logged onto a social-networking website where users have the ability to create and post quizzes on a variety of subjects. After the appellant submitted a quiz and the girl answered it and told the appellant her age, the two began communicating via instant messaging on a daily basis, with their conversations sometimes lasting for hours. During all these communications, the girl used her mother's laptop located in the family room of her residence, where her parents and two siblings also had access to it.

The girl's mother became aware her daughter was communicating with the appellant and spoke to him by telephone. Telling him her daughter was only 13 years old, the mother expressed concern about their age difference, even sending him a family photograph to demonstrate how young her daughter was. In response, the appellant said he did not believe their relative age mattered, citing to his personal family history and the relationship of his mother and stepfather. The appellant also told her he was a member of the United States Air Force stationed in Texas, and that he was very close to his own family and protective of his younger sisters. The mother's impression was that the appellant was trying to portray himself as a very upstanding member of the military. She asked him to prove his status and the appellant texted her a copy of his military identification card, along with a photograph of him in his military uniform.

Feeling sorry for the appellant because he appeared lonely while living away from his family and trusting him because he was in the military, the mother agreed to allow him to continue communicating with her daughter, something she would not have allowed if the appellant was not in the military. She informed the appellant that she had installed a program called a "key logger" on the family computer that recorded all communications made on it. The mother warned him she would be constantly monitoring their electronic communications, as well as any telephone conversations. The appellant replied that he had no problem with her exercising this oversight and he simply wanted to communicate with her daughter.

The communications between the girl and the appellant continued for another month. According to the appellant, their discussions eventually turned to their past experiences with other people and, after she said she had never seen a man's penis,

he asked if she would like to. When she responded with "I guess," he sent her two photographs of his erect penis.

While monitoring her daughter's communications, the mother came across a statement in a text from her daughter using the word "sexy." Believing this to be inappropriate, she confronted her daughter. After the girl told her mother the appellant had also sent her photographs, the mother went into her daughter's email, found the message, and saw the two photographs of the appellant's penis. According to her mother, the girl appeared uncomfortable and disturbed about having received them, while the mother was appalled and upset, as well as angry at herself for allowing the relationship to continue. She also testified without further explanation that, in her view, the photographs are obscene and the appellant's conduct towards her daughter was of a nature to bring discredit to the military and had a negative impact on good order and discipline in the military.

When the mother told the appellant by telephone that she had found the photographs and was very upset, he admitted sending them and that it was probably inappropriate. She directed him to have no further contact with the girl, either on-line or by telephone.[1] He complied for two years, but he contacted the daughter again in 2009, having, according to him, realized it had been a mistake to "let her go." The mother again spoke to him by telephone and ordered him to stop calling the house and to leave her daughter alone or she would contact the police or the Air Force. He replied "Good luck trying to find me. I'm in the desert," which, to her, meant he was stationed overseas.

The mother contacted agents from the Air Force Office of Special Investigations and provided the photographs to them. Under rights advisement, the appellant identified the photographs as ones he had taken of himself with a cellular phone camera and stored on his computer. He admitted sending the photographs from his computer to the 13-year-old girl in order to "test the waters" and elevate their relationship to a higher sexual level. He also admitted being aware that the girl's mother monitored her email. The appellant said he and the girl were engaged to be married and that he did not believe sending her those photographs was wrong because he was not having sex with her.

For this conduct, the appellant was charged with and convicted of wrongfully committing an indecent act with the 13-year-old girl by "electronically sending [her] digital photos of his genitals, which she did, in fact, receive and view." For that same act, he was also convicted of knowingly transferring obscene materials to a person under 16-years old by "sending via electronic means over the Internet digital photos of his genitals," in violation of 18 U.S.C. § 1470. He was also convicted of willfully exposing his genitals to public view in an indecent manner by electronically communicating the

[1] The mother testified at trial that she unsuccessfully tried to report the appellant's conduct to civilian authorities in 2007 and ended those efforts after it was clear the appellant had stopped communicating with her daughter.

photographs to the girl's email account. After findings, the military judge "merged" the indecent act and transfer of obscenity offenses for purposes of sentencing and advised the members they should consider them as one offense.

Failure to State an Offense

The indecent act and indecent exposure specifications in this case were brought pursuant to Article 134, UCMJ, but failed to allege the terminal element. Although there was no objection at trial, the appellant contends this constitutes plain and obvious error that materially prejudiced his substantial Constitutional right to notice such that these two specifications must be set aside on appeal.

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

In *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court dismissed a contested adultery specification whose failure to allege an Article 134, UCMJ, terminal element was not challenged at trial. Applying a plain error analysis, the Court found the failure to allege the terminal element was plain and obvious error but a remedy is required only if "the defective specification resulted in material prejudice to [the appellant's] substantial right to notice." *Id*. at 215 (citation omitted). The Court explained that the prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009); *United States v. Cotton*, 535 U.S. 625, 633 (2002); *United States v. Johnson*, 520 U.S. 461, 470 (1997)).

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where such notice was missing: (1) the Government did not even mention the Article 134, UCMJ, specification in its opening statement let alone how the accused's conduct satisfied Clause 1 or Clause 2 of the terminal element; (2) the Government presented no evidence or witnesses to show how one or both of those clauses were satisfied; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; (4) though the panel instructions listed and identified the terminal elements, they came after the

close of the evidence without alerting the accused of the Government's theory of guilt; and (5) the Government made only a passing reference to the Article 134, UCMJ, charge in closing argument but again failed to mention either terminal element. *Id*. at 216. In sum, the Court found nothing that reasonably placed the accused "on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*. (citation omitted). That is not the case here.

Prior to trial, the defense raised a motion alleging unreasonable multiplication of charges for findings and sentencing. During the Article 39(a), 10 U.S.C. § 839(a), session on this pre-trial motion, the parties discussed the specifications and their elements. For the indecent act specification, the trial counsel stated the Government had to prove the appellant's conduct was either prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces, and that it intended to prove the first prong by introducing evidence the appellant used his military uniform and position to gain the trust of the victim's mother, and also that the appellant had acted in a manner that brought discredit upon the armed forces. Without protest, the defense counsel expressly acknowledged this as the Government's position relative to that specification and, as such, the defense was clearly on notice as to the Government's theory of criminality for the indecent act offense brought pursuant to Article 134, UCMJ.

Under the unique circumstances of this case, we also find the appellant was on comparable notice regarding the terminal element of the indecent exposure specification. The appellant's complaint in the unreasonable multiplication motion was that the Government had charged him three different ways for the exact same act (emailing the photographs). During the initial Article 39(a), UCMJ, session on that motion, the defense counsel argued that the Air Force's interest in enforcing good order and discipline was not limited to the indecent acts specification and instead was incorporated in all three Article 134, UCMJ, specifications. This indicates the defense was already on notice about the Government's intended theory of criminality for the indecent exposure specification and was prepared to defend against it.

Additionally, in its opening statement, the Government mentioned the appellant's use of his military status to gain the mother's trust. In its closing argument on both specifications, the Government argued both terminal elements were met by the evidence presented at trial. The trial counsel cited the mother's opinion that his conduct brought discredit to the military and reminded the panel how the appellant was able to maintain communication with the girl (and thus send these photographs) because of his military status. Before the members, the defense did not dispute the underlying facts about the appellant's use of his military status and instead focused on the Government's overcharging in the case and how the appellant's conduct was not public enough to constitute an indecent exposure.

Viewing this case in light of *Humphries* and following a close review of the record, we find these defective specifications did not result in substantial prejudice to the appellant's material right to notice. The trial record makes clear the appellant was "on notice of whether he needed to defend against this charge on the basis that his conduct was not service discrediting, not prejudicial to good order and discipline, both, or neither." *Humphries*, 71 M.J. at 217. Accordingly, we decline to set aside the indecent act and indecent exposure specifications.

Indecent Exposure Specification

The appellant raises an instructional issue regarding his indecent exposure conviction, which alleged that he "did, . . . through an electronic communication to the electronic email account of [the 13-year-old girl] which [he] knew to be monitored by [the girl's mother], willfully and wrongfully expose in an indecent manner to public view his genitals." He also argues the evidence is factually and legally insufficient to prove he committed this offense. We agree the evidence is factually insufficient.

We review issues of 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 and making allowances for not having observed the witnesses, [we] are [ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a 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.

At the time of the appellant's activities, indecent exposure was charged under Article 134, UCMJ. As charged in Specification 2 and instructed by the military judge, the elements of this offense are: (1) the appellant exposed his genitals to public view in an indecent manner through an electronic communication to the electronic email account of the 13-year-old girl which he knew was monitored by her mother[2]; (2) the exposure was willful and wrongful; and (3) under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 88 (2005 ed.).

[2] After the trial counsel argued the appellant's conduct met the "public view" requirement because he sent the photograph to the daughter and did so through the Internet where many people can see it, the military judge expressly instructed the panel that the "public" for purposes of this specification was only the mother.

Here, the gravamen of this "public exposure" was the mother, not her daughter or any other member of the public. Accordingly, the Government was required to prove the appellant intended the mother to view his exposed genitals when he sent the email to her daughter. Under the facts of this case as developed at trial, we are not personally convinced of the appellant's guilt beyond a reasonable doubt. We therefore set aside the indecent exposure specification and reassess the sentence below.[3]

Indecent Act Specification

Although he did not request such an instruction at trial and did not raise a consent defense before the members, the appellant now contends the military judge erred by not instructing the members that consent was a defense to the charge that he committed an indecent act with another after evidence was presented that the 13-year-old girl consented to the appellant sending her the photographs of his erect penis. He also argues the evidence is factually and legally insufficient to sustain his conviction. We agree the evidence is factually insufficient.

As charged in Specification 1, the elements of indecent acts with another are: (1) the appellant committed a certain wrongful act with the 13-year-old girl by electronically sending her digital photographs of his genitals which she did receive and view, (2) the act was indecent, and (3) under the circumstances, his conduct was to the prejudice of good order and discipline or was of a nature to ring discredit upon the armed forces. *MCM*, Part IV, ¶ 90(b). To be guilty of committing indecent acts *with* the 13-year-old girl by sending photographs to her, his acts had to "'be done in conjunction or participating with'" her. *United States v. Miller*, 67 M.J. 87, 91 (C.A.A.F. 2008) (quoting *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987)). "There must be some 'affirmative interaction' between the accused and the victim to satisfy the 'with another person' element" and the girl must be "more than an inadvertent or passive observer" to meet this requirement. *Id.* (citation omitted).

According to the appellant's statement to investigators, he sent the photographs to her after he asked if she had ever seen a man's penis and whether she wanted to. When she equivocally responded with "I guess," he elected to send her photographs of his own penis. He had not asked her if she wanted to see or receive such photographs so her response can hardly be considered an invitation of such an action, nor an indication that she knew his response would be to send those photographs. Here, the girl was the recipient of an unsolicited email containing the images of the appellant's penis, and did not respond to or actively participate with the appellant regarding the images before or after receiving them. In fact, her reaction to receiving the photographs was to immediately stop communicating with him for a period of time. Although she passively

[3] Because we are setting aside the specification on factual sufficiency grounds, we do not reach the alleged instructional error regarding this offense.

observed the photographs, we are not convinced beyond a reasonable doubt that the appellant was "acting with" her for purposes of indecent acts with another. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). Accordingly, we set aside the indecent act specification and reassess the sentence below.[4]

Transferring Obscene Materials to a Minor

The appellant was convicted of using a means of interstate commerce (the Internet) to knowingly transfer obscene materials to a person he knew was under the age of 16 by sending photographs of his genitals to the 13-year-old girl. This was charged under Article 134, UCMJ, as a violation of 18 U.S.C. § 1470. The elements of this offense are: (1) the accused used a means of interstate commerce (here, the Internet) to transfer obscene material to another person; (2) that matter was obscene; (3) the transfer of obscene material was done knowingly; (4) the recipient of the material had not attained the age of 16; and (5) the accused knew such other person had not attained the age of 16 at the time of the transfer. *See MCM,* Part IV, ¶ 60; 18 U.S.C. § 1470.

For purposes of the related offense of depositing obscene matters in the mail, the *Manual* states: "Whether something is obscene is a question of fact. 'Obscene" is synonymous with 'indecent' as the latter is defined in [regard to indecent language.] The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression." *MCM*, Part IV, ¶ 94.c (2008 ed.). The related definition of "indecent" states the material must be "grossly offensive to modesty, decency, or propriety, or shocks the moral sense because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. [The material] is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The [material] must violate community standards." *Id.* at ¶ 89.c.

Because this specification alleged a violation of federal law, the defense argued federal case law should be utilized in advising the panel on the definitions of this offense. Specifically, in defining the "community" for purposes of evaluating the obscene nature of the photographs in this case, the defense requested the panel be instructed that:

> [] "Obscene matter" is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature.
>
> [] The "community" you should consider in deciding whether a matter is obscene is not defined by a precise geographic area or collection of society. You may consider evidence of standards existing on a national

[4] Because we are setting aside the specification on factual sufficiency grounds, we do not reach the alleged instructional error regarding this offense.

> contemporary community standard rather than a standard existing in a particular military organization.

According to the trial defense counsel, this language came from *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009), a recent federal case involving the same federal offense incorporated in the appellant's case. The military judge denied the defense request and instead used the definition of "obscene matter" found in the Military Judges' Benchbook relative to depositing "obscene materials" in the mail:

> "Obscene matter" is that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature.
>
> Matter is also "obscene" if it is grossly offensive to the community's sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its tendency to incite lustful thought. Matter is, therefore, "obscene" if it tends, reasonably, to corrupt morals or incite lustful thought, either expressly or by implication, as reasonably interpreted by commonly accepted community standards. The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. *The community standards of decency or obscenity are to be judged according to a reasonable person in the military community as a whole, rather than the most prudish or the most tolerant members of the military community*.

(Emphasis added.).

Military case law supports the military judge's decision to use a "military community" standard, as opposed to a "national contemporary community standard." *See United States v. Baker*, 57 M.J. 330, 339 (C.A.A.F. 2002); *United States v. Hullet*, 40 M.J. 189, 191 (C.M.A. 1994); *United States v. Gallo*, 53 M.J. 556, 568 (A.F. Ct. Crim. App. 2000); *United States v. Dyer*, 22 M.J. 578, 582-83 (A.C.M.R. 1986). This position is consistent with the Supreme Court's specific rejection of a nationwide standard. *Miller v. California*, 413 U.S. 15, 31-32 (1973); *United States v. Maxwell*, 45 M.J. 406, 425-26 (C.A.A.F. 1996). As such, the instruction did not constitute plain error. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011).

Sentence Reassessment

Having found error regarding the indecent exposure and indecent act specifications, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error,

the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08. Under this standard, we have determined that we can discern the effect of the errors and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

Regarding the indecent act specification, we note the military judge told the panel they must consider it and the transfer of obscenity specifications to be one for purposes of sentencing. Therefore, the maximum sentence faced by the appellant was not affected by this specification and the panel was instructed not to punish the appellant separately for it. Accordingly, the appellant's erroneous conviction for committing indecent acts did not affect the sentence adjudged by the court-martial panel.

For the indecent exposure specification, the underlying facts regarding the mother's viewing of the photographs and her reaction to them would still have been before the panel as part of the facts and circumstances of the other two specifications. Under the circumstances of this case, especially considering that the affected specification contributed only 6 months to the 10 ½ year maximum confinement the appellant faced and since the facts underlying the exposure specification would still have been otherwise admissible, we are convinced that, absent these errors, the panel would have imposed and the convening authority would have approved the same sentence.

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

Conclusion

The finding of guilt as to Specifications 1 and 2 of the Charge are set aside and dismissed. The remaining findings and sentence, following reassessment, are correct in

law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ. Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).