UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant TIMOTHY M. BAZAR
United States Air Force

ACM 37548

29 June 2012

Sentence adjudged 10 July 2009 by GCM convened at Randolph Air Force Base, Texas. Military Judge: William M. Burd.

Approved sentence: Dishonorable discharge, confinement for 8 years, and reduction to E-1.

Appellate Counsel for the Appellant: Frank J. Spinner (civilian counsel) (argued); Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Reggie D. Yager; and Captain Nathan A. White.

Appellate Counsel for the United States: Major Charles G. Warren (argued); Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Naomi N. Porterfield; Captain Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of one specification each of sodomy with a child, indecent liberties with a child, and providing alcohol to a minor, in violation of Articles 125 and

134, UCMJ, 10 U.S.C. §§ 925, 934.[1] The adjudged sentence consisted of a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. Except for the forfeitures, the convening authority approved the sentence as adjudged.

The appellant raises nine issues for our consideration: (1) Whether the military judge erred by ruling that Specification 1 (sodomy with a child) and Specification 2 (forcible sodomy) of Charge I were multiplicious for findings; (2) Whether the military judge erred by failing to instruct the members that mistake of fact is a defense to indecent liberties; (3) Whether the military judge erred by admitting improper rebuttal evidence during sentencing; (4) Whether the evidence is legally sufficient to sustain the appellant's convictions for indecent liberties and providing alcohol to a minor; (5) Whether the military judge erred by restricting cross-examination of DWS during sentencing; (6) Whether the military judge should have provided a mistake of fact defense to an allegation of sodomy; (7) Whether the military judge erred by not treating Specification 1 of Charge II (indecent liberties with a child) as being unreasonably multiplicious with the specifications of Charge I for findings and sentencing; (8) Whether the appellant's conviction of sodomy with a child is unconstitutional; and (9) Whether Specifications 1 and 2 of Charge II fail to state an offense under Article 134, UCMJ.[2]

Background

In May 2007, the appellant and DWS, a then 15-year-old male, began communicating online through the social networking website MySpace. DWS contacted the appellant on the site after DWS's high school acquaintance gave him the appellant's name in response to DWS's inquiries about where he could obtain drugs. DWS and the appellant agreed to meet in person.

On 15 May 2007, DWS called the appellant and gave him the address and phone number to DWS's great-grandparents' house, where DWS was staying that night. The appellant drove to the address, picked up DWS, and then went to a liquor or convenience store where the appellant purchased at least two bottles of alcohol. They then drove to an Econo Lodge Hotel where the appellant identified himself as a military member and paid for the room. DWS testified that after entering the room, he tried but could not open his bottle of alcohol, which he described at trial as containing a pink liquid and being similar to "Boone's Farm Strawberry Hill." DWS then went to use the bathroom. When he returned, he found the bottle opened. DWS drank some of the alcohol and then sat on the bed and watched TV. He testified that several seconds later he began to feel dizzy and "kind of paralyzed," as if he couldn't move his body. DWS testified the appellant got on

[1] The appellant was acquitted of one specification of committing forcible sodomy in violation of Article 125, UCMJ.
[2] Issues 6, 7, and 8 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

top of him and began to kiss his neck before momentarily leaving the room and returning with a bottle of what DWS believed was some type of lubricant or oil. The appellant continued kissing DWS, removed his clothing and rubbed the substance on DWS's backside and anal region and then anally sodomized DWS. DWS stated the appellant next sat him on a chair and began to orally sodomize him. Later, the appellant helped DWS into the shower where the appellant washed both of them with soap. Afterwards, they dressed and left the hotel.

At the time of trial DWS was 5'3" and 113 pounds. He testified he weighed about 102 pounds at the time of the incident. DWS also acknowledged that, though he was only 15 years old at the time, he told the appellant that he was 17 years old.

Multiplicity

Specification 1 of Charge I alleged the appellant committed sodomy on DWS, a child between the age of 12 and 16, on or about 15 May 2007, while Specification 2 alleged forcible, nonconsensual sodomy upon DWS on the same date. The appellant made a timely motion at trial to dismiss the forcible sodomy specification, arguing that it was a lesser included offense of sodomy with a child and therefore multiplicious. The military judge denied the motion and instructed the members on the elements of both specifications. The appellant was ultimately acquitted of Specification 2.

The appellant now resumes his argument that Specifications 1 and 2 of Charge I were multiplicious. He complains that even though he was acquitted of forcible sodomy with DWS, he was nonetheless prejudiced by the military judge's ruling because the inclusion of Specification 2 amongst the other charges exaggerated his criminality. We disagree.

We review issues of multiplicity *de novo*. *United States v.* Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007). Multiplicity is an issue of law that enforces the Double Jeopardy Clause. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993); *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See Teters*, 37 M.J. at 376; *see also* Rule for Courts-Martial (R.C.M.) 907(b)(3), Discussion. Where legislative intent is not expressed in the statute or legislative history, "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376-77. Thus, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304 (citation omitted); *see also Teters*, 37 M.J. at 377

(*Blockburger* rule "is to be applied to the elements of the statutes violated"). Accordingly, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

Applying the *Blockburger* test, we find no improper multiplication of charges. The offense of sodomy with a child as charged in Specification 1 and the offense of forcible sodomy as charged in Specification 2 carry distinct elements. The elements of sodomy with a child under the age of 16 years are: (a) That the accused engaged in unnatural carnal copulation with a certain other person; and (b) That the act was done with a child who was between 12 and 16 years old. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 51b(1), (3) (2005 ed.). The elements of forcible sodomy are: (a) That the accused engaged in unnatural carnal copulation with a certain other person; and (b) That the act was done by force and without the consent of the other person. *MCM*, Part IV, ¶ 51b(1), (4). Clearly, the offense of sodomy with a child requires proof of a victim's age of minority, which is not required to prove the offense of forcible sodomy. Conversely, the offense of forcible sodomy requires proof of non-consent, which is irrelevant to prove the offense of sodomy with a child. As there are elements of each offense which are not contained within the other, and as there is no congressional or presidential guidance to the contrary, the military judge did not err in denying the appellant's motion to dismiss Specification 2 of Charge I.

Unreasonable Multiplication of Charges

The appellant argues that the military judge erred by not finding Specification 1 of Charge II (indecent liberties with a child) as being unreasonably multiplicious with the two sodomy specifications of Charge I. Specifically, the appellant claims that the charges of anal sodomy and showering with DWS were part of a continuing course of events occurring during the same evening with the same person and should not have been charged separately.

"Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct. Crim. App. 1999)). Our superior court has noted that:

> [E]ven if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard – reasonableness – to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001); *see also* R.C.M. 307(c)(4) ("[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.").

In determining issues of unreasonable multiplication, we apply a five-part test which considers: (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *Pauling*, 60 M.J. at 95 (citing *Quiroz*, 55 M.J. at 338). The factors are to be balanced, with no single factor dictating the result. *Id*.

Applying the test to this case, we find no unreasonable multiplication of charges for findings or sentence. While the trial defense counsel did object to the charging at trial, the other factors weigh against the appellant. Specifically, we note that: (1) each charge and specification is aimed at distinctly criminal acts for findings purposes – anal sodomy with a child and indecent liberties by taking a shower with a child; (2) the separate charges and specifications simply describe rather than misrepresent or exaggerate the appellant's criminality; (3) given the member's not guilty finding regarding forcible sodomy, the number of charges and specifications do not unreasonably increase the appellant's punitive exposure; and (4) charging the acts separately was a fair and reasonable exercise of prosecutorial discretion given the exigencies of proof in the context of the events on the night in question and there is otherwise no evidence of prosecutorial overreaching. In short, the record of trial is clear that the sodomy and indecent liberties were separate and distinct events and did not constitute a single transaction within a unity of time. We find the appellant was not subjected to an unreasonable multiplication of charges and that the military judge did not abuse his discretion on this matter.

Mistake of Fact as a Defense to Sodomy

The military judge ruled that mistake of fact as to age is not a defense to an allegation of sodomy with a person between the ages of 12 and 16 under Article 125, UCMJ. We agree. Our superior court has spoken directly to this issue and held that mistake of fact is not a defense to sodomy. *United States v. Wilson*, 66 M.J. 39, 40 (C.A.A.F. 2008) (explaining that Congress included an explicit mistake of fact defense as to age in Article 120, UCMJ, but did not provide one in Article 125, UCMJ). Accordingly, an instruction on mistake of fact as to age was not warranted for Charge I.

Use of Uncharged Misconduct to Impeach Defense Witness

The defense's sentencing case consisted primarily of the appellant's unsworn statement and letters offered in mitigation from family members and acquaintances who wrote favorably of the appellant's military character and rehabilitative potential.

Four of the seven character letters presented by the defense expressed opinions that the appellant is the kind of person who has or would learn from his mistakes and implied he was unlikely to commit the same acts again. Staff Sergeant (SSgt) D, an author of one of those letters also testified during the appellant's sentencing case-in-chief. During her cross-examination, SSgt D reaffirmed her written opinion that the appellant is someone who learns from his mistakes and makes a point never to make the same mistake twice. Trial counsel sought to impeach SSgt D's opinion with evidence of uncharged misconduct regarding a "sting operation" in which the appellant purportedly solicited sexual acts with a minor, "Bobby Ramos." "Bobby Ramos" was in fact a fictitious 15-year-old boy fabricated by law enforcement. The trial defense counsel objected under Mil. R. Evid. 403 and 404(b), arguing the uncharged misconduct was not relevant because the fictitious "Bobby Ramos" was, according to a website printout, in fact 17 years old. The military judge overruled the defense's objections, finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

On cross-examination a witness's opinion or knowledge may be tested by inquiring into relevant specific instances of conduct. Mil. R. Evid. 405(a); *see also United States v. Catrett*, 55 M.J. 400, 406 (C.A.A.F. 2001); *United States v. Pruitt*, 46 M.J. 148 (C.A.A.F. 1997). Cross-examination that delved "into relevant specific instances of conduct" was permitted as SSgt D gave testimony regarding a pertinent character trait of the accused – that he was the type of person who makes a point to never make the same mistake twice. Such an inquiry was permitted by Mil. R. Evid. 405(a). The issue of whether "Bobby Ramos" was 15 or 17 years old was an issue for the factfinder to determine. The military judge did not abuse his discretion by permitting trial counsel to cross-examine SSgt D concerning the "sting operation."

Government Rebuttal Evidence

In the Government's rebuttal case, over the defense counsel's objection, Special Agent Gonzales testified that detectives from the San Antonio Police Department created a MySpace profile of an adult police officer purporting to be a 15-year old boy named Bobby Ramos. The operation was created in an attempt to obtain sufficient evidence to secure a search authorization of the appellant's computer.[3] During various e-mail exchanges, the appellant asked the fictitious Bobby Ramos whether they could get

[3] The sting operation took place approximately a year after the events involving DWS.

together and engage in sexual activities. The interplay continued with the appellant asking Bobby Ramos to provide naked pictures of himself. The police officer did not provide the requested material and the e-mail correspondence ceased.

The appellant argues that he was prejudiced because trial counsel was able to use this evidence during his sentencing argument to characterize the appellant as a "predator" and to argue that the charged offenses weren't a "one-time mistake." He further asserts that the military judge's failure to provide a limiting instruction on the proper use of this evidence – to assess witness credibility or rehabilitation potential – allowed the members to punish the appellant for the uncharged misconduct on top of the charged offenses.

In overruling the defense's objection, the military judge ruled the uncharged misconduct was:

> Clearly admissible rebuttal evidence based on the characterization the defense evidence has made of the accused's character, his rehabilitative potential, his performance over the last few years. Not only have the character letters opened the door to his, but his unsworn statement has opened the door to this. His mother's testimony has opened the door to this.

In sentencing, except for non-factual matters in the accused's unsworn statement, "[t]he prosecution may rebut matters presented by the defense." R.C.M. 1001(d). "The scope of rebuttal is defined by evidence introduced by the other party." *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992); *United States v. Hallum*, 31 M.J. 254 (C.A.A.F. 1990) ("[T]he relevance of the Government's rebuttal evidence must be determined in light of the evidence first introduced and issues initially raised by the defense." (quoting *United States v. Wirth*, 18 M.J. 214, 218 (C.M.A. 1984)). For example, rebuttal evidence may be presented to contradict defense evidence of "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." R.C.M. 1001(c)(1)(B).

We agree with the military judge that the defense chose to open the door regarding the appellant's character utilizing witnesses who could not be cross examined about their opinions. Where the accused introduces evidence of his reputation and the good quality of his prior service, the prosecution may rebut with specific instances of misconduct "[f]or, otherwise, an accused would occupy the unique position of being able to parade a series of partisan witnesses before the court testifying at length concerning specific acts of exemplary conduct by him without the slightest apprehension of contradiction or refutation by the opposition, fullhanded with proof of a contrary import although the prosecution might be." *United States v. Ledezma*, 4 M.J. 838 (A.F.C.M.R. 1978)

(internal quotations marks and citations omitted). Additionally, the military judge conducted the required balancing test and found that whatever prejudice may have resulted from admission of the "sting operation" was substantially outweighed by its probative value. A military judge is presumed to know and apply the law correctly, *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994), and has "wide discretion" in conducting the Mil. R. Evid. 403 balancing test, *United States v. Pearce*, 27 M.J. 121, 125 (C.M.A. 1988); *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997) ("Ordinarily, appellate courts 'exercise great restraint' in reviewing a judge's decisions under Rule 403."). We find the evidence of the sting operation was properly used to "repel, counteract or disprove the evidence introduced by the opposing party." *United States v. Saferite*, 59 M.J. 270, 274 (C.A.A.F. 2004) (quoting *United States v. Banks*, 36 M.J. 150, 166 (C.M.A. 1992) (citation omitted)).

Moreover, we are convinced the evidence was not impermissibly used to persuade the panel to impose a more severe punishment. *See United States v. Gambini*, 13 M.J. 423, 427 (C.M.A. 1982). Trial counsel's sentencing argument did not dwell on the sting operation nor did he argue the appellant should be punished because of it. In the context of his entire argument, it is clear to us that the trial counsel's reference to a "predator" was based on the offenses for which the appellant was convicted and not the e-mail conversations with Bobby Ramos. We also note the military judge specifically instructed the members that the accused could only be sentenced for the offenses of which he had been found guilty and we have no reason to conclude the members did not comply with the instruction.

Because the prosecution's introduction of the uncharged misconduct fit squarely within the parameters of permissible sentencing evidence under R.C.M. 1001(d), was relevant and not inadmissible for some other reason, and the military judge found its probative value substantially outweighed any possible undue prejudice, the military judge did not abuse his discretion by ruling the sting operation was admissible as proper rebuttal evidence.

Cross-examination of DWS

During sentencing, the appellant sought to cross-examine DWS about matters contained in DWS's mental health records, arguing the information would show DWS sought out and consented to the sodomy. After conducting a Mil. R. Evid. 403 balancing test, the military judge denied the defense request, finding the substance of the cross-examination was not constitutionally required under either Mil. R. Evid. 513 or 412. The appellant argues the military judge abused his discretion in disallowing cross-examination that delved into the requested matters.

We review the military judge's rulings limiting cross-examination for abuse of discretion. *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006); *United States v.*

Israel, 60 M.J. 485, 488 (C.A.A.F. 2005). A military judge has broad discretion in applying Mil. R. Evid. 403, and when he conducts a Mil. R. Evid. 403 balancing test (as he did in this case), his ruling will not be overturned unless there has been a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "Trial judges have broad discretion to impose reasonable limitations on cross-examination, 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). That discretion, however, is not unfettered. An accused's "right under the Sixth Amendment to cross-examine witnesses is violated if the military judge precludes a defendant from exploring an entire relevant area of cross-examination." *Israel*, 60 M.J. at 486 (citing *United States v. Gray*, 40 M.J. 77, 81 (C.M.A. 1994)).

Here, the military judge did not abuse his discretion. We agree with his conclusion that the probative value of permitting cross-examination of DWS with the contents of the mental health records was substantially outweighed by the danger of unfair prejudice. Even assuming for argument that the military judge erred, the appellant suffered no prejudice as a result. Defense counsel ably argued that because the members did not find the appellant guilty of forcible sodomy, the natural implication was that they concluded the incident was consensual and any punishment should be mitigated by that fact. There is no reason to conclude that being able to cross-examine DWS on the matters contained within the mental health records would have significantly altered defense counsel's argument or brought about a different result in the appellant's sentence.

Constitutionality of Article 125, UCMJ

The appellant asserts that that his conviction for sodomy with a minor under Article 125, UCMJ, is unconstitutional because the acts charged fell under the protected liberty interests prescribed by *Lawrence v. Texas*, 539 U.S. 558 (2003). Specifically, the appellant argues that first, the sodomy was consensual because the panel acquitted the appellant of the forcible sodomy charge, and second, the sodomy was between consenting adults as DWS told the appellant he was 17 years old, and thus of legal age (with respect to jurisdiction of the UCMJ). As discussed above, DWS was only 15 years old and the defense of mistake of fact as to age was not available to the charge of sodomy under Article 125, UCMJ. Accordingly, while an act of sodomy occurring in private between consenting adults may be constitutionally protected, the conduct charged under Article 125 in this case remains criminal because DWS was in fact a minor. *See Lawrence*, 539 U.S. at 578 (reasoning that the constitutionally protected sodomy did "not involve minors"); *United States v. Marcum*, 60 M.J. 198, 203–08 (C.A.A.F.2004) (noting *Lawrence*' *s* exceptions for cases involving minors, or persons "who might be injured or coerced or who are situated in relationships where consent might not easily be refused" in upholding Article 125, UCMJ) (internal quotation marks and citation omitted)); *United*

States v. Banker, 63 M.J. 657, 660 (C.A.A.F. 2006). Accordingly, we find the appellant's argument to be without merit.

Failure to State an Offense

The appellant argues that his conviction of Charge II should be set aside and dismissed because neither specification of the Charge alleged the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2).

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.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citing R.C.M. 307(c)(3))). In the appellant's case, the specifications alleging the appellant engaged in indecent sexual acts with a minor and provided alcohol to a minor are defective because neither expressly alleges the terminal element of Article 134, UCMJ; nor do we find the terminal element to be necessarily implied as alleged. *United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Although we find error in the failure of both specifications to allege expressly or by necessary implication either clause 1 or 2 of the terminal element, a finding of error does not alone warrant dismissal. *Ballan*, 71 M.J. at 34. Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012) ("[W]here defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error – which, in most cases will turn on the question of prejudice." (citations omitted)). The appellant has the burden of demonstrating prejudice when a specification fails to allege an offense. *Id*. (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

After a thorough review, we did not find evidence that notice of the missing element is "somewhere extant in the trial record." *Id*. As in *Humphries*, neither Specification 1 or 2 of Charge II provides notice of which terminal element or theory of criminality the Government pursued in the case. Further, no Government witnesses testified as to how the appellant's conduct specifically violated Clause 1 or 2. Rather, the trial counsel merely asserted during his argument that appellant's actions were in effect prejudicial or service discrediting because they occurred. Additionally, although the military judge's instructions to the members properly delineated the terminal elements of Article 134, UCMJ, for both specifications of Charge II, this took place after the close of evidence, "and again, did not alert the appelle[nt] to the Government's theory of guilt." *Id*. (citing *Fosler*, 70 M.J. at 230) (internal quotations omitted)

Based on a totality of the circumstances, we are not convinced the appellant was placed on sufficient notice of the Government's theory as to which clause(s) of the terminal element he had violated. Consequently, the Government's failure to allege the terminal element in both specifications of Charge II constituted material prejudice to the appellant's substantial rights to notice. *See* Article 59a, UCMJ. We therefore set aside the findings of guilty for Charge II and its specifications.[4]

Sentence Reassessment

Having set aside the findings of guilty of Charge II and its specifications, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). 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. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307).

Our review of the record reveals that the sodomy charged under Article 125, UCMJ, was the primary focus of the trial and that the indecent liberties and providing alcohol to a minor were essentially viewed as collateral offenses. The maximum punishment on the appellant's conviction for sodomy with a child between 12 and 16 years of age under Article 125, UCMJ, was a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction in rank to E-1. *See MCM*, Part IV, ¶ 51e(2). The panel sentenced the appellant to a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction in rank to E-1. Furthermore, the acts basing the set aside conviction were inextricably intertwined with the other offenses, and would have been known to the panel members even if the Government had not charged appellant with the Article 134, UCMJ, offenses. We therefore find the appellant suffered no prejudice in this regard.

On the basis of the error noted, the entire record, and applying the principles set forth above, we determine that we can discern the effect of the error and will reassess the sentence. Under the circumstances of this case and considering the relative severity of

[4] Based on our decision to set aside Charge II and its specifications, appellant's arguments with respect to issues two and four are moot.

the unaffected charges, we are confident that the panel members would have imposed the same sentence. *See Doss*, 57 M.J. at 185.

Conclusion

The finding of guilty of Charge II and its specifications is set aside and the charge is 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. 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, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court