UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39295

UNITED STATES
Appellee

v.

James S. MACHEN III
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 29 August 2018

Military Judge: Donald R. Eller Jr.

Approved sentence: Dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. Sentence adjudged 6 April 2017 by GCM convened at Spangdahlem Air Base, Germany.

For Appellant: Capt Mark J. Schwartz, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Jeremy D. Gehman, USAF; Mary Ellen Payne, Esquire.

Before HARDING, HUYGEN, and POSCH, *Appellate Military Judges.*

Senior Judge HARDING delivered the opinion of the court, in which Judges HUYGEN and POSCH joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

HARDING, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, consistent with his pleas, of receiving, possessing, and viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C.

§ 934.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant raises a single issue on appeal: that the military judge abused his discretion when, during the Government sentencing case, he admitted three written unsworn victim impact statements from the victims depicted in the child pornography received, possessed, or viewed by Appellant. The victim impact statements were offered and admitted as prosecution exhibits under Rule for Courts-Martial (R.C.M.) 1001A. As detailed below, the victims did not participate in the proceedings, were not notified of and were likely unaware of Appellant's trial, and, most importantly, did not themselves, or through a designee or counsel, elect to submit unsworn victim impact statements in *this* case. Considering those facts in light of *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018), which held that a victim statement may not be admitted under R.C.M. 1001A without the participation of the victim, we find the military judge abused his discretion by admitting the victim impact statements under R.C.M. 1001A. However, because we conclude in this military judge-alone case that this error did not substantially influence the sentence, we find no prejudicial error and affirm the findings and sentence.

I. BACKGROUND

During its sentencing case, the Government offered unsworn written statements of victims associated with three distinct National Center for Missing and Exploited Children (NCMEC) series of child pornography—the "Jan-Feb" series, "Vicky" series, and "Cindy" series—that matched the images of child pornography Appellant had been charged with, pleaded guilty to, and was found guilty of receiving, possessing, and viewing. In lieu of notification to these victims of their rights to be reasonably heard at this sentencing hearing pursuant to Article 6b, UCMJ, 10 U.S.C. § 806b, and R.C.M. 1001A, the Government relied on the law enforcement case agent for each NCMEC child pornography series to attempt to meet the requirements of R.C.M. 1001A. The agents were called as Government sentencing witnesses and, even though the agents had each met or corresponded in the past with the victims in this case, there is no basis in the record to conclude the agents discussed Appellant's case with the victims. Thus, there is no basis to conclude the agents were designated to represent the victims for this case. Instead, through the testimony of the agents, the Government established that each victim generally desired to have her respective unsworn written statement "heard" by sentencing authorities in

[1] Appellant was convicted of three specifications for child pornography offenses.

cases where a defendant had been convicted of a child pornography offense or offenses involving the NCMEC series that pertained to her.

On notice that the Government would offer the victim statements during the Government sentencing case, Appellant's trial defense counsel filed a written motion in limine prior to trial. The motion sought "to preclude trial counsel from presenting impermissible sentencing evidence in the form of unsworn impact letters and testimony from law enforcement case agents." Among the multiple grounds for exclusion of the victim statements, Appellant's trial defense counsel highlighted the lack of participation by any of the victims.

> These statements lack foundation for personal knowledge about this case. R.C.M. 1001A(e)(1) envisions, after announcement of findings, a "victim who would like to present an unsworn statement" providing to the court a copy of the statement. This implies active involvement in this specific case by an interested victim. It also implies the court is able to assess the identity of the victim and how that person relates to the proceedings. In this case there is no indication that any purported victim wants to present an unsworn statement—or even that any know about this case and their rights with respect to it. Instead trial counsel is trying to offer old, recirculated letters from past cases.

The trial defense counsel reiterated this ground for exclusion of the victim statements at the beginning of the hearing on the motion in limine.

> [The victims in this case] haven't been notified of the proceeding. They haven't been notified of their opportunity to be present. They haven't been notified of any pretrial matters that victims would be required to be notified of.
>
> . . . .
>
> . . . R.C.M. 1001A envisions that at the end of a trial, or a guilty proceeding, that there's going to be a real victim who comes forward and says, "I would like my unsworn statement to be considered by the Court," [sic] provides it to you. So there's a real person that we're interacting with that we, you know, we have foundation for who this person is and how they're related to the case, and then they are aware of the case. So none of these people are aware that this case is occurring.

The military judge then posed a direct question to the trial counsel, "[U]nder Article 6(b) do I have to make the finding that this particular victim was notified of the case of *U.S. v. Machen* and has personally requested this statement [be considered]?" The trial counsel replied that a law enforcement

agent could be permitted to lay the foundation for a victim to be heard in sentencing under Article 6b. Trial counsel also asserted there is no requirement a victim of child pornography be aware of a particular court-martial concerning her images in order for her prior unsworn victim impact statement to be heard at a sentencing hearing for that court-martial. Trial counsel then called the law enforcement case agent for the "Jan-Feb" series. The agent testified that he had met the victim and was aware of the victim's intent to have an unsworn statement considered in future cases but did concede that the victim was not aware of Appellant's case. The case agent also testified the victim's birthday was in April of 1996—the victim was approximately 20 years old at the time of Appellant's trial.

After the agent's testimony and further argument, the military judge determined that the agent could exercise the victim's rights under R.C.M. 1001A. The military judge did not, however, refer to R.C.M. 801(a)(6) as a basis to treat the agent as the representative for the victim or otherwise follow that rule's procedure to determine the appointment of a designee to assume the victim's rights under the UCMJ.

> To the extent that this witness has had contact with the victim, the Court will treat this agent as the representative for the victim in that capacity. So I will allow him to, while he's still under oath, and counsel can certainly question him about it, but I will accept his representations on the behalf of the person identified in the Jan-Feb image . . . .
>
> So in that capacity, your objection is overruled and I will allow the witness to testify in the capacity of the victim and her right to be heard in sentencing.

After hearing the testimony of the law enforcement case agents for the "Vicky" series[2] and "Cindy" series,[3] the military judge also determined they could act as representatives for the respective victims.

---

[2] The case agent for the "Vicky" series testified that he met the victim in 2007 when she was 17 years of age—at the time of Appellant's trial she was at least 26 years of age. The agent testified that he was aware of the victim's intent to have an unsworn statement considered in future cases but did concede that the victim was not aware of Appellant's case.

[3] The case agent for the "Cindy" series testified that the victim was born in 1987—she was at least 29 years of age at the time of Appellant's trial. The agent testified that he was aware of the victim's intent to have an unsworn statement considered in future cases but did concede that he had not communicated with the victim in the four years preceding Appellant's trial. Thus, the victim was not aware of Appellant's case.

In sum, the military judge treated the law enforcement case agents as designees for the victims, even though each victim was an adult by the time of Appellant's trial and there was not even a scintilla of evidence to suggest that any of the victims was incapacitated or incompetent. The military judge then admitted the written unsworn statements of the victims as prosecution exhibits. After admitting the victim statements, the military judge did state for the record that he would not sentence Appellant for the abuse described in the statements and suffered by the victims attributable to the production of the child pornography. He stated he would consider the impact on the victims attributed to the images or videos being shared with others and accessed by Appellant in particular. The military judge reiterated his limited use of the victim statements just before announcing the sentence.

II. DISCUSSION

A. R.C.M. 1001A

This Court reviews "a military judge's decision to admit evidence for an abuse of discretion." *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002) (citation omitted). A military judge abuses his discretion when he admits evidence based on an erroneous view of the law. *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013) (quoting *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)).

In *Barker*, the Court of Appeals for the Armed Forces (CAAF) interpreted R.C.M. 1001A and concluded,

> [The] rights vindicated by R.C.M. 1001A are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim, R.C.M. 1001A(a), the special victim's counsel, . . . or the victim's representative, R.C.M. 1001A(d)–(e).

77 M.J. at 382.

In this case, the Government attempted to meet the presence or request of the victim requirement by calling the case agents who had met with the victims in the past and had general knowledge of their intent that their written statements be considered in future cases. The military judge went a step further and decided to treat the case agents as representatives of the victims but did not follow the procedure to determine the appointment of a designee described in R.C.M. 1001A(e) and R.C.M. 801(a)(6). The victims, even though all adults at the time of Appellant's trial, were not contacted by the trial counsel or the case agents with a view toward this particular trial.

As the CAAF stated in *Barker*, it is likewise in this case that

> [T]his approach ignores the requirement of Article 6b, UCMJ, that victims be contacted and have the choice to participate and be consulted in cases where they are victims. Article 6b(a)(2)−(5), UCMJ. It further ignores the fact that the R.C.M. 1001A process belongs to the victim, not to the trial counsel. R.C.M. 1001A(a).

77 M.J. at 383. The CAAF further noted,

> All of the procedures in R.C.M. 1001A contemplate the actual participation of the victim, and the statement being offered by the victim or through her counsel. Moreover, they assume the victim chooses to offer the statement for a particular accused, as they permit only the admission of information on victim impact "directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2).

Id.

Furthermore, all of the victim statements, although admitted under R.C.M. 1001A, were marked as prosecution exhibits. As this court observed in *United States v. Hamilton*, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017) (en banc), *rev. granted*, 77 M.J. 368 (C.A.A.F. 2018),

> Trial practitioners must recognize the distinction between evidence offered and admitted during presentencing by the prosecution and defense under R.C.M. 1001 and victim impact statements offered under R.C.M. 1001A. The victim "shall be *called by the court-martial*" as their right to be heard is "*independent* of whether they testify during findings or are *called to testify under R.C.M. 1001*." R.C.M. 1001A(a) (emphasis added).

Exhibits presented under R.C.M. 1001A should be marked as court exhibits.[4] In this case, however, marking the victim impact statements as prosecution exhibits accurately captured how they were admitted as these exhibits were offered by the Prosecution during *its* sentencing case. Effectively, trial counsel appropriated the victims' rights under R.C.M. 1001A in order to admit *the Government's evidence* in aggravation. This use of R.C.M. 1001A by the trial counsel is impermissible in light of *Barker*; "the R.C.M. 1001A process belongs to the victim, not to the trial counsel." *Barker*, 77 M.J. at 383. Trial

[4] As this court also stated in *Hamilton,* "[w]e recommend these types of exhibits be marked as court exhibits in accordance with the Uniform Rules of Military Practice Before Air Force Courts-Martial, Rule 7.1(C) (1 Jan. 2017)."

counsel's proper role under R.C.M. 1001A is to "ensure the victim is aware of the opportunity to exercise" the right to be heard at a sentence hearing, not to ensure the right is exercised.

Trial counsel had no personal knowledge of or contact with the victim-declarants of the unsworn written statements and had not notified the victims to provide them an opportunity to appear at the court-martial and provide a statement. The three victims from the NCMEC series involved in Appellant's offenses did not participate in the proceedings and there is no indication that any of these victims was aware of Appellant's trial. Most importantly, the unsworn statements were not offered by the victims—all adults at the time of trial—and the law enforcement case agents were not designated to exercise the victims' right to be reasonably heard at Appellant's sentencing. Thus, we conclude the military judge abused his discretion by admitting the unsworn victim impact statements under R.C.M. 1001A.

B. Prejudice

When there is error regarding the presentation of victim statements under R.C.M. 1001A, the test for prejudice "is whether the error substantially influenced the adjudged sentence." *Barker*, 77 M.J. at 384 (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

As highlighted by the trial counsel during the Government's sentencing argument, Appellant possessed over 80 computer files of children being raped or abused, received child pornography on a cell phone, and viewed videos depicting children being bound and sodomized. The Government's case was exceptionally strong. By comparison, Appellant's sentencing case—consisting of an unsworn statement by Appellant, expert testimony that non-contact online offenders present very low recidivism risk, and awards received by Appellant—was relatively weak.

While the theme of the improperly admitted unsworn victim statements was constant re-victimization, the impact of child pornography is itself settled law. It is also highly relevant when we analyze the effect of the error on Appellant's sentence that this case was tried before a military judge, who is presumed to know the law. *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F.

2008) (citations omitted); *see also United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007). Beyond mere presumption, this military judge in Appellant's case specifically referred to *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), wherein we agreed "with the overwhelming majority of Federal circuit courts that children portrayed in pornography are the direct victims of such offenses for sentencing purposes in that they suffer a direct psychological and emotional harm through the invasion of their privacy." *Id.* at 555. Further, the military judge stated for the record that he would limit his use of the victim impact statement to these considerations. Thus, the materiality of the statements was slight. Given the aggravated nature of the other properly admitted prosecution evidence and the settled law as to the lasting impacts of child pornography on its victims, we are convinced the improperly admitted victim impact statements did not substantially influence the sentence. We conclude that in this military judge-alone case the error did not result in prejudice to Appellant.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court