UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
R.Q. WARD, K.M. MCDONALD, T.J. STINSON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SHAWN L. MOOREFIELD
CHIEF INFORMATION SYSTEMS TECHNICIAN (E-7),
U.S. NAVY

NMCCA 201300456
GENERAL COURT-MARTIAL

Sentence Adjudged: 25 July 2013.
Military Judge: CAPT Kevin R. O'Neil, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: CAPT J.M. Nilsen, JAGC, USN.
For Appellant: Maj John Stephens, USMC.
For Appellee: Maj Paul M. Ervasti, USMC; LT Ann Dingle, JAGC, USN.

15 July 2014

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of two specifications of aggravated sexual abuse of a child; four specifications of indecent liberty with a child; aggravated sexual assault of a child and abusive sexual contact with a

child in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920; sodomy with a child under the age of 12 and sodomy with a child over the age of 12 and under the age of 16 in violation of Article 125, UCMJ, 10 U.S.C. § 925; three specifications of persuading a minor to engage in sexually explicit conduct; receipt of images of child pornography; possession of child pornography and two specifications of adultery in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was sentenced to confinement for 29 years and 6 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of 25 years.

The appellant submits two assignments of error: first, that the military judge committed plain error by permitting improper argument in sentencing, and, second, that his sentence is inappropriately severe.[1] After careful consideration of the record of trial and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant pled guilty to a sustained period of sexual abuse of his daughter and to committing sexual misconduct with the seventeen-year-old daughter of a member of his command. During argument on sentence, the trial counsel referred to the impact of the appellant's crimes on his daughter saying:

> And look at her life now. She's basically a ward of the state for almost two years. The last time any family visited her, secondary family, was a year ago. The only friends she's made are other people who are foster children or wards of the state who themselves have difficult lives. She is only a year and a half from being 18, and then where is she going to go from there? Back with [K][2] who participated in some of the sexual abuse when she was six so the accused could hold it over her head so that she wouldn't tell? This

[1] This second assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] [K] is the wife of the appellant and step-mother of the victim.

has changed the first decades of her life and it's impossible to say how long of a shadow this will cast.

Record at 287.

The appellant now argues that the trial counsel's comment ". . . so the accused could hold it over her head so that she wouldn't tell?" - is unsupported in the record and improper. The Government responds that testimony during the aggravation phase supported the inference argued by trial counsel and the military judge presumptively filtered out any improper argument when arriving at an appropriate sentence in this case.

Analysis

Improper Argument of Trial Counsel

When an appellant fails to object to a sentencing argument at the time of trial, appellate courts review the argument for plain error. *United States v. Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003); *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001). In order to prevail under a plain error analysis, the appellant must demonstrate that: (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011); United *States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999).

Here, the appellant's daughter testified that the appellant and her stepmother told her not to report the abuse or they would both go to jail, the family would split up, and she would never see her brothers again. Record at 172. The appellant argues that the implication that the appellant manipulated the stepmother to not report the abuse because of her participation in at least some of the conduct would "radically alter the scope of [the appellant's] criminality." Appellant's Brief of 5 Mar 2014 at 8. We disagree. The appellant pled guilty to a lengthy and sustained pattern of sexual abuse of his minor child, including, *inter alia,* aggravated sexual assault of a child, child sexual abuse, and sodomy on a child under the age of twelve. Arguing that he also manipulated his wife to not report the abuse would not, in our view, radically alter the criminality at issue here.

Assuming *arguendo* that the complained of comment by trial counsel was improper, we find that there was no material

prejudice to a substantial right of the appellant. "When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citations omitted); *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007); *Marsh*, 70 M.J. at 106. The sentencing argument complained of here is limited to less than a full sentence in the trial counsel's sentencing argument. In addition, the argument was made before a military judge and was not objected to by defense counsel. Further, based on his misconduct, the appellant faced a maximum term of confinement of life without the possibility of parole. The sentence of confinement awarded by the trial judge, twenty nine years and six months, is well within the spectrum of authorized punishment. Here, there is no indication that the military judge was improperly swayed by arguments of counsel.

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. *United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). As part of this presumption, we further presume that the military judge is able to distinguish between proper and improper sentencing arguments. *Erickson*, 65 M.J. at 225. In the case before us, we are convinced that the military judge sentenced the appellant based on the evidence alone.

Appropriateness of the Sentence

This court reviews the appropriateness of a sentence *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). As part of that review, we give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). As set forth above, the appellant was convicted of multiple counts of sexual abuse of his young daughter over an extended period of time and sexual misconduct with the minor child of a shipmate. We conclude that considering the evidence admitted at trial, the post-trial matters submitted by the appellant, and the severity of the offenses committed by the appellant, justice was served and the appellant received the punishment he deserved.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court