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

Before
D.E. O'TOOLE, V.S. COUCH, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

EDWIN A. EHLERS II
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800190
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 August 2007.
Military Judge: Maj Brian Kasprzyk, USMC.
Convening Authority: Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC.
For Appellant: Mr. Michael Eisenberg, Esq.; LT Sarah Harris, JAGC, USN.
For Appellee: Capt Robert Eckert, USMC; LT Elliot Oxman, JAGC, USN.

30 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of sodomy with a child under the age of 12 years, assault consummated by a battery upon a child under 16 years, and indecent liberties with a child under the age of 16 years, in violation of Articles 125, 128, and 134, Uniform Code of

Military Justice, 10 U.S.C. §§ 925, 928, and 934.[1] The appellant was sentenced to confinement for 25 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and the sentence, but disapproved all confinement in excess of 19 years in an act of clemency.

The appellant alleges five assignments of error: (1) that the evidence is legally and factually insufficient to support the findings of guilty to sodomy and indecent liberties with a child; (2) that the appellant "was prejudiced before and during the trial by the military's misconduct" in the form of ineffective assistance of counsel, prosecutorial misconduct, and unlawful command influence; (3) that the offenses alleged constitute an unreasonable multiplication of charges; (4) that the sodomy, assault, and indecent liberties charges are multiplicious; and (5) that the appellant's adjudged sentence of confinement for 25 years is "unduly disproportionate." After considering the record, the appellant's briefs and assignments of error, the appellant's *pro se* petition for a new trial, the Government's responses, and the affidavits of the trial and detailed defense counsel which are attached to the record, 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. The appellant's petition for a new trial is denied. RULE FOR COURTS-MARTIAL 1210(g)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Background

While assigned to Camp Pendleton, California, the appellant and his family became friends with their next door neighbors, Petty Officer Second Class [S] and his family, including their four year-old daughter, HS. The two families were close, and their children played and spent time together at each family's house. The appellant's former spouse, Gloria, testified that she occasionally babysat the [S] family children in her home, sometimes in the company of the appellant.

At the time of the alleged offenses, Gloria testified that the appellant routinely viewed pornography from the internet, and maintained a collection of pornography consisting of three digital video disks (DVDs). Gloria further testified that in August 2002, she underwent a hysterectomy and, as a result, experienced a lack of sexual drive and mood swings, which affected the marital

[1] The offenses occurred prior to October 2007, and are therefore unaffected by the amendment of Article 120, UCMJ, that now encompasses sexual offenses involving children.

relationship between her and the appellant. The couple separated in April 2004, and subsequently divorced.

While living next door to the [S] family, the appellant babysat for HS on at least one occasion while her father was on deployment and her mother was sick as a result of a pregnancy. Record at 316. HS testified that the appellant masturbated in her presence, and spanked her on the buttocks with his hand.[2] *Id.* at 348. HS also testified that the appellant put "a type of lotion on his hand," put his penis into her mouth, and that later "white stuff came out." *Id.* HS testified that she was afraid to tell anybody about the incident because the appellant told her if she did, her "parents won't love me." *Id.*

HS's parents testified that she occasionally rubbed her genitals very hard. After the [S] family moved to Parris Island, South Carolina in late 2003, the appellant's former stepdaughter, RH, visited during her summer vacation. HS's parents mentioned HS's behavior to RH, who in turn spoke to HS. During this conversation, HS said that she had been sexually abused by the appellant. HS's parents related these allegations to medical care providers, and later to agents of the Naval Criminal Investigative Service (NCIS).

Towards the end of the NCIS investigation, Special Agent (SA) Eric [M] interviewed the appellant. The appellant admitted to viewing pornography and masturbating to ejaculation in the presence of HS, and to spanking her on the buttocks while in the process of this sexual activity. *Id.* at 287-88. The appellant also admitted that HS watched him while he masturbated, and drew a diagram of his living quarters to indicate where HS was standing during the incident. *Id.* at 285; Prosecution Exhibit 2.

Legal and Factual Sufficiency

The appellant's first assignment of error claims that the evidence underlying the findings of guilty are legally and factually insufficient, specifically because the Government failed to prove the appellant's sodomy of HS occurred, the military judge acted as a "second prosecutor" during his questioning of the appellant, and the Government failed to prove the appellant formed the requisite intent "to gratify his lust sexual desires" in relation to the indecent liberties offense under Charge II, Specification 1.[3] Appellant's Brief and Assignments of Error of 19 Jun at 5-17. We disagree.

---

[2] HS was four years old when the appellant's offenses occurred, and eight years old when she testified at trial.

[3] The specification reads: "In that Sergeant Edwin A. Ehlers, U.S. Marine Corps, on active duty, did, on board Camp Pendleton, between on or about 1 August 2002 and on or about 1 October 2003, take indecent

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

As a predicate matter, we consider the appellant's assertion that the military judge abandoned his impartial role when he asked questions of the appellant during the litigation of a pretrial motion to suppress the appellant's admissions to SA [M] Appellant's Brief at 9.[4] It is a basic right of military due process to have "a judge who appears impartial throughout [an accused's] court-martial." *United States v. Cooper*, 51 M.J. 247, 250 (C.A.A.F. 1999); *see also United States v. Grandy*, 11 M.J. 270, 277 (C.M.A. 1981); R.C.M. 801(c), Discussion. It has "long been the law" that the military judge may question witnesses. *United States v. Dock*, 40 M.J. 112, 127 (C.M.A. 1994). The military judge does not abandon his impartiality by asking appropriate questions "to clarify factual uncertainties." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987)(citations omitted). Indeed, the military judge has "wide latitude" to ask questions, including "questions which might adversely affect one party or the another." *United States v. Acosta*, 49 M.J. 14, 17-18 (C.A.A.F. 1998).

We find nothing in the questioning of the accused during pretrial motions that indicates the military judge abandoned his impartiality. Moreover, we note that the appellant elected to be tried by military judge alone *after* his motion to suppress his statements to NCIS was litigated pretrial. Record at 242. The appellant's assertion on appeal that the military judge acted as a "second prosecutor" is contrary to the evidence of record, and it is inconsistent with his own affirmative decision to have the same military judge serve as the sole trier of fact in his

---

liberties with [HS], a female under 16 years of age, not the wife of the [appellant], by exposing his penis, masturbating, and ejaculating in front of the said [HS], with intent to gratify the sexual desires of the [appellant]."

[4] In light of the fact that the appellant did not testify in his defense during the trial on the merits, we have not considered this testimony for purposes of our review of the factual and legal sufficiency of the evidence on findings because it was not "evidence presented at trial." *United States v. Beatty,* 64 M.J. 456, 458 (C.A.A.F. 2007)(citations omitted).

case following what he now alleges was biased conduct by that military judge. This asserted error merits no relief.

The appellant next contends that, as an eight-year-old witness testifying about matters that occurred when she was four years old, HS was not a credible witness. We disagree. Preliminary questioning established that HS was a competent witness. HS then testified clearly that the appellant "put his private" in her mouth and that "white stuff came out," although she did not know "what it tasted like." Record at 347-48. She later testified that another name for a boy's "privates" is "penis." *Id.* at 353. Upon questioning by the military judge, HS reiterated twice that the appellant had placed his penis in her mouth. *Id.* at 354, 357. The military judge was positioned as the trier of fact to assess the veracity of HS' testimony by observing her in-court demeanor.

We perceive the testimony of HS at trial to have been in age appropriate terms, not adult-like. Highly persuasive was her description of her male assailant's interest in oral sex, when a child of her years would have no reason to know or to understand the purpose of such an act. Even more persuasive was her description of the appellant's sexual bodily functions, including that a lubricant was used during masturbation, and that ejaculation followed oral sodomy -- facts that, as previously noted, no child would know in the absence of the abuse described. And, if someone described such acts to the child, intentionally or inadvertently, she would have had no context into which to place such facts in order to remember them correctly. In the view of the majority, her graphic testimony would be possible only if she was victim of the sodomy so as to indelibly fix those facts in her mind in the proper sequence.

Even though HS was four years old at the time of the offense, and eight years old when she testified at trial, we find that HS' recounting of events was compelling and credible, most especially because it was corroborated, in large part, by the appellant's own admissions to NCIS. On the whole of these facts, we find that the evidence amounted to a strong case against the appellant. While we have noted inconsistencies in HS's testimony regarding time and location, such inconsistencies are not uncommon when any abuse victim testifies:

> [T]he evidence . . . is underscored by the fact that the persuasive testimony is from a child, from whom gathering more exact details as to when the sexual conduct precisely began is an unreasonable expectation and formidable hurdle. Any person who suffers from some type of traumatic experience, adult or child, may have difficulty relating that experience in a chronological,

> coherent and organized manner. *See* Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy,* 42 Me. L. Rev. 283, 345 (1990).

United States v. Cano, 61 M.J. 74, 77 (C.A.A.F. 2005)(quoting *Paramore v. Filion,* F. Supp. 2d 285, 292 (S.D.N.Y. 2003)).

Finally, in assessing HS's credibility, we do not consider the four-year delay between the abuse and the trial as negatively affecting the child's credibility. Given that the appellant himself corroborated that the child was with him in the house, in front of the computer, as he sat masturbating, her memory as to these events is clearly neither faulty, fanciful, nor manufactured. Nothing leads us to conclude HS's testimony is credible about the offenses that the appellant admitted, but then to impute a lack of credibility to that portion of her testimony relating to the sodomy, based on an elapsed period of time that applies equally to all of her testimony.

With respect to intent, the record provides ample circumstantial evidence to show the appellant's intent to gratify his own lust and sexual desires by taking indecent liberties with HS. The appellant specifically told SA [M] that he viewed pornography and masturbated twice a day. Gloria and her son both testified they had seen the appellant viewing what appeared to be pornography of teenage girls. Record at 260-61, 333-34. The appellant admitted to NCIS that at the time of the offenses his relationship with his wife, Gloria, was strained and that they were not having sexual relations. *Id.* at 286. These facts, combined with the testimony of HS that the appellant ejaculated in her presence as a result of sodomizing her, are more than sufficient to establish his intent in taking the preceding indecent liberties with HS was also to gratify his lust.

Despite the credibility challenges made by the appellant at trial and now on appeal, we are mindful that reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin,* 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006)(citing *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd,* 64 M.J. 348 (C.A.A.F. 2007). Viewing the evidence in the light most favorable to the prosecution, including all reasonable inferences, we find that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007) (quoting *Jackson*, 443 U.S. at 318-19). Likewise, for the reasons set forth above, we too are convinced of the appellant's guilt beyond a reasonable doubt. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we conclude that the

appellant is guilty of all specifications and charges beyond a reasonable doubt. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Multiplicity and Unreasonable Multiplication of Charges

The appellant's third assignment of error alleges that all of the offenses constitute an unreasonable multiplication of charges, and his fourth assignment of error asserts that the sodomy (Charge I), and indecent liberties and assault (Charge II, Specification 1 and 2) offenses are multiplicious under *United States v. Weymouth,* 43 M.J. 329 (C.A.A.F. 1995). We disagree.

We note that in addition to the sodomy charge and its sole specification, the appellant was charged with six specifications of indecent liberties, and one specification of communicating a threat. In response to a motion to dismiss under R.C.M. 917, the military judge dismissed three of the indecent liberties specifications, and the communicating a threat specification. Record at 367. Of the remaining three indecent liberties specifications, the military judge found the appellant guilty of only one; not guilty of one; and, of the third, guilty of the lesser included offense of assault consummated by battery. Notwithstanding the appellant's unreasonable multiplication claim regarding all of his charged offenses, we limit our consideration here to the sole conviction for sodomy (Charge I), and the convictions for indecent liberties and assault (Charge II).

We have examined both of the appellant's claims to determine whether the specifications under Charge I or Charge II constitute an unreasonable multiplication of charges. Considering the five factors set forth in *United States v. Quiroz*, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition), we conclude that they do not.

Multiplicity, a constitutional violation under the Double Jeopardy Clause, occurs if a court, "contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Paxton,* 64 M.J. 484, 490 (C.A.A.F. 2007)(quoting *United States v. Teters,* 37 M.J. 370, 373 (C.M.A. 1993)).

In that the appellant failed to raise the issue of multiplicity as to the offenses referred for trial, it is waived so long as the specifications are not facially duplicative. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)(citing *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F.1997)). Our review of the sodomy specification under Charge I satisfies us that it is not facially

duplicative with the indecent liberties specifications under Charge II, because both the language of the specifications and facts apparent on the face of the record are different, and not based upon the same conduct. *United States v. Barner,* 56 M.J. 131, 137 (C.A.A.F. 2001)(citing *United States v. Powell,* 49 M.J. 460, 464-65 (C.A.A.F. 1998)); *United States v. Lloyd,* 46 M.J. 19, 23 (C.A.A.F. 1997). The appellant has not met his burden that plain error exists in relation to any specification under Charge I or Charge II.

Sentence Severity

The appellant's fifth assignment of error alleges his adjudged sentence of confinement for 25 years is inappropriately severe. Based upon our review of the record, we find that the sentence, including 19 years confinement, approved by the convening authority, is appropriate for this offender and his offenses. *United States v. Baier,* 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy,* 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982). Granting additional sentence relief at this point would be to engage in additional clemency, a prerogative reserved for the convening authority, who exercised it in this case. *Healy,* 26 M.J. at 395-96.

Prejudice by "Military Misconduct"

We have considered the appellant's remaining assignment of error, and find that it has no merit. *United States v. Reed,* 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias,* 25 M.J. 356, 363 (C.M.A. 1987)). As for the appellant's claim of ineffective assistance of counsel, we specifically find that the appellant has failed to meet his burden to show that his defense counsel's performance "fell below an objective standard of reasonableness." *United States v. States v. Edmond,* 63 M.J. 343, 345 (C.A.A.F. 2006)(citing *Strickland v. Washington,* 466 U.S. 668 (1984), and *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005)). Despite his allegations of prosecutorial misconduct and unlawful command influence, the appellant has also failed to substantiate either claim. *See United States v. Rodriguez-Rivera,* 63 M.J. 372 (C.A.A.F. 2006), and *United States v. Lewis,* 63 M.J. 405 (C.A.A.F. 2006).

Petition for a New Trial

Following submission of the appellant's brief and assignments of error, the appellant filed a Petition for a New Trial *pro se*. A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

(1) The evidence was discovered after the trial;

(2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(3) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a more favorable result for the accused.

R.C.M. 1210(f)(2). Requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored; relief is granted only if a manifest injustice would result absent a new trial, rehearing, or reopening based on proferred newly discovered evidence. *United States v. Johnson,* 61 M.J. 195, 199 (C.A.A.F. 2005). The denial of an appellant's request for a new trial based on newly discovered evidence is not an abuse of discretion where the evidence did not offer some new version of the facts presented at trial and where additional impeachment material and potential perjury by witnesses would probably not have produced a substantially more favorable result for the accused. *See Johnson*, 61 M.J. at 199-201.

The appellant's petition amounts to a restatement of issues already litigated at trial, and lacks reference to any "newly discovered evidence." The appellant thus fails to meet the criteria set forth in R.C.M. 1210(f). The appellant's petition for a new trial is denied.

Conclusion

The findings and sentence, as approved, are affirmed.

Chief Judge O'TOOLE concurs.

MAKSYM, Judge (dissenting in part, and concurring in part):

I dissent. As a matter of moral conscience and mindful of my oath as a jurist, I cannot bring myself to join my learned brethren in affirming the sodomy conviction below. Clearly, reasonable minds can differ in determining whether or not the Government has satisfied its burden of proof based upon the facts as they have been placed before us.

My marked reservations are, in the main, prompted by the significant delay - opaquely portrayed in the record of the nearly three year interregnum between the first statement by the minor alleged victim and a trial on the merits. Record at 319-20. These massive delays shroud the entire proceedings with the specter of reasonable doubt. Any explanation from the United States as to the rationale

for these delays would have permitted me to place them in context. No such explanation exists.

To be clear, I advance no allegation or even suspicion that the Naval Criminal Investigative Service ("NCIS") or any arm of law enforcement improperly influenced the formulation or content of the alleged minor victim's testimony. I simply draw upon my own knowledge of the ways of the world combined with the admitted and numerous conversations that took place over the long span of more than three years between this child and her parents as well as investigative and prosecutorial personnel in reaching the conclusion that her testimony is not fully reliable. Moreover, I cannot ignore the multiple assertions of abuse by the child, followed by numerous recantations. I am mindful of the constraints, properly outlined by the majority, that we only consider facts raised within the four corners of the cases-in-chief below. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007).

However, I cannot ignore the uncontroverted fact that the minor witness, four years old at the time of the alleged incident and eight years old at the time of trial, had originally alleged in the NCIS forensic interview that the appellant had committed an act or acts of penile penetration. Yet, at trial she advanced, during incredibly unformulated and non-detail seeking direct examination, an allegation of a single act of oral sodomy. Similarly representative of the child's apparent confusion are the numerous inconsistencies in the record on issues as significant as the location and date of the act, those present at the time of the act, the date the child's family learned of the act, and a later instance of alleged sexual contact between the victim and another child. Record at 260, 264, 270, 275-76, 316, 318-20, 323, 327, 329, 348, 350-51, 354. Moreover, I consider the child's vocabulary during her testimony, unquestionably mature beyond her tender years, as indicative of outside influence, benign or not. *See* Record at 356 (child victim responding "no, not that I'm aware of" to the questioning of the military judge).

This case was not well-tried and left me with significant doubt as to the appellant's culpability for forcible sodomy. Beyond the massive and unexplained delays, the dispositive child testimony, given half a life from the date of the alleged incident and her statement thereafter, was not buttressed by any medico-forensic evidence or expert testimony. I am mindful that the trial judge is in the best position to evaluate the deportment of the witnesses before him and had heard extensive testimony during the litigation of several motions. Of course, as a result of hearing these motions, the military judge would have known that the child witness had originally accused the appellant of an act or acts of penile penetration and three years later made no

such accusation and was not examined as to this alleged occurrence by the United States.

Nonetheless, I do have confidence, based upon the inculpatory statement of the appellant that he was guilty of indecent acts, by way of his conducting acts of masturbation in front of a minor child, and admitting to having touched her person during this felonious episode. I would affirm the findings of guilty to assault consummated by a battery and indecent acts with a child, and I would reassess the sentence. I also concur in the majority's resolution of the asserted errors as they relate to these two offenses. However, based upon my significant doubts as to factual sufficiency and the anemic state of the Government's case, I cannot affirm the sodomy conviction. I respectfully dissent.

For the Court

R.H. TROIDL
Clerk of Court