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

**Before**
**E.E. GEISER, R.G. KELLY, L.T. BOOKER**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JACOB L. IMLER**
**INFORMATIONS SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200800650**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 30 April 2008.
**Military Judge:** CDR Mario DeOliveira, JAGC, USN.
**Convening Authority:** Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
**Staff Judge Advocate's Recommendation:** LCDR Z.S. Kugeares, JAGC, USN; **Addendum:** LCDR F.J. Yuzon, JAGC, USN.
**For Appellant:** Capt Kyle Kilian, USMC.
**For Appellee:** Capt Mark Balfantz, USMC.

**30 April 2009**

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**OPINION OF THE COURT**

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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of committing an indecent act upon a female under 16 years of age, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for three years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The appellant raises two assignments of error on appeal. First, the appellant asserts that the trial counsel's sentencing argument improperly urged the members to sentence the appellant not only for the victim of the charged misconduct but also for

the victim of prior uncharged misconduct.[1] Second, the appellant avers that the military judge failed to instruct the members on how to properly consider the uncharged misconduct evidence for sentencing.[2]

After considering the record of trial and the parties' pleadings, we conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

**Improper Sentencing Argument/Insufficient Instructions**

During an evening visit to his supervisor's home, the appellant was permitted to play video games with the supervisor's 8 and 11-year-old daughters in an upstairs playroom. Although the supervisor and his wife checked in periodically, the appellant's contact with the children was essentially unsupervised. Later in the evening, as the ll-year-old slept nearby, the door to the playroom was closed and the lights were turned off for another game. Shortly thereafter, the appellant rubbed his penis on the 8-year-old victim's face, mouth, and stomach. Record 561-74.

As part of its proof, the Government presented propensity evidence under MILITARY RULE OF EVIDENCE 414, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) that the appellant previously pleaded guilty in a civilian court to placing his penis in a 7-year-old girl's mouth. The victim of that earlier molestation testified in the instant court-martial. Record at 655-70; Prosecution Exhibit 2. The appellant was convicted.

The trial counsel's sentencing argument included reference to the "victims" of the appellant's misconduct. Specifically, trial counsel stated that "one of the most important tenants [sic] [of good order and discipline] is impact on the victim—victims." Trial counsel went on to argue that while the 8-year-old child was the "most important victim [she] is not the only victim . . . [t]he focus is the real victims in this case." Record at 888-89. At no point did the trial defense counsel object to this aspect of the trial counsel's sentencing argument.

Both before and after sentencing arguments, the military judge instructed the members. Among the military judge's instructions were, "you must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation, you must bear in mind that the accused is to be

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[1] Pursuant to RULE FOR COURTS-MARTIAL 414, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), the Government put on evidence of a prior civilian court proceeding in which the appellant entered a plea of guilty to commission of an indecent act with another female child.

[2] The appellant combined these two errors within one assignment of error. For clarity, we will divide them and address each separately.

sentenced only for the offenses to which he has been found guilty." *Id.* at 878. The military judge also instructed the members, "[i]t is the duty of each member to vote for a proper sentence for the offenses to which the accused has been found guilty-*the offense, excuse me*." *Id.* (emphasis added). The military judge later instructed, "[a] single sentence shall be adjudged for the offense to which the accused has been found guilty." *Id.*

Absent plain error, the appellant's failure to object either to trial counsel's argument or to the military judge's instructions waives any error. RULES FOR COURTS-MARTIAL 1001(g) and 1005(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993); *see United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986). The appellant bears the burden of demonstrating plain error. *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

The plain error standard is well-established. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). We find that the appellant has not carried his burden in demonstrating that the trial counsel's references to multiple "victims" during his sentencing argument constituted error much less plain error. When viewing trial counsel's sentencing argument "in context," as we must, it is apparent that his allusion to multiple "victims" was a reference to the victim's family and not to the victim of the prior indecent act. Record at 889-90; *see United States v. Baer,* 53 M.J. 235 (C.A.A.F. 2000)(quoting *United States v. Young*, 470 U.S. 1, 16 (1985); *see also Dunlop v. United States*, 165 U.S. 486, 498 (1897). Comment on the impact the appellant's crime had on the victim's family was permissible. *United States v. Fontenot*, 29 M.J. 244, 250-51 (C.M.A. 1989). Even assuming, *arguendo*, that there was error, we further find that the appellant has not demonstrated material prejudice to a substantial right. *See United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007).

With regard to the military judge's sentencing instructions, we find that the appellant has not met his burden in demonstrating that the military judge erred. "An accused is supposed to be tried and sentenced as an individual on the basis of the offense(s) charged and the legally and logically relevant evidence presented." *Schroder* 65 M.J. at 58. And "M.R.E. 414(a) provides that evidence of uncharged misconduct may be considered for 'any matter to which it is relevant'"; this includes sentencing. *Id.; see also United States v. Tanner*, 63 M.J. 445, 448-49 (C.A.A.F. 2006). Again, even assuming, *arguendo*, that the military judge's instructions were somehow deficient; we find that the appellant has not demonstrated material prejudice to a substantial right.

**Conclusion**

The findings and the approved sentence are affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court