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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DECKER B. JORDAN
CHIEF SONAR TECHNICIAN SUBMARINE (E-7), U.S. NAVY

NMCCA 201100621
GENERAL COURT-MARTIAL

Sentence Adjudged: 4 August 2011.
Military Judge: LtCol Michael Mori, USMC.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR K.A. Elkins, JAGC, USN.
For Appellant: Maj Kirk Sripinyo, USMC; Capt Michael Berry, USMC.
For Appellee: Maj William Kirby, USMC; Maj Mark V. Balfantz, USMC.

30 November 2012

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.

PAYTON-O'BRIEN, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of two specifications of rape of a child under the age of 12, one specification of aggravated sexual contact of a child under the age of 12, and three specifications of aggravated sexual abuse of a child under the age of 12, in violation of Article 120,

Uniform Code of Military Justice, 10 U.S.C. § 920.[1] Appellant was sentenced to confinement for 30 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority (CA) approved only so much of the sentence as provides for confinement for 29 years and 6 months, total forfeitures, reduction to pay grade E-1 and a dishonorable discharge.[2]

The appellant submits the following eight assignments of error (AOE);[3]

(1) The military judge erred in denying a defense motion for a mistrial due to unlawful command influence;

(2) The military judge erred by not allowing the members to reassess the appellant's sentence after several specifications were dismissed post-sentencing;

(3) The evidence is legally and factually insufficient as to Specification 1 of Charge I (rape);

(4) The evidence is factually insufficient to convict the appellant where the only evidence is the testimony of a child witness;

(5) The military judge committed plain error that prejudiced the appellant by instructing on constructive force by parental compulsion;

(6) The military judge erred by not dismissing two specifications for unreasonable multiplication of charges rather than instructing the members to merge them for sentencing;

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[1] The members also found the appellant guilty of three specifications of indecent acts with a child in violation of Article 134, UCMJ, but after the members announced sentence, the military judge dismissed the specifications for failure to state the terminal element in light of the Court of Appeals for the Armed Forces' opinion in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

[2] In light of the dismissal of the Article 134 charge and specifications, the military judge recommended to the CA that he grant clemency in the form of a six-month reduction in sentence. The CA noted in his action his approval of only 29 years and 6 months confinement was based upon dismissal of Charge II and the specifications thereunder.

[3] We have renumbered the appellant's AOEs. AOEs 3-7 are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(7) A *DuBay* hearing is required to compare a witness's DNA to the DNA evidence found on the victim's bed sheets; and

(8) The record of trial is incomplete due to the missing clemency submission.

After reviewing the record of trial and the pleadings of the parties, we hold that Specifications 2 and 5 of Charge I are multiplicious. We will set aside and dismiss Specification 5 in our decretal paragraph. After our corrective action, we find the remaining findings of guilty and reassessed sentence are correct in law and fact, and there is no remaining error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was stationed in Hawaii over a period of four years with his family, including his daughter, TJ. During this time period, the appellant sexually abused TJ, who was between the ages of 6 and 10 years old. The abuse consisted of numerous acts involving the appellant rubbing his penis on TJ's vagina while lying behind her, touching TJ's genitalia and buttocks with his hand, and having TJ touch his penis with her hand. TJ referred to some of the appellant's acts as rubbing his "spot" against her "spot."[4] A majority of the sexual abuse acts took place in either TJ's or the appellant's beds at the family's two different homes. TJ described that the appellant sometimes put liquid on his penis before he rubbed it against her vagina. Additionally, the appellant touched TJ's vagina over her clothes one time in a car while she was asleep. The abuse eventually came to light when TJ left her mother a note that said, "Me and Dad had S.E.X."[5]

To corroborate the victim's testimony at trial, the Government introduced evidence from the appellant's wife, as well as the video interrogation of the appellant by the Naval Criminal Investigative Service (NCIS). The appellant once told his wife that he had a "wet dream" while TJ was lying on top of him while he was asleep, and his wife observed a wet area on TJ's pants between her knees after this occurred. The appellant admitted to NCIS during his interrogation that this event happened, but included the additional facts that when he woke up his penis was exposed and he had his hands on TJ's buttocks

[4] Record at 534.

[5] *Id.* at 559.

while she was on top of him. Additionally, the appellant told NCIS that he was rubbing his penis on TJ and ejaculated when he awakened and that he panicked once he realized what happened. The appellant denied that this act was intentional and denied all allegations of abusing TJ. Further relevant facts are developed below as necessary.

Unlawful Command Influence

After initial *voir dire*, during an overnight recess, Lieutenant (LT) R, a member of the panel, attended a staff meeting at his command, Submarine Squadron ONE.[6] LT R was wearing his summer white uniform because he was reporting to court later that afternoon for the start of the appellant's trial on the merits. In the minutes just prior to the start of the squadron meeting, before the Commodore arrived, other individuals in attendance raised the issue of the appellant's court-martial. LT R indicated he was a member and could not discuss the case. Command Master Chief (CMC) JD, who knew the appellant from a prior duty station, stated during a conversation with others in attendance that the appellant had worked for him at a prior command and was a good chief petty officer, but that, "[i]f someone is convicted of child molestation, they should rot in hell."[7] There were additional numerous informal conversations occurring simultaneously between various attendees just prior to the Commodore's entrance into the conference room and the start of the meeting.

While the members were deliberating on the sentence, trial defense counsel became aware of the SUBRON ONE meeting and CMC JD's comment and raised an allegation of unlawful command influence. The military judge allowed the members to return with the sentence, but then immediately conducted *voir dire* of LT R on the matter. LT R indicated that he did not hear CMC JD's comments, as he was engaged in a conversation with another officer. The military judge did not discharge the members and held a post-trial evidentiary hearing to assess whether CMC JD's comments rose to the level of unlawful command influence. The military judge also conducted *voir dire* of the other panel

[6] Submarine Squadron ONE (SUBRON ONE) receives logistical support from Naval Submarine Support Command (NSSC), the appellant's command. There is no command relationship between SUBRON ONE and NSSC. Of note, SUBRON ONE is not the special court-martial convening authority in this case, and was not involved in the origination of the charges in this case.

[7] Record at 1196.

members. This *voir dire* revealed that the each member indicated no one had expressed an opinion to them regarding the case.

When the issue of unlawful command influence is litigated at trial, we review the military judge's findings of fact under a clearly-erroneous standard, but the question of whether there was command influence flowing from those facts is a question of law that we review *de novo*. *United States v. Reed*, 65 M.J. 487, 488 (C.A.A.F. 2008) (citing *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994)).

While this issue was deemed unlawful command influence by the military judge and the parties, under the circumstances of this case, wherein CMC JD was not acting with the "mantle of command authority," the issue is actually more akin to unlawful interference or influence of a court-martial member. However, it makes no practical difference whether the challenged action is called unlawful command influence or unlawful interference with a court-martial member, the test applied is the same. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994).

Article 37(a), UCMJ, states, in pertinent part: "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . . ." Once the defense has met its initial burden of producing evidence sufficient to raise the issue of unlawful interference with a member under this provision, the burden shifts to the Government to demonstrate beyond a reasonable doubt either that there was no unlawful interference or that the proceedings were untainted. *Stombaugh*, 30 M.J. at 213; *see also United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

The military judge found that the defense met its initial burden and, therefore, the burden shifted to the Government to demonstrate beyond a reasonable doubt that there was no actual or apparent "unlawful command influence." During an Article 39(a), UCMJ, session LT R indicated during *voir dire* that he did not hear a comment made by CMC JD relating to the current case, as he was involved in a conversation with another service member at the time the comment was made. Other witnesses who were present at the meeting also corroborated LT R's version of events. Many conversations were being held simultaneously in the conference room prior to the start of the meeting. We find beyond a reasonable doubt that the case was not influenced by any actual interference with a member.

Our inquiry does not end there. In reviewing a case involving an allegation of an attempt to interfere with a court-martial member, we must also be concerned about "the perception of fairness in the military justice system as viewed through the eyes of a reasonable member of the public." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). We must determine whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* Our evaluation of the appearance of attempted interference with a the court-martial process is highly case-specific, and with respect to potential court members in particular, we review several factors including "the degree to which the record itself demonstrates that the defense has had a full opportunity to explore the issue, whether the Government has been forthcoming in its response, and whether the military judge has taken any necessary corrective action." *Reed*, 65 M.J. at 492.

In this case, CMC JD testified that he briefly stated his personal opinion on child molesters in general, not about this specific case. CMC JD made the comments informally to a group of individuals before the official meeting started and, although LT R was present in the room, CMC JD did not direct his comments toward him. LT R had over 23 years of naval experience both as an enlisted member and as an officer, and was senior in rank to CMC JD. LT R even stated to the group that he could not talk about the court-martial in order to prevent any improper conduct from occurring.

Furthermore, this issue was fully litigated at trial, with both sides submitting briefs and the military judge holding an evidentiary hearing six days after the announcement of the sentence in order to give both parties time to investigate the issue. A reasonable member of the public would not question the fairness of the military justice system on this issue because the facts underlying this allegation were extensively explored at the trial stage.

Reviewing this issue *de novo*, we believe that a disinterested observer, fully informed of all the facts and circumstances mentioned above, would not harbor a significant doubt about the fairness of the proceeding. Under the factual circumstances here, we find beyond a reasonable doubt that this case was not influenced by a wrongful interference on the court-martial member.

Legally and Factually Insufficiency

The appellant has put forth two assignments of error that rely on claims of legal and factual insufficiency: 1) that the evidence for all charges is insufficient because most of the evidence against him came from a child; and 2) the evidence is insufficient to show "divers occasions" for Specification 1 of Charge I (rape of a child). We disagree.

Article 66(c), UCMJ, requires that this court review issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is, considering the evidence in the light most favorable to the Government, whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Wincklemann*, 70 M.J. 403, 406 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" this court is "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

It is clear from the review of the record of trial that evidence exists which proves every element of the charges for which the appellant was convicted. After carefully reviewing the record and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case the members, could indeed have found all the essential elements of the offenses beyond a reasonable doubt. *Wincklemann*, 70 M.J. at 406. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of Appellant's guilt as to those charges. *Turner*, 25 M.J. at 325.

Constructive Force

The appellant next alleges the military judge committed plain error by instructing the members on constructive force by parental compulsion for Specification 2 of Charge I (rape of child).

The appellant's argument relies upon an incorrect understanding of the military judge's instructions. The military judge gave two distinct sets of instructions for Charge

I: proper pre-2007 Article 120, UCMJ, instructions for Specification 1, and proper 2007-2012 Article 120, UCMJ, instructions for Specification 2. The instructions for Specification 2 did not include any reference to "force" because it was not a required element under that version of the statute. The record of trial and Appellate Exhibit XL clearly show two different sets of instructions for the rape offenses. The military judge specifically did not instruct the members on constructive force for Specification 2 of Charge I. It was not necessary for the military judge to expressly state that the constructive force instruction did not apply to Specification 2 of Charge I because the instructions on their face clearly indicated this principle. Therefore, the military judge's instructions were proper and there was no error.

Rehearing on Sentence

The appellant contends that the military judge erred by not allowing the members to re-sentence him after the Article 134 charge and specifications were dismissed. Assuming without deciding that the military judge erred, this court has the power to reassess a sentence when prejudicial error occurs at trial, as long as the sentence affirmed is "appropriate in relation to the affirmed findings of guilty," and the sentence is no greater than what would have been imposed if there had been no error. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1988). If there is a "dramatic change in the penalty landscape," then that change may limit our ability to properly reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003).

In this case, even if there was prejudicial error, we are convinced that the sentence approved by the CA was appropriate and the appellant would not have received a lesser sentence absent any error. As stated above, the members were instructed by the military judge to consider two of the Article 134 specifications as merged with the more serious offenses under Charge I. Therefore, the dismissal of Specifications 2 and 3 of Charge II would not have impacted sentencing.

The only remaining issue is Specification 1 of Charge II, which involves the appellant placing his hands on TJ's buttocks, an offense not merged with any other offense for sentencing. The maximum confinement for this specification was seven years. The appellant had already been convicted of the more serious offenses of rape of a child, aggravated sexual contact of a child, and aggravated sexual abuse of a child, all under the age

of 12. Removing this one Article 134 specification did not result in a "dramatic change in the penalty landscape," because the appellant was still facing the maximum punishment of life in prison without the possibility of parole due to the far more serious rape offenses. The sentence adjudged by the members of 30 years confinement was lenient compared to the maximum possible punishment and well below that maximum. The CA then even reduced the appellant's sentence by six months.

Consistent with the principles in *Sales* and *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006), and after carefully considering the entire record, we are satisfied that with the dismissal of Specification 1 of Charge II, the members would have adjudged a sentence no less than that approved by the CA in this case.

Multiplicity

The appellant requests that we set aside either Specification 2 or 5 of Charge I, and either Specification 4 or 6 of Charge I, because they are multiplicious and facially duplicative.

In *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012), the Court of Appeals for the Armed Forces (CAAF) clarified that there are three separate concepts at trial: 1) multiplicity for double jeopardy purposes; 2) unreasonable multiplication of charges as applied to findings; and 3) unreasonable multiplication of charges as applied to sentencing.

Prior to sentencing, the military judge determined that Specifications 1, 2, and 5 of Charge I and Specification 3 of Charge II[8] were "multiplicious for sentencing.[9] At the same

[8] Specification 1 of Charge I, VUCMJ Article 120 (rape a child under age 12), read as follows: "In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between on or about 1 February 2006 and 20 September 2007, rape [TJ], a child under the age of 12."
Specification 2 of Charge I, VUCMJ Article 120 (rape a child under age 12), read as follows: "In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between 1 October 2007 and on or about 30 April 2010, engage in a sexual act, to wit: contact between his penis and the vulva of [TJ]," a child under the age of 12."
Specification 5 of Charge I, VUCMJ Article 120 (aggravated sexual abuse of a child), read as follows: "In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between 1 October 2007 and on or about 30 April 2010, engage in a

time, the military judge determined that Specifications 4 and 6 of Charge I and Specification 2 of Charge II,[10] were "multiplicious for sentencing."[11] The military judge then instructed the members that they should consider each set of charges and specifications as only one offense for sentencing.[12]

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lewd act, to wit: touch the genitalia of [TJ], a child who had not attained the age of 16 years, with his penis."
Specification 3 of Charge II, VUCMJ Article 134 (indecent acts or liberties with a child), read as follows: "In [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between on or about 1 February 2006 and 30 September 2007, commit an indecent act upon the body of [TJ], a female under the 16 years of age, not the wife of the said [appellant], by touching the genitalia of [TJ] with his penis, with intent to arouse, appeal to, or gratify the lust, passion, or sexual desires of the said [appellant]."

[9] The military judge used the term of "multiplicious for sentencing" as *Campbell* had not yet clarified the issue. Record at 1056.

[10] Specification 4 of Charge I VUCMJ Article 120 (aggravated sexual contact with a child), read as follows: In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, between on or about 1 April 2010 and on or about 30 April 2010, engage in sexual contact, to wit: touch the genitalia of [TJ], a child who had not attained the age of 12 years, with his hands."

Specification 6 of Charge I (VUCMJ Article 120 (aggravated sexual abuse of a child), read as follows: In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between on or about 1 October 2007 and on or about 30 April 2010, engage in a lewd act, to wit: touch the genitalia of [TJ], a child who had not attained the age of 16 years, with his hand."

Specification 2 of Charge II (VUCMJ Article 134 (indecent acts or liberties with a child), read as follows: In that [the appellant], Naval Submarine Support Command, on active duty, did, on the island of Oahu, Hawaii, on divers occasions, between on or about 1 February 2006 and 30 September 2007, commit an indecent act upon the body of [TJ], a female under 16 years of age, not the wife of the said [appellant], by placing his hands upon her genitalia with intent to arouse, appeal to, or gratify the lust, passion, or sexual desires of the said [appellant]."

[11] As discussed, the military judge dismissed Charge II, Specifications 2 and 3 after sentencing in light of *Fosler*, so those specifications will not impact this analysis.

[12] The entire instruction provided to the members was: "The offenses charged in Specification 1, Specification 2, Specification 5 of Charge I and Specification 3 of Charge II are one offense for sentencing purposes. The offenses charged in Specification 4, and Specification 6 of Charge I and Specification 2 of Charge II, are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense." Record at 1088.

When asked by the military judge whether there were any other specifications that should be considered multiplicious for sentencing, the civilian defense counsel replied "No, sir."[13] The defense registered no objection to the military judge's proposal, nor did it raise the issue of mulitiplicity for findings. Absent plain error, mulitiplicity is waived by failure to raise the matter by a timely motion to dismiss. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). The appellant has the burden of persuading us that there was plain error. *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001) (citing *United States v. Powell*, 48 M.J. 460, 464-65 (C.A.A.F. 1998). The appellant can show plain error and overcome waiver by showing that the specifications are facially duplicative. *United States v. Heryford*, 52 M.J 265, 266 (C.A.A.F. 2000).

First, we find that the appellant has met his burden with regard to Specifications 2 and 5 and we will take corrective action in our decretal paragraph. In light of *Campbell*, Specification 5 of Charge I is multiplicious with Specification 2 under a *Blockburger/Teters* analysis.[14,15] In this case, the appellant was convicted of both rape of a child (Specification 2) and aggravated sexual abuse of a child (Specification 5), based upon the same conduct.[16] We note that aggravated sexual abuse of a child under the circumstances of this case is a lesser included offense of rape of a child.[17] We conclude it was plain and obvious error for the military judge not to dismiss Specification 5 of Charge I after the members found the appellant guilty of both penetrating TJ's vulva and touching her genitalia with his penis, as one offense is a lesser included

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[13] *Id.* at 1056.

[14] We do not find Specification 1 of Charge I multiplicious with Specification 2 of Charge I, as it charges conduct that occurred during a different time period, in a different location, and in violation of a different statute, than Specifications 2 and 5.

[15] *Blockburger v. United* States, 284 U.S. 299 (1932); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

[16] In reviewing the record, and as highlighted by the trial counsel in closing argument, it is apparent that the Government used the exact same evidence to prove both specifications. In closing argument, the trial counsel stated, "[n]ow as to Charge I, Specification 5, the same evidence that I recited to you for Specification 2 supports Specification 5," and then provided no further commentary on Specification 5. Record at 982.

[17] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45e(2).

offense of the greater crime. *See United States v. Wilkins,* __ MJ __ , No. 11-0486, (C.A.A.F. Order Nov. 16, 2012)

Specifications 4 and 6 of Charge I, however, are another matter. Our review of the two specifications satisfies us that under the circumstances of this case, Specifications 4 and 6 of Charge II are not multiplicious. We note the specification of aggravated sexual contact (Specification 4) was charged on one occasion in April 2010, and the facts apparent on the face of the record reveal that the appellant touched TJ's genitalia over her clothes while she slept in their car. The specification of aggravated sexual abuse (Specification 6) was charged on divers occasions from October 2007 to April 2010, and the facts apparent on the face of the record reveal the appellant touched TJ's vagina with his hand under her clothes several different times while abusing her in their family home. Thus the language of the specification and the facts apparent on the record lead us to conclude that the specifications are not based upon the same conduct. *Barner*, 56 M.J. at 137; s*ee also United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997); *United States v. Harwood*, 46 M.J. 26, 28-29 (C.A.A.F. 1997)). *Cf. United States v. Halliday,* 672 F.3d 462 (7th Cir. 2012). The appellant has failed to meet his burden with regard to Specifications 4 and 6.

The appellant's remaining two assignments of error are without merit.

Conclusion

Accordingly, the finding of guilt as to Specification 5 of Charge I is set aside and that specification is dismissed. The remaining guilty findings and the sentence as approved by the convening authority and reassessed are affirmed.

Judge WARD and Judge McFARLANE concur.

For the Court

R.H. TROIDL
Clerk of Court