UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain ROBERT D. BITNER
United States Air Force

ACM 36990

29 September 2008

Sentence adjudged 10 February 2007 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory Gaudette.

Approved sentence: Dismissal and confinement for 1 year.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain John S. Fredland, and Captain Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

Contrary to his plea the appellant was convicted of one specification of indecent acts with a child under the age of 16, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a dismissal and confinement for one year.

Background

The appellant was the step-father of two young boys between the ages of six and ten. These boys were friends with two other boys of similar ages. Over the course of

five or six months, on three or four occasions, the friends spent the evening at the appellant's residence. On each occasion, the four boys spent the night in the appellant's "fifth-wheel" trailer that was parked near his residence. During the course of these nights, the boys engaged in activities such as movie watching and playing videos and board games. During the visits, the appellant remained in the "fifth-wheel" to supervise the boys and participate in some of the activities. He also slept in the trailer with the boys. He admits that on at least two occasions he "scratched" the victim's back and "rubbed" his belly.

At some point, the appellant promised the two "friends" that he would take them on an overnight camping trip. In anticipation of the trip, the appellant called the boy's mother to explain his plans. During the course of the phone conversation, the mother learned, to her surprise, that the appellant was only taking her boys on the trip. At the time, his step-children were away at their father's home in another state. She was also surprised to learn that the appellant's wife would not be going on the trip. He contends that he was seeking to fulfill his promise before his pending permanent change of station to Hawaii.

Concerned, she called in her older son and asked him, "Is there something I should know?" When he failed to answer, she asked, "[D]id something happen?" He replied, "Yes." Asking no more questions, she notified the police. At trial, the victim testified that while he was spending the night in the appellant's trailer, the appellant would put his hand "down my underwear." The victim further testified the appellant then "started wiggling my private part" for a couple of minutes. He testified that no one ever saw this occur except on one occasion, his younger brother walked in and the appellant stopped fondling him and put the "blankets over me."

Based upon the police interview of the boy, the appellant was arrested and called in for questioning. While the appellant denied any inappropriate conduct with the victim, when asked, "What would prompt you to touch his penis," he responded, with a bit of a chuckle, "I'm not going to say I did that, sir." In addition, the appellant asked the investigator vague questions about the process and a plea. At trial, the prosecution argued that the equivocal nature of the appellant's denial to investigators and his vague questions regarding a plea indicated guilt.

The appellant contested the allegations in a number of ways. First, a step-son testified and contested some general facts and circumstances surrounding the victim's description of his stays at the trailer. Second, the victim's brother was called to dispute the "blanket" cover-up story. On direct examination, he testified that he did not recall the "blanket" incident, but on cross examination, the victim's brother admitted seeing the appellant and the victim lying together watching a movie and acknowledging that the appellant slept in a bed with him and his brother in the trailer. In addition, the appellant himself took the stand and denied any inappropriate touching, while essentially admitting

all the other facts outlined above. Finally, in addition to admitting Officer Performance Reports and award citations, the appellant called three fellow Air Force officers to testify as to his good military character and their opinion as to his reputation for truthfulness.

After instructions and lengthy deliberations, the panel returned with a finding of guilty by exceptions and substitutions. Specifically, the panel excepted out the words, "divers occasions" and substituted the words, "at least one occasion." Upon the judge finding no errors in the verdict, the members announced their findings at the conclusion of the duty day. Beginning the next morning, the military judge advised the parties that he intended to advise the members that they needed to "clarify what [they] mean by 'at least one occasion.'" Specifically, he gave the following instruction:

> Members of the court, before we begin the sentencing portion of the court-martial, I need to discuss with you the Findings Worksheet that was read in court yesterday. First, before I begin, I want to emphasize, and I cannot emphasize it enough, you cannot, you cannot reconsider your verdict. You cannot go back into your deliberation room and begin to deliberate again. On the worksheet you found the accused guilty of the Specification, except the words, "divers occasions" and guilty of the substituted words "at least one occasion." The definition of "on divers occasions" is that the offense occurred on two or more occasions. By excepting the words "divers occasions," the only logical conclusion is that the offense only occurred on one occasion. Because you found Captain Bitner not guilty on divers occasions, that finding of not guilty is not subject to reconsideration. What I am instructing you to do is to return to your deliberation room to clarify what you mean by "at least one occasion." Further, if you did, in your earlier deliberations, identify which one occasion the accused committed the indecent act with Richard Hernandez, either by time, place or manner, and without further deliberation, please come back into court to identify that one occasion. However, you are not to deliberate any further as to what occasion the indecent act occurred. Simply put, if you did not already decide which occasion you found the accused guilty of, you may not now make that determination. Again, your deliberations on findings have concluded. There will be no further deliberation. I am simply instructing you to return to your deliberation room to discuss among yourselves and to clarify what you meant by "at least one occasion" and to identify which one occasion your findings reflect, provided that you identified that one occasion in your deliberations yesterday. Whatever information you provide, it is important that you not reveal the vote of the court or any opinions of any particular. Members of the court, do you have any questions as to the instructions that I have just given you? I will give you a copy of the instructions I just read. Any questions? Negative response.

The trial defense counsel objected to the instruction both before and after it was read to the members, and argued that *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003) prohibited reconsideration of the verdict and that a mistrial was the only appropriate remedy.

After 41 minutes, the members indicated that they were ready and that they had a clarification to announce. Specifically, the President of the panel stated: "Your honor, to clarify, we were convinced beyond a reasonable doubt that Captain Bitner fondled the penis of [RH] on one occasion in the fifth wheel. That occasion was identified by [RH] as the time which a blanket was thrown over [RH]. Does that cover? "

Overruling the defense's request for a mistrial, the court proceeded to sentencing.

The appellant raises three issues on appeal. He claims the military judge erred in failing to properly instruct the members in findings and further erred when he ordered the members to conduct a "clarification" of their findings. Finally, the appellant alleges that the military judge erred by not allowing a former babysitter to testify regarding the character for untruthfulness of the victim.

Ambiguous Finding

The appellant's first two issues, their claim of instructional error and actions to clarify findings, are interrelated.

When an accused is charged with committing a crime on "divers" occasions the military judge has two very specific duties. First, he must instruct the members that if they except out the "divers occasions" language, they would need to make clear which allegation was the basis for their guilty finding. Second, if the members fail to clearly state the basis of such a finding, the judge should ask the members to clarify any ambiguous findings prior to announcement. *See* Rule for Courts-Martial (R.C.M.) 922(b); *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005); *Walters*, 58 M.J. at 391.

Failure to request a specific instruction forfeits the issue, unless it amounts to plain error. *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001). To show plain error, an appellant must establish an error which "must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, (1985)); *see also United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998); *United States v. Riley*, 47 M.J. 276 (C.A.A.F. 1997). Furthermore, the plain-error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

Clarification of ambiguous findings involving verdicts after announcement, involves a dual finding of guilty and not guilty. Once announced, a finding of not guilty clearly becomes final and cannot be reconsidered. *See United States v. Boswell*, 23 C.M.R. 369, 377 (C.M.A. 1957); *see also* R.C.M. 924(a). However R.C.M. 922 (d) does provide that if errors are made in the "announcement of the findings," the "error may be corrected" before "the final adjournment of the court-martial." R.C.M. 922(d).

We begin by concluding that the Military Judge's failure to provide the required *Walters/Augspurger* instruction, prior to announcement of the findings, was plain error. Our superior court has clearly highlighted the need for the absent instruction in both *Walters* and *Augspurger*. Finding error, the question then turns to one of impact of this error. We do not find "unfair prejudicial impact on the jury's deliberations." The initial verdict itself confirms that fact. Despite the lack of instruction on their authority to except out the "divers" occasions language, the panel recognized, and did in fact find the appellant guilty of only a single violation. Having then returned a verdict that correctly, but not precisely, stated their findings, it was simply a matter of completing the verdict to the specificity required by *Walters* and *Augspurger*. While a clarifying instruction before announcement is the preferred solution, the judge's instructions occurred before any other actions by the members, and we conclude this instruction was a post-announcement clarification permitted by R.C.M. 922(d). As for the appellant's claim that *Walters* does not permit efforts to clarify findings once they have been announced, the plain language of R.C.M. 922 and *Walters* is not so sweeping. The facts and circumstances surrounding the post announcement clarification is what must control. In evaluating those facts and circumstances, we will look to the instructions given and the actions and comments of the members in response.

When we consider the military judge's clarifying instructions, we are satisfied that the members understood that they could not reopen deliberations and that they could only return a corrective clarification if they had already decided which occasion they relied upon in reaching their verdict. The military judge properly instructed the members. In the absence of contrary evidence, we presume the members followed these instructions. *See United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). As for the members, they did not ask to review any evidence and they very precisely described the incident upon which they based their finding of guilty when they announced their clarified findings. In addition, after making their announcement, when the military judge directly asked them if they had followed his instructions, they each affirmatively assured the judge they had followed his instructions. Therefore, under the limited facts of this case, we are satisfied that the appellant was not prejudiced by the delayed instruction and that the clarification amounted to an authorized correction of an error in the announcement of findings under R.C.M. 922(d).[1]

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[1] We direct a new Court-Martial Order be issued reflecting that the appellant was found guilty of only one incident of indecent acts. The new order will show that the appellant was found guilty except for the words "divers occasions." There would be no substituted words

Denial of Witness

At trial and on appeal, the appellant contends that the military judge erred when he denied the trial defense request to call the victim's former babysitter to the stand to testify. According to the offer of proof, the babysitter would have testified as to the victim's lack of character for truthfulness. While not specified, apparently the witness would have only testified as to her opinion of his character for truthfulness vice his reputation in the community. *See* Mil. R. Evid. 608(a). The offer of proof also indicated that the babysitter saw the victim on a daily basis at a daycare facility and on occasion supervised the victim at his home for a total of approximately three to four years. The victim was between ages four and seven during this period of time. Finally, the offer indicated that the babysitter had only passing contact with the victim in the two years immediately preceding the date the victim made the allegations. In opposition, the prosecution argued that since the babysitter did not have any routine contact with the victim for the two years prior to the allegations, she did not possess the proper foundation for a relevant opinion. In making this argument, the prosecution relied extensively on the fact that the babysitter's last significant contact with the victim was when the victim was only seven years old, arguing that a child changes considerably between the ages of seven and nine or ten.

Denying the trial defense request to call the babysitter, the judge ruled that the babysitter did not have an adequate foundation to testify as to the victim's credibility during the charged timeframe. He further concluded that even if she could lay a proper foundation for the period when she knew the victim, that testimony would not be relevant to his character at the time of the allegations because this contact was too remote in time. Finally, the judge advised trial defense that he was not denying them the right to call other witnesses to attack the victim's credibility but was only excluding this testimony.

The appellant cites *United States v. Miller*, 47 M.J. 352, 359-60 (C.A.A.F. 1997) to support his argument that the judge erred and denied his constitutional right to present a defense. The government responds citing *United States v. Carruthers*, 64 M.J. 340 (C.A.A.F 2007) and *United States v. McAllister, 64 M.J. 248* (C.A.A.F. 2007) to assert the judge did not error and even if there was error, the appellant was not denied his ability to present a defense, although the appellant's efforts may have been somewhat limited,.

The distinction between these two lines of cases is important. Denying the appellant the opportunity to present a defense is an error of constitutional magnitude. In such cases we must determine whether an error, if made, was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967). On the other hand, if the defense was merely limited in its ability to present a defense, any error would be considered a non-constitutional error, and the government need only show that the error did not have a substantial influence on the findings. *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323 (C.A.A.F. 2003)).

When we find error, we review the prejudicial effect of an erroneous evidentiary ruling de novo. *United States v. Diaz*, 45 M.J. 494, 496 (C.A.A.F. 1997). In this particular case, the appellant was still able to call the appellant's step-son, the victim's brother, and the appellant himself to question the victim's version of the events. While the babysitter's testimony may have enhanced this defense, the appellant was still able to present this other evidence to undermine the credibility of the victim. Thus, we conclude that he was not denied a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319 (2006). Having concluded the judge's denial, if error, was not of a constitutional magnitude, any error that may have occurred would be tested for harmlessness under Article 59(a), UCMJ, 10 U.S.C. § 859(a) to determine if it had a substantial influence on the findings.

In testing for harmlessness, we evaluate and weigh: (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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). Using this evaluation criteria, we will reverse only if we determine that the finder of fact would have been influenced by the evidence that was erroneously omitted. *United States v. Roberson*, 65 M.J. 43, 48 (2007).

Ultimately, the questionable materiality and relevance of the babysitter's testimony lead us to conclude that the military judge did not err in excluding the evidence, and if he did, any error was harmless. While this case does center on the credibility of the victim, it was his credibility during the period of time he spent with the appellant that is critical, not his credibility more than two years prior. Considering the victim's age, as the trial judge did, we find this time period significant. The panel saw both and had the opportunity to assess witness credibility and each witness's version of the events. The babysitter's testimony that she may not have believed the young victim two years prior to the charged timeframe would not have influenced this panel in its assessment of the credibility of either the victim or the appellant. Therefore, we find that if error had occurred it would have been harmless error.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] We note Appellate Exhibit VIII, as found in the Record of Trial (ROT), does not contain the Variance Instruction, as stated by the trial judge during the court-martial. The missing instruction was, however, read into the record. Finding the record substantially verbatim, we note no error. *See United States v. Henry*, 53 M.J. 108, 110-11 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court