UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BROCK A. COOPER
United States Air Force

ACM 37761

16 January 2013

Sentence adjudged 16 September 2010 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Michael S. Kerr and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of two specifications of attempted indecent language and one specification of indecent language, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 14 months, forfeitures of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the specifications of communicating indecent language and attempting to communicate indecent language fail to state offenses because each omits the required

terminal element for Article 134, UCMJ, offenses. We also considered whether the appellant has been denied the due process right to speedy post-trial review. Finding no error that materially prejudices the appellant, we affirm.

Background

In April 2008, while participating in a free online multi-player game designed for children aged 8 and over, the appellant was contacted by MLJ, an 11-year-old girl, who mistakenly thought he was one of her classmates. They communicated over instant messaging through the game program and Yahoo as well as over email.

For the first year, their communications were conversational and limited to "small talk." About a year later, the appellant and MLJ began telling each other that they loved one another and began referring to each other as boyfriend and girlfriend. The appellant was aware of MLJ's age throughout this time period.

In September 2009, the appellant engaged in two chats with MLJ where he expressed his physical desires, how he felt about her, and what he wanted to do with her, including kissing and stroking her. For this conduct, the appellant pled guilty to communicating indecent language to MLJ, a child under the age of 16. At this time, MLJ was 12 years old and the appellant was 21 years old.

During a chat that occurred on 11 September 2009, MLJ told her parents about her communications with the appellant. Her father, Senior Master Sergeant GMJ, contacted Security Forces at Wright Patterson Air Force Base, and was directed to continue the chat until agents from the Air Force Office of Special Investigations could be contacted. MLJ's parents then impersonated MLJ online and the appellant communicated sexually suggestive language to them, thinking it was MLJ. Agents from the Federal Bureau of Investigations (FBI) soon became involved in investigating the appellant's relationship with MLJ by taking over her online screen name, making contact with the appellant, and collecting evidence. As a result, on multiple occasions between September and October 2009, the appellant communicated sexually suggestive language to an FBI agent, believing him to be 12-year-old MLJ. For this conduct, the appellant pled guilty to two specifications of attempted communication of indecent language to MLJ, a child under the age of 16 years.

Terminal Element

Neither the indecent language specification nor the attempt specifications allege that the appellant's conduct was prejudicial to good order and discipline or service discrediting. The appellant alleges these specifications therefore fail to state an offense.

The indecent language specification's failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). This error was not prejudicial, however, where the military judge described Clauses 1 and 2 of the terminal element of Article 134, UCMJ, during the guilty plea inquiry. The record conspicuously reflected that the appellant clearly understood the nature of the prohibited conduct as being in violation of Clause 1 or Clause 2, and the appellant admitted that his actions were service discrediting in violation of Clause 2. *Id.* at 34-36. The appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty to and clearly understood his conduct to be violative of the terminal element of Article 134, UCMJ.

The appellant was also charged with two specifications of attempting to communicate indecent language to a child under 16 years of age, pursuant to Article 80, UCMJ. Although these specifications do not allege the terminal element of the underlying indecent language offense, they do state an offense, as there is "no legal requirement to plead the elements of a 'target' offense for . . . [an] attempt." *United States v. Norwood*, 71 M.J. 204, 207 (C.A.A.F. 2012). The elements of an attempted communication of indecent language are: (1) the appellant did an overt act, (2) the act was done with the specific intent to commit an offense under the code, (3) the act was more than mere preparation, and (4) the act apparently tended to effect the commission of the intended offense. *Manual for Courts-Martial, United States*, Part IV, ¶ 4.b. We are satisfied that the specifications here expressly allege that the appellant attempted to communicate indecent language to a child under 16 years of age and that he did so by communicating certain words in writing. Furthermore, during the guilty plea inquiry, the military judge advised the appellant of each element of the underlying Article 134, UCMJ, offense at issue, including the terminal element, and defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant, who then explained to the military judge how his misconduct was service discrediting. Thus, even if it was error, the appellant suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood his conduct to be violative of the terminal element of Article 134, UCMJ. *Ballan*, 71 M.J. at 34-36.

Post-Trial Delay

Although not raised by the appellant, we note more than 18 months have elapsed between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court. Because this delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude it was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of

each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review was harmless beyond a reasonable doubt, and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Conclusion

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

AFFIRMED.

OFFICIAL

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Appellate Paralegal Specialist