UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TROY J. FRANKS
United States Air Force

ACM 36541

20 September 2007

Sentence adjudged 12 August 2005 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Barbara G. Brand.

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major John N. Page III, Captain Anthony D. Ortiz, and Mary T. Hill, Esq.

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

Before

FRANCIS, SOYBEL, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Contrary to his pleas, the appellant was convicted of one specification of sodomizing a child, in violation of Article 125, UCMJ, 10 U.S.C. § 925.[1] A panel of officers sentenced him to a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

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[1] The appellant was acquitted of a separate charge of committing indecent acts against the same child victim, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

Issues Asserted

The appellant raises the following assertions of error:

I. THE MILITARY JUDGE FAILED TO ENSURE THAT K.W., A DEVELOPMENTALLY-DELAYED FOUR-YEAR-OLD, UNDERSTOOD HER DUTY TO TELL THE TRUTH.

II. THE MILITARY JUDGE ERRED IN PERMITTING A FORENSIC INTERVIEWER TO TESTIFY TO STATEMENTS MADE BY K.W. DURING A FORENSIC INTERVIEW.

III. THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILTY BEYOND A REASONABLE DOUBT THAT THE APPELLANT SODOMIZED K.W.

IV. AN APPROVED SENTENCE WHICH INCLUDES CONFINEMENT FOR 10 YEARS IS INAPPROPRIATELY SEVERE.

Background

The appellant and SSgt C were neighbors, living across the street from each other in military family housing. The appellant and his wife had a young boy. SSgt C and his wife had two young children, a boy and a girl, K.W. K.W. was approximately 3 ½ years old at the time of the alleged offenses and 4 years old at time of trial. The two families were close friends, visiting with each other several times each week and at times watching each other's children.

On the evening of 7 October 2004, the appellant and his son visited with SSgt C and his children at SSgt C's house. With both of their spouses away at work, the men talked while SSgt C fixed dinner and the children played together. Both men were drinking.

Some time after dinner, SSgt C and the appellant decided to play video games. They agreed to use the appellant's video game system, so he started out to his house to go get it, while SSgt C went into the bathroom.

According to the appellant, when he started out the door to go home for the video game system, he glanced back to check on the children and found K.W. following him. He asked her if she wanted to help get the game. She said yes, so he took her hand and they started across the street to the appellant's house. When they were part way there, SSgt C, who had not seen his daughter leave, came out of his house and asked the appellant what he was doing with K.W. The appellant told him she was helping get the video game system. SSgt C thought that a little odd, but accepted the appellant's explanation and went back inside.

The evidence conflicts as to what happened next. The appellant testified that as soon they got inside the door to his house, K.W. started doing a "pee-pee" dance and told him she had to go to the bathroom. The only bathroom in the house was upstairs, so the appellant took K.W. up to use it. Because K.W. was still in potty training, the appellant helped her onto the toilet and then helped her wipe when she was done. According to the appellant, he at that point suddenly had to go to the bathroom, so he shooed K.W. out, went into the bathroom, and closed the door. While there, he thought he heard the front door open and close. Worried about K.W. walking back across the street on her own, he reached over and opened the bathroom door slightly, calling "Hello, [K.W.], hello." When he did not get an answer, he closed the bathroom door, but opened it again when he heard someone coming up the stairs. He saw it was SSgt C, asked if he had seen K.W., to which SSgt C replied "no," and then closed the door again. When he came out of the bathroom, K.W. and SSgt C were gone. He grabbed the video game system, and went back to SSgt C's house, where he found SSgt C on the telephone, accusing the appellant of trying to rape K.W.

SSgt C testified that when the appellant and K.W. did not return within 5-10 minutes, he went over to the appellant's house to see what was taking so long. He found the front door unlatched, pushed it open and went in. He did not see anyone and the lights were out. As he entered, he heard someone say "hello, hello" from upstairs. He then heard the appellant answer the telephone, walk across the hall into the bathroom, and close the door. SSgt C walked upstairs to see what was going on and found K.W. lying on the bed in the master bedroom with her shirt off and her pants down. He concluded she had been sexually assaulted, quickly got her dressed and took her back across the street to his house, where he called his supervisor to report that the appellant had just tried to rape his daughter. He was still on the telephone when the appellant arrived with the video game system.

SSgt C's supervisor reported the allegation to law enforcement personnel, who quickly arrived on scene. During the resulting investigation, K.W. ultimately reported that the appellant touched her "down there," referring to her genital area, touched his

"boy part" to her "girl part," and put his "boy part" in her "girl part" and in her mouth. Laboratory testing of the boxer shorts worn by the appellant that evening found two spots of amylase, a molecular compound found in saliva, and also reflected the presence of K.W.'s DNA.

Witness Competency

The appellant asserts the military judge improperly failed to ensure that K.W., who the defense describes as a "developmentally-delayed" four-year-old, understood her duty to tell the truth. We disagree.

At the outset, we note that the evidence conflicts as to whether, and to what extent, K.W. was developmentally delayed. Dr. Olson, who examined K.W. in the emergency room the night of the incident, testified he believed her to be developmentally delayed in terms of her level of maturity. However, that assessment was provided within the context of a discussion about potty training of someone K.W.'s age and his testimony did not address K.W.'s ability to perceive and accurately relate events. In contrast, Ms. Condol, who conducted a forensic interview of K.W. about a week after the incident, testified that K.W. was not developmentally delayed, at least in terms of her ability to recall events and answer questions. Indeed, she found that K.W. "did much better than most 3-year-olds" she had interviewed. Both witnesses testified before K.W. did, so the military judge was aware of their views on K.W.'s development at the time she was called to testify and when the military judge assessed K.W.'s ability to understand and tell the truth.

"Before testifying, every witness [is] required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." Mil. R. Evid. 603. No particular format is required. Rather, "[a]ny process that is sufficient to 'awaken the witness's conscience . . .' is satisfactory." *United States v. Allen*, 13 M.J. 597, 600 (A.F.C.M.R. 1982) (internal citations omitted). With young child witnesses, it is sufficient if the duty to tell the truth is impressed upon them and they solemnly undertake to do so. *United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006). Because the appellant did not object at trial to the form of oath or affirmation given to K.W., he waived the issue absent plain error. *Id.* at 424. *See also* Mil. R. Evid. 103(d). To establish plain error, the appellant must demonstrate that an error occurred, that the error was plain, clear, and obvious, and that the error affected his substantial rights. *Washington*, 63 M.J. at 424.

We find no plain error. Although no formal oath was issued to K.W., questioning by the trial counsel and military judge about K.W.'s duty to tell the truth at the beginning of her testimony was sufficient to meet the mandates of Mil. R. Evid. 603. In response to questions by the trial counsel, K.W. specifically agreed to tell the truth. The military judge then initiated a brief discussion with K.W., during which the child indicated she knew how to tell the truth, demonstrated she knew the difference between what was true and not true through simple questions about the color of the judge's robe, and specifically acknowledged the importance of telling the truth "in here" as she sat in the courtroom. Given K.W.'s young age, that is all that was required.

Admission of Hearsay Testimony

Ms. Condol interviewed K.W. approximately one week after the charged events. During the interview, K.W. indicated the appellant had done several things, including touching her genital area, having her touch his "boy part," touching his "boy part" to her "girl part," and putting his "boy part" in her mouth. At trial, the government, without objection from the defense, called Ms. Condol to testify about what K.W. told her. The appellant now asserts the military judge erred in admitting Ms. Condol's testimony about K.W.'s statements during the interview.

Failure to object to hearsay testimony at trial waives the issue for appeal, absent a finding of plain error. *United States v. Cox*, 45 M.J. 153, 156 (C.A.A.F. 1996). Again, we find no plain error.

There is no question that Ms. Condol's account of K.W.'s statements during the forensic interview was hearsay. However, it is not clear that the military judge should have sua sponte precluded such testimony in the absence of a defense objection. When examining the admission of hearsay testimony, "[t]he question of plain error often turns on defense trial strategy. If there is a defense strategy to allow the evidence, and admission does not affect a substantial right of the appellant, then there is no plain error." *United States v. Cox*, 42 M.J. 647, 652 (A.F. Ct. Crim. App. 1995).

Throughout the appellant's trial, the defense strategy was clearly to establish that any contact the appellant had with K.W. was innocent, in that he was just helping her go to the bathroom, and that K.W.'s accounts of what happened were contaminated by suggestive questions from her overprotective parents, who had simply jumped to the wrong conclusion. To that end, the defense, with limited exceptions,[2] generally made no

[2] The defense did object to the government's attempts to enter K.W.'s prior testimony under Article 32, UCMJ, 10 U.S.C. § 832, and an audio of K.W.'s interview with Ms. Condol. The military judge sustained both objections.

effort to exclude statements made by K.W. prior to trial, but focused instead on the potential influence of her parents in making those statements. The defense's cross-examination of Ms. Condol, who testified before K.W., reflected that strategy, eliciting testimony that 3- and 4- year-olds are highly suggestible and can be unintentionally influenced by the way parents ask questions and how the parents respond to the child's answers. Indeed, the defense specifically referred to Ms. Condol's testimony at least three times during its findings argument to bolster its assertion that K.W.'s statements about what happened had been contaminated by her parents. Although ultimately unsuccessful, the defense strategy was a reasonable one, particularly in light of the appellant's assertion of innocent contact with K.W. Given that obvious defense strategy, and in the absence of defense objection, the military judge's failure to exclude Ms. Condol's testimony was not plain error and did not contravene a substantial right of the appellant.

Legal and Factual Sufficiency

The appellant asserts the evidence is legally and factually insufficient to support his conviction for sodomizing K.W. We find otherwise.

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Both standards are met here.

The appellant was convicted of sodomizing K.W. by placing his penis in her mouth. During her testimony, K.W. shook her head "no" when the trial counsel asked if the appellant, who she referred to as "TJ," had done so.[3] Despite that denial, other convincing evidence of record supports the appellant's conviction of that offense.

[3] K.W. was unable to point out the appellant in the courtroom when asked to do so. However, other witnesses, including the appellant, established that K.W. knew and referred to the appellant as "TJ". Accordingly, the examination of K.W., both by the government and the defense, focused on what "TJ" had or had not done to her.

As discussed above, Ms. Condol testified that when she interviewed the child, K.W. told her the appellant had placed his "boy part" in K.W.'s mouth. Given K.W.'s age, the court members could reasonably conclude that her statement to Ms. Condol was more reliable than her testimony at trial on this point. K.W. talked with Ms. Condol only a week after the event, while the details were presumably still fresh in K.W.'s young mind. Her testimony at trial was more than 10 months later, a long time in the life of a 3-4-year-old. The circumstances surrounding K.W.'s statement to Ms. Condol also support its reliability. Ms. Condol's interview of K.W. included questions designed to ensure that she knew the difference between truth and lies. Further, it is evident from Ms. Condol's testimony that K.W.'s assertion about the appellant putting his "boy part" in her mouth was not the result of a leading question, but was in response to a general request from Ms. Condol to "hear more about what [K.W. had] said." Finally, in response to questions about the appellant's "boy part" at trial, K.W. held up her hands to indicate it was about 4-6 inches long, and twice described it as "hard." Coming from a 4-year-old, such descriptions suggest the child actually saw that which she asserted had been placed in her mouth, raising an additional inference as to the truth of her accusation.

K.W.'s assertion that the appellant placed his penis in her mouth is also supported by scientific evidence. Dr. Fletcher, a forensic biologist with the U.S. Army Criminal Investigations Laboratory, testified that chemical testing of the underwear worn by the appellant at the time of the charged events disclosed the presence of K.W.'s DNA and amylase, a molecular compound found in saliva. Amylase, but no DNA, was also found on a penile swab taken from the appellant. The defense's cross-examination of Dr. Fletcher made clear that amylase could be found in virtually all bodily fluids, not just saliva, and suggested that such fluids could have been inadvertently transferred from the appellant's hands to his underwear after he helped K.W. go to the bathroom and wipe. However, while Dr. Fletcher acknowledged that such a transfer was possible, he thought it unlikely that enough fluids would transfer to result in a significant chemical finding.

Finally, the truth of K.W.'s assertion is supported in part by SSgt C's testimony about finding K.W. partially unclothed on the appellant's bed and the appellant's reaction when he returned to SSgt C's house and found him on the telephone reporting the incident. According to SSgt C, when the appellant came in the house and saw SSgt C on the telephone, he started acting strange even before he knew who SSgt C was talking to, raising and lowering his arms, sighing, and turning in circles. Although the appellant denied doing so, such behavior, if it occurred, raises at least the inference of an acknowledgment of wrongdoing.

In the face of this evidence, the appellant testified that he did not sexually molest K.W., but merely helped her go to the bathroom and wipe, before himself going to the

bathroom.[4] The defense argued that any amylase or DNA found in the appellant's underwear must have been inadvertently transferred by the appellant's hands during this process. The defense also raised evidence to suggest that SSgt C and his wife were spring loaded to jump to the wrong conclusion about the nature of the appellant's contact with K.W., because the appellant had previously reported SSgt C for spouse abuse, and because Mrs. C was herself sexually abused as a child and was overprotective of her daughter. The defense also presented evidence to suggest, and argued to the members, that SSgt C and Mrs. C, because of these same factors, may have inadvertently contaminated K.W.'s accounts of what happened through suggestive questioning and by their reactions to K.W.'s responses to those questions. Having considered this evidence, as well as the government evidence of the appellant's guilt, the court members found the government's case more persuasive. So do we.

The evidence of record properly admitted at trial, taken as a whole and viewed in the light most favorable to the prosecution, provided a sufficient basis for a rational trier of fact to conclude beyond a reasonable doubt that the appellant committed the offense of which he was convicted. Further, we ourselves are convinced beyond a reasonable doubt that the appellant is in fact guilty. Mindful that we did not personally observe the witnesses, we find the testimony of the government witnesses both credible and convincing.

Sentence Appropriateness

The appellant asserts that a sentence which includes confinement for 10 years is inappropriately severe. We find to the contrary.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

[4] In her testimony, K.W. specifically denied going to the bathroom at the appellant's house.

Although it is considerably less than the maximum possible confinement of life imprisonment without parole the appellant could have received, there is no doubt that 10 years confinement is a significant period of time. However, given the nature of the appellant's offense, including the tender age of his victim, and considering the appellant's time in service, military record, and all other matters in the record of trial, we find nothing inappropriately severe in the approved punishment.

Conclusion

The approved 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

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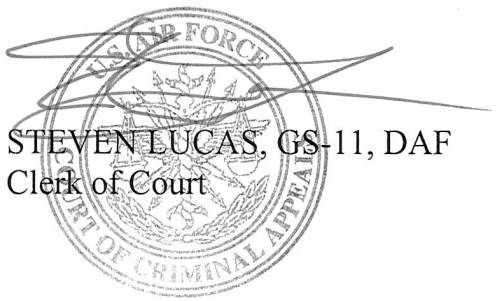

STEVEN LUCAS, GS-11, DAF
Clerk of Court