UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALEJANDRO E. GONZALEZ
United States Air Force

ACM 38154

09 October 2013

Sentence adjudged 10 March 2012 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Natalie D. Richardson.

Approved Sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan and Captain Luke D. Wilson.

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

Before

ROAN, HECKER, and WIEDIE
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 officer members convicted the appellant, contrary to his pleas, of one specification of possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934, and sentenced him to a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence except for the adjudged forfeitures, and waived mandatory forfeitures for the benefit of the appellant's dependent. On appeal, the appellant asserts his due process rights were violated when the trial counsel's findings

argument improperly shifted the burden to the defense by indicating the defense had failed to call a witness. Finding no error that materially prejudices the appellant, we affirm.

Background

On 23 December 2010, a civilian investigator working on an internet crime task force was alerted though a law enforcement computer program that a certain computer had been used to access files indicative of child pornography. The sharing software program allows a user to link to and then search the computers of other users for content those users have agreed to share, using either search terms or searching by category.

The investigator then used his own computer to monitor the suspect computer's activity. For over a month, the suspect computer did not connect to the file sharing network. However, on 29 January 2011, additional downloads of files with names indicative of child pornography were made from the suspect computer. Using the digital signature associated with one of these files, the investigator found it within the file sharing network and determined it was a videorecording of a child under the age of 18 engaged in sexual activity.

After issuing a subpoena to the suspect computer's internet service provider, the investigator learned the appellant owned the computer and it was located in the on-base residence the appellant shared with his wife and young son. Military investigators later executed a search warrant on the appellant's home and seized multiple items of computer media.

Subsequent forensic analysis found thousands of video files on the computer media, 12 of which were determined to contain images of minors engaging in sexually explicit conduct. These files had been moved from their initial download folder on the laptop and placed into a folder named "Lolita" on an external hard drive. The court-martial panel found the appellant guilty of possessing these images between 23 December 2010 and 10 February 2011.

Findings Argument

The defense theory at trial was that the government had failed to prove the appellant had knowingly possessed the images. This multi-pronged approach included expert testimony about the possibility of the files ending up on the appellant's computer through a mass download of multiple files, the lack of evidence the files were ever opened, and the possibility that someone else downloaded the files on the two days in question.

On this latter point, the trial defense counsel made the following findings argument:

> The government also talked a lot about dates in this case, 23 December, 29 January, of 2010 and 2011 respectively. But guess what? No one testified who was in the house on [the] 23rd of December. No one testified who was in the house on the 29th of January. He had a wife at the time, now his ex-wife. Where was she today? Why isn't she here? Why didn't she take the witness stand to tell you what she knows?
>
> . . . You can't say that he was at the screen . . . . Can't physically put him there . . . ."

During the Government rebuttal argument, the senior trial counsel argued:

> [T]he defense's argument invites you to a world free of reason, logic, and common sense. How did this get on his computer?
>
> . . . What kind of fantasy where we've been told stories where a fairy, I guess, came into his house . . . downloaded and started moving . . . file names indicative of child pornography.
>
> Not only that, after they're downloaded, they're moved and stored in a folder called [L]olita. I guess that just happens. Don't know who snuck into their house at 0200 that morning and did this. They want you to believe it wasn't him. . . . Don't know how this happened. . . .
>
> [T]he defense is saying, 'Well, maybe it's his wife.' Well, you didn't hear from her. Agent [P] testified she didn't report the child pornography. She didn't have anything to talk to you about. I submit to you that's why we didn't hear from her.

Following a defense objection to "facts not in evidence," the military judge instructed the panel to disregard the trial counsel's comment that the appellant's wife did not testify because she did not have anything to say. The trial counsel then continued:

> [T]he defense wants you to believe that some stranger or whatever was in the house looking for, I guess, adult pornography and just happened to find all these file names indicative of child pornography.
>
> Members, that didn't happen. That defies reason and common sense. It wasn't the toddler. It wasn't his wife. It was him.

. . . Members, it's him, nobody else.

Although the defense counsel did not object that the trial counsel's argument improperly shifted the burden to the defense, he now raises this issue on appeal.

The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). When defense counsel fails to object or request a curative instruction, we grant relief only if the improper argument amounts to plain error. *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007). Under the plain error standard, an appellant must show (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (internal quotation marks and citation omitted). An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). If the error is constitutional, the prejudice prong is satisfied if the Government cannot show that the error was harmless beyond a reasonable doubt. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).

The Government always has the burden of proof to produce evidence on every element and to persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). The burden of proof never shifts to the defense and the Government "may not comment on the failure of the defense to call witnesses." Rule for Courts-Martial 919(b), Discussion; *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990). A trial counsel's suggestion that an accused may have an obligation to produce evidence of his own innocence is "error of constitutional dimension." *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

However, not every comment by the prosecution is a constitutional violation. Instead, we evaluate the comment in the context of the overall record and the facts of the case. The Supreme Court has stated that "[i]t is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). A trial counsel is permitted to make a "fair response" to claims made by the defense, even where a constitutional right is at stake. *Id.* at 32; *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). A prosecutor's argument must be examined in light of its context within the entire trial. *Robinson*, 485 U.S. at 33; *Gilley*, 56 M.J. at 121; *Lockett v. Ohio*, 438 U.S. 586, 595 (1978); *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005).

Here, we do not find error in this case, plain or otherwise. When considered in context, we find the trial counsel's argument was aimed at attacking the defense theory of

the case and did not shift the burden of proof. *United States v. Vandyke*, 56 M.J. 812, 817 (N.M. Ct. Crim. App. 2002). Furthermore, the military judge properly instructed the members that the Government always carried the burden of proving the appellant's guilt beyond a reasonable doubt and the burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense. After a thorough review of the record, we are convinced the trial counsel's remarks, when taken in context, did not improperly shift the Government's burden to the appellant. Even if the trial counsel's argument was error, we find it harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court