UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW A. HEBERT
United States Air Force

ACM 38150

22 October 2013

Sentence adjudged 4 April 2012 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Natalie D. Richardson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Lieutenant Colonel Shaun S. Speranza; Lieutenant Colonel Steven J. Grocki; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

WEBER, Judge:

Contrary to his pleas, the appellant was convicted by a military judge sitting as a general court-martial of one specification of wrongfully and knowingly possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The military judge sentenced the appellant to a

[1] For ease of reference throughout this opinion, we refer to the material the appellant was charged with possessing as "child pornography."

bad-conduct discharge, confinement for 9 months, and reduction to the grade of E-1. The convening authority deferred mandatory forfeitures from 14 days after the sentence was adjudged until action, but otherwise approved the sentence as adjudged.

The appellant now raises three issues for our consideration: (1) Whether his conviction is legally and factually sufficient; (2) Whether he received ineffective assistance of counsel, citing several alleged deficiencies in his counsels' performance; and (3) Whether the military judge abandoned her impartial role when she suggested litigation strategy for trial counsel in response to trial defense counsel's Rule for Courts-Martial (R.C.M.) 917 motion.[2] We find no error materially prejudicial to a substantial right of the appellant, and affirm.

Background

The appellant's wife, MH, visited the appellant in 2010 while he was in technical training school. During this visit, MH examined the contents of one of his external hard drives because she suspected he may have been unfaithful to her. In so doing, she viewed a video file of what appeared to be a nude young girl lying on a blanket with a man entering the camera's view. She called the appellant about this discovery. He responded that he knew nothing about the file and instructed her to delete it, which she did.

A domestic dispute followed a month or two later where MH was arrested for hitting the appellant. MH then reported her earlier discovery of apparent child pornography to Family Advocacy. Family Advocacy, in turn, reported this information to the Air Force Office of Special Investigations (AFOSI). MH consented to AFOSI's seizure of the appellant's laptop computer and three external hard drives he used. AFOSI agents also later seized the appellant's journal, MH's laptop, and a desktop computer the family no longer actively used. Forensic analysis of the equipment revealed images and video files of known child pornography on the desktop computer, the appellant's laptop computer, and two of the external hard drives. The forensic examination also revealed that shortly after the domestic dispute that led to MH's arrest and report to Family Advocacy, the appellant moved more than 17,000 files from his laptop to an external hard drive and reformatted his laptop. This erased files from the active portion of computer memory and moved those files onto the "unallocated" space on the laptop's hard drive. Examination of MH's laptop and the remaining external hard drive did not reveal any suspected child pornography. The appellant's journal contained one entry dated 12 days after the first seizure of evidence in which the appellant wrote statements such as, "I now face jail time" and "[MH] betrayed my confidence, were [sic] anything that happens between a husband and a wife stays private."

[2] The third issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The appellant repeatedly committed acts of misconduct during the investigation into his suspected child pornography activity. In February 2011, he received a letter of reprimand (LOR) for adultery. One month later he received a second LOR for failing to attend a squadron event and then lying about his whereabouts and attempting to get other Airmen to support his false account. On 13 April 2011, a special court-martial found him guilty of stealing ammunition from the Air Force, resulting in his reduction from staff sergeant to senior airman. He received nonjudicial punishment for assaulting his wife two months after his first court-martial, resulting in his further reduction to airman first class. Finally, in March 2012, he received another LOR for adultery and violating a no contact order.

Further facts relevant to the analysis of each issue are discussed below.

Legal and Factual Sufficiency

The appellant asks this Court to set aside the findings of guilt as to the Charge and Specification because the evidence is not legally or factually sufficient to support his conviction. Specifically, he argues that all the files of child pornography were either found in the unallocated spaces of the computers or came in the form of a "thumbs.db" file, neither one of which would be accessible to the average computer user without specialized software. The appellant further alleges that he shared custody and control of his computer equipment with others, and that files on the external hard drives could have been placed there from other computers besides those belonging to him.

We 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 of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). 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] are [] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence . . . appl[ying] neither a presumption of innocence nor a presumption of guilt . . . [to] make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The elements of the charged offense are as follows:

(1) That at or near Ellsworth Air Force Base, South Dakota, between on or about 2 January 2007 and on or about 14 September 2010, the appellant wrongfully and knowingly possessed one or more visual depictions of a minor engaging in sexually explicit conduct; and

(2) That, under the circumstances, the appellant's conduct was prejudicial to good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.[3]

Manual for Courts-Martial (*MCM*), Part IV, ¶ 60.b.(1)-(2) (2008 ed.).

Applying the standards discussed above, we conclude a rational factfinder could have determined that the appellant wrongfully and knowingly possessed child pornography. Additionally, after reviewing the record, weighing the evidence and the record of trial, and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.

The evidence of child pornography the Government introduced, while inaccessible to a person without specialized software, represented trace evidence of the appellant's earlier knowing and wrongful possession of child pornography. The Government's forensic computer expert explained that a user had installed the "LimeWire" program on both the desktop computer and the appellant's laptop, and that this program was used to download video files containing terms strongly indicative of child pornography, including a search for the term "pthc" (preteen hardcore). The user then navigated to the folder on the computer where the files were being downloaded to see thumbnail images of the videos. Those thumbnail images unmistakably indicated that the videos contained child pornography. When the user viewed the folder of downloading videos in thumbnail format, the computer created "thumbs.db" files. These "thumbs.db" files were not accessible to the appellant, but they nonetheless demonstrate that a user knowingly downloaded child pornography. Moreover, evidence obtained from the unallocated space of the computers and hard drives support the conclusion that a user employed "LimeWire" to download files with names indicative of child pornography.

Likewise, we do not believe the Government's failure to demonstrate the appellant was the exclusive user of the computers and hard drives renders his conviction legally or factually insufficient. Trace evidence of possession of child pornography was found on four different pieces of computer equipment. The appellant was the common user of these four items, and the items in question were located under his profiles. The images

[3] The Government charged the appellant in the conjunctive, meaning it needed to prove that his conduct met both terminal elements of the General Article.

and videos were acquired through "LimeWire," a program loaded on both the desktop and the appellant's laptop computer and a program MH testified she did not use. In addition, a user under the profile "Matthew" conducted a Google search for a term associated with child pornography. The fact that the appellant reformatted his laptop computer shortly after his domestic dispute indicates his consciousness of guilt, as he deleted evidence soon after his wife (who had previously seen child pornography on his external hard drive) acquired a motivation to report his activities. Combined with his statements in his journal that his wife had betrayed his confidences and he now faced jail time, the evidence is both legally and factually sufficient to support the appellant's conviction.

Assistance of Counsel

The appellant next alleges that his trial defense counsel were ineffective in several respects. Specifically, he alleges the following deficiencies in his counsels' performance: (1) They failed to object to the introduction of the appellant's journal entry as a privileged communication to clergy under Mil. R. Evid. 503; (2) They failed to call witnesses the appellant had identified who had borrowed his computer equipment or who had lent computer equipment to him; (3) They conceded his guilt in sentencing argument and argued that he should be punished; and (4) They failed to submit in sentencing any character letters the appellant provided. We find no merit in this allegation.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, an appellant must demonstrate: (1) a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense through errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Tippit*, 65 M.J. at 76 (internal quotation marks omitted) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687)).

The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Thus, judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000) (citing *Moulton*, 47 M.J. at 289). The "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

In response to this Court's Order, the appellant's military and civilian trial defense attorneys submitted affidavits addressing his allegations. Generally, the two affidavits agree that: (1) The appellant never told his counsel he was a clergy member and never provided them proof of such that would enable them to assert a Mil. R. Evid. 503 privilege as to the journal entry; (2) Counsel did interview several of the people the appellant suggested but elected not to call any of these witnesses; (3) Defense counsel's remarks in sentencing were not intended to concede guilt but were aimed at minimizing his punishment consistent with the appellant's expressed desires; and (4) Counsel elected not to introduce any character letters in sentencing because this would have allowed the Government to introduce victim impact statements in rebuttal.

Although there are factual differences between the declarations of the appellant and his counsel, we need not order an evidentiary hearing since these issues can be resolved based on the "appellant filings and the record." *Ginn*, 47 M.J. at 248. The filings and record "compellingly demonstrate" the improbability of appellant's allegations that he received ineffective assistance of counsel. *Id.*

As to his claim concerning the failure of his counsel to make a Mil. R. Evid. 503 objection, even if we accept the appellant's contention that he had informed his counsel of his status as an ordained minister, and even if we accept that his ordination by the "Universal Life Church Monastery" conferred upon him the status of a clergyman, Mil. R. Evid. 503 would not compel exclusion of his journal entry. This rule holds that "a confidential communication *to* a clergyman" is privileged. Mil. R. Evid. 503(a) (emphasis added). In order for a communication to be privileged under this Rule, three elements must be met: "(1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor; and (3) the communication must be intended to be confidential." *United States v. Napoleon*, 44 M.J. 537, 543 (A.F. Ct. Crim. App. 1996) (citing *United States v. Moreno*, 20 M.J. 623, 626 (A.C.M.R. 1985)), *aff'd*, 46 M.J. 279 (C.A.A.F. 1997). It is too great a stretch to suggest that the appellant made his journal entry "to" himself as his own spiritual advisor. In any event, there is no reason to believe that he made the journal entry as either a formal act of religion or as a matter of conscience. Trial defense counsel were not ineffective in failing to raise this meritless issue.

Concerning the alleged failure to investigate witnesses and introduce character letters, the record of trial and the appellate filings convincingly demonstrate that trial defense counsel had sound tactical reasons for choosing both courses of action. As to the witnesses, trial defense counsel were able to employ their strategy of demonstrating that the appellant was not the only person with access to the computer equipment through the

testimony of MH. This made it unnecessary and possibly unwise to call the witnesses the appellant identified, as such witnesses may have denied placing any contraband on the appellant's computer equipment. Introducing character letters in sentencing would have forced the defense to relax the rules of evidence in sentencing. *See* R.C.M. 1001(c)(3)(d). This, in turn, would have allowed the Government to introduce damaging victim impact statements in rebuttal. In any event, trial defense counsel did introduce evidence concerning the appellant's character through three telephonic witnesses. Trial defense counsel's decisions on these matters did not amount to ineffective assistance of counsel.

Finally, the appellant's assertions that his trial defense counsel conceded his guilt and conceded that the appellant needed to be punished are baseless. Our review of trial defense counsel's sentencing argument revealed nothing that could reasonably be considered as conceding the appellant's guilt. The one comment the appellant cites was as follows: "This was, at most, 24 files spanning a 42-month timeframe." This was an obvious attempt to place the crimes of which the appellant had already been convicted in a more favorable context. It was not a concession of the appellant's guilt. Likewise, trial defense counsel did not improperly concede that the appellant needed to be punished. Trial defense counsel did tell the military judge that the defense was not contending that the appellant did not deserve to be reduced in grade to E-1, and he likewise commented that confinement should be "measured in months and not years." At one point, trial defense counsel rebutted the Government's argument for confinement of 2-4 years by arguing, "[W]hat is two to four years going to do, that five or six months is not going to do?" We see nothing ineffective in this argument, as defense counsel was merely trying to acknowledge the obvious – that some punishment was likely to be meted out – while trying to reset the framework for what an appropriate sentence to confinement would be. The appellant has no basis to argue on appeal that his defense counsel was ineffective in arguing for confinement measured in months rather than years, as his possession of child pornography coupled with his lengthy disciplinary record left little doubt that he would serve time in confinement for his crime. Trial defense counsel zealously and competently represented the appellant, and he did not suffer from ineffective assistance of counsel.

Military Judge's Impartiality

Finally, the appellant asserts that the military judge abandoned her impartial role by suggesting trial counsel's strategy for proving its case in response to a defense motion to dismiss under R.C.M. 917. We disagree.

Following the Government's presentation of its case-in-chief, trial defense counsel moved for a finding of not guilty under R.C.M. 917, asserting that the Government failed to introduce sufficient evidence to sustain a conviction. The defense's position was similar to that now advanced on appeal as to the legal and factual sufficiency of the evidence. After a recess to consider the defense's motion, the military judge denied the

motion, citing case law for the proposition that the trace evidence found on the computer equipment could demonstrate a knowing and wrongful prior possession of child pornography.

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999). A military judge is charged to "avoid undue interference with the parties' presentations or the appearance of partiality." R.C.M. 801(a)(3) (Discussion). "In the military, a judge may not abandon his role as an impartial party and assist in the conviction of a specified accused." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (citing *United States v. Lindsay*, 30 C.M.R. 235 (C.M.A. 1961)). A military judge is entitled to a "strong presumption" of impartiality, particularly when the actions at issue took place in conjunction with judicial proceedings. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). "'When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of [the] trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *Id.* at 78 (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)).

We have examined the military judge's response to trial defense counsel's R.C.M. 917 motion and find no error. Trial defense counsel's motion for a finding of not guilty asserted that the absence of evidence of child pornography in accessible locations and format demonstrated the appellant did not knowingly and wrongfully possess child pornography. Trial defense counsel cited several cases in support of this proposition. The military judge recessed to review the cases cited, and returned with her conclusion that other federal case law demonstrated the contrary. The military judge found case law that indicated exactly what the Government expert had already testified to – that trace evidence of child pornography that is normally inaccessible to lay persons may nonetheless be used to prove that the person previously possessed child pornography in an accessible location and format. A military judge is not bound to accept only cases cited to it by one party, and in fact the military judge has a duty to thoroughly research and accurately cite the law. The military judge did not suggest litigation strategy to trial counsel, her ruling did not lead to the Government introducing any additional evidence, and her actions did not amount to an abandonment of her impartial role.

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.[4] Articles 59(a)

[4] We note one issue with the record of trial. In sentencing proceedings, the Government introduced a record of nonjudicial punishment proceedings imposed upon the appellant on 9 June 2011. The record of nonjudicial punishment proceedings indicates that the appellant submitted a written presentation for the commander's consideration, but that written presentation is not included in the record of trial. Normally, when the Government introduces derogatory information from an accused's personnel record, it must, if challenged by the defense, also

and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

introduce the favorable information which is included within the record. *United States v. Salgado-Agosto*, 20 M.J. 238, 239 (C.M.A. 1985). However, where defense counsel does not identify any such favorable documents or object to the introduction of the derogatory evidence, we may presume that the record is complete and any error is waived. *Id.*; *United States v. Merrill*, 25 M.J. 501, 503 (A.F.C.M.R. 1987). Since defense counsel did not object to the introduction of the nonjudicial punishment record and did not identify that the appellant provided a response, we presume that the record of trial is complete and any error is waived.