UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOHN A. MCCRARY
United States Air Force

ACM 38016

07 May 2013

Sentence adjudged 10 August 2011 by GCM convened at Travis Air Force Base, California. Military Judge: Martin T. Mitchell.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Andrew J. Unsicker.

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

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial composed of officer members, the appellant pled guilty to possessing and attempting to use Spice, in violation of a lawful general order, and possessing one or more visual depictions of minors engaging in sexually explicit conduct, in violation of Articles 80, 92 and 134, UCMJ, 10 U.S.C. §§ 880, 892, 934. After the military judge accepted his pleas and entered findings of guilty, the court sentenced the appellant to a bad-conduct discharge, confinement for one year and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts his sentence should be set aside because the military judge improperly

admitted certain uncharged misconduct and a Senate Judiciary Committee report as aggravation evidence.

Background

In late July 2010, a civilian detective working on a state task force in California identified the appellant's Internet Protocol (IP) address as potentially sharing child pornography with others on the Internet. After reviewing some of the materials that had been accessed, the detective found indicia of child pornography. Using a search warrant issued to the Internet service provider, the detective determined the IP address was assigned to an off-base residence occupied by the appellant and another individual. Through another search warrant, the detective and agents from the Air Force Office of Special Investigations conducted a search of the residence, seizing a laptop and external hard drive from the appellant's bedroom.[1] After forensic testing of these items found several photographs and video-recordings of child pornography, the Government charged the appellant with wrongfully possessing one or more visual depictions of minors engaged in sexually explicit conduct.

Guilty Plea to Child Pornography Specification

In his guilty plea inquiry, the appellant described how he used a peer-to-peer file sharing program called LimeWire to download pornography during a two-week period in July 2010. This program allows a user to link to and then search the computers of other users ("peers") for content those peers have agreed to share. When the appellant typed a search term into LimeWire, the program provided a list of file names containing that term. The appellant would download the files by clicking on the file names, and the files would be saved automatically into a folder called "LimeWire Saved."

According to the appellant during the guilty plea inquiry, he did not remember what search terms he used to look for images on LimeWire but admitted some of the terms he used could (and did) find images of child pornography. Forensic testing was unable to determine what search terms had been used. A video recording of the appellant's November 2010 interrogation, entered into evidence during sentencing, showed the appellant admitting to using search terms such as "16 years old," "13 years old," and "young girls."

[1] This search also found Spice in the appellant's bedroom. A few weeks earlier, the appellant had purchased Spice and rolling papers at a tobacco store. Intending to smoke the Spice and achieve an intoxicating effect, he attempted to use the rolling papers to create a Spice cigarette but was unable to do so. He then removed the tobacco from a standard cigarette and placed the Spice inside, but he was again unsuccessful at creating a device that would allow him to smoke the Spice. Based on this conduct, the appellant pled guilty to possessing and attempting to use Spice.

Although he did not remember the file names that contained images of child pornography, the appellant admitted seeing some images that included individuals who appeared to be under the age of 18. Once he downloaded and reviewed these images, he did not take any steps to delete them. Based on his review of the forensic evidence with his defense counsel, the appellant admitted that his laptop's LimeWire folder contained 6-7 images or videos depicting minors engaging in sexually explicit conduct.

In his guilty plea inquiry, the appellant also described how he came into possession of the pornography found on his external hard drive. In 2008, the appellant received pornography from a friend, downloaded it onto that hard drive and maintained possession of the hard drive until his residence was searched in November 2010. He regularly looked at the adult pornography on the hard drive, but he did not know there was child pornography on this hard drive until he reviewed the forensic evidence with his defense counsel. The appellant told the military judge he should have ensured all the images on his hard drive were "legal" for him to possess during the charged time frame. The forensic evaluation of the hard drive found three video files of child pornography on this hard drive and no evidence these files were accessed after 2009.

Apparently recognizing these facts are not consistent with "knowingly" possessing the child pornography images on the external hard drive between July and November 2010, the military judge instructed the appellant to focus solely on the images downloaded through LimeWire. The appellant and the military judge then completed the guilty plea inquiry by discussing how the appellant's possession of the images he downloaded through LimeWire met the terminal element to the Article 134, UCMJ offense. Similarly, when the military judge reopened the guilty plea based on statements made during the accused's unsworn statement, he focused solely on the images found on the laptop and downloaded through LimeWire. Without specific discussion about which images served as the basis for the conviction, the military judge found the appellant guilty of the specification as charged, finding he wrongfully and knowingly possessed one or more visual depictions of minors engaging in sexually explicit conduct.

The guilty plea inquiry played for the members in sentencing included his discussion of the external hard drive and its contents, and the panel was shown its three video recordings. Given that and the sentencing arguments of the parties, the members would have believed the appellant had been found guilty of, and thus could be sentenced for, knowing possession of the external hard drive files. However, based on his guilty plea inquiry and the evidence presented at trial, we find the appellant's guilty plea is only provident as to the two video files and five photographic files found on his laptop.

Because the possession of the child pornography on the external hard drive was neither validated by a guilty plea inquiry nor proven to a fact-finder beyond a reasonable doubt during litigation on findings, the appellant's conviction for possession of one or

more images of child pornography does not cover these images, and they should not have been admitted for that purpose. We will evaluate the impact of this error below.

Admission of File Names and Trial Counsel Argument

During the guilty plea inquiry, the military judge admitted multiple exhibits, along with testimony about those exhibits from the civilian detective, who testified as an expert in computer forensic examination. In that testimony, the detective explained how his forensic analysis found ten files containing depictions of child pornography—seven on the laptop and three on the external hard drive. During sentencing, the panel viewed these videos and photographs and were also provided a list of file paths showing precisely where those images were found on the appellant's computer media. For the files found on the laptop, one video file was found within a folder called "LimeWire Incomplete," meaning that file had only been partially downloaded from LimeWire, while another video file and five photographic files were found in the "LimeWire Saved" folder, where fully-downloaded files are placed by LimeWire. The video files found on the external hard drive were found together within a folder.

Without defense objection, the military judge also admitted three other exhibits, which the appellant now contends is plain error. The detective testified that, in addition to finding these ten images of child pornography in three folders on the appellant's computer media, he came across other files in those folders that were "potentially indicative" of child pornography based on certain words or phrases found in their file names. The detective created three reports containing the file names found for those folders: (1) 22 files found in the same folder on the external hard drive where three video files of child pornography were found; (2) 39 files found in the LimeWire "incomplete" folder where one video file of child pornography was found; (3) 77 files found in the "LimeWire Saved" folder, where one video file and five photographic files of child pornography were found.[2]

These reports contained the name of the file, the full file path where these files were located on the appellant's computer media and certain dates relevant to the files' creation and accession. The detective admitted that the description found in a file name does not always correspond to the file's contents and, therefore, the file name could be misleading. In fact, when the detective clicked on many of these files from the appellant's computer and hard drive, he found adult pornography. The only child pornography found on the appellant's computer and hard drive were the ten images entered into evidence.

[2] The detective testified it was impossible to know whether the 77 files in the "LimeWire saved" folder were ever viewed or, if they were, how many times. In contrast, most of the files found in the "LimeWire Incomplete" folder and on the external hard drive had a "preview-T" designation in the file name, meaning the item had been viewed by the user but the download was interrupted prior to completion.

At the outset of his sentencing argument, the trial counsel listed ten file names for the members, only three of which were linked to images of child pornography found on the appellant's laptop computer. The other seven file names were from files found in the "LimeWire Saved" folder. The trial counsel argued these 10 files were:

> . . . just a small sample of the files that the accused searched for, clicked on, downloaded and viewed on his computer. Why? Because he wanted to see children having sex. He wanted to see children being raped.
> . . . .
> . . . [T]his is serious stuff. He knowingly searched out, looked for, longed to see, downloaded and watched children being raped . . . . Click after click after click. Members, don't be swayed by the thought that "Well, he only saw 10 files." You have Prosecution Exhibits 4, 5 and 6 which show over 130 times the accused knowingly received a file—knowingly brought a file onto his computer—that certainly suggested it was child pornography. Using tools such as "child," "preteen," "16-year old," "14-year old," these are search terms that he is willing to admit. Videos and pictures of children being raped.
> . . . [Y[ou know he did not have just one. He tried to and he downloaded many more files than that.
> . . . .
> He downloaded LimeWire specifically so he could search out and download child pornography.

In his sentencing argument, the defense counsel responded by pointing out that the trial counsel:

> . . . read a bunch of [horrible] file names to you . . . but what did you hear from [the detective]? . . . [T]he file names are empty; there is nothing behind them. What we're talking about today are ten images; ten known child images on [the appellant's] computer or external hard drive . . . . [T]here are a hundred and thirty some odd file names that they showed you. Most of those names they read, what was behind them is adult pornography.
> . . . .
> . . . [The evidence is] not the stack of papers they are giving you.

The appellant now contends the military judge committed plain error by admitting the exhibits and testimony about the file names that were not associated with actual images of child pornography. He claims this evidence is not "directly related" to his offenses and thus was not proper aggravation evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4) and that the Government improperly used this evidence of

uncharged misconduct to argue the appellant lacked rehabilitative potential and inflame the members.

We review a military judge's decision to admit sentencing evidence, including aggravation evidence under R.C.M. 1001(b)(4), for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (citation omitted). Improper argument is a question of law that we review de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citation omitted). For both issues, in the absence of a defense objection, we review for plain error. In the context of a plain error analysis, the appellant has the burden of demonstrating that: (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right of the accused. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citation omitted).

After findings of guilty have been entered, trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. R.C.M. 1001(b)(4). Uncharged misconduct can be admitted as aggravation evidence if it is "interwoven" in the res gestae of the crime. *United States v. Metz*, 34 M.J. 349, 351-52 (C.M.A. 1992). Matters in aggravation must be used for an appropriate purpose, namely to inform the sentencing authority's judgment regarding the charged offense and putting that offense in context, including the facts and circumstances surrounding the offense. *United States v. Mullens*, 29 M.J. 398, 400-01 (C.M.A. 1990); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982); *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Evidence can be admissible as aggravation evidence under the "continuing offense doctrine," if evidence of similar misconduct is part of a continuous course of conduct involving similar crimes.[3] Aggravation evidence is also subject to the balancing test of Mil. R. Evid. 403.

Here, the appellant pled guilty to possessing one or more depictions of child pornography on his laptop computer. In explaining how those depictions ended up on the computer, the appellant described putting search terms into LimeWire, receiving a list of file names, and clicking on them so they would download. According to the expert witness, files that only partially downloaded went into a folder called "LimeWire

[3] *See United States v. Moore*, 68 M.J. 491 (C.A.A.F. 2010) (mem.) (It was not plain error to admit evidence of two failed urinalysis tests taken several months outside the charged time period "in light of the continuing offense doctrine and a lack of material prejudice" in a judge alone trial); *United States v. Nourse*, 55 M.J. 229, 231-32 (C.A.A.F. 2001) (Evidence of additional thefts from a sheriff's office was admissible in a larceny case because it was part of the accused's continuing scheme to steal and was admissible to show the full impact on the victim); *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1993) (Evidence of drug transactions outside the pled-to conspiracy was admissible to show the charged misconduct was not an "isolated transaction" and "the continuous nature of the charged conduct and its full impact on the military community"); *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (It was permissible to show the accused had altered 20-30 enlistment aptitude tests, even though he pled guilty to altering only four, as it shows his "pattern" of conduct and the harm suffered by the Army).

Incomplete" and those that fully download went into a folder called "LimeWire Saved." Given the expert witness' testimony that no files entered these folders unless the computer user affirmatively took steps to download them, we find the reports listing the contents of those folders to be appropriate aggravation evidence.

The appellant conducted searches on LimeWire using terms likely to find child pornography, received lists of files whose names were descriptive of child pornography and chose to download over 100 of those files onto his laptop computer over a short time period in July 2010. Although only seven of those files ultimately contained child pornography, the fact that the appellant, at a point close in time, downloaded the other files directly relates to his possession of those seven files and is interwoven with the res gestae of that offense. As such, the reports listing the files found in the "LimeWire Incomplete" and "LimeWire Shared" folders can be used by the sentencing authority to inform its judgment about the appellant's possession offense and put it into context.

The panel members were also provided with three video recordings of child pornography found on the appellant's external hard drive and, as noted above, were erroneously led to believe the appellant had been found guilty of possessing those images. The panel was also provided a report listing the file names of the 22 files found on that hard drive. Unlike the reports listing the files names found in the LimeWire folders, we find the three video recordings of child pornography and external hard drive report would not have been admissible as aggravation evidence, given the appellant's lack of knowledge that he possessed these materials and the lack of evidence about whether he knew he was downloading these images when he downloaded his friend's pornography collection onto the external hard drive. We discuss whether the appellant was prejudiced by this error later in our decision.

Admission of Senate Report

During the Article 39(a), UCMJ, 10 U.S.C. § 839(a), session where sentencing evidence was discussed, the prosecution moved the military judge to take judicial notice of a two-page document entitled, "Senate Report 104-358 – Child Pornography Prevention Act of 1995," contending this report constituted "legislative facts" which can be judicially noticed as "domestic law" pursuant to Mil. R. Evid. 201A(a). The trial defense counsel, stating he was aware of this Court's decision in *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), objected to the admission of the entire report on relevance grounds and specific portions of the report as improper victim impact testimony even under the reasoning in *Anderson*.

Without addressing the judicial notice aspect of the Government's request, the military judge found most of the Government's proposed exhibit to be admissible under *Anderson*, as it provided evidence to the panel about the impact of child pornography on the children who are depicted and the effects those children experience by having their

images in interstate commerce. He also found its probative value was not outweighed by the danger of unfair prejudice.

Following redactions ordered by the military judge, the Senate Report included statements that: (1) the children used in the pornographic images will suffer current and future physical and psychological harm, providing examples of that harm; (2) child pornography presents a clear and present danger to all children; and (3) the sexualization of minors undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children. The trial counsel marked the Senate Report as a prosecution exhibit and provided it to the members. There was no discussion about whether to provide the members with an instruction on judicial notice or their use of this exhibit in sentencing. Instead, the military judge instructed the panel that, in determining an appropriate sentence, they were to consider all the facts and circumstances of the offenses and any matters in aggravation. He also told the panel the appellant was only to be sentenced for the offenses of which he was found guilty.

In his sentencing argument, the trial counsel argued that society needed to be protected from the accused based on what was seen in the images. He then referenced the Senate report's statements about the effects child pornography has on the victims. Noting this is not a "victimless crime," the trial counsel quoted the Senate Report's language that the existence of and trafficking of child pornographic images presents "a clear and present danger to all children," and then reiterated that the members needed to protect society from the accused by confining him for at least two years. The trial defense counsel did not reference the Senate Report or its contents in his sentencing argument, although he did note that the appellant was sorry about what happened to the children who were depicted in the pornography and that the appellant did not have the same culpability as the individuals who created the images.

We review a military judge's decision to admit or exclude evidence for an abuse of discretion, *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010), and test the admission of evidence by the military judge based on the law at the time of appeal. *See United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011); *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (citations and internal quotation marks omitted) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration.").

This Court recently held this Senate Report is inappropriate for judicial notice under the Military Rules of Evidence. *United States v. Lutes*, 72 M.J. 530 (A.F. Ct. Crim. App. 2013). Thus, admitting this document through the use of judicial notice was an abuse of discretion. We find further error in the military judge's failure to issue a limiting instruction advising the members they could use this document only in considering the direct impact these pornographic images had on the child victims

portrayed in them, which then allowed the Government to rely on this exhibit to argue child pornography presents a "clear and present danger to all children." *See United States v. Anderson*, 60 M.J. 548, 556-57 (A.F. Ct. Crim. App. 2004) (holding evidence of child pornography's impact on the children used in its production is admissible under R.C.M. 1001(b)(4)).

Prejudice

After finding error, we test for prejudice which, in this context, is done by determining whether the admission of the evidence may have substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citation omitted). This requires us to evaluate whether the panel "might have been 'substantially swayed'" by the evidence in adjudging its sentence. *United States v. Reyes*, 63 M.J. 265, 267 (C.A.A.F. 2006). If so, then the result is material prejudice to Appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Under the circumstances of this case, we are not confident that the improperly admitted Senate Report and the improperly referenced external hard drive materials did not substantially influence the panel's judgment on the sentence.

Having determined that the admission of the evidence was prejudicial error, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. To validly reassess a sentence to purge the effect of error, we must be able to (1) discern the extent of the error's effect on the sentence and (2) conclude with confidence that, absent the error, the panel would have imposed a sentence of at least of a certain magnitude. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999); *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002); *United States v Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999)). We must also determine that the sentence we propose to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

On the basis of the errors noted, considering the evidence of record, and applying the principles set forth above, we determine that we can discern the effect of the errors and will reassess the sentence. Under the circumstances of this case, we are confident that the panel would have imposed a sentence including at least 10 months of confinement, reduction to E-1 and a bad-conduct discharge. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, that the reassessed sentence is appropriate.

Conclusion

The findings of guilty and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ. Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also 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).