**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

---

**UNITED STATES**

**v.**

**Staff Sergeant LYLE W. ODEN**
**United States Air Force**

**ACM 37035**

**17 April 2009**

Sentence adjudged 16 May 2007 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Tiaundra Sorrell (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Shannon A. Bennett.

Appellate Counsel for the United States: Captain Naomi N. Porterfield (argued), Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

WISE, JACKSON, and THOMPSON
Appellate Military Judges



PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of indecent liberties with a child and one specification of indecent exposure, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, 15 months confinement, and reduction to E-1.

The appellant asserts two errors: (1) the guilty plea to indecent liberties with a child was improvident and (2) the evidence in the record does not sufficiently show the appellant's acts to be taking indecent liberties *with* another.[1]

*Background*

The appellant was a 24-year-old assigned to F.E. Warren Air Force Base, Wyoming. In June 2006, the appellant was driving his truck in Cheyenne, Wyoming. He noticed a car with three "girls"[2] in it and decided to pull his truck up next to this car. While driving and in view of the females, the appellant raised himself up in his truck, exposed his penis, and masturbated. During the incident, the females remained in their vehicle, and the appellant remained in his truck. None of the females wanted, asked, or indicated that they wanted the appellant to pull his pants down and masturbate.

The ages of the three females in the vehicle were 15, 16, and 17. After the incident, the females called the Cheyenne Police Department, who began an investigation. Each of the females identified the appellant in a six-person photograph lineup.

At trial, the military judge explained the elements of indecent liberties with a child to the appellant. During questioning by the military judge, the appellant stated that he was "now aware that [the 15-year-old female] was under the age of 16." He went on to say that he was unaware of the female's age at the time of the incident but had no reason to doubt the female's age once he learned she was under 16. The military judge did not ask any further questions about the female's age or the appellant's knowledge regarding it. Neither the military judge nor counsel mentioned the mistake of fact defense.

*Law and Analysis*

This Court will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). "A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). If "the factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). This Court considers the entire record in conducting its review. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995).

---

[1] This Court heard arguments in this case as part of the Project Outreach Program at North Carolina Central University School of Law.

[2] During the *Care* inquiry, *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the appellant described the occupants of the vehicle as "girls."

*I.*

The first issue raised by the appellant is whether his guilty plea to Specification 1 of the Charge is provident due to the military judge's failure to advise the appellant on the mistake of fact defense. The appellant argues that the military judge was required to do an inquiry into the mistake of fact defense once the appellant stated that, at the time of the incident, he did not know the victim was under 16 years of age. Because the military judge did not conduct such an inquiry, the appellant argues that his plea was improvident and the Court should set aside his conviction of the specification.

The mistake of fact defense is available to a military accused charged with committing indecent acts (or liberties) with a child because the age of the victim is a separate element of the charge. *United States v. Zachary*, 63 M.J. 438, 443-44 (C.A.A.F. 2006); *United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995).

"Article 45(a)[, UCMJ, 10 U.S.C. § 845(a)] requires that, in a guilty-plea case, inconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected." *Zachary*, 63 M.J. at 444 (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). The appellant argues that once he said he was "now aware that [the 15-year-old female] was under the age of 16," and that he was unaware of the female's age at the time of the incident, then the military judge needed to inquire into the mistake of fact defense.

In *Zachary*, the accused said he believed the victim was over the age of 17. That fact is not present in this case. Our superior court has said that if the appellant "had an honest and reasonable mistake as to [the victim's] age, [the appellant] set up matter inconsistent with his guilty plea." *Id.*

In this case, the appellant had no belief about the victim's age; rather, he saw a car full of "girls" and decided to pull up next to them and masturbate in their view. The record does not contain any indication that the appellant knew the victims prior to this incident. In essence, the "girls" were strangers and that is why he did not know one of them was under 16 years of age at the time. The appellant did not have a mistaken belief that the girls were all over 16; instead, he simply had no belief about their age. This was evident at court. During the *Care*[3] inquiry, the appellant said that during the investigation he learned one victim was 15 and that he had no reason to question this fact. This lack of knowledge set up a "[mere] tactical possibility" of a defense, which does not provide a substantial basis for rejecting an otherwise provident plea. *United States v. Clark*, 28 M.J. 401, 407 (C.M.A. 1989) (alteration in original) (quoting *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973)).

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

The mistake of fact defense is available to an accused who has an honest and reasonable mistaken belief about the age of the victim at the time of the offense. In this case, the appellant had no belief about the victim's age. This lack of knowledge does not raise the mistake of fact defense, so the military judge did not erroneously accept the appellant's guilty plea without further inquiry into the appellant's impressions about the victim's age.

*II.*

The second issue is whether the appellant's guilty plea to Specification 1 of the Charge is provident based upon the sufficiency of the evidence in the record showing that the appellant took indecent liberties *with* another.[4]

The victim of indecent liberties "must be more than an inadvertent or passive observer." *United States v. Miller*, 67 M.J. 87, 91 (C.A.A.F. 2008) (citing *Eberle*, 44 M.J. at 375)). Similarly, to have an indecent act "with" another person, there must be more than just involuntary observation, but there need not be physical touching. *Eberle*, 44 M.J. at 375.

"[T]he offense of taking indecent liberties with a child may be committed without any physical contact or touching, even though the same act also may constitute indecent exposure." *United States v. Scott*, 21 M.J. 345, 348 (C.M.A. 1986) (citing *United States v. Brown*, 13 C.M.R. 10 (C.M.A. 1953)) (holding that providing pornographic magazines to children under the age of 16 for the purpose of gratifying the appellant's sexual desires constituted taking indecent liberties with a child). In *United States v. Ramirez*, 21 M.J. 353 (C.M.A. 1986), our superior court held that a charge under Article 133, UCMJ, 10 U.S.C. § 933, "that an accused masturbated in a public place in the presence of two minor children was closely related to the offense of taking indecent liberties with a child" and the maximum punishment for taking indecent liberties with a child applied to this Article 133, UCMJ, charge. *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987).

The case sub judice is similar to *Brown*, wherein our superior court upheld a conviction for taking indecent liberties with a child when the appellant drove past two children who were riding their bicycles, and as he passed, he exposed himself to them. *Brown*, 13 C.M.R. at 11. The girls turned a corner, and he returned and exposed himself to them again. *Id.*

In this Court's decision in *United States v. Williams*, ACM 35350 (A.F. Ct. Crim. App. 30 Nov 2004) (unpub. op.), we held that the actions by the accused, appearing to seek out the location of three children and then masturbate in front of them, did fulfill the

[4] The appellant and government disagreed on how to approach and analyze this issue. As this is a guilty plea, "the issue must be analyzed in terms of providence of [the appellant's] plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

"with" portion of the required elements for indecent liberties with a child. In *Williams*, the accused argued that he took no affirmative action to draw the children's attention to him and that they were accidental involuntary observers. This Court disagreed, finding "that the appellant's actions clearly show that he intended for the children to see him." *Williams*, unpub. op. at 4.

The explanation for "indecent liberties," as found in the *Manual for Courts-Martial, United States (MCM)* (2005 ed.),[5] states: "When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense." *MCM*, Part IV, ¶ 87(c)(2).

In this case, the appellant spotted a car full of "girls" ahead of him. He decided to pull up along-side of them. Once beside them, he lifted himself up off of the truck seat for the purpose of showing them what he was doing. This was not a simple feat as the "girls" were in a car at a lower level than the appellant sitting up in his truck. Once the appellant was in the lifted position, he then continued to masturbate in their presence and in their view. Thus, the appellant took indecent liberties with a child. The appellant's guilty plea to Specification 1 of the Charge was provident.

*Timely Post-Trial Processing*

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial and completion of review by this Court is facially unreasonable. Because the 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 that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *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 and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

[5] The 2008 edition of the *Manual for Courts-Martial, United States (MCM)* includes similar language, but the 2005 edition was in effect at the time of the appellant's court-martial.

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

AFFIRMED.

OFFICIAL


STEVEN LUCAS, YA-02, DAF
Clerk of the Court