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

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**UNITED STATES**

**v.**

**Technical Sergeant KEVIN E. PAXTON**
**United States Air Force**

**ACM 36092**

**18 April 2006**

Sentence adjudged 20 May 2004 by GCM at Spangdahlem Air Base, Germany. Military Judge: Thomas W. Pittman and William M. Burd.

Approved sentence: Dishonorable discharge, confinement for 26 years, forfeiture of all pay and allowances, and reduction to E-5.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major John N. Page III, and James A. Hernandez, Esq.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Matthew S. Ward.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT



MOODY, Senior Judge:

A general court-martial consisting of officer members convicted the appellant, contrary to his pleas, of one specification of rape, one specification of forcible sodomy, three specifications of committing indecent acts, one specification of taking indecent liberties, one specification of communicating indecent language, all of a person under 16, one specification of wrongfully providing alcohol to a minor, one specification of wrongful and knowing possession of child pornography, and one specification of incest, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The

members sentenced the appellant to a dishonorable discharge, confinement for 26 years, forfeiture of all pay and allowances, and reduction to E-5. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted five assignments of error: (1) Whether the trial counsel made an improper findings argument; (2) Whether the trial counsel made an improper sentencing argument; (3) Whether the appellant received ineffective assistance of counsel; (4) Whether two of the indecent acts specifications are multiplicious for sentencing with the rape charge or, in the alternative, constitute an unreasonable multiplication of charges; and (5) Whether the pretext phone call between the appellant and the victim should have been suppressed due to the appellant not having been advised of his rights under Article 31, UCMJ, 10 U.S.C. § 831. This last assignment of error is asserted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

*Improper Argument*

The acts which underlie this case involve the appellant's engaging in sexual activity with his biological daughter, BCP, to include touching her breasts and genitals, showing her pornographic pictures, giving her alcohol, observing her urinate, forcibly sodomizing her, and raping her.

The standard of review 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). Failure to object to improper argument waives the objection absent plain error. Rule for Courts-Martial (R.C.M.) 919(c); *see generally United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

The appellant first argues that the trial counsel made an improper argument in findings. Specifically, in rebuttal following argument by the trial defense counsel, the trial counsel stated the following: "To assert that what the government had to do to get this child ready to come in here and testify in this criminal proceeding is the same as what the accused is charged with is repulsive and disingenuous." The appellant asserts that the trial defense counsel made no such comparison and that this allegedly erroneous comment constituted plain error.

The appellant's having shown BCP pornographic pictures was charged as an indecent act. BCP testified that the appellant showed her pornographic images on a computer located in their quarters. She subsequently identified certain photographs depicting nude female children as photographs the appellant had shown to her on the computer. During argument on findings, the trial defense counsel stated to the members:

> Now you also have the . . . pictures that we spoke of earlier that [BCP] identified as what was on the computer. She says she was shown these images to pick out which ones she saw on the computer, so essentially, what [the appellant] is charged with is showing [BCP] pornography and that is exactly what [BCP] did in preparation for this trial.

We conclude that, despite the appellant's assertions to the contrary, the trial defense counsel did indeed equate the government's trial preparation with one of the crimes of which the appellant was charged. While the trial counsel's words were somewhat intemperate, we conclude that they responded to a prior attack by the trial defense counsel and were not simply an effort to bolster the trial counsel's credibility by denigrating the defense. *See* TJAG Policy Memorandum, TJAGC Standards – 2, *Air Force Standards of Professional Conduct and Standards for Civility in Professional Conduct*, Attachment 2, ¶ 28 (17 Aug 2005) (a lawyer may not "degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding"). We hold that the remarks in question do not constitute plain error.

Next, the appellant alleges that the trial counsel improperly commented during the sentencing argument on the appellant's failure to have testified and the appellant having declined to make even an unsworn statement. The trial counsel argued as follows:

> We want society to be protected from this person. We want never to have to go through this again, so rehabilitation is one of our big principles here. What is your punishment going to do to make sure that this person never commits this type of offense again, any of these types of offenses? You have to look at this individual and see that he really is a worthy candidate for rehabilitation. The MMPI [Minnesota Multiphasic Personality Inventory - a test performed on the appellant by a psychologist called as a defense witness] tells you that he was trying to fake himself looking better, trying to fake himself looking better. The test he was taking for you to know more about him, he is trying to bamboozle you. He doesn't want you to know what kind of person he really is, the child rapist, the child pornography, that's the kind of person he is. It also tells you he is unwilling and has an inability to accept responsibility and to disclose personal information. He needs severe punishment and long-term treatment to make sure he is never going to do this again. Rehabilitation, as we know it, the doctor told us, we have long-term treatment facilities in our military disciplinary barracks. He needs to be there. We know it is going to take him a while, because he won't admit what he has done. He won't admit it to his doctor. He won't admit it to himself and until he admits it, he can't even get into the treatment. He has to volunteer to get into treatment. You

> saw all the other things from the doctor's testimony that shows he is the kind of person who is not going to be proactively seeking that out. He has to get over that hurdle. He has to be punished long-term to make sure that he gets treatment and that he never does this again.

The defense counsel did not object to this argument. The appellant asserts that this argument "was an improper comment on [the appellant's] constitutional right to remain silent."

Although the appellant did not make a statement during sentencing, his counsel did call Dr. Jay Stone, a lieutenant colonel in the Air Force and a clinical psychologist who testified that the appellant posed a low risk for future offense. Dr. Stone based his conclusions, in part, upon his discussions with the appellant and upon the results of psychological testing.

On cross-examination, the prosecution attempted to establish that the appellant had not been completely forthright during his meetings with Dr. Stone.

> Q. I want to talk about some of the findings that you came up with, and this is from your report, I am going to quote . . . you said, "That [the appellant's] profile suggested that he responded to items by claiming to be unrealistically virtuous."
>
> A. Correct
>
> Q. "This test taking attitude weakens the validity of the test and shows unwillingness or inability on the part of the defendant to disclose personal information."
>
> A. Correct.
>
> . . . .
>
> Q. [T]here could be other risk factors out there that you just don't know about, because they didn't report them to you.
>
> A. Sure.
>
> Q. And your MMPI says he is unlikely to report personal information.
>
> A. He attempted to present himself in the most favorable light possible and that is to be expected under these circumstances.

Q. And that is called "fake good" right?

A. That is called impression management.

Q. But there is a term "fake good" correct?

A. Fake good -- I don't know about faking, I would say impression management, trying to present himself favorably.

Examining the trial counsel's sentencing argument in light of the record as a whole, we conclude that the challenged portion of that argument was directed at Dr. Stone's testimony on cross-examination rather than at the appellant's election to remain silent. The gist of the appellant's sentencing case was that he had a low risk of committing further similar offenses. The trial counsel attempted to undermine that strategy by eliciting from Dr. Stone facts which might lead the members to conclude that the appellant had not been completely truthful during his psychological interviews and testing. Reading the argument in light of the record as a whole, we hold that the trial counsel's comments do not constitute plain error.

*Remaining Issues*

At trial the defense asked the military judge to treat Specifications 1 and 2 of Charge II, which allege indecent acts with BCP, as multiplicious for sentencing with the Specification of Charge I, which alleges rape. The military judge denied the motion.[1] On appeal, the appellant contends that this was error. In the alternative, the appellant argues that the allegations of rape and indecent acts constitute an unreasonable multiplication of charges. We have considered the record of trial and hold that the military judge did not abuse his discretion in denying the multiplicity for sentencing motion. *See* R.C.M. 906(b)(12); *United States v. Wilson*, 35 M.J. 473, 475 n.3 (C.M.A. 1992). Furthermore, applying the criteria set forth in *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001), we hold that there is no unreasonable multiplication of charges.

We have considered the appellant's claim that his trial defense counsel were ineffective in that (1) they did not object to the allegedly improper arguments by the prosecutor; (2) they advised him to remain silent during sentencing; and (3) they did not call the appellant's wife and former wife as witnesses during findings.

The test for ineffective assistance of counsel is: (1) Whether "counsel made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed the defendant

[1] The military judge did, however, agree to treat the rape and incest convictions as multiplicious for sentencing.

by the Sixth Amendment[;]" and (2) Whether the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We have considered the appellate filings, however, and conclude that both trial defense counsel have provided a reasonable explanation for their conduct in the appellant's case. Indeed, the appellate filings and the record as a whole "compellingly demonstrate" the improbability of the appellant's claim. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We hold that the appellant has not been denied effective assistance of counsel. Finally, we hold the remaining issue to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator