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

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**UNITED STATES**

**v.**

**Airman Basic ANDREW F. PIETTE**
**United States Air Force**

**ACM 38101**

**14 August 2013**

Sentence adjudged 19 January 2012 by GCM convened at Dyess Air Force Base, Texas. Military Judge: J. Wesley Moore.

Approved Sentence: Dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

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

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges



PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of two specifications of wrongful sexual contact with a child who had not attained the age of 12 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for 12 years, forfeiture of all pay and allowances, and reduction to E-1. In accordance with the terms of a pretrial agreement (PTA), the convening authority approved the findings, 5 years confinement, and the remaining sentence as adjudged.

[1] The military judge dismissed a third specification of indecent conduct with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

Before this court, the appellant asserts that he received ineffective assistance of counsel during the sentencing portion of his court-martial. We disagree and affirm.

*Factual Background*

The victim, JCA, is the appellant's cousin. At the time of the offense and at trial, she was 10 years old. JCA lived in Minnesota with her mother and two brothers. The family often spent weekends with relatives at a campground called Sherwood Forest. The relatives included the appellant's parents (JCA's aunt and uncle) and grandfather. The appellant spent the month of July 2011 on leave visiting family in Minnesota after returning from an overseas deployment. He spent some of the time with his family at the campground. During some of those visits to the campground, the appellant touched the "vulva of JCA with his hand or finger," and "placed his mouth on the vulva of JCA." JCA eventually told her mother, which led to appellant's arrest by local authorities and his eventual court-martial.

Prior to trial, the defense filed a motion in limine under Mil. R. Evid. 513 asking the military judge to conduct an in camera review of JCA's counseling records. After conducting his review, the military judge released the records under seal to the Government and the defense as part of a protective order.

During sentencing, the Government called JCA, her mother, father, oldest brother, and an expert witness to testify about the impact of the appellant's actions on JCA and the family. JCA's mother testified that JCA became a "completely different child" after the assault. She stated that JCA had lost her sense of security, had "no desire to do anything," did not want to compete in sports (softball and karate) any longer, did not want to go to school or play with her friends, and had anxiety attacks. She also stated that JCA had constant intestinal troubles. JCA's father and brother testified substantially the same as her mother. Defense counsel did not cross-examine JCA's mother or brother, but did cross-examine her father about the fact that JCA was going to testify, and how he thought that was "best for her."

On direct examination, JCA recounted how the appellant assaulted her, and related that the incidents confused and scared her. She stated that she was afraid of the appellant, no longer trusted him, and did not like to be alone with "an adult I haven't really known before." But, JCA also stated that she had not stopped doing anything she used to do, and answered affirmatively when asked if she still played softball. On cross-examination, defense counsel explored with JCA her interests. JCA testified that she still liked softball and planned to play again when the weather warmed up. She stated that she was good at karate, but found it no longer challenging. JCA stated she still had her friends, was getting "A" grades in school, and liked her teachers. She also stated that she had been seeing a therapist and that she liked counseling because it helped her to talk about things.

The Government called Dr. Veronique Valliere as an expert witness in sexual assault trauma. Dr. Valliere testified that she reviewed JCA's mental health records, the police reports, and the case file. She also interviewed JCA and her mother. Dr. Valliere stated that her greatest concerns for JCA were the reappearance of her anxiety and associated behaviors. She noted that JCA had fears for her own safety and that people would be "mad" at her. The defense cross-examined Dr. Valliere but did not delve into JCA's mental health records.

In his oral unsworn statement, the appellant took responsibility for his actions and revealed that he had been abused by his cousin when he was a young boy:

> My cousin [J] sexually abused me for years, from about the age of 5, as best as I can figure, until I was about 11. I was not strong enough to tell anyone about it. [J] got caught when I was about 14 for abusing his younger brother. When I learned that my cousin had been arrested for abusing his younger brother, I felt the blame because I thought I could have prevented it if I would have just said something.[2]

*Ineffective Assistance of Counsel*

The appellant argues that he received ineffective assistance of counsel during the sentencing portion of his court-martial because his defense counsel failed to cross-examine the government witnesses about the victim's mental health records. We disagree.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). This court reviews claims of ineffective assistance of counsel de novo. *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009); *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citing *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006)). When reviewing such claims, we follow the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, the appellant has the burden of demonstrating: (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." *Id.*

The deficiency prong requires the appellant to show his defense counsel's performance fell below an objective standard of reasonableness, according to the

[2] In his written unsworn statement, the appellant also stated that the Air Force had put him in a facility where he was getting treatment for suicidal depression and where he had "begun to work on the real issues behind it: what I did to [JCA] and my own childhood abuse."

prevailing standards of the profession. *Id*. at 688. The prejudice prong requires the appellant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In doing so, the appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (citing *Strickland*, 466 U.S. at 689). This is because counsel is presumed competent in the performance of their representational duties. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). 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)).

To determine whether the presumption of competence has been overcome, our superior court has set forth a three-part test:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy "fall[ ] measurably below the performance … [ordinarily expected] of fallible lawyers"?
>
> 3. If ineffective assistance of counsel is found to exist, "is … there … a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?

*United States* v. *Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (alterations and omissions in original) (citations omitted) (quoting *United States v. McGillis*, 27 M.J. 462 No. 60165/AR (Daily Journal 6 December 1988)). *See also United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011). Moreover, "we need not determine whether any of the alleged errors [in counsel's performance] establish[ ] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*." *United States v. Saintaude*, 61 M.J. 175, 183 (C.A.A.F. 2005).

In assessing the appellant's allegation of ineffective assistance of counsel, we find that the appellant has failed to establish that his counsel were deficient such that their performance fell below an objective standard of reasonableness, according to the prevailing standards of the profession. In affidavits, trial defense counsel state that they reviewed JCA's mental health records with their court-appointed forensic psychologist to assess, among other areas, the "possible effectiveness of any cross examination [sic] on the topic against all the witnesses that the government intended to call." From their review, the defense team concluded that most of "the statements provided by the mother,

father, and brother of the alleged victim, were contradicted by the minor's own statements that she still related to male figures or that she was not participating in sports because of reasons unrelated to the assault."

Based on this review of the mental health records with their expert, the defense team decided as a matter of strategy to cross-examine JCA on the areas they concluded needed to be clarified for the members regarding victim impact. The defense focused the cross-examination on how well JCA was doing in school and how she still enjoyed some of her outside activities, to include sports. The defense also pointed out that while JCA may no longer have participated in some things she enjoyed doing prior to the charged offenses, "[T]hat was a product of a young girl changing her mind and not a product of the abuse she suffered at the hands of [the appellant]." According to defense counsel, "Any decision not to attack [JCA's] veracity was made strategically as to avoid alienating or infuriating the members that a young victim was being attacked by counsel." Their main strategy "was to show that she [was] doing ok and still living her life."

The defense strategy on how to cross-examine JCA also tied into their approach on extenuation and mitigation. Counsel decided not to "show that [JCA] suffered no ill effects from the abuse as [trial defense counsel] thought that would not be beneficial to [the appellant] in providing him the best mitigation and extenuation defense under the circumstances." In his unsworn statement, the appellant talked about the child abuse he experienced at the hands of a family member and the effects it had on him. Thus, defense counsel state that their "strategy could not support minimizing the effects on a nine [sic] year old allegedly victimized by her cousin, when the same effect on the Appellant's victimization by his family member was a matter being presented as mitigation."

Because we find trial defense counsel were not deficient, we need not address the prejudice prong of *Strickland*. Even if we had found their performance deficient, we find that the appellant has failed to show that he suffered any prejudice, i.e., a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The members sentenced the appellant to 12 years of confinement after hearing a 10 year-old JCA describe the sexual assaults at the hands of a cousin she used to admire but no longer trusted. The appellant's defense counsel secured a PTA prior to trial that capped confinement at five years. Thus, the appellant reaped the benefit of his bargain and has failed to convince us that the results of his sentencing hearing would have been different.

## *Conclusion*

We have reviewed the record in accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c). The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved.

Accordingly, the findings of guilty and the sentence, as approved, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court