UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman VINICIUS S. SANTANA
United States Air Force

ACM 37742

18 October 2012

Sentence adjudged 18 June 2010 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: David S. Castro.

Approved sentence: Dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Phillip D. Cave, Esquire; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

WEISS, Judge:

In accordance with his pleas, the appellant was convicted by a general court-martial composed of officer members of a single specification each of wrongful possession of Stanozol, a Schedule III controlled substance, and reckless endangerment, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. Contrary to his plea, the appellant was convicted of one specification of aggravated assault with a

dangerous weapon, in violation of Article 128, UCMJ, 10 U.S.C. § 928.[1] The court members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant initially assigned four errors on appeal: (1) that the appellant's plea to the Specification of the Second Additional Charge (reckless endangerment) is improvident; (2) that the Specification of the Second Additional Charge fails to state an offense because it fails to allege the terminal element of Article 134, UCMJ; (3) that, during sentencing argument, the trial counsel improperly referred to media coverage of the appellant's case, revealed content of individual voir dire to other court members, and improperly argued for a more severe sentence because of pretrial publicity; and (4) that the military judge failed to give a curative instruction addressing the trial counsel's improper argument. In a supplemental assignment of errors, the appellant claims a denial of due process because of the delay in appellate review. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Providence of Guilty Plea

The appellant was charged with wrongfully and recklessly engaging in conduct likely to cause death or grievous bodily harm to three fellow Airmen by possessing an unauthorized loaded handgun in his dormitory room and, while intoxicated, waving the loaded handgun at or near the other Airmen in the dormitory room. The appellant claims his guilty plea to this offense is improvident because the providence inquiry failed to establish facts demonstrating that the appellant's actions were likely to produce death or grievous bodily harm to another person – the third element of proof for the crime of reckless endangerment. *See Manual for Courts-Martial, United States*, Part IV, ¶ 100.a. (2008 ed.). The appellant argues that his responses to the providence inquiry only establish that his actions produced a *possibility* of death or grievous bodily harm rather than the required higher threshold of *likely* to produce the necessary degree of harm.

"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). "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea – an area in which we afford significant deference." *Id*. (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). *See also United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009). In conducting this review, "we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual

[1] The appellant was found not guilty of the greater offense of attempted murder, in violation of Article 80, UCMJ, 10 U.S.C. § 880. Also, the appellant was found not guilty of one specification of conspiracy to distribute controlled substances, in violation of Article 81, UCMJ, 10 U.S.C. § 881.

basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322.

During the providence inquiry, after properly apprising the appellant of the elements and definitions of the offense of reckless endangerment under Article 134, UCMJ, including the element at issue, the military judge elicited the appellant's own description of why he believed he was guilty. The appellant explained that he and three other Airmen were drinking in his dorm room where the appellant kept an unauthorized Glock nine millimeter handgun. The appellant admitted he was "drunk and acting stupidly" when he later removed the gun from his dresser, placed a clip into the magazine, and began waiving the loaded gun around the crowded room while ordering everyone to get out. The appellant admitted that waving a loaded gun in a small dorm room with other people present is dangerous and could have caused serious injury if he accidently had pulled the trigger. In addition, the military judge twice confirmed the appellant's belief that his conduct was likely to produce death or grievous bodily harm to another.[2]

After considering the record as a whole and the totality of circumstances of the providence inquiry, including the full range of the appellant's responses during the plea inquiry, we find that the military judge obtained an adequate factual basis from the appellant to establish that his conduct was likely to produce death or grievous bodily harm to another person. The military judge did not abuse his discretion in accepting the appellant's guilty plea to reckless endangerment.

Failure to State an Offense under Article 134, UCMJ

The appellant also requests that we dismiss the reckless endangerment charge and specification for failure to state an offense, because the specification fails to allege the terminal element of Article 134, UCMJ. This is a question of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (citations omitted). We agree that the failure of the specification to allege, either expressly or by necessary implication, one of the three clauses of the terminal element of Article 134, UCMJ, is error. *Id*. at 34 (citing *United States v. Fosler*, 70 M.J. 225, 229-34 (C.A.A.F. 2011)). The appellant, however, did not object to the charge and specification at trial and pleaded guilty to the offense. During the providence inquiry, the military judge fully explained the elements of reckless endangerment including the terminal element and, in admitting his guilt, the appellant described for the court why his conduct was to the prejudice of good order and discipline. In this context

[2] The military judge asked the appellant, "Do you think messing around with a loaded weapon was conduct that was likely to produce death or grievous bodily harm to another?" to which the appellant responded, "Yes, Your Honor." Then the judge said, "I think I may have already asked you this, and I'll ask you again to be safe here. Was that conduct likely to produce death or grievous bodily harm, as I defined that term for you, to another person?" to which the appellant responded "Yes, Your Honor."

and in light of our superior court's holding in *Ballan*, we find no material prejudice to the appellant's substantial rights. *Id*. at 35.

Sentencing Argument

In addition to the offenses under Articles 112a and 134, UCMJ, the appellant was convicted of aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ. At the time of this offense, the appellant was sharing an apartment with another Airman in Rapid City, South Dakota. After an evening of drinking, several Airmen gathered at the apartment of the appellant and his roommate. The appellant and one of the guests, Airman First Class (A1C) DP, became engaged in a verbal, then physical altercation. The altercation resulted in the appellant shooting A1C DP three times at close range with his Glock handgun. Local police and emergency medical personnel responded to the scene.

Presumably, because the shooting incident generated media interest, the subject of pretrial publicity was raised in voir dire by the trial defense counsel. The initial responses from several panel members led to follow up questions in individual voir dire. Six of the 13 court members indicated they had seen or read something about the case in the local media. After challenges, four of the eight remaining court members had professed some knowledge of the appellant's case from pretrial media accounts; the rest were unaware of any media reports. As part of his sentencing argument for imposing a dishonorable discharge, the trial counsel stated:

> Another reason why a dishonorable discharge is appropriate in this case is because of the service discrediting aspects of this case. I want to take you back to Tuesday afternoon when we were going through court member questioning. There were a lot of questions from I think everyone – the judge, [senior trial counsel], defense counsel – about media involvement in this case. You heard a lot about that. In fact, many of you were brought back in here to find out specifically what you've heard about this case, what you've read about this case, from news reports or seen on TV. There are a lot of people who heard about this incident, a lot of people in the local community who heard about this incident. And it brought a lot of discredit upon the Air Force, upon Ellsworth Air Force Base, upon the Air Force Financial Services Center. His crimes have brought discredit on the Air Force. One way that we can help regain some of that credibility that we've lost, as an Air Force and as a base, is by letting those same people know that when Airmen are engaged in this kind of criminal dishonorable conduct we punish them appropriately. We punish them with a dishonorable discharge.

The appellant did not object to the trial counsel's argument, but on appeal alleges the trial counsel engaged in prosecutorial misconduct and committed plain error in his sentencing argument by referring to press coverage of the case that was not in evidence, by revealing the content of individual members' voir dire to the panel as a whole, and by arguing that a more severe sentence was necessary because of pretrial publicity.

"When a defense attorney fails to object to a sentencing argument at the time of trial, appellate courts review the statement for plain error." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted). Under plain error analysis, the appellant "must demonstrate that: (1) there was an error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right." *Id*. (internal quotation marks and citations omitted). "Counsel should limit their arguments to 'the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). *See also United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007) ("To the extent the argument went beyond the facts established in the record or failed to make clear that counsel was calling for an inference reasonably drawn from the evidence, it would constitute error.").

We find that the above cited portion of the trial counsel's sentencing argument veered across the line into impermissible argument and constitutes error. The trial counsel improperly argued facts not in evidence about media involvement and media reports in support of his argument to the court members for punishing the appellant with a dishonorable discharge. The responses of court members in voir dire are not evidence, and no other evidence of media interest, publicity, or community reaction was properly admitted during the trial. Nevertheless, the trial counsel referred to some of the court members' personal knowledge about media exposure and then argued as fact that "[t]here are a lot of people who heard about this incident, a lot of people in the local community who heard about this incident . . . [a]nd it brought a lot of discredit upon the Air Force . . . ." While the trial counsel might have argued as a reasonable inference that in a small city such as Rapid City, South Dakota, the community was likely to hear about a shooting incident involving military members from the local base, and that such awareness of the crime could bring discredit upon the Air Force – but that's not what the trial counsel argued. Instead, the trial counsel erred by arguing the supposed media interest as a fact, supported only by the non-evidentiary responses of some of the court members made during individual voir dire, which also tended to improperly expose the other court members to an awareness of media interest in the case.

Whether or not the error was plain or obvious, we find the appellant suffered no material prejudice as a result of the error. In the context of the trial counsel's sentencing argument, the offending comments were but a brief segment of the entire argument, accounting for a mere 20 lines in an argument that went on for about 14 pages and over 290 lines in the record of trial. Also, the improper remarks about publicity were only one

factor among several the trial counsel properly argued as justification for a dishonorable discharge, including the significant long-term impact of injuries to the shooting victim and the appellant's possession of illegal steroids. Taken as a whole, we find the sentencing argument was relatively measured and unlikely to inflame the passions of the court members. For example, the trial counsel acknowledged as a mitigating factor the shooting victim's own share of blame in precipitating the incident.

In addition, the evidence supporting the adjudged sentence is strong. The appellant was convicted of serious offenses that included shooting a fellow Airman, whose injuries required numerous surgeries; reckless endangerment with a handgun in a crowded dormitory room; as well as illegal drug possession. For his crimes, the appellant was sentenced to a dishonorable discharge and a mere fraction of the maximum authorized confinement—two years less than the five years of confinement the trial counsel recommended.

For these reasons, we are confident the appellant was sentenced on the basis of the evidence alone. *Erickson*, 65 M.J. at 224. Therefore, we find that the appellant did not suffer material prejudice to a substantial right as a result of the trial counsel's improper argument. Likewise, even if we assume the comments that constituted error were plain or obvious, and that the military judge should have *sua sponte* given a curative instruction to the members, we find that in the context of the entire trial that any error in failing to give a curative instruction was harmless. *See United States v. Miller*, 58 M.J. 266, 271 (2003); *Burton*, 67 M.J. at 152-153.

Appellate Review Delay

The appellant's case was docketed with this Court on 1 October 2010. The appellant filed an assignment of errors and brief with this Court on 29 April 2011. On 26 May 2011, the Government requested an enlargement of time until on or before 30 June 2011, in which to submit its answer to the appellant's assignment of errors. The appellant lodged its opposition to the Government's motion for enlargement of time on 31 May 2011. The basis for the opposition was the alleged failure of the Government to comply with this Court's procedural rules for requesting an enlargement of time. The appellant cited six reasons why the enlargement request did not satisfy the Court's rules with the sixth reason stating the following:

> (6) A motion for enlargement of time shall indicate 'whether the appellant is confined and, if so, the appellant's minimum release date.' The omission is particularly significant in this case because the Appellant is confined with a minimum release date of 24 February 2012. This suggests the need to process this case quickly, with prioritization over cases in which the appellant is no longer confined. Yet the Government failed to provide this required information.

The enlargement was granted by this Court and the Government subsequently filed its answer on 30 June 2011. The appellant filed a reply brief on 7 July 2011. Other than the aforementioned opposition to the Government's request for enlargement, the appellant did not assert a right to timely review and appeal. The appellant filed a supplemental assignment of errors on 10 September 2012, alleging the delay in appellate review violated the appellant's due process rights, citing as support *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) and *United States v. Tardif*, 57 M.J. 219, (C.A.A.F. 2002).

We find the overall delay of more than 540 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is presumptively unreasonable. *Moreno*, 63 M.J. at 142. 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. *Moreno*, 36 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See 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.

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
Clerk of the Court