UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class FRANK R. SMITH, JR.
United States Air Force

ACM 37879

10 January 2013

Sentence adjudged 21 February 2011 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: William C. Muldoon (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 90 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Robert D. Stuart.

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

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of use of lysergic acid diethylamide (LSD), distribution of LSD, use of ecstasy, distribution of ecstasy, aggravated sexual assault of a child, and possession of child pornography, in violation of Articles 112a, 120, 134, UCMJ, 10 U.S.C. §§ 912a, 920, 934. The court adjudged a bad-conduct discharge, confinement for 90 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged. The appellant argues that the military judge erred by admitting evidence of another act of child molestation in sentencing.

The military judge accepted the appellant's plea of guilty to aggravated sexual assault of a child by having sexual intercourse with AC, a 12-year-old girl. During the plea inquiry, the appellant told the military judge that he had sexual intercourse with AC while home on leave, in August 2009, when he was 20 years old. During sentencing, the military judge admitted, over defense objection, evidence that the appellant had engaged in other acts of child molestation by having sexual intercourse with a 13-year-old girl when he was 18. In detailed findings of fact and conclusions of law, the military judge determined the evidence admissible and relevant as another act of child molestation under Mil. R. Evid. 414 and that the probative value was not substantially outweighed by the danger of unfair prejudice.

We review de novo whether evidence qualifies as an act of child molestation under Mil. R. Evid. 414 and will review for an abuse of discretion the decision to admit evidence that meets the threshold requirements for admissibility. *United States v. Yammine*, 69 M.J. 70, 73 (C.A.A.F. 2010). We find that the appellant's act of sexual intercourse with a 13-year-old girl meets the requirements for admissibility as a sexual act with a child under Mil. R. Evid. 414, and we find no abuse of discretion in the admission of this act as relevant to sentencing for another charged act of child molestation. *United States v. Tanner*, 63 M.J. 445, 449 (C.A.A.F. 2006) ("[E]vidence of a prior act of child molestation 'directly relat[es]' to [a charged act of child molestation] of which the accused has been found guilty and is therefore relevant during sentencing under [Rule for Courts-Martial] 1001(b)(4).").

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).

[*] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals 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. *See 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 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. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. 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.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court