UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman TREVOR J. TUCKER
United States Air Force

ACM 38129

05 September 2013

Sentence adjudged 17 January 2012 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Matthew D. Van Dalen.

Approved Sentence: Dishonorable discharge, confinement for 1 year and 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Matthew T. King.

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

Before

ROAN, SARAGOSA, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

A general court-martial comprised of officer and enlisted members convicted the appellant, in accordance with his pleas, of two specifications of aggravated sexual assault of a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of possession of a visual depiction of a minor engaging in sexually explicit conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 1 year and 6 months, and reduction to E-1.

The appellant raises two issues on appeal: (1) Whether the military judge erred by disallowing cross-examination by trial defense counsel into specific acts to challenge a government witness's opinion of the appellant's rehabilitative potential, as permitted by Rule for Courts-Martial (R.C.M.) 1001(b)(5)(E); and (2) Whether the military judge committed plain error by failing to properly instruct the members regarding the appropriate uses of evidence admitted in presentencing.

Cross-Examination

This Court reviews a military judge's ruling on the admissibility of evidence for abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010). "If an abuse of discretion is found, the case will be reversed unless the error is harmless beyond a reasonable doubt." *United States v. Moss*, 63 M.J. 233, 236 (C.A.A.F. 2006) (citing *Untied States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).

During the presentencing proceedings, the Government called the appellant's first sergeant as a witness. The first sergeant testified he knew the appellant, was familiar with his disciplinary history, and had formed an opinion as to his potential for rehabilitation. When asked what that opinion was, he replied, "It will be very difficult for him to press forward from where he is at this point and rehabilitate as far as I would be able to tell." On cross-examination, trial defense counsel asked the first sergeant about a first sergeants' winter coat drive. Trial counsel objected, arguing that the question went to "specific acts of conduct." The military judge sustained the objection. Trial defense counsel then asked the witness what the winter coat drive entailed. The first sergeant explained it was for personnel assigned to the base who had been displaced by a flood. When trial defense counsel asked if the appellant had helped out with the drive, trial counsel again objected. The military judge again sustained the objection, stating, "All right. Again, to the extent that you are eliciting specific acts of conduct the objection is sustained." Following this second ruling, trial defense counsel asked the witness:

Q. . . . [W]as Airman Tucker involved in this winter coat drive?
A. He was.
Q. Was he helpful?
A. He did assist with it.

On this third attempt there was no objection.

R.C.M. 1001(b)(5)(E) specifically permits inquiry into "relevant and specific instances of conduct" on cross-examination. To disallow questioning into specific instances of conduct as a challenge to the witness's opinion, without providing an adequate explanation, is an abuse of discretion. However, in light of the fact that the testimony was eventually elicited without objection, we find the error to be harmless. Having reviewed the entire record of trial, including evidence of a referral enlisted

performance report with an overall performance assessment of poor, a lengthy disciplinary history relevant to the issue of rehabilitation potential, and character letters submitted on behalf of the appellant, we are convinced that this error was harmless beyond a reasonable doubt and warrants no relief.

Sentencing Instruction

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." R.C.M. 1005(f). In this case, sentencing instructions were discussed at an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. During that session, trial defense counsel stated:

> Your Honor, the defense would like to request or at least confirm that in your instructions you will . . . instruct the members that [the appellant] is to be sentenced pursuant to the crimes for which he has pled guilty at this court-martial and not necessarily the administrative paperwork that he has previously received.

The military judge responded, "All right. I think that is encompassed in the standard sentencing instructions." Trial defense counsel did not request any further clarification and did not object when the instructions were read to the members. The instructions, given both orally and in writing, provided:

> Members of the court, you are about to deliberate and vote on a sentence in this case. It is the duty of each court member to vote for a proper sentence for the offenses of which the Accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, you must bear in mind that the Accused is to be sentenced only for the offenses of which he has been found guilty.

Without an objection to this instruction or to the omission of any additional instruction, the issue is waived absent plain error. To establish plain error, an appellant must demonstrate: (1) error; (2) that is plain; and (3) that it affects substantial rights of an accused. *United States v. Roberson*, 46 M.J. 826, 828 (A.F. Ct. Crim. App. 1997) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)), *aff'd*, 48 M.J. 411 (C.A.A.F. 1997). We find the given instruction appropriately satisfied the requirements of R.C.M. 1005(e) and made clear to the members that while they should consider all matters, they must only sentence the appellant for the offenses of which he had been found guilty. As the members are presumed to follow the military judge's instructions, we find no error. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000).

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court