UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant RICHARD B. WHITMILL
United States Air Force

ACM 37805

22 August 2012

Sentence adjudged 11 August 2010 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: William C. Muldoon, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 42 months, and reduction to E-1.

Appellate Counsel for the Appellant: Greg D. McCormack, Esquire (civilian counsel) and Jarrett L. McCormack, Esquire (civilian counsel).

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant according to his plea of disorderly conduct by surreptitiously videotaping a female guest in the bathroom of his residence and convicted him contrary to his pleas of indecent acts and indecent liberties with his minor daughter, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The court-martial sentenced him to a bad-conduct discharge,

[1] The military judge excepted the words "on divers occasions" from Specification 1 of the Charge.

confinement for 42 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant assigns two errors: (1) the evidence fails to prove that the indecent acts and indecent liberties occurred within the charged time frame and (2) the indecent acts and indecent liberties specifications fail to state an offense.

Legal and Factual Sufficiency

In December 2008, the appellant's daughter, KW, explained in a brief note to her foster parent that she did not want to live with her father because he had previously "tried to have sex" with her. The foster parent reported the allegation to KW's case manager. In January 2009, the appellant consented to an interview with agents of the Air Force Office of Special Investigations. In a written statement, he confessed to taking "a tub" with his daughter, touching her breasts, and masturbating in front of her.

Although initially uncertain of the dates, the victim testified at trial that after reviewing her school yearbooks she is certain that the incident happened in 2005-2006 when she was 14 or 15 years old. As he did at trial, the appellant argues that the victim's statements prior to trial indicate that the incident occurred much earlier than the charged time frame and fell outside the applicable statute of limitations. Therefore, he argues, the evidence fails to prove beyond a reasonable doubt that the offenses occurred after 24 November 2003, the date the applicable statute of limitations changed from five years to the date the child attains the age of 25 years.[2] KW was 19 on the date of trial.

Despite the appellant's characterization of the issue as one of "statutory construction" involving the applicable statute of limitations, the issue is essentially one of legal and factual sufficiency. Both contested specifications of the Charge allege that the acts occurred between January 2004 and March 2006, periods clearly within the statute of limitations for these offenses.[3] The appellant's brief concedes as much: "Although as charged at the time of trial, the subject offenses were not barred by the applicable statute of limitations, the prior statements and testimony of the [victim] . . . clearly establishes that the [victim] could not testify truthfully that the alleged subject offenses occurred at a time that was not barred by the applicable statute of limitations." Thus, the appellant argues the sufficiency of the proof rather than the applicable statute of limitations.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting

[2] A 2006 amendment changed the limitation period to the life of the child.
[3] *See* Article 43(b)(2)(A), UCMJ, 10 U.S.C. § 843(b)(2)(A); *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F. 2008).

United States v. Turner, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The test for factual sufficiency is "whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses," we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325, *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

That the incident occurred is not in dispute. The appellant confessed to taking a bath with his daughter during which he inappropriately touched her and masturbated in front of her. But he argues that his daughter's testimony is insufficient to show that the acts occurred during the charged time of January 2004 to March 2006. KW, however, testified that she was certain the incident happened in 2005-2006 because she had a specific friend in school when it happened. In response to extensive cross-examination about her uncertainty as to dates during prior interviews, KW explained that she needed to review her school yearbooks which were in the possession of the prosecutors in order to identify when she knew this specific friend. She testified that, after reviewing the yearbooks, she was certain that the incident happened during the school year of 2005-2006, sometime before her father left for Alabama in March 2006. We find this testimony together with the other evidence in the case legally sufficient to support the findings of guilt. After weighing the evidence and making allowances for not having observed the witnesses, we are convinced that the evidence is factually sufficient to support the appellant's guilt beyond a reasonable doubt.

Sufficiency of the Specifications to Allege an Offense

The appellant argues that the specifications alleging indecent acts and indecent liberties with his daughter fail to state an offense because neither expressly alleges that such conduct is service discrediting or prejudicial to good order and discipline, the required terminal elements of an Article 134, UCMJ, offense. Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3).

In this case, the specifications alleging indecent acts and indecent liberties with his minor daughter are defective under the current state of the law. Neither expressly alleges the terminal element of Article 134, UCMJ, and the terminal element is not necessarily implied as alleged. *United States v. Fosler*, 70 M.J. 225, 230-231 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), *cert. denied*, __ S. Ct. __ (U.S. 25 June 2012) (No. 11-1394). Although we find error in the failure of both specifications to allege expressly or by necessary implication either Clause 1 or 2 of the terminal element, a finding of error does not alone warrant dismissal. *Ballan*, 71 M.J. at 34. Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). "[W]here defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error—which, in most cases will turn on the question of prejudice." *Id*. at 213 (citations omitted). The appellant has the burden of demonstrating prejudice when a specification fails to allege an offense. *Id*. at 214 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

Although the Government did not allege the terminal elements or address them in opening statement, the trial counsel expressly attempted to prove that the appellant's conduct was service discrediting and prejudicial to good order and discipline during its case-in-chief. During direct examination of the victim, trial counsel asked how she felt about her father. Defense counsel objected on the basis of relevance for findings. Trial counsel replied that the line of questioning is relevant to the "service discrediting conduct prejudicial to good order and discipline nature of the offenses that the government has to prove up." The military judge overruled the objection, stating, "It is an element that the government has to prove up, so I will allow it." Defense counsel did not argue further.

Unlike *Humphries* where the Government presented no evidence or testimony concerning the terminal element, this exchange during the Government's case-in-chief reasonably placed the appellant on notice of the terminal element. Furthermore, at no point following this exchange, did the trial defense counsel object to the form of the specifications nor did he make a motion to dismiss for failure to state an offense. Indeed, his findings argument to the military judge focused on the issue of the charged time and the statute of limitations.

Accordingly, after reviewing the record in its entirety, we find that "under the totality of the circumstances in this case, the Government's error in failing to plead the terminal element of Article 134, UCMJ, resulted in [no] material prejudice to [the appellant's] substantial, constitutional right to notice." *Humphries*, 71 M.J. at 215 (citing *Girouard*, 70 M.J. at 11-12; *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *Fosler*, 70 M.J. at 229).

Appellate Delay

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.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[4] The court-martial order (CMO) erroneously reflects a plea of not guilty to the charge, when the appellant pled guilty to Specification 3 of the Charge and to the charge itself. We order the promulgation of a corrected CMO.