UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist CHARLES A. REYNOLDS
United States Army, Appellant

ARMY 20200473

Headquarters, 25th Infantry Division
Wheeler Army Airfield, Hawaii
Mark A. Bridges, Military Judge
Colonel Terri J. Erisman, Staff Judge Advocate (Pretrial)
Colonel Marvin McBurrows, Staff Judge Advocate (Post-trial)

For Appellant: Captain Carol K. Rim, JA; Major Joyce C. Liu, JA; Jonathan F. Potter, Esquire (on brief).

For Appellee: Timothy R. Emmons, JA; Major Mark T. Robinson, JA; Lieutenant Colonel Craig J. Shapira, JA; Colonel Christopher B. Burgess, JA (on brief).

28 March 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

Appellant engaged in graphic sexual online conversations with two undercover law enforcement agents posing as thirteen-year-old girls. After one of the sessions appellant left work, went to the store, bought condoms, and traveled to the address on Schofield Barracks, Hawaii, where he believed the "child" was staying alone. He was arrested upon arrival. Following his conviction and sentencing at a general court-martial, appellant claims that the military judge erred by denying his motion to compel the appointment of a forensic psychologist to his

defense team, and that his defense counsel rendered ineffective assistance in relation to the military judge's instructions. Finding no error, we affirm.[1]

BACKGROUND

A. The Trial Evidence

In February 2020 appellant was a married [redacted]-old aviation operations Specialist (SPC) stationed in Hawaii. Over the course of two days on 8-9 February, appellant used the internet application "Whisper" to engage in two chats with individuals who identified themselves as "[redacted]" and "[redacted]"[2] Appellant first made contact with "[redacted]," and the two had the following exchange: [3]

[redacted]: "Im yunger tho . . . dnt want to wast ur time . . . or mine"

Appellant: "Just send me a pic . . . How young"

[redacted]: "14 soon . . . so be nice [winking emoji]"

Appellant: "Okay"

Appellant and "[redacted]" determined that they were both on Schofield Barracks, and [redacted] told appellant she was alone. The two had the following exchange:

Appellant: "What are you on here for? Trying to get fucked?"

[redacted]: "Mayb . . just bored of guys my age"

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[1] A panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of attempted sexual assault of a child, and two specifications of attempted sexual abuse of a child, in violation of Article 80 of the Uniform Code of Military Justice, 10 U.S.C. § 880 [UCMJ]. Appellant elected judge-alone sentencing, and the military judge sentenced him to a dishonorable discharge, confinement for five years, and reduction to the grade of E-1. The convening authority took no action on the findings and sentence other than deferring the automatic forfeitures.

[2] Whisper allows users to see other users' general locations, and to engage in chat sessions using "handles" or assumed names; appellant's Whisper handle was "bigblackd."

[3] We reproduce these chat sessions with their original misspellings and grammatical errors and edit only where necessary for clarity.

Appellant: "I don't know if you could take me honestly I'm huge"

[redacted]: "Oh [winking emoji]"

Appellant then asked [redacted] to send him "a nude" photograph. When [redacted] refused, appellant said, "[n]ow I'm thinking about how you look naked." [redacted] sent appellant a cell phone number, and the two switched from Whisper to text. [redacted] told appellant that she was home alone because her mother was away for Army training on another Hawaiian island, and appellant responded "Oh bet." The two discussed trading nude photos, and ultimately ended the text exchange at around midnight on 8 February.

Appellant initiated a second text exchange with [redacted] the following evening. Appellant told [redacted] that he was at work but that she could come visit him and they could "chill or . . . fuck" in appellant's office. [redacted] asked whether appellant had condoms because her mother would not allow her to be on birth control; appellant said he did not, and asked [redacted] again to trade photos. They discussed [redacted] walking to meet appellant at work, but it was raining outside the two ultimately disengaged around 2030 hours.

Later the same night on 9 February, appellant contacted "[redacted]" on Whisper. The two had the following conversation almost immediately:

Appellant: "How old are you"

[redacted]: "13.5"

Appellant: "You got a condom?"

[redacted]: "Why would I . . . lol"

Appellant: "Lol cause i don't have one . . . unless I could just fuck you raw and pull out"

[redacted] asked appellant his age; appellant told her he was [redacted]. The two continued to discuss meeting up for sex in graphic terms, and [redacted] insisted on appellant bringing condoms. Appellant, still in uniform, drove to Walgreens, purchased condoms, and sent [redacted] a photo of the box of condoms. [redacted] responded by sending appellant an address on Schofield Barracks.

"[redacted]" and "[redacted]" were both Army CID agents working undercover as part of "[redacted]," a joint law enforcement operation with the goal of identifying individuals interested in having sex with minors. As such, when

appellant drove to the address [redacted] provided him, law enforcement agents were waiting there and arrested him after he came inside.

Appellant testified at trial and told the panel that he did not believe that [redacted] or [redacted] were actually 13 years old, but rather were adults misrepresenting their age, and that he was using Whisper to meet other adults for sex. In support of this, appellant noted that both [redacted] and [redacted] had sent him photographs of (clothed) female undercover law enforcement agents who were adults. The government explained that the photos had been altered to make the agents appear to be younger than they were. After considering the chat logs, photos, appellant's testimony, and the rest of the trial evidence, a panel with enlisted representation convicted appellant of two specifications of attempted sexual abuse of a child for the chats themselves, and one specification of attempted sexual assault of a child for traveling to [redacted] home with the intent of having sex with her.

B. The Expert Assistance Litigation

Before trial, appellant filed a motion to compel the appointment of Dr. DM, a forensic psychiatrist with expertise in sexual offenders, as an expert consultant for the defense team. Appellant contended that he needed Dr. DM's assistance to develop and present an "entrapment" defense at trial, as well as to conduct a "recidivism analysis" for potential use at sentencing. The government opposed appellant's motion.

The military judge held a pretrial hearing on the motion, at which appellant called Dr. DM as a witness. Dr. DM explained that she had not evaluated appellant, but that if she were appointed a member of the defense team she could perform psychological testing and take other steps to evaluate appellant's risk for recidivism, as well as an evaluation of appellant's mental responsibility. Notably, Dr. DM's testimony did not include any discussion of the concept of predisposition as related to the entrapment defense.

The military judge denied appellant's motion in a four-page written order. Citing, *inter alia*, *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010), *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), and *United States v. Gunkle*, 55 M.J. 26 (C.A.A.F. 2001), the military judge held that appellant had "failed to establish the necessity of employing" Dr. DM as an expert assistant. As to the entrapment defense, the military judge noted that Dr. DM did not testify that her analysis of appellant "would potentially allow her to form an opinion about whether the accused . . . was predisposed to engage in the alleged misconduct." As to recidivism, the military judge held that while Dr. DM could be of some potential assistance to appellant "depending on the results of her analysis and testing, the issue of recidivism is not of such importance . . . that her denial would result in a fundamentally unfair trial." Moreover, the military judge noted that the government

had indicated that it did not intend to present evidence at sentencing of appellant's potential for recidivism, and that appellant would have the opportunity to present evidence of his lack of any history of similar child sex offenses.

C. The Military Judge's Instructions

As relevant here, the military judge instructed the panel as follows:

For the two specifications of attempted sexual abuse of a child (the chats):

> "'Child' means any person who has not attained the age of 16 years. The prosecution must prove the accused believed that '[redacted]' and '[redacted]' had not attained the age of 16 years at the time of the alleged attempted sexual abuse."

For the specification of attempted sexual assault of a child (the traveling):

> "'Child' means any person who has not attained the age of 16 years. The prosecution must prove the accused believed that '[redacted]' had not attained the age of 16 years at the time of the alleged attempted sexual abuse."

Appellant's counsel did not request, and the military judge did not give, the instruction related to the affirmative defense of "mistake of fact as to age." Rule for Courts-Martial [R.C.M.] 916(j)(2) defines the affirmative defense of "mistake of fact as to age" as follows:

> "It is a defense to a prosecution under Article 120b(b), sexual assault of a child, and Article 120b(c), sexual abuse of a child, that, at the time of the offense, the child was at least 12 years of age, and the accused reasonably believed that the child had attained the age of 16 years. The accused must prove this defense by a preponderance of the evidence."

LAW AND DISCUSSION

I. The Expert Assistance Claim

A. Legal Principles and Standard of Review

"Servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense." *United States v. Freeman*, 65 M.J. 451, 458

(C.A.A.F. 2008) (cleaned up). To demonstrate the necessity of expert assistance, an accused must show that a "'reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.'" *United States v. Hennis*, 79 M.J. 370, 382–83 (C.A.A.F. 2020) (quoting *Lloyd*, 69 M.J. at 99). Within the first "assistance" requirement are three sub-requirements that the defense must meet, namely: "'(1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop.'" *Hennis*, 79 M.J. at 383. A successful showing of necessity "requires more than the mere possibility of assistance from a requested expert." *Bresnahan*, 62 M.J. at 143. This standard for expert assistance is distinct from the standard for granting or denying a defense request for an expert *witness*. *United States v. Tinsley*, 81 M.J. 836, 840–41 (Army Ct. Crim. App. 2021) (discussing these two "often confused" standards).

This court reviews a military judge's decision on an expert assistance motion for abuse of discretion. *Lloyd*, 69 M.J. at 96; *Bresnahan*, 62 M.J. at 143. To reverse a military judge's decision for an abuse of discretion "involves far more than a difference in . . . opinion." *Bresnahan*, 62 M.J. at 143 (cleaned up). Rather, a military judge abuses his or her discretion only "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008). In other words, "[w]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *United States v. Cannon*, 74 M.J. 746, 750 (Army Ct. Crim. App. 2015) (cleaned up).

B. Discussion

This assignment of error is nearly identical to the issue we addressed last year in *United States v. Hunt*, ARMY 20200158, 2021 CCA LEXIS 457 (Army Ct. Crim. App. 9 Sep. 2021) (mem. op.). *Hunt* was another "[redacted] case" involving an enlisted Soldier in Hawaii who engaged in sexually graphic online chats with undercover law enforcement officers posing (in that case) either as minors or the parent of minors available for sex. *Id.* at *1–3. Indeed, the only meaningful factual distinction between *Hunt* and this case is that appellant here actually traveled in the hopes of meeting up with one of his chat partners, whereas Hunt did not. *Id.* at *2–5. Hunt also requested that an expert assistant be appointed to his defense team, and the (same) military judge denied Hunt's request. *Id.* at *5–7. We affirmed the military judge's decision, and explained that Hunt could "show

only the possibility" that an expert assistant could have assisted in his defense, and that this was not a sufficient showing under the applicable precedent. *Id.* at *8–9.

The same is true here. At best, appellant has shown only the "mere possibility" that Dr. DM's appointment to the defense team would have assisted in his defense. This is not enough. *See Bresnahan*, 62 M.J. at 143 (showing necessity "requires more than the mere possibility of assistance") (cleaned up); *Hunt*, 2021 CCA LEXIS 457, at *8. As in *Hunt*, the best appellant can show is that he needed Dr. DM to *first* examine appellant to determine whether there was a possibility that Dr. DM could *then* opine that appellant was not, for example, a recidivism risk at sentencing.

Notably as to the entrapment defense, Dr. DM did not testify that she could assist in showing a lack of predisposition, as potentially relevant to entrapment, even assuming the admissibility of such evidence. *See* R.C.M. 916(g) ("It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense."); *but see United States v. Traum*, 60 M.J. 226, 234 (C.A.A.F. 2004) (profile evidence "presents a characteristic profile of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile," and is generally improper "as evidence of guilt or innocence in criminal trials") (cleaned up). Moreover, entrapment is an "affirmative defense." *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002). Like Hunt, appellant's main defense theme was not that he committed the offenses but was entrapped (although like Hunt he did seek and receive an entrapment instruction from the military judge). Rather, appellant consistently maintained, including during his merits testimony, that he did not believe "[redacted]" and "[redacted]" were minors. This is not an entrapment defense, but rather a claim that appellant lacked the requisite *mens rea* to commit the charged offenses in the first place. *See also United States v. Arthurton*, No. 201600228, 2017 CCA LEXIS 115 (N.M. Ct. Crim. App. 23 Feb. 2017) (summ. disp.) (no error where military judge denied expert assistance in another factually similar case).

As in *Hunt*, the military judge's denial of appellant's expert assistance request here was sound, and fell "well within his zone of discretion." *Hunt*, 2021 CCA LEXIS 457, at *13.

II. Ineffective Assistance of Counsel

A. Appellant's claim

Appellant claims that his trial defense counsel's failure to request an instruction on the affirmative defense of "mistake of fact as to age" amounted to constitutionally ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Legal Principles and Standard of Review

We review ineffective assistance claims *de novo*. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015); *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361–62 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. at 687).

C. Discussion

After the close of the evidence and before instructing the panel, the military judge asked the parties on two separate occasions whether there were "any request[s] for any additional instructions" or "[a]ny objection to [the military judge's draft] instructions or request for additional instructions." Appellant's counsel answered "none, Your Honor," and "No, your Honor," respectively. These responses likely waived any direct challenge to the military judge's instructions, and thus appellant styles his claim here as one of ineffective assistance. *See, e.g., United States v. Rich*, 79 M.J. 472, 475–76 (C.A.A.F. 2020) (holding that trial defense counsel's similar responses to military judge's similar questions related to instructions affirmatively waived any allegation of instructional error).

The instructions the military judge *did give* resolve this assignment of error. Appellant's entire defense at trial was that he did not believe that "[redacted]" and "[redacted]" were actually 13 years old, but rather thought that they were adults misrepresenting their age, as is common (according to appellant's testimony) during internet chat sessions. On this point, the military judge instructed the panel that the government had the *affirmative obligation to prove beyond a reasonable doubt* that appellant *actually believed* that "[redacted]" and "[redacted]" "had not attained the age of 16 years" at the time of the attempted sexual assault or sexual abuse.

Based on this instruction, if the panel credited appellant's testimony that he did not think the individuals he was chatting with were minors, then he was not guilty because of a failure of the government's proof, without having to resort to any affirmative defenses. *Cf. United States v. Teague*, 75 M.J. 636, 638 (Army Ct. Crim. App. 2016) (finding that mistake of fact defense was "baked in" to the elements themselves where the government was required to affirmatively prove that appellant "knew or reasonably should have known" that victim was incapable of consenting). Stated differently, the instructions appellant actually received were more favorable to him than the one that he now claims his counsel should have requested.

The instructional language that inured to appellant's benefit here—namely, "[t]he prosecution must prove the accused believed that '[redacted]' and '[redacted]' had not attained the age of 16 years at the time of the alleged attempted sexual abuse," is

not a standard Military Judge's Benchbook instruction for either of the underlying substantive offenses of sexual assault of a child or sexual abuse of a child. This is because, in the context of those *completed* offenses, the government does not have an affirmative duty to prove knowledge of the victim's age. *See, e.g., United States v. Keeter*, No. 201700119, 2018 CCA LEXIS 474 (N.M. Ct. Crim. App. 3 Oct. 2018) (mem. op.), at *9–12 (discussing this issue). It is in this scenario that the affirmative defense of mistake of fact as to age can naturally arise.

While the parties did not discuss the issue at trial, it is apparent that the military judge tailored his instructions to account for the fact that appellant was charged with *attempted* sexual assault of a child and *attempted* sexual abuse of a child under Article 80, UCMJ, and not with the substantive offenses themselves. As these instructions recognized, to be guilty of an attempt appellant had to have the "specific intent to commit the underlying offense"—here, sexual abuse of a child and sexual assault of a child. *United States v. Dorrbecker*, 79 M.J. 558, 563 (N.M. Ct. Crim. App. 2019). Thus, as the military judge instructed, if appellant believed that he was talking to adults, he did not have the requisite specific intent to commit the inchoate offense of attempt. *See Keeter*, 2018 CCA LEXIS 474, at *9–12 (explaining the rationale for tailoring attempt instructions—in a factually similar case—in the way the military judge did here).

Appellant's counsel therefore did not render deficient performance by failing to request a mistake of fact instruction here, because the military judge's instructions fully accounted for the issue of appellant's mens rea as to age in the attempt context. Nor can appellant demonstrate *Strickland* prejudice, because, again, if the panel credited appellant's claim that he did not think the individuals he was chatting with were minors, then he was *not guilty of the offense in the first place* as instructed by the military judge. Even if appellant could somehow show that the military judge should have given the mistake of fact as to age instruction, it would be speculative at best to say that the outcome of appellant's court-martial would have been different in light of the instructions that were given. A showing of *Strickland* prejudice requires more than speculation. *See, e.g., Harrington v. Richter*, 562 U.S. 86, 112 (2011); *Datavs*, 71 M.J. at 424 ("It is not enough to show that the errors had some conceivable effect on the outcome.") (cleaned up).

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Judges WALKER and PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court