

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, KRAUSS, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain ALEXANDER LOYA
United States Army, Appellant

ARMY 20090770

Headquarters, Joint Readiness Training Center and Fort Polk
Charles D. Hayes, Military Judge
Colonel James D. Key, Staff Judge Advocate (pretrial)
Colonel Keith C. Wells, Staff Judge Advocate (recommendation)

For Appellant: Mr. William E. Cassara, Esquire (argued); Captain Barbara A. Snow–Martone, JA; Mr. William E. Cassara, Esquire (on original & reply brief); Captain Ian M. Guy, JA; Mr. William E. Cassara, Esquire (Petition for New Trial); Captain Kristin McGrory, JA; *Pro Se* (Petition for New Trial).

For Appellee: Major Stephen E. Latino, JA (argued); Lieutenant Colonel Amber J. Roach, JA; Major Stephen E. Latino, JA (on brief); Lieutenant Colonel Amber J. Roach, JA; Major Catherine L. Brantley, JA; Major Stephen E. Latino, JA (Answer to Petition for New Trial); Major Catherine L. Brantley, JA.

30 August 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

KRAUSS, Judge:

A panel of officers, sitting as a general court–martial, convicted appellant, contrary to his pleas, of two specifications of abusive sexual contact with a child, two specifications of indecent liberties with a child, two specifications of aggravated sexual contact with a child who had not obtained the age of twelve years, two

specifications of indecent acts with a child, and one specification of indecent language, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 934 (2006) [hereinafter UCMJ].¹ The court sentenced appellant to a dismissal from the service, confinement for 108 years, and forfeiture of all pay and allowances. The convening authority disapproved the finding of guilty as to one of appellant's convictions for indecent liberties with a child, approved the remaining findings of guilty, and approved only so much of the sentence extending to a dismissal from the service, confinement for thirty-five years, and forfeiture of all pay and allowances. Appellant was credited with seven days of pretrial confinement against the sentence to confinement.

This case is before this court for review pursuant to Article 66, UCMJ. Appellant raised sixteen assignments of error and personally submitted matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have thoroughly considered the record of trial, the matters submitted pursuant to *Grostefon*, and enjoyed the benefit of the parties' briefs and oral argument. After our review of the record of trial and consideration of all issues, separately and cumulatively, we find that appellant received a fair trial whose results are reliable. However, we also find that appellant is entitled to relief under *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012).

BACKGROUND

Facing charges alleging he sexually molested his daughter, appellant testified and denied the accusations levied against him, professed his innocence, and asserted a defense that essentially characterized those allegations and the government's prosecution as ridiculous, terribly misguided, and erroneously based upon the unreliable testimony of his wife and daughter. The government's case consisted primarily of the testimony of the child victim, her mother, a series of emails from appellant to his wife, including his reaction to accusations of wrongdoing against their daughter, and a case in rebuttal that included evidence contrary to appellant's efforts to undermine the credibility of his wife.

In some of the emails, appellant discussed his perspective and opinion on certain religious matters including reference to Biblical stories and discussion of polygamy. The government also introduced a text on the subject of polygamy written by appellant. Though civilian defense counsel initially objected to the introduction of any evidence relative to polygamy, he ultimately withdrew his

¹ The court-martial acquitted appellant of a separate specification of indecent liberties with a child under Article 120, UCMJ, and a specification alleging attempted sodomy under Article 80, UCMJ.

objection and positively sought the admission of that evidence. This he did despite the military judge's ruling that the polygamy matters were legally irrelevant. In light of appellant's positive embrace of this evidence, the judge allowed its introduction but nevertheless fashioned instructions to address the limits of its relevance. Defense counsel did not object to the instruction rendered in the midst of trial, but did object to the final instruction on the matter.

Additional facts salient to the matters discussed below include the following: During appellant's testimony in the findings phase of the court-martial, the military judge, without any objection from the defense, directed appellant to leave the courtroom when the government objected to admission of a defense exhibit and the judge believed the issue should be addressed outside the presence of the panel members and apparently the witness. Without defense objection, trial counsel cross-examined appellant, in part, by asking him whether certain other witnesses were lying. During sentencing argument, without any objection from the defense, trial counsel repeatedly made reference to appellant's status as a chaplain and invited the panel members to "take [appellant] up on his suggestion" of "life in prison without parole" (derived from an email message of appellant's written in response to his wife's messages suggesting that appellant molested the victim daughter in this case).

LAW AND DISCUSSION

We agree errors were committed during the course of appellant's court-martial. For example, the military judge excluded appellant from the proceedings when he held a hearing to resolve objection to Defense Exhibit F. That is indeed an error. UCMJ art. 39. The judge treated appellant as if he were a witness only. The accused was entitled and required to remain present for that hearing. *Id.* However, we find that the error excluding appellant from the event and content of that hearing was harmless beyond any reasonable doubt. *See United States v. Rembert*, 43 M.J. 837, 838 (Army Ct. Crim. App. 1996). We find no indication that appellant's presence at the hearing "would have been useful in ensuring a more reliable determination." *See Kentucky v. Stincer*, 482 U.S. 730, 747 (1987). This is especially true because the subject of the hearing related to appellant's ongoing testimony, which permits the judge to prohibit discussion between attorney and client on the subject. *Perry v. Leake*, 488 U.S. 272, 283-85 (1989).

We find trial counsel's repeated demands that appellant admit or deny that other witnesses were lying inappropriate and unnecessary. However, the extent to which they constitute plain error under the circumstances is another question. *See United States v. Jenkins*, 54 M.J. 12, 16-17 (C.A.A.F. 2000). Assuming such cross-examination was plain and obvious error, we are nevertheless convinced that the error was harmless as appellant was merely confronted with what his counsel had asserted, in relation to such a question relative to a Criminal Investigative Command agent's testimony, defense offered no further objection after the judge admonished

trial counsel on the matter and the military judge provided sufficient limiting and final instructions. *Id.*

We find trial counsel’s sentencing argument ran close to the edge of propriety. But again, absent objection, even assuming it was plain error, we find no prejudice. “Taking into consideration the record as a whole, including the relative weight of the parties’ respective sentencing cases and [assuming] trial counsel’s improper argument, we [are] confident that [appellant] was sentenced on the basis of the evidence alone.” *United States v. Marsh*, 70 M.J. 101, 107 (C.A.A.F. 2011).

We disagree with appellant’s assertions that his civilian defense counsel was constitutionally ineffective or, in the alternative, that the military judge committed plain error by admitting evidence of appellant’s views on polygamy. Defense counsel made a tactical choice to abandon his previous objection to the admission of this evidence. He positively embraced its admission and pursued a strategy of undermining the credibility of the government’s approach to the case as well as attacking the credibility of the witnesses against him. We do not find this decision to constitute deficient practice nor do we consider it appropriate, under the circumstances, to second-guess these choices on appeal. *See United States v. Mazza*, 67 M.J. 470, 474–75 (C.A.A.F. 2009).

Even assuming for the sake of argument that the decision to introduce this evidence was deficient, we find no prejudice to appellant. Despite the fact that appellant’s views on polygamy played a role in the trial, the matter was not exploited for an improper purpose.² *See United States v. Brown*, 41 M.J. 1, 3 (C.M.A. 1994); *United States v. Thomas*, 40 M.J. 252, 255–56 (C.M.A. 1994); Military Rule of Evidence 610. In addition, the significance of that evidence pales in comparison with the overwhelming evidence of guilt in the case. We therefore conclude that despite any assumed deficiency with defense counsel’s performance, appellant received a fair trial whose result is reliable. *See United States v. Larsen*, 66 M.J. 212, 219 (C.A.A.F. 2008).

Having waived this issue, there is no error for us to review in relation to its admission by the judge. *See United States v. Campos*, 67 M.J. 330, 333 (C.A.A.F. 2009). Even if we were to assume plain error, there is no prejudice. For the reasons stated above, it did not have “an unfair prejudicial impact on the [panel’s]

² Also, despite what might be interpreted as an incorrect limiting instruction as to its relevance to credibility of witnesses, appellant conceded at oral argument, and we find, that the final instruction on the matter was correct. Any possible previous error was harmless.

deliberations.” See *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (citations omitted).

On review of appellant’s remaining assignments of error, except that based on *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) discussed below, we find none warrant relief.

Appellant is “entitled to a fair trial, not ‘an error-free, perfect trial.’” *United States v. Owens*, 21 M.J. 117, 126 (C.M.A. 1985) (quoting *United States v. Hasting*, 461 U.S. 499, 508 (1983)). We find that the record establishes a fair trial with overwhelming evidence of appellant’s guilt. We have considered each of the errors assigned separately and find that none warrant relief and that, assuming error in each case, such error was harmless. We also do not find that “there is a reasonable possibility that, taken cumulatively, those errors might have contributed to the conviction.” *United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011).

In relation to the three specifications alleged under Article 134, UCMJ, and in light of *Humphries*, we are required to disapprove the findings of guilt as to Specifications 2–4 of Charge II. None of the specifications contained allegations of terminal elements under Article 134, UCMJ, nor is there anything in the record to satisfactorily establish notice of the need to defend against a terminal element as required under *Humphries*. In addition, trial counsel incorrectly conflated the Article 134, UCMJ, charge with the Article 120, UCMJ, charge during argument on findings. Therefore, we now reverse appellant’s convictions for indecent acts with a child and indecent language under Article 134, UCMJ, and dismiss the defective specifications which failed to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

However, we are confident, under the circumstances of this case, that appellant would have received a sentence at least as severe as that approved by the convening authority even absent charge of the Article 134 offenses here disapproved. See *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Finally, we have considered appellant’s petitions for a new trial and find neither fraud on the court nor any “newly discovered evidence” as contemplated by the law sufficient to warrant a new trial.

CONCLUSION

We have considered the entire record of trial, appellant’s assignments of error and the matters personally raised by appellant pursuant to *Grostefon*. The findings of guilty of Charge II and its Specifications are dismissed. The remaining findings of guilty are affirmed and the Petition for New Trial is also denied. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the

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principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*, the court affirms the sentence as approved by the convening authority.

Senior Judge JOHNSON and Judge BURTON concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court