IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40019
Airman First Class (E-3), CHASE M. THOMPSON, USAF, *Appellee.*	)	USCA Dkt. No. 22-0098/AF

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED:

DID THE LOWER COURT ERR BY REQUIRING THAT APPELLANT INTRODUCE DIRECT EVIDENCE OF HIS SUBJECTIVE BELIEF TO MEET HIS BURDEN FOR A REASONABLE MISTAKE OF FACT DEFENSE?

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C § 866(d) (2019). This Court has jurisdiction over this matter under Article 67(a)(3) UCMJ, 10 U.S.C. § 867(a)(3) (2019).

STATEMENT OF THE CASE

On 28-30 September 2020, a General Court-Martial comprised of a military judge sitting alone convicted Appellant of one specification of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907; one specification of committing a sexual act upon a child who had attained the age of

12, but not attained the age of 16 years in violation of Article 120b, UCMJ, 10 U.S.C. § 920b; and one specification of producing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. (Entry of Judgment, dated 13 November 2020, ROT, Vol. 1.) Appellant was sentenced to a dishonorable discharge, confinement for 12 months, and reduction to the grade of E-1. (Id.) AFCCA set aside and dismissed with prejudice Appellant's conviction of production of child pornography in violation of Article 134, UCMJ, due to factual insufficiency. United States v. Thompson, ACM No. 40019, 2021 CCA LEXIS 641, *21-22 (A.F. Ct. Crim. App. 29 November 2021) (unpub. op.). AFCCA reassessed the sentence to the sentence adjudged.

STATEMENT OF FACTS

On or about 30 May 2019, the Office of Special Investigations detachment ("OSI") at Aviano AB, Italy received a report about an allegation of sexual abuse. (JA at 029 & 032.) The report came from MSgt AO, whose daughter, AV, described to MSgt AO the ongoing sexual relationship between Appellant, who was 20 years old, and VP, a 15-year-old child. (JA at 029-30.) As soon as OSI received this report, agents went to VP's residence to see if Appellant was there. (JA 004.) While there, agents captured surveillance footage of Appellant parking a block away in a grass lot across the road from VP's residence. (JA at 005 & 143-152.)

Simultaneously, OSI contacted VP's father, MSgt RH, who provided OSI with his daughter's phone and gave OSI access to search her room. (JA at 005.) On 30 May 2019, after Appellant left VP's residence, OSI conducted a search of VP's bedroom. (JA at 032.) There, OSI collected used condoms and condom wrappers, as well as VP's underwear because VP told agents she wore them immediately after having sex with Appellant. (JA at 033 & 055.) OSI submitted VP's underwear for DNA testing which later revealed Appellant's semen on the inside crotch area of VP's underwear. (JA at 056-57.) Additionally, OSI submitted VP's phone to the Defense Cyber Crimes Center, Computer Forensics Lab ("DC3") to be forensically extracted and analyzed. (JA at 005.)

On VP's phone, DCFL discovered several messages between Appellant and VP on the dating application, Bumble, and found hundreds of messages between them on the WhatsApp application. (JA at 049 & 153.) Starting 27 March 2019, Appellant and VP began messaging on Bumble. (JA at 024 & 049.) VP's Bumble profile listed VP's age as 20, but VP's bio section listed her age as 18. (JA at 049 & 215.) Along with VP's bio, VP's Bumble account also included photographs and a link to VP's Instagram profile, which listed VP's age as 16. (Id.) VP's Bumble profile also stated she was "an undergrad." (JA at 215.) VP and Appellant exchanged a few messages on Bumble, but they conversed mostly on WhatsApp. (JA at 207 & 153-204.) Their WhatsApp messages started on 29 March 2019 and ended on 30 May 2019, which was when OSI began its investigation of Appellant.

(JA at 005 & 153-204.) In those messages, VP and Appellant regularly discuss the times they met and had sex. (JA at 153-204.) Based on their messages, VP and Appellant met on 30 March, 5, April, 11 April, 15 April, and 30 May 2019. (JA at 155, 171, 173, 177, & 204.) VP and Appellant discussed in explicit detail their sexual encounters on many of those particular dates. (JA at 153-204.)

After they met on 15 April 2019, VP asked Appellant if he took the condom because she could not find it. (JA at 177.) VP implied that Appellant only came over to have sex – stating, "You never just want to hang w [sic] me though you wanna [sic] have sex mr," and "Why can't you just hang out with me? Do you have to fuck lol." (JA at 157 & 160.)

VP and Appellant seemingly coordinated Appellant's visits around her parents' work schedules at her parents' house. (JA at 163, 168, 175, & 176.) Their messages suggested VP and Appellant hid their relationship from her parents. (Id.) For example, on one occasion, VP seemingly gave Appellant the all clear to come over by stating, "okay babe I think you can . . . okay we are good babe . . . wait not yet haha." (JA at 175.) Then Appellant asked VP how much time they had together, to which VP responded with, "like an hour and a half." (JA at 176.)

The record also shows some indications Appellant tried to hide his relationship with VP. (JA at 185.) On 10 May 2019, Appellant told VP he could not talk to her while he was in his room because someone was staying in the room right next to him. (Id.) Also, Appellant seemingly acknowledged VP's age when

on 15 May 2019, after VP told Appellant that she got a boyfriend, Appellant asked, "is he atleast [sic] your own age." (JA at 188.)

At trial, the Government called Appellant's supervisor, TSgt LC, to testify. (JA at 091-92.) TSgt LC testified that after Appellant was called into OSI for "this allegation" and during the summer of 2019 at a "going away" party, he overheard Appellant asking an Airman's spouse what the age of consent was in Italy. (JA at 094 & 096.) When the spouse replied that it was 14, Appellant responded that he would be scot-free "because of what the age was." (JA at 095.)

Additionally, the Government called Appellant's co-worker, A1C TM, to testify. A1C TM testified that on 23 June 2020, Appellant and his co-worker, A1C TM, drove to Treviso to spend a day there with other friends. (JA at 101.) Before meeting up with those friends, Appellant discussed with A1C TM the "full details" of his case and "how he felt he was wronged." (JA at 102.) Throughout the day and as Appellant got drunk, he "kept rambling" about his upcoming case and told A1C TM "different variations" of what happened in this case. (Id.) For example, Appellant told A1C TM three different stories: "that it was a master sergeant's daughter, a German girl or woman and an Italian girl." (Id.) Towards the end of the night, when A1C TM drove Appellant home, Appellant admitted that he "had met a girl that was –he was continuing to have intercourse and then he found out eventually that she was underaged and continued." (JA at 007.)

During the trial, the government called SrA DN to testify about a conversation he had with VP. (JA at 007.) He testified that he met VP on the Bumble application, which listed VP's age as 18 and that she was in college. (Id.) He said that in communicating with VP, he realized VP was younger than 16. (Id.) SrA DN later confronted VP through Instagram, telling her that she could get a lot of people in trouble. (Id.) VP responded that SrA DN "wouldn't have been the first guy in the Air Force" and that she did not believe it was illegal in Europe. (Id.) It was not established at trial, however, whether Appellant knew SrA DN or had any knowledge about VP's interaction with SrA DN. (JA at 058-091.)

The Air Force Court Opinion

The Air Force Court upheld Appellant's conviction for sexual assault of a child, finding it was both factually and legally sufficient. (JA at 015.) The Court noted there was "no direct evidence that Appellant knew VP was 15 years old," but if Appellant wanted to present a defense, "he had to prove by a preponderance of the evidence that his ignorance or mistake of VP's age existed in his mind and was reasonable under all the circumstances." (JA at 012-13.) The Court observed there was plenty of evidence to conclude that "Appellant could have had a reasonable belief VP was at least 16, [but] there was no direct evidence that this belief existed in Appellant's mind." (JA at 013.) The Court quoted Appellant's concession that "there is no direct evidence that shows [he] ever knew her real age . . . Rather, there is only evidence about [his] conduct." (Id.) AFCCA agreed with

this concession, and held that "the Defense failed to meet its burden to demonstrate by a preponderance of the evidence that a mistake of fact actually existed in Appellant's mind every time he had sex with VP." (Id.)

SUMMARY OF ARGUMENT

In its opinion, AFCCA incorrectly implied Appellant needed to prove his state of mind as to VP's age with "direct evidence." But despite AFCCA's misstatement, AFCCA correctly concluded Appellant failed to prove by a preponderance of the evidence his state of mind as to VP's age every time he had sex with her. To successfully establish a mistake of fact as to VP's age, Appellant was required to show by a preponderance of the evidence that he had both an honest and reasonable belief that VP was at least 16 years old. Article 120b(d)(2), UCMJ (requiring Appellant to demonstrate that he "reasonably believed" the victim was at least 16 years old). Despite Appellant's ability to present circumstantial evidence of his actual belief as to VP's age, Appellant failed to provide any such evidence. Instead, even on appeal, Appellant points to evidence that remains focused on VP's conduct. As AFCCA correctly noted, the only evidence presented by Appellant shows only that he *could have had* a reasonable belief VP was at least 16. But this evidence does not show that Appellant *actually* believed VP was at least 16—it neither contemplates his conduct nor reflects his state of mind.

Moreover, Appellant could not prevail on his mistake of fact as to age defense at trial because the Government presented evidence that established Appellant's knowledge that VP was under 16. One of the Government's witnesses, A1C TM, testified that in the months leading up to Appellant's trial, Appellant told A1C TM that he met a girl, had sex with her, and when he discovered she was "underaged," he "continued to have sex with her." (JA at 102-04.) The Government also presented other circumstantial evidence, such as Appellant's coordinated efforts to hide his relationship with VP from VP's parents, Appellant hiding his communication with VP from his roommate, and Appellant texting VP that he hoped her new boyfriend "[wa]s he atleast [sic] [her] own age." (JA at 162.) This evidence suggests the reason Appellant could not present evidence – direct or circumstantial – about his mistaken belief as to VP's age is because he *actually knew* VP was under 16.

Furthermore, despite Appellant's suggestion, the law does not require Appellant to testify to meet the burden of establishing his defense. But assuming Appellant's testimony was the only compelling evidence to show his subjective belief of VP's age, it would not be an infringement of Appellant's Fifth Amendment rights for Appellant to have to testify to present that evidence. As explained by the Supreme Court, "The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction," but such "pressures" to testify or present a defense cannot be

considered "compelled within the meaning of the Fifth [Amendment]." Williams v. Florida, 399 U.S. 78, 83-84 (1970).

Lastly, a contextual reading of AFCCA's opinion suggests that, despite its misstatement about direct evidence, AFCCA understood circumstantial evidence could be used to infer Appellant's state of mind as to VP's age. The Court correctly cited United States v. Curtin, which states that circumstantial evidence may be used to prove an accused's knowledge. 9 U.S.C.M.A. 427, 432 (C.M.A 1958); Thompson, 2021 CCA LEXIS at *14. And the Court reviewed circumstantial evidence, like Appellant's prior statements about VP's age, to infer Appellant's state of mind as to VP's age. Id. at *11-12. Thus, AFCCA correctly found that Appellant did not prove by a preponderance of the evidence that he had an honest and reasonable mistake of fact as to VP's age. Therefore, AFCCA's opinion should be affirmed, and the case should not be remanded for a new Article 66 review.

ARGUMENT

THE LOWER COURT DID NOT ERR WHEN IT FOUND THAT APPELLANT FAILED TO MEET HIS BURDEN TO ESTABLISH A MISTAKE OF FACT DEFENSE.

Standard of Review

Whether the Court of Criminal Appeals has applied the appropriate legal standard in its Article 66(d)(1) review is reviewed de novo. United States v. Gifford, 75 M.J. 140 (C.A.A.F. 2016).

Law

Applicable to Appellant's case, the prosecution must prove beyond a reasonable doubt that: (1) "the accused committed a sexual act upon a child;" and (2) that "at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years." Article 120b(b), UCMJ, 10 U.S.C. § 920b(b); MCM, pt. IV, 62.b.2.a. Article 120b(b), UCMJ, does not require the prosecution to prove the accused knew the child had not attained the age of 16 years. Id.

Article 120b, UCMJ, contains the requirements for the mistake of fact defense for the crime of sexual assault of a child. An accused must "prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years." Article 120b(d)(2), UCMJ.

Analysis

A. *The affirmative mistake of fact as to age defense in Article 120b does not require "direct evidence*."

As a preliminary matter, AFCCA was incorrect when it suggested "direct evidence" was required to show that Appellant had a subjective belief that VP was at least 16 years old. No such requirement exists in the Manual for Courts-Martial. *See generally* R.C.M. 918(c) ("Findings may be based on direct or circumstantial evidence."). And this Court has never held that "direct evidence" is required to show state of mind. To the contrary, this Court stated in United States v. Jones that to the extent the appellate court below "possibly suggested that an accused must testify in order that a mistake-of-fact instruction be given" it was error. 49 M.J. 85, 91 (C.A.A.F. 1998). Although Jones contemplated a defense that does not place a burden of proof upon the accused, this Court seemingly dismissed the requirement of "direct evidence" for any mistake defense. Id.

That said, AFCCA was ultimately correct when it held Appellant did not prove by a preponderance of the evidence that his ignorance or mistake of VP's age actually existed in his mind and was reasonable under all the circumstances. (JA at 013.) Appellant did not present *any* evidence – direct or circumstantial – demonstrating his honest, but mistaken, belief as to VP's age. Thus, despite AFCCA's mistaken suggestion, it correctly concluded Appellant failed to meet his burden of establishing the affirmative defense.

B. *Appellant failed to show by a preponderance of the evidence that he honestly believed VP was at least 16 years old.*

Appellant failed to demonstrate by a preponderance of the evidence that he believed VP was at least 16 years old when he had sex with her. To put forth a successful defense, Appellant was required to prove he "reasonably believed" VP was at least 16 years old "at the time of the offense." Article 120b(d)(2) (2019). Military courts have consistently interpreted the term "reasonably believed" to require both an honest and reasonable belief. *See* United States v. Brown, 2005 CCA LEXIS 188, at *7-8 (N-M Ct. Crim. App. June 23, 2005) (unpub op.) (interpreting "reasonably believed" from the defense of mistake of fact as to age for Article 120(b), carnal knowledge, to mean an honest and reasonable belief); United States v. Sirk, 2004 CCA LEXIS 217 (N-M Ct. Crim. App. Sep. 27, 2004) (unpub. op.); *see also* United States v. Vega, 2020 CCA LEXIS 206, at *8-9 (A. Ct. Crim. App. June 8, 2020) (unpub. op.) (interpreting "reasonably believed" from the defense of mistake of fact as to age for sexual assault of a minor under Article 120b to mean an honest and reasonable belief); United States v. Riojas, No. ARMY 20170097, 2018 CCA LEXIS 533 (A. Ct. Crim. App. Oct. 26, 2018) (unpub. op.); and United States v. Carpenter, 2017 CCA LEXIS 273 (A.F. Ct. Crim. App. Apr. 21, 2017) (unpub. op.). Thus, in order for Appellant to meet his burden of showing he "reasonably believed" VP to be at least 16 years old, he was required to show that his belief was both honest and reasonable.

To show his belief was honest and reasonable, Appellant was required to show he honestly believed VP was at least 16 years old and that belief was reasonable under an objective standard. As this Court explained, in United States v. Goodman, for a mistake of fact defense "[t]he honest belief prong is subjective, while the reasonableness prong is objective." 70 M.J. 396, 399 (C.A.A.F. 2011).

Appellant seemingly does not contest the requirement of showing he had an honest, subjective belief that VP was at least 16 years old. (App. Br. at 26.) Instead, he objects to AFCCA's observation that there was "no direct evidence" Appellant believed VP was 16 years old. (App. Br. at 23-24.) Yet regardless of AFCCA's observation, AFCCA correctly concluded Appellant failed to meet the burden of his affirmative defense because he failed to present *any* evidence of his subjective belief. (JA at 013.)

At trial, Appellant did not present any evidence as to what existed in his mind regarding VP's age. Yet despite this, Appellant claims there are "numerous examples in the record" of circumstantial evidence of Appellant's honest belief. (App. Br. at 22, 28-29.) He points to: (1) VP's pictures on Bumble; (2) VP representing on her Bumble account that she was 18 years old and was an undergraduate college student; (3) VP routinely telling others she was 18 years old; (4) VP not disclosing her age to Appellant on the WhatsApp messages; (5) VP telling Appellant about her alcohol consumption, relationships with older men, and consuming "edibles"; (6) VP telling Appellant that she was taking a college class;

and (7) VP leaving to go to Italy, London, and Germany for weeks at a time. (App. Br. at 21-22.) But Appellant conflates an ***honest*** belief with a ***reasonable*** belief.

Appellant's cited "examples" focus *entirely* on VP's conduct. While VP's conduct is certainly relevant to show Appellant *could have* held a reasonable belief that VP was at least 16 years old, it does not demonstrate whether Appellant actually held such a belief. To establish an honest, subjective mistake, Appellant needed to show that he "actually believed" VP was at least 16 years old. *Cf.* Jones, 49 M.J. at 91 (citing United States v. Willis, 41 M.J. 435, 438 (C.A.A.F. 1995)) (indicating that having an honest mistake is synonymous with a having an *actual* belief as to the fact in question).

Despite Appellant's ability to present direct or circumstantial evidence of his actual belief as to VP's age, Appellant failed to provide any such evidence. The Supreme Court has indicated that when a party has the burden to show someone's "actual" state of mind, the showing "must be more than "potential, possible, virtual, conceivable, hypothetical, or nominal." Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 777 (2020). So here, Appellant had the burden to show his belief that VP was at least 16 was more than potential, possible, conceivable, etc.

Further, a "belief" is defined by Black's Law Dictionary as: "A state of mind that regards the existence or truth of something as likely or relatively certain; conviction about the truth of something." *Belief*, Black's Law Dictionary (11th ed.

2019). Notably, a "belief" is different from "knowledge," which can be mere "awareness or understanding of a fact or circumstance." *Knowledge*, Black's Law Dictionary (11th ed. 2019). Appellant might have been able to circumstantially prove his awareness of VP's asserted age by showing that he viewed some sort of statement of her age – like a statement on her Bumble account. But showing his "belief" as to her age requires something different. The circumstantial evidence would have to reveal his inner "conviction about the truth" of VP's age. And Appellant would have had to show circumstantially that his inner conviction as to VP's age was more than potential, probable, or conceivable. *See also* Stern v. Dittmann, No. 13-CV-1376, 2015 U.S. Dist. LEXIS 47138, at *13 (E.D. Wis. Apr. 10, 2015) (observing that "actual belief is difficult to prove").

To demonstrate his honest mistaken belief, Appellant could have presented evidence of his own conduct or statements that might have circumstantially illustrated his state of mind as to VP's age. For example, if Appellant texted VP asking her who she intended to vote for in this year's election, that might have circumstantially showed he believed she was 18. Or, had a witness testified that he had observed Appellant taking VP to an over-18 bar or club, that might have circumstantially demonstrated Appellant believed VP to be 18. But Appellant proffered no such evidence. Instead, his "numerous examples" focus entirely on VP's conduct without any reference to Appellant's belief about VP's age. (App. Br. at 22, 28-29.) Despite Appellant's reference to 918 messages between him and

VP (App. Br. at 29), even on appeal, he cannot point to a single statement by him that reflects his actual belief that VP was at least 16.

As to the conversations between VP and other men, there is nothing in the record indicating Appellant knew about these conversations. Without evidence Appellant knew VP was telling SrA DN or other men that she was 18, VP's statements to other men are not relevant to Appellant's own state of mind.

At bottom, VP's actions would have only allowed the factfinder to infer what Appellant's beliefs potentially, possibly, or conceivably might have been. This was insufficient to establish an actual belief. Since Appellant failed to present any evidence (direct or circumstantial) of his inner conviction as to VP's age, AFCCA rightly determined he did not meet his burden of establishing the mistake of fact as to age defense. Thus, even if the Court mistakenly described Appellant's failure to meet his burden as lack of "direct evidence," applying the correct rule would not have changed the outcome of AFCCA's legal and factual sufficiency analysis.

C. *Appellant could not meet his burden to show that he had an honest belief that VP was at least 16 because the Government presented evidence proving Appellant knew VP was under 16.*

Further cementing the correctness of AFCCA's legal and factual sufficiency determination, Appellant could not prevail on his mistake of fact as to age defense at trial anyway, because the Government presented evidence establishing Appellant's knowledge that VP was under 16. *Cf.* United States v.

Teague, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016) (finding that if the government proves that an accused has actual knowledge that a victim was incapable of consenting, then such an accused could not simultaneously honestly have believed that the victim consented). The record indicates Appellant discovered VP was 15 years old, but then continued to have sex with her. During the months leading up to Appellant's trial, Appellant told A1C TM that he met a girl, had sex with her, and when he discovered she was "underaged," he continued to have sex with her. (JA at 102-04.) But more specifically, it is clear from the record that Appellant used the term, "underaged" to mean under 16 years old. Appellant made this admission as he discussed "the full details of his case" and current investigation with A1C TM. (JA at 102-03.) While there is nothing in the record that explicitly reflects that OSI told Appellant he was under investigation for having sex with VP, who was 15 years old, Appellant's conversation with A1C TM suggests he knew he was facing criminal allegations for having sex with VP. (Id.) Namely, A1C TM testified that Appellant discussed "an allegation[] against him" involving an "underaged woman." (JA at 102.) So it could be surmised that since Appellant knew he was under investigation for having sex with VP, he also knew it was because she was 15 years old. Therefore, when Appellant referred to knowing she was "underaged," he was referring to his knowledge that she was 15 years old when he had sex with her. This fact alone undercuts any assertion Appellant honestly held a mistake of fact as to VP's age.

Moreover, Appellant's reference to "underaged" as under 16 years old was corroborated by his conversation with a spouse of a fellow Airman, in which Appellant was relieved when he found out the Italian age of consent was 14. (JA at 095.) Specifically, he said that he would be scot-free "because of what the age was." (JA at 095.) The fact Appellant believed he was off the hook for having sex with VP after learning 14 was the applicable age of consent further underscores he knew VP was 15 years old.

Furthermore, Appellant's admission that he knew VP was "underaged," but continued to have sex with her is corroborated by circumstantial evidence. *See* United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (holding circumstantial evidence may suffice for a finding of guilty). On 15 May 2019, Appellant suggested he knew VP's age when he messaged her in reference to her new boyfriend, asking "is he atleast [sic] your own age." (JA at 162.) Appellant's use of the words "your own age" indicates a distinction between his age and VP's age, and thus, implying Appellant knew VP was a minor. Moreover, because Appellant sent this message 15 days prior to his last sexual[1] encounter with VP, it is likely

[1] While Appellant and VP did not explicitly discuss their sexual acts from their meet-up on 30 May 2019 in their WhatsApp messages, there is enough evidence to reasonably conclude they had sex. (JA at 153-204.) Law enforcement agents positively identified Appellant at VP's residence that morning, and after Appellant left, OSI collected used condoms, condom wrappers, and the underwear VP wore immediately after having sex with Appellant. (JA at 033 & 055.) USACIL identified Appellant's semen inside the crotch area of VP's underwear. (JA at 056-57.)

Appellant knew VP's age prior to having sex with her on 30 May 2019. (JA at 162.)

Lastly, VP and Appellant took steps to hide their relationship from others. VP and Appellant regularly coordinated Appellant's visits while her parents were at work. (JA at 163, 168, 175, & 176.) And Appellant indicated he was trying to hide his relationship with VP from his roommate. (JA at 185.) On 10 May 2019, Appellant told VP that he could not talk to her while he was in his room because someone was staying in the room right next to him. (Id.) So while there could be a number of explanations for why VP and Appellant would keep their relationship from VP's parents and from Appellant's roommate, the most reasonable explanation is that they wanted to hide their illegal relationship.

Accordingly, given the strength of the evidence showing Appellant knew VP was 15 years old, AFCCA correctly concluded that Appellant could not meet his burden of showing that he had a mistaken belief that VP was at least 16.

D. *There is no Fifth Amendment violation in assigning Appellant the burden of proof for an affirmative defense, even if the only way to satisfy that burden is for Appellant to testify.*

Appellant's burden of proving the affirmative defense of reasonable mistake of fact as to age cannot be reduced by using the Fifth Amendment as a sword on appeal. As the Supreme Court pointed out, "the Fifth Amendment privilege should not be converted from the shield . . . which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in

support of a burden which would otherwise have been his." United States v. Rylander, 460 U.S. 752, 759 (1983). The Supreme Court has categorically held that assigning the burden of production or persuasion to a defendant to prove a defense or rebut a presumption does not violate the privilege against self-incrimination. *See* Rylander, 460 U.S. at 758. (collecting cases); Williams v. Florida, 399 U.S. 78, 84 (1970); Turner v. United States, 396 U.S. 398 (1970); McGautha v. California, 402 U.S. 183, 215 (1970) ("the pressures which might lead the defendant to furnish . . . testimonial and incriminating information is not compelled self-incrimination."); *see also* Dixon v. United States, 548 U.S. 1, 5-8 (2005) (holding that the Constitution allows Congress to place a burden on a defendant in proving the affirmative defense of duress, even if the facts with regard to the issue are only known by the defendant). Further, the Supreme Court explained that a defendant's dilemma in choosing between complete silence and presenting a defense has never been held as an invasion of the privilege against self-incrimination. *See* Rylander, 460 U.S. at 758; Williams v. Florida, 399 U.S. 78, 84 (1970). Appellant suggests he "could [not] have introduced 'direct' evidence of his subjective belief about VP's age except by waiving his Fifth Amendment privilege against compelled testimony." (App. Br. at 27.) While the government agrees with Appellant that "direct" evidence was not required to establish a defense, the government contends there still may be factual scenarios in which an accused may need to testify in order to show his subjective belief.

The Supreme Court has also acknowledged that there may be situations in which an accused is the only repository of evidence, and thus the "necessity of an explanation by [an] accused" is "not forbidden by the Constitution." Yee Hem v. United States, 268 U.S. 178, 185 (1925). In Yee Hem, the Supreme Court held it was not a Fifth Amendment violation when a defendant was the only "repository" for evidence that could rebut a statutory presumption. Id. The Court reasoned that if the "accused happens to be the only repository of the facts," it is merely the "misfortune which the statute under review does not create, but which is inherent in the case." Yee Hem, 268 U.S. 185. Although Yee Hem did not deal directly with the burden of establishing a defense, it did find there was no constitutional infringement when the defendant had the statutorily created burden of negating the Government's case with his own testimony. Id. This supposition directly contradicts Appellant's claim that "Congress cannot create a statutory defense which foreordains a conviction unless an accused waives his constitutional privilege against testifying at [a] court-martial." (App. Br. at 32.). Therefore, no constitutional infringement occurs if a defendant must testify to satisfy the burden to prove his own affirmative defense of mistake of fact as to age.

"The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction." Williams, 399 U.S. at 83. But such "pressures" to testify or present a defense cannot be considered "compelled within the meaning of the Fifth [Amendment]." Id. at 84.

In this case, the law does not require Appellant to testify in order to meet the burden of his defense. But should the facts and circumstances of this case be such where Appellant's testimony was the only compelling evidence to show his subjective belief of VP's age, then it would not be a Fifth Amendment infringement for Appellant to have to testify to present that evidence.

E. *The Air Force Court's factual sufficiency review was correct and untainted by its misstatement concerning direct evidence.*

While AFCCA was incorrect in suggesting Appellant had to show "direct" evidence of his subjective belief of VP's age, it correctly concluded Appellant's conviction was factually sufficient. Appellant claims that because the Air Force Court relied upon "a false evidentiary dichotomy," its factual sufficiency review was premised upon an erroneous understanding of the law. (App. Br. at 12-13.) But regardless of AFCCA's incorrect suggestion that direct evidence was required, AFCCA correctly grasped that Appellant was required to put on some evidence of Appellant's actual state-of-mind. AFCCA then accurately observed that Appellant provided no evidence at all of his subjective belief. AFCCA's entire opinion makes that clear.

AFCCA's opinion reflects that the Court properly analyzed the two requirements of the mistake of fact as to age defense – both subjective and objective belief. The Court cited United States v. Curtin for the proposition that circumstantial evidence may be used to prove an accused's knowledge. 9

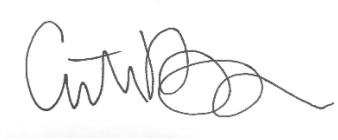
U.S.C.M.A. 427, 432 (C.M.A 1958); Thompson, 2021 CCA LEXIS at *14. This citation highlights that the Court likely understood that circumstantial evidence could be used to prove other states of mind – such as an accused's belief as to age. But to further highlight this, AFCCA devoted part of its opinion to discussing Appellant's statements to others about VP's age. Id. at *11-12. Specifically, the Court highlighted Appellant's statement to A1C TM, in which he suggested that he knew VP was "underaged," but continued to have sex with her. Id. And the Court discussed Appellant's statement to TSgt LC, wherein Appellant was relieved to learn that the Italian age of consent was 14. Id. These discussions demonstrate AFCCA reviewed all circumstantial evidence from the record that could establish Appellant's belief as to VP's age. In conjunction, AFCCA also included a summary of Appellant's case-in-chief, wherein Appellant presented no evidence –direct or circumstantial—as to his actual state of mind as to VP's age. (JA at 008.) AFCCA's summary of that evidence shows that Appellant presented evidence focused entirely on VP's conduct rather than Appellant's response to VP's conduct. (Id.) A contextual reading of AFCCA's opinion reflects that AFCCA understood it could use circumstantial evidence to infer Appellant's beliefs, but as the Court concluded, Appellant failed to present any evidence of his subjective belief as to VP's age.

Therefore, AFCCA's opinion shows that it correctly weighed all of the evidence in the record, and after making allowances for not having personally

observed the witnesses, was correctly convinced of Appellant's guilty beyond a reasonable doubt. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). There is no need for this Court to remand this case to AFCCA for a new Article 66 review.

CONCLUSION

WHEREFORE the United States respectfully requests this Honorable Court deny Appellant's requested relief and affirm the decision of Air Force Court of Criminal Appeals.



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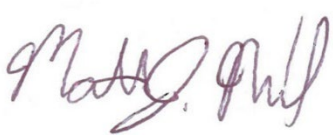

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 13 May 2022.

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/s/ _____

CORTLAND BOBCZYNSKI

Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 13 May 2022

APPENDIX

Cited Unpublished Opinions

United States v. Brown

United States Navy-Marine Corps Court of Criminal Appeals

June 23, 2005, Decided

NMCCA 9901754

Reporter
2005 CCA LEXIS 188 *; 2005 WL 1473976

UNITED STATES v. Kevin C. BROWN, Aviation Ordnanceman Airman Apprentice (E-2), U.S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by United States v. Brown, 62 M.J. 229, 2005 CAAF LEXIS 1159 (C.A.A.F., 2005)

Review denied by United States v. Brown, 63 M.J. 246, 2006 CAAF LEXIS 457 (C.A.A.F., Apr. 13, 2006)

Prior History: Sentence adjudged 23 July 1999. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Region Northwest, Silverdale, WA.

Disposition: Affirmed.

Counsel: LT THOMAS P. BELSKY, JAGC, USNR, Appellate Defense Counsel.

LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE C.L. CARVER, D.A. WAGNER, R.W. REDCLIFF. Senior Judge CARVER and Judge WAGNER concur.

Opinion by: REDCLIFF

Opinion

REDCLIFF, Judge:

Officer members serving as a general court-martial convicted the appellant, contrary to his plea, of carnal knowledge on one occasion, [1] in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was acquitted of sodomy, conspiracy to obstruct justice, and obstruction of justice. He was sentenced to a bad-conduct discharge, confinement for 3 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 12 months as an act of clemency. There was no pretrial agreement.

[*2] We have carefully considered the record of trial, the appellant's 9 assignments of error, [2] and the Government's

[1] The appellant was acquitted of committing carnal knowledge "on divers occasions."

[2] The appellant raises the following assignments of error (AOEs):

I. The military judge denied the appellant's 6th Amendment right to present evidence from his stepfather that the appellant said the victim was "19 or 20 years old."

II. The appellant was denied his 6th Amendment right to confrontation and to present a defense when prevented from questioning a witness about another witnesses' prior attempted sexual contact with the victim.

III. The evidence is factually and legally insufficient to sustain the appellant's carnal knowledge conviction.

IV. The military judge abused his discretion by failing to grant a mistrial after a sentencing witness violated an order not to mention the appellant's statement that he would be "going away for three years."

V. The military judge committed plain error by not interrupting the trial counsel's closing argument suggesting that the appellant had to prove mistake of fact beyond reasonable doubt.

VI. The military judge committed plain error by not instructing the members to disregard trial counsel's sentencing argument comparing the maximum authorized sentence for carnal knowledge to the maximum authorized sentences for manslaughter and robbery.

VII. The sentence of three years confinement and a bad-conduct discharge is inappropriately severe.

VIII. The military judge abused his discretion by not ordering the victim to appear in the same clothes, makeup and jewelry as she wore on the night in question.

IX. Cumulative error mandates disapproval of the findings and sentence.

response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

[*3] Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to sustain his conviction for carnal knowledge. We disagree.

The evidence at trial established that the appellant admitted engaging in sexual intercourse with the victim, "KB," who was age 13 at the time of the incident. The only disputed issue for the members to decide was whether the appellant honestly and reasonably believed KB was 16 when he engaged in sexual intercourse with her. We conclude that the members properly rejected the appellant's assertions of ignorance concerning his knowledge of KB's age prior to engaging in sexual intercourse with her. We further find that the evidence is both legally and factually sufficient to support the appellant's conviction for carnal knowledge.

On the merits, several prosecution witnesses testified that the appellant was told that KB was 13 or 14 years old on or before the night of the incident. Mrs. "CB," who employed KB as her babysitter, testified that she, the appellant, and others (including KB and her sister, "FB") were drinking at her home on the night of the incident when the topic of KB and her sister came up. Mrs. CB testified that she **[*4]** specifically told the appellant that KB was 13 and FB was 16. Record at 144-45. Of greater import was the testimony of Mrs. "AA," a disinterested witness who testified that she had met the appellant, his roommate (and co-accused), and Mrs. CB at a local bar several days before the incident. Mrs. AA testified that during the course of their conversation, the topic of Mrs. CB's babysitter (KB) came up and the appellant asked how old she was. In response, Mrs. AA told the appellant that the babysitter was age 14. *Id.* at 411, 421-22.

In the appellant's defense, his trial defense counsel vigorously cross-examined Mrs. CB and impeached her through use of prior inconsistent statements. He also suggested that Mrs. CB had a motive to fabricate because she was under civilian charges for providing alcohol to minors (namely, KB and FB) and further feared that she would lose custody of her children.

The appellant elected to testify in his own defense and adamantly denied any knowledge of KB's true age until when he was interrogated by agents from the Naval Criminal Investigative Service (NCIS). He vividly described KB's sexually aggressive behavior toward him, her smoking and drinking, her **[*5]** "mature" body, and her provocative attire. All this, he testified, led him to believe that KB was "not under the age of 16." Record at 453-56, 464-65.

However, the appellant himself suffered from significant credibility problems. Many of his answers to probing questions were evasive or professed an inability to remember crucial conversations. Record at 521, 523. In response to a member's question, for example, the appellant testified that "I *would say* I became aware of the girls ages at NCIS." (emphasis added) *Id.* at 525. Furthermore, he admitted he lied, or failed to disclose, his drug abuse history before entering the Navy. He also admitted he repeatedly lied when initially interviewed by agents from the NCIS. In fact, he conceded that his sworn statement to NCIS was composed of "8 lies." *Id.* at 511. Contrary to his claim that he thought KB was older than her sister, FB, he used (or adopted) diminutive terms to describe KB in his NCIS statement. His claim that he fabricated engaging in oral sex with KB in his statement to NCIS because he thought it was okay to engage in sodomy with a minor was simply incredible.

Moreover, the appellant denied that he ever discussed **[*6]** with Mrs. AA anything about Mrs. CB's babysitter. He also made inconsistent statements about where he was sitting in relation to Mrs. AA when the discussion about the babysitter purportedly took place. He did not remember asking FB about her age. Although the appellant testified that KB and FB were smoking and drinking beer, this alone was insufficient to reasonably conclude they were over 16 given the other circumstances presented at trial. Multiple witnesses opined that KB could not pass for 16 in January 1999 when the incident occurred. A medical expert testified about KB's sexual development, concluding that KB was a 4 out of 5 on the Tanner scale. [3] Record at 271-72. Finally, the members had an opportunity to observe both FB and KB in court and weigh their observations against the appellant's contentions concerning his perception of KB's apparent age.

[*7] The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (C.M.A. 1979); *United States v. Turner*, 25 M.J. 324, 325

See Appellant Brief of 23 April 2002.

We will address several of these AOEs out of order.

[3] The Tanner Scale is utilized by experts to describe the development of the human body. A "5" on the Tanner Scale represents a fully-developed adult.

(C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim. App. 1999), *aff'd* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant had the burden to prove his belief of KB's age was an honest and reasonable mistake of fact. We are convinced, as were the **[*8]** members, that he failed to do so. The Government amply met its burden of proof in this case, and the evidence is both factually and legally sufficient to sustain the appellant's conviction. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of carnal knowledge. This assignment of error lacks merit.

Admissibility of Hearsay Evidence

The appellant further contends he was denied his 6th Amendment right to present evidence. Specifically, he asserts that the military judge improperly excluded offered testimony from the appellant's stepfather that on the day after the incident the appellant said KB was "19 or 20 years old." We find no basis for relief.

Essentially, the day after the incident, the appellant told his stepfather he had sex with some "gal or gals" and he believed the young women were within the age of consent. At an Article 39(a), UCMJ, session the appellant's stepfather testified that he spoke to the appellant the day after the incident by phone. He asked what the appellant was doing, and the appellant said he was out partying the night before with his roommate (co-accused) and Mrs. CB. The appellant **[*9]** also told his stepfather that there were two other gals at Mrs. CB's house and they had sex. The stepfather asked "Well, how old's the gals?" The appellant responded that they were '19 or 20.'

We are convinced that the military judge's decision to preclude the defense from offering the appellant's hearsay statement as "state of mind" evidence or as a "prior consistent statement" was not an abuse of discretion. Thus, we decline to provide relief on the basis of this assignment of error.

Prior Sexual Conduct of the Victim

The appellant contends that he was denied his 6th Amendment right to confrontation and to present a defense when the military judge prevented his trial defense counsel from questioning a witness about another witnesses' prior attempted sexual contact with victim. We decline to grant relief on the basis of this assignment of error.

During cross-examination, the trial defense counsel began to ask the NCIS case agent, Special Agent "K," about a statement Mrs. CB made regarding the weekend prior to the incident when KB was babysitting for her. Apparently, CB admitted to having "inappropriately" touched KB. After the trial counsel raised a timely objection based **[*10]** on MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) the military judge held an Article 39(a) session. Record at 328-29. At that hearing, the trial defense counsel made the following proffer:

> DC: "That's exactly what I'm getting at, Your Honor. The proffer is more than that. There is more than just [Mrs. CB] may have touched [KB]. It's that [Mrs. CB] had [KB] stay in [Mrs. CB's] bed. They were both very intoxicated, and that [Mrs. CB] had fondled [KB]. That's the evidence we believe will be offered."
>
> MJ: "And the relevance?"
>
> DC: "Your Honor, the relevance of that, first of all, as we've said before, impeachment on a non collateral issue. The second reason for relevance, Your Honor, is that we intend to offer her sexual contact with [KB] the week before to show that it makes it more likely that when she invited [KB] back the next weekend, she did so with the intention of having more sex with her. That's relevant, Your Honor, to show, first of all, that she never told my client the age because she clearly wouldn't have been telling people ages of girls that she wanted to have sex with.
>
> But, secondly, and more **[*11]** constitutionally important, Your Honor, it goes to my client's reasonable and honest mistake as to [KB]'s age. If we can establish that [Mrs. CB] was having sex with [KB] or attempting to have sex with [KB], the members can more likely believe that she did not tell my client the age of [KB], and right now that's the only evidence out there my client knew [KB]'s age, was coming from [Mrs. CB]."

Record at 329-30.

The military judge ruled this line of questioning was a collateral issue and irrelevant to any issue in the case. He also ruled that MIL. R. EVID. 412 barred the proffered testimony

due to the trial defense counsel's failure to file a written motion at least five days prior. No good cause was provided for the trial defense counsel's late request. Record at 336-37.

Assuming, without deciding, that the military judge erred by ruling that the proffered testimony was procedurally barred, we decline to grant relief. Based on the exchange between the military judge and the trial defense counsel, we find no nexus between the offered testimony and the appellant's purportedly mistaken belief as to KB's age. The trial defense argued that prior sexual activity **[*12]** between CB and KB would corroborate the appellant's claim that they were doing "adult like" things and, thus, it was reasonable for the appellant to assume KB was over 16. But the appellant's own testimony is that he did not know of the earlier sexual activity alleged between Mrs. CB and KB, nor did he see any sexual contact between Mrs. CB or KB until after he had engaged in sexual intercourse with KB. The trial defense counsel's claim of admissibility stretches the limits of reason, as well as relevance.

Putting the relevance issue aside temporarily, we find that the disputed evidence does not rise to the level of being constitutionally mandated. MIL. R. EVID. 412(b)(1) provides that evidence of a victim's past sexual behavior with persons other than the accused is not admissible unless constitutionally required to be admitted. The rule "is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." *United States v. Hurst*, 29 M.J. 477, 480 (CMA 1990); *see* Analysis of MIL. R. EVID. 412, Appendix 22 at A22-35.

> "Whether evidence is 'constitutionally **[*13]** required to be admitted' is reviewed on a case-by-case basis." *United States v. Buenaventura*, 45 M.J. 72, 79 (C.A.A.F. 1996). "Relevance is the key to determining when the evidence is 'constitutionally required to be admitted.'" *United States v. Jensen*, 25 M.J. 284, 286 (C.M.A. 1987); *see also United States v. Knox*, 41 M.J. 28 (C.M.A. 1994); *United States v. Greaves*, 40 M.J. 432 (C.M.A. 1994). The test for relevance is whether the evidence has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401.
>
> To overcome the prohibition of Mil.R.Evid. 412, the defense must establish a foundation demonstrating constitutionally required relevance, such as "testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case. . . ." *United States v. Moulton*, 47 M.J. 227, 229 (1997). "Defense counsel has the burden of demonstrating why the general prohibition in Mil.R.Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim. **[*14]** . . ." *Id.* at 228.

United States v. Eurico D. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998).

In *Carter*, the accused claimed that the victim was bisexual and, thus, was using allegations of rape to hide a lesbian affair. The trial defense counsel attempted to cross-examine the victim about an instance where the victim and another woman were "groping" each other at a club. The defense was unsuccessful in its claim that MIL. R. EVID. 412 did not bar the evidence because "groping" was not necessarily a sexual activity.

Here, as in *Carter*, the defense has failed to demonstrate that the protections of MIL. R. EVID. 412 should be lifted. We find that the relevance of the offered evidence to prove "plan" or "motive" was tenuous at best. And the evidence itself was hearsay within hearsay. Specifically, the trial defense counsel was attempting to introduce a prior out-of-court statement that Mrs. CB made to Special Agent K to the effect that she previously fondled KB. The trial defense counsel, however, never asked Mrs. CB or KB about these matters while they were on the stand.

Even if the trial defense counsel could have overcome a hearsay objection, **[*15]** as well as his procedural default by failing to provide the required notice under MIL. R. EVID. 412, the offered evidence is cumulative. Evidence of Mrs. CB's sexual conduct towards KB's sister, FB, was clearly established at trial. Some evidence of Mrs. CB's sexual interest in KB was also introduced. Evidence that Mrs. CB may have had ulterior motives in bringing KB back to baby-sit was placed before the members. Mrs. CB's credibility was repeatedly attacked. She had made several inconsistent or deceitful statements, including her sworn statement to Special Agent K. She had a significant motive to lie to escape the consequences of her own misconduct, including loss of her children and criminal prosecution. She had an undisputed bias against the appellant. Two friends of Mrs. CB opined that Mrs. CB was an untruthful person. Lastly, the military judge gave the standard accomplice and prior inconsistent statement instructions concerning Mrs. CB, further limiting the value of her testimony. Record at 636-38.

Even if the trial defense counsel had complied procedurally with MIL. R. EVID. 412 and could have overcome a hearsay objection, the military judge's decision to preclude the defense **[*16]** from launching an additional attack on Mrs. CB's credibility was not prejudicial.

Denial of Mistrial Motion

The appellant asserts that the military judge abused his discretion by failing to grant a mistrial after a prosecution witness violated an order not to mention the appellant's admission that he was "going away for three years." We find no abuse of discretion under the circumstances presented here.

Testifying for the prosecution on the merits, Senior Chief Aviation Electronics Technician (AECS) "S" stated that he encountered the appellant in the barracks several weeks prior to trial and saw the appellant "crying." Record at 391-92. AECS S added, contrary to an earlier instruction from the trial counsel, that the appellant told him he was "going away for 3 years." *Id.* at 393. The military judge immediately interrupted the testimony and provided this instruction: "Members, I'm going to instruct you to disregard the phrase '3 years.' It's completely irrelevant. Can each of you disregard that? Please indicate that you can positively by raising your hand. All members have affirmatively indicated." *Id.*

Following the military judge's curative instruction, the trial **[*17]** defense counsel asked for an Article 39(a) session. The trial defense counsel then indicated an intent "to explore the possibility of a motion for mistrial." Record at 394. The mistrial motion was denied by the military judge, who instead granted the trial defense counsel's alternative request to strike all of the witness' testimony. Upon reassembling the court, the military judge further instructed the members to disregard the challenged testimony, and all the members affirmatively indicated they understood the instruction by raising their hands. Record at 404-06.

We note that RULE FOR COURTS-MARTIAL 915 (a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) provides:

> The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings.

Further, our superior court has said that a mistrial is a "'drastic remedy'" that the military judge should order only when necessary to "'prevent a miscarriage of justice.'" *United States v. Taylor,* 53 M.J. 195, 198 (C.A.A.F. 2000) **[*18]** (quoting *United States v. Garces,* 32 M.J. 345, 349 (C.M.A. 1991)). Curative instructions, rather than declarations of mistrial, are the preferred remedy to correct error when court members have been exposed to inadmissible evidence. *Id.; United States v. Barron,* 52 M.J. 1, 4-5 (C.A.A.F. 1999). Finally, an appellate court should not reverse a military judge's decision to deny a mistrial motion absent a clear abuse of discretion. *Taylor,* 53 M.J. at 198.

After careful review of the entire record, we conclude that the witness' improper testimony did not cast substantial doubt on the fairness of these proceedings. We reach this conclusion in light of the military judge's prompt intervention, immediate curative instruction, and ultimately, his final instruction to disregard the witness' entire testimony. We further conclude that the military judge's denial of the request for a mistrial does not rise to the level of manifest injustice required by R.C.M. 915(a). Therefore, we decline to grant the requested relief

Improper Argument

The appellant contends that the military judge committed plain error by not interrupting the trial counsel's **[*19]** closing argument suggesting that the defense had to prove the appellant's mistake of fact as to KB's age beyond a reasonable doubt. This contention is without merit.

We begin by noting that the Government had the burden to prove that the appellant had sexual intercourse with a girl less than 16 years of age beyond reasonable doubt. This burden remained with the prosecution, but in this case, these matters were not in dispute. On the other hand, the defense had the burden to prove, by a preponderance of the evidence, that the appellant's purported mistake was both honest and reasonable under the circumstances.

Here, any misstatement of law arguably begins with the trial defense counsel, who argued that if there was reasonable doubt that the appellant knew the girls ages "you've got to give [the appellant] the benefit of the reasonable doubt." Record at 589-590, 614. In response, the trial counsel argued:

> "I've got to bring up the fact that Lieutenant [K], the defense mentioned a number of times, 'Benefit goes to my client. Benefit of the doubt goes to my client. Benefit of the doubt goes to my client when it goes to this whole mistake of fact as far as age.'
>
> Wrong. Benefit **[*20]** of the doubt goes to the government. He's got the burden to prove to you by a preponderance of the evidence that he not only subjectively thought she was over the age of 16 years or older, but that a reasonable person would.
>
> I've got no burden here. This is a prosecutors dream. I've got no burden. If you do have some doubt, it is resolved in favor of the government. If you have some doubt, then you're not convinced that an ordinary prudent person . . .

.

Id. at 620-21.

In raising this assignment of error, the appellant lifts the quoted language out of its proper context. In the body of his closing argument, the trial counsel properly stated the law. And we note that the trial counsel's statements partially quoted above were in response to the trial defense counsel's initial misleading statements of the law concerning mistake of fact. We also note that the trial defense counsel made no objection to the argument at the time it was made, and most importantly, the military judge correctly instructed the members on the law. Record at 626-29. This assignment of error is without merit.

Sentence Appropriateness

The appellant contends that his sentence is inappropriately **[*21]** severe for his offense. We disagree.

Sentence appropriateness involves the *individualized* consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the evidence introduced at trial on the merits, evidence in aggravation and mitigation, including the appellant's statement, and the briefs of counsel, we conclude that appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003)(citing *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). Here, the appellant received substantial clemency from the convening authority in the form of suspension of confinement in excess of 12 months. We decline to grant the requested relief.

Remaining [*22] Assignments of Error

We have also carefully considered the appellant's remaining assignments of error, including his contention that the military judge should have ordered KB to appear in court attired in the same makeup and clothing she wore on the night of the incident, that the military judge committed plain error by not stopping the trial counsel's sentencing argument, and that cumulative error requires disapproval of the findings and sentence. We find no merit in these contentions and decline to provide the requested relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

End of Document

United States v. Carpenter

United States Air Force Court of Criminal Appeals

April 21, 2017, Decided

No. ACM 38995

Reporter
2017 CCA LEXIS 273 *

UNITED STATES, Appellee v. David C. CARPENTER, II, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by United States v. Carpenter, 76 M.J. 432, 2017 CAAF LEXIS 796 (C.A.A.F., July 13, 2017)

Motion granted by United States v. Carpenter, 77 M.J. 32, 2017 CAAF LEXIS 917 (C.A.A.F., Sept. 13, 2017)

Later proceeding at United States v. Carpenter, 77 M.J. 145, 2017 CAAF LEXIS 1210 (C.A.A.F., Dec. 27, 2017)

Motion granted by, in part, Motion denied by, in part United States v. Carpenter, 77 M.J. 195, 2018 CAAF LEXIS 11 (C.A.A.F., Jan. 9, 2018)

Later proceeding at United States v. Carpenter, 2018 CAAF LEXIS 441 (C.A.A.F., Jan. 10, 2018)

Affirmed by United States v. Carpenter, 77 M.J. 285, 2018 CAAF LEXIS 292 (C.A.A.F., Mar. 20, 2018)

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Matthew P. Stoffel. Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 9 December 2015 by GCM convened at Joint Base Lewis-McChord, Washington.

Counsel: For Appellant: Captain Allen S. Abrams, USAF; Stephen H. Carpenter, Jr., Esquire.

For Appellee: Colonel Katherine E. Oler, USAF; Major Jeremy D. Gehman, USAF; Major Meredith L. Steer, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, SANTORO, and HARDING, Appellate Military Judges. Judge SANTORO delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge HARDING joined.

Opinion by: SANTORO

Opinion

SANTORO, Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexually assaulting a 13-year-old boy, in violation of Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b. The adjudged and approved sentence was a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.

Appellant raises two assignments of error: (1) the evidence is factually and legally insufficient to sustain his convictions **[*2]** and (2) the military judge abused his discretion by excluding evidence offered pursuant to Mil. R. Evid. 412. We disagree and affirm.

I. Background

JM was the 13-year-old son of an active-duty Air Force technical sergeant living at Kadena Air Base, Japan. Appellant responded to a message JM posted on Craigslist seeking a sexual encounter. After communicating via Skype, Appellant and JM met and engaged in mutual fellatio and anal intercourse.

II. Discussion

A. Legal and Factual Sufficiency

Appellant argues that the evidence is legally and factually insufficient to sustain his convictions. 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 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 *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In applying this test, "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); *see also United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of [Appellant]'s **[*3]** guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. 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. The phrase "beyond a reasonable doubt," however, does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Appellant concedes that the charged conduct occurred. He contends, however, that he believed JM was at least 16 years old and therefore able to consent to sexual activity. Although the prosecution was not required to prove Appellant knew that JM had not attained the age of 16 years at the time the sexual acts occurred, Appellant's honest and reasonable mistake of fact as to JM's age would be a defense. Article 120b(d)(2), UCMJ. Under this defense, JM must actually have been above the age of 12 and Appellant must have had an incorrect belief that JM was at least 16 years old. *Id.* The ignorance or mistake must have existed in Appellant's mind **[*4]** *and* must have been reasonable under all the circumstances as known to him. *See United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2010); *United States v. Strode*, 43 M.J. 29, 32-33 (C.A.A.F. 1995). To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that JM was at least 16 years old, and the ignorance or mistake cannot be based on a negligent failure to discover the true facts. Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45b-2, Note 3 (10 Sep. 2014); *see also United States v. True*, 41 M.J. 424, 425 (C.A.A.F. 1995) (applying mistake of fact defense to a charge of rape of an adult and stating that "for one reasonably to believe something, one must have taken such measures as to not be reckless or negligent with respect to the truth of the matter."). Appellant bears the burden of proof to establish the defense by a preponderance of the evidence. Article 120b(d)(2), UCMJ.

It was not disputed that JM told Appellant he was either 19 or 20 years old. The Government's evidence included testimony that Appellant told JM he looked young for his age, that JM told Appellant he was on active duty and living in base housing (when Appellant knew that an adult single Airman would not be authorized to live in base housing). Finally, an Air Force Office of Special **[*5]** Investigations agent testified that Appellant lied to them about whether he had sex with JM.

Appellant testified that he believed JM was 19 years old and that had he known JM's true age, he would not have engaged in sexual conduct with him. He also testified that during a Skype session, JM told him that his drunk friend was nearby, causing Appellant to think that Appellant was old enough to have a friend who could consume alcohol. Additionally, Appellant testified that JM had pubic hair and seemed more sexually aware than one would expect of a 13-year old.

Both the Government and Appellant introduced photographs of JM. Unsurprisingly, the photographs selected depict JM in a light consistent with each side's theory of the case (i.e., the Government's photos make JM appear younger whereas Appellant's photos make JM appear older). The record does not contain a photograph of JM as he appeared at trial.

This case turns entirely on two things: the credibility of Appellant and JM's appearance and demeanor. Both are difficult—if not impossible—to divine from a cold reading of words in a transcript. This is why we give great deference to the trial court's ability to hear and see the witnesses **[*6]** when we conduct a factual-sufficiency review. "[T]he degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015) (en banc).

A reasonable factfinder could have concluded that Appellant failed to meet his burden to establish that he was both honestly and reasonably mistaken about JM's age. The evidence is therefore legally sufficient to support Appellant's convictions.

We have reviewed the evidence offered at trial, paying particular attention to Appellant's arguments and the evidence with respect to JM's purported age. Giving appropriate deference to the trial court's ability to see and hear the witnesses, and after our own independent review of the record, we are ourselves convinced of Appellant's guilt beyond a reasonable doubt.

B. Admissibility of Craigslist Messages

The actual Craigslist message to which Appellant responded was apparently no longer available and not admitted into evidence. However, in addition to the message to which Appellant responded, JM posted several additional messages soliciting sexual encounters and stating that his age was variously **[*7]** 18, 19, or 20. These additional messages were posted after Appellant's encounter with JM, and Appellant never saw them. Trial defense counsel wanted to cross-examine JM to establish both that he lied about his age in those other messages and that he had sexual encounters with as many as six additional adult men he met as a result. The military judge precluded that testimony.

Appellant contends the military judge erred. We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (quoting *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000)).

Under the version of Mil. R. Evid. 412 in effect at the time of Appellant's trial, evidence offered by the accused to show that the alleged victim engaged in other sexual behavior was inadmissible with three limited exceptions. The third exception stated that the evidence is admissible if "the exclusion of [it] would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). This exception includes an accused's Sixth Amendment right to confront witnesses against him, including the right to cross-examine **[*8]** and impeach those witnesses. *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011).

If there is a theory of admissibility under one of the exceptions, the military judge must conduct the balancing test as outlined in Mil. R. Evid. 412(c)(3) and clarified by *United States v. Gaddis*, 70 M.J. 248, 250 (C.A.A.F. 2011). The test is whether the evidence is "relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *Ellerbrock*, 70 M.J. at 318. Evidence is relevant if it has "any tendency to make the existence of any fact more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. Evidence is material if it is "of consequence to the determination of appellant's guilt." *United States v. Dorsey*, 16 M.J. 1, 6 (C.M.A. 1983) (citations and quotation marks omitted).

Based on the posture of the case, JM's testimony that he lied to Appellant about his age, and Appellant's admission the sexual conduct occurred, the only remaining fact of consequence to the determination of Appellant's guilt was whether he mistakenly and reasonably believed *at the time of the sexual acts* that JM was at least 16 years old. We agree with the military judge that Craigslist messages JM posted after his encounter with Appellant, of which Appellant had no knowledge, could not possibly be relevant to Appellant's actual belief about JM's age.

Appellant also argued, however, that **[*9]** the sexualized language JM used in the messages and subsequent emails JM sent to other men suggested that he had knowledge beyond that of the ordinary 13-year old. This, he argues, would corroborate his subjective belief that JM was older than 13 and suggest that his subjective belief was objectively reasonable because JM "was adept at concealing his age." As noted by the military judge, this argument also fails because the relevant inquiry with regard to whether Appellant's belief about JM's age was objectively reasonable is based on the facts known to Appellant at the time of the conduct. Appellant was unaware of JM's messages or interaction with other men so that conduct was not relevant to Appellant's mistake-of-fact defense.

Finally, Appellant argues that other adult men's decisions to engage in sexual conduct with JM establish that Appellant's belief was objectively reasonable because, he posits, those other men would not have engaged in the conduct had they known JM's true age. Whatever probative value this argument might have—and we believe it has very little, if any—is undercut by the fact that Appellant sought to introduce this evidence through cross-examination of JM. However, **[*10]** JM would not have been able to testify about his paramours' subjective belief about his age or speculate as to whether they would have engaged in sexual conduct had they known his true age.

We agree with the military judge that the proffered evidence was irrelevant to the mistake-of-fact defense. The military judge therefore did not abuse his discretion by excluding it.

III. CONCLUSION

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

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United States v. Riojas

United States Army Court of Criminal Appeals

October 26, 2018, Decided

ARMY 20170097

Reporter
2018 CCA LEXIS 533 *; 2018 WL 5619958

UNITED STATES, Appellee v. Captain PAUL A. RIOJAS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Riojas, 78 M.J. 346, 2019 CAAF LEXIS 74 (C.A.A.F., Feb. 4, 2019)

Writ denied by United States v. Riojas, 2020 CAAF LEXIS 187 (C.A.A.F., Mar. 31, 2020)

Prior History: [*1] Headquarters, 1st Cavalry Division (Rear)(Provisional). Joseph A. Keeler, Military Judge, Major Edward B. Martin, Acting Staff Judge Advocate.

Counsel: For Appellant: Captain Zachary A. Gray, JA; Daniel Conway, Esquire (on brief).

For Appellee: Lieutenant Colonel Eric K. Stafford, JA; Major Wayne H. Williams, JA (on brief).

Judges: Before BURTON, HAGLER, and FLEMING, Appellate Military Judges. Senior Judge BURTON and Judge HAGLER concur.

Opinion by: FLEMING

Opinion

SUMMARY DISPOSITION

FLEMING, Judge:

In this appeal, we find the military judge did not abuse his discretion in accepting appellant's plea of guilty to one specification of sexual abuse of seven children.

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of one specification of disobeying an order from a superior commissioned officer and one specification of sexual abuse of a child,[1] in violation of Articles 90 and 120b, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 920b (2012 & Supp. III 2016) (UCMJ). The convening authority approved the adjudged sentence of a dismissal, confinement for nine months,[2] and forfeiture of all pay and allowances.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises two assignments of error, **[*2]** one of which merits discussion but no relief. Specifically, appellant asserts the military judge abused his discretion in accepting appellant's pleas to sexual abuse of a child by failing to address a possible mistake of fact by appellant as to the ages of the seven victims. We disagree.

DISCUSSION

Appellant was assigned to the U.S. Army Medical Department Activity — Bavaria and resided in Amberg, Germany. Appellant frequently took morning runs at a park near his apartment, usually finishing at approximately 0745 hours. This was about the same time each morning that young girls walked by the park on their way to school. When appellant completed his runs, he would usually stretch in the park. On one such occasion, appellant's penis accidentally came out of the bottom of his admittedly "short jogging shorts." Some girls on their way to school witnessed this wardrobe malfunction and giggled.

This excited the appellant. So much so, he intentionally exposed himself to teenage girls on three or four more occasions in a similar fashion. As appellant explained during

[1] Appellant pleaded guilty to seven specifications of sexual abuse of a child. Prior to announcement of the sentence, the military judge merged these offenses into a single specification for purposes of findings and sentence.

[2] The convening authority's action was erroneous. Appellant pleaded guilty pursuant to a pretrial agreement wherein the convening authority agreed to disapprove any sentence to confinement in excess of six months. Rather than remanding this case to the convening authority for a corrected action we, as a matter of judicial economy, set aside that portion of the sentence to confinement in excess of six months.

his *Care*[3] inquiry, "[W]hen I saw teenage girls walk by me while I was stretching, I would intentionally make it so my penis would **[*3]** be exposed outside of my shorts." Each time appellant knew his penis was exposed and was seen by teenage girls.

In total, appellant pleaded guilty to exposing himself multiple times to seven different girls who were all younger than sixteen years of age. His offense — sexual abuse of a child — required that each victim was under the age of sixteen years. *See Manual for Courts-Martial, United States* (2016 ed.) *[MCM]*, pt. IV, ¶¶ 45b.a.(c), (d)(2). While not required for appellant to know the girls were under the age of sixteen, it was a defense if appellant reasonably believed the victims had attained the age of sixteen. *MCM*, ¶ 45b.a.(d)(2). On this point, appellant claims his responses to the military judge during the *Care* inquiry set up a matter inconsistent with his pleas of guilty.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citations omitted). An abuse of discretion occurs if the military judge "fails to obtain from the accused an adequate factual basis to support the plea." *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). We afford a military judge's decision to accept a guilty plea "significant deference." *Id.* We will not reject a plea unless the record of trial shows **[*4]** "'a substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.A.A.F. 1991). That is, once a military judge has accepted a plea as provident, "an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the accused's statements or other evidence of record." *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

As appellant explained during his *Care* inquiry, "I did not know the age of any of the girls to whom I exposed myself; however, I made no attempt to ascertain their age." Repeatedly, he referred to the victims as "young" or "teenage." Later, the military judge asked, "did you believe that any of the girls had attained the age of 16," to which appellant responded "I only saw young women. I didn't actually know their ages and I didn't try to ascertain their age." The military judge did not explain the mistake of fact defense or directly ask appellant if he believed he had a defense to the allegations of sexual abuse of a child.

Standing alone, appellant's responses did not clearly dispel the possibility of a defense to the sexual abuse charges. "Where the possibility of a defense exists, [our superior] Court has indeed suggested that a military judge secure **[*5]** satisfactory disclaimers by the accused of this defense." *Prater*, 32 M.J. at 436 (citations omitted). But we are not limited to appellant's responses and consider the "'full context' of the plea inquiry," to include the stipulation of fact. *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011) (quoting *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995)). Viewing the record as a whole, mistake of fact as to age was not even remotely presented as a possible defense.[4]

During the *Care* inquiry, appellant read the stipulation of fact that was ultimately admitted as a prosecution exhibit. The appellant admitted under oath that everything in the stipulation of fact was true, to include the ages of the victims of his sexual abuse (variously fourteen, thirteen, and twelve years of age). More importantly, as to each victim of sexual abuse, the stipulation of fact provided "The [a]ccused did not have an honest and reasonable mistake of fact as to her age, and at no time did the [a]ccused make any effort to ascertain her true age." Put another way, the prospect of the defense of mistake of fact did not exist because, by the accused's answers during the *Care* inquiry and the stipulation, he did not raise an honest or reasonable belief that any victim was over the age of sixteen.

In the end, we do not find appellant raised **[*6]** a matter inconsistent with his plea of guilty or an abuse of discretion by the military judge in accepting appellant's plea.

CONCLUSION

The findings of guilty are AFFIRMED. Only so much of the sentence extending to a dismissal, confinement for six months, and total forfeiture of all pay and allowances is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision are ordered restored.

Senior Judge BURTON and Judge HAGLER concur.

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[3] *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

[4] While we ultimately find, based on a review of the entire record, the military judge did not abuse his discretion in failing to advise appellant of the defense of mistake of fact, the *Care* inquiry was not a model for other military judges to emulate. We encourage military judges to consider advising an accused of a possible defense in situations, such as this case, where appellate litigation could result from the mere prospect of a defense.

United States v. Sirk

United States Navy-Marine Corps Court of Criminal Appeals

September 27, 2004, Decided

NMCCA 200301084

Reporter
2004 CCA LEXIS 217 *; 2004 WL 2216485

UNITED STATES v. Michael T. SIRK, Staff Sergeant (E-6), U.S. Marine Corps

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by United States v. Sirk, 2004 CAAF LEXIS 1243 (C.A.A.F., Nov. 19, 2004)

Review denied by United States v. Sirk, 2005 CAAF LEXIS 42 (C.A.A.F., Jan. 11, 2005)

Prior History: Sentence adjudged 4 April 2002. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Disposition: Affirmed.

Counsel: LT COLIN KISOR, JAGC, USNR, Appellate Defense Counsel.

Capt GLEN HINES, USMC, Appellate Government Counsel.

Judges: BEFORE: Charles Wm. DORMAN, W.L. RITTER, M.J. SUSZAN.

Opinion by: CHARLES WILLIAM DORMAN

Opinion

DORMAN, Chief Judge:

Pursuant to his pleas, the appellant was convicted by general court-martial of the following offenses: consensual sodomy, indecent acts, and indecent language -- all with the same 14-year-old female, and fraternization with the females' Marine boyfriend. The appellant's crimes violated Articles 92, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 925, and 934. The military judge sentenced the appellant to confinement for 48 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence and, except for the bad-conduct discharge, ordered the sentence executed.

The **[*2]** appellant has raised three assignments of error in his appeal before this court. He asserts that the military judge erred in advising that the appellant's mistaken belief as to the female's age was not a defense to sodomy, that the approved sentence is inappropriately severe, and that he has been denied a timely review of his conviction.

We have carefully considered the record of trial, the appellant's three assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Mistake of Fact

At trial the parties stipulated that the appellant did not know the real age of the female, and that she had told the appellant that she was 17 years old. In advising the appellant of the elements of sodomy, the military judge also informed the appellant: "It is no defense that you were ignorant or misinformed as to the true age of the child. It is the fact of the child's age and not your knowledge or belief that fixes criminal responsibility." Record at 33. The appellant argues that this advice was legally **[*3]** incorrect in light of *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003).

The appellant also argues that, since mistake of fact as to the "victim's" age in carnal knowledge is an affirmative defense, an absurd result obtains when considering the maximum punishments that may be imposed for the two different crimes of carnal knowledge and sodomy. An honest and mistaken belief as to a female's age can negate criminality with respect to carnal knowledge, yet if the same accused and the same female were to engage in sodomy during the same tryst, the accused could be sentenced to 20 years of confinement. *See* Art 120(d), UCMJ, and MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, P 51.e(2). As reasonable and well-crafted as is the appellant's argument,

and as absurd the result, that is the law. We must apply it. *See United States v. Nelson*, 53 M.J. 319, 323 (C.A.A.F. 2000)(noting that it is up to the legislative branch rather than the judicial branch of government to change the law in the area of public policy.)

We are also guided by decisions of our superior court, which we must also follow. In *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), **[*4]** the constitutionality of Article 125 was upheld. Applying *Marcum* to the facts of the case before us, there is no constitutional issue concerning the appellant's conviction for sodomy. Additionally, in *United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995) the court noted that the defense of mistake of fact concerning the victim's age "is not . . . available to . . . sodomy." *Id*. at 31. In our view however, an honest and reasonable belief as to the victim's age "may serve as a mitigating circumstance under the sentencing rules." *Id*. at 32.

Sentence Appropriateness

In determining the appropriateness of a sentence we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the character of the offender." *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Without question this requires a balancing of the offense against the character of the offender. We have **[*5]** conducted that balancing in this case. We are cognizant of the appellant's honorable and lengthy service, as reflected by the evidence presented during the sentencing phase of his court-martial -- to include four separate awards of the Good-Conduct Medal, and noteworthy fitness reports. We are also cognizant of the criminal activities he engaged in, activities which were not only morally repugnant, but in which he also used his position as a Marine Staff Noncommissioned Officer to commit. Balancing all these factors, we conclude that the approved sentence is appropriate for this offender in light of his very serious offenses.

Speedy Review

In his third assignment of error, the appellant seeks relief based solely upon the length of time from the date of trial until review is completed before this court. Assuming the appellant is accurate with his count in days of delay as of 31 March 2004, as of 31 August 2004 it has been 890 days since the appellant's court-martial. Under the facts of this case, we decline to grant relief based upon this length of delay. We have been presented with no evidence that the appellant requested the convening authority to take a speedier action. Additionally, **[*6]** the appellant has made no attempt to demonstrate any prejudice as a result of this delay. *See generally United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). Furthermore, where we have thoroughly reviewed the appellant's conviction while he is still confined, and having found no errors materially prejudicial to his substantial rights, to grant relief on delay alone would be granting a windfall.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge RITTER and Judge SUSZAN concur.

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United States v. Vega

United States Army Court of Criminal Appeals

June 8, 2020, Decided

ARMY 20190009

Reporter
2020 CCA LEXIS 206 *

UNITED STATES, Appellee v. Private E1 JUSTIN R. VEGA, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by United States v. Vega, 2020 CAAF LEXIS 731 (C.A.A.F., July 29, 2020)

Motion denied by, As moot United States v. Vega, 80 M.J. 332, 2020 CAAF LEXIS 505, 2020 WL 5939879 (C.A.A.F., Sept. 2, 2020)

Review denied by United States v. Vega, 80 M.J. 331, 2020 CAAF LEXIS 501 (C.A.A.F., Sept. 2, 2020)

Related proceeding at United States v. Brooks, 2020 CCA LEXIS 394, 2020 WL 6375853 (A.C.C.A., Oct. 29, 2020)

Prior History: [*1] Headquarters, 8th Theater Sustainment Command Kenneth W. Shahan and Lanny J. Acosta, Jr., Military Judges. Lieutenant Colonel Ryan B. Dowdy, Staff Judge Advocate.

Counsel: For Appellant: Captain Rachele A. Adkins, JA; William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Jonathan S. Reiner, JA; Captain R. Tristan C. De Vega, JA (on brief).

Judges: Before KRIMBILL, BROOKHART, and LEVIN[1] Appellate Military Judges. Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

Opinion by: LEVIN

Opinion

MEMORANDUM OPINION

LEVIN, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of making a false official statement, one specification of wrongful use of a controlled substance, one specification of rape of a child, two specifications of sexual assault of a child, and one specification of adultery, in violation of Articles 107, 112a, 120b, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, 920b, and 934 [UCMJ].[2] The convening authority approved the adjudged sentence of a dishonorable discharge and confinement for twelve years.

On appeal, appellant raises two assignments of error. First, appellant **[*2]** argues that the evidence is legally and factually insufficient to sustain findings of guilty for rape of a child, sexual assault of a child, and adultery. Second, appellant claims his sentence is inappropriately severe. For the reasons that follow, we disagree.

BACKGROUND

At the time of appellant's crimes, KB was a fifteen-year-old girl. On 20 April 2017, KB, a troubled teenager who had run away from home the previous day, went to a McDonald's restaurant, where she met appellant for the first time. While in the parking lot, appellant introduced KB to his friend, Private (PVT) Donovan Brooks.[3] The three of them discussed a number of matters, including the fact that KB had run away from home and had neither showered nor eaten recently. Appellant, who was married, gave KB $20.00 for food, supplied her with vodka, and asked KB her age and whether she had a boyfriend. Among other things, KB responded that she was sixteen years old. Hungry, tired, and dirty, KB accepted appellant's invitation to go to his barracks to shower and spend the night.

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[1] Judge Levin participated in this case while on active duty.

[2] The military judge acquitted appellant of rape of a child in Specification 3 of Charge I, but convicted him of the lesser included offense of sexual assault of a child.

[3] Private Brooks was prosecuted separately. *See United States v. Brooks*, ARMY 20180567 (appeal pending before this court).

The two service members drove KB to appellant's barracks. In order to enter post, appellant told KB, who had no identification, **[*3]** to hide in the car. The plan worked and once on post, appellant again hid KB's presence by leading her through a side entrance to his barracks and directly to his room, where, after KB showered, the two engaged in sexual intercourse.

Shortly thereafter, appellant contacted PVT Brooks and told him to bring the bottle of vodka that they shared at McDonald's earlier that evening to his room. Private Brooks did so, and the three of them passed the bottle of vodka around and drank it until the bottle was empty.

According to her testimony, the next thing KB remembered was waking to appellant having vaginal sex with her. Appellant was on top of KB, pinning her hands and legs down, while vaginally penetrating her in a painful and more aggressive manner than in their previous sexual encounter. KB cried as she told appellant to stop at least three times. He did not.

While appellant continued to penetrate KB vaginally, PVT Brooks positioned KB's head so that she could simultaneously fellate him. According to her testimony, KB could not move because appellant placed his weight upon her and had pinned her hands and legs down, nor could she say anything because PVT Brooks had placed his penis in her **[*4]** mouth. Eventually, KB stopped resisting, even as appellant and PVT Brooks switched positions so that PVT Brooks vaginally penetrated KB while appellant forced his penis into her mouth.

By approximately 0400 hours, PVT Brooks had departed the barracks room and KB used appellant's phone to call a friend. When the friend did not answer, appellant arranged for a Lyft to return KB to the McDonald's parking lot where they had met.

On 22 April 2017, KB returned to her parents' home, where she appeared withdrawn and in pain. KB eventually disclosed the attack and was taken to the hospital. While there, KB complained of genital pain, burning during urination, vaginal discharge, leaking urine, and knee and ankle pain. The examination results were consistent with vaginal penetration, and the treating physician observed that KB walked with an altered gait and guarded her knee, indicating additional nongenital injuries. The results from a vaginal swab corroborated the presence of appellant's DNA in KB's vagina.

During the investigation that followed KB's visit to the hospital, appellant told law enforcement officials that he had not engaged in vaginal intercourse with KB. At trial, appellant admitted **[*5]** that he had previously lied to authorities, and that he in fact had engaged in vaginal intercourse with KB.

LAW AND DISCUSSION

Sufficiency of the Evidence

Appellant asserts his convictions for rape of a child, sexual assault of a child, and adultery are legally and factually insufficient. We address each in turn.

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. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[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). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" we are "convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Article 66(d)(1), UCMJ, provides that this court may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." When exercising this authority, this court does not give deference to the decisions of the trial **[*6]** court (such as a finding of guilty). *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (A court of criminal appeals gives "no deference to the decision of the trial court" except for the "admonition . . . to take into account the fact that the trial court saw and heard the witnesses."). "We note the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), *aff'd on other grounds*, 76 M.J. 224 (C.A.A.F. 2017).

We first address appellant's conviction for forcible child rape. The elements of forcible child rape are:

> [1] That the accused committed a sexual act upon a child causing penetration, however slight, by the penis of the vulva or anus or mouth; and
>
> [2] That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

[3] That the accused did so by using force against that child or any other person.

Manual for Courts-Martial, United States (2016 ed.)[*MCM*], pt. IV, ¶ 45b.b.(1)(b).

Force is "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child." *MCM*, pt. IV, ¶ 45b.a.(h)(2). Appellant argues that the government failed to **[*7]** prove the third element beyond a reasonable doubt. We disagree.

At the outset, and after assessing the credibility of the witness, we credit KB's version of events. *See United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127, at *11 (Army Ct. Crim. App. 29 Feb. 2016) (mem. op.) ("The deference given to the trial court's ability to see and hear the witnesses and evidence—or 'recogni[tion]' as phrased in Article 66, UCMJ—reflects an appreciation that much is lost when the testimony of live witnesses is converted into the plain text of a trial transcript."). KB's testimony was supported by the testimony of others, to whom she had made fresh complaints. KB's testimony was further corroborated by the forensic examination that revealed evidence of physical injuries. Appellant's prior false statements to law enforcement also support the government's theory. *See United States v. Lloyd*, ARMY 9801781, 2000 CCA LEXIS 365, at *16 (Army Ct. Crim. App. 24 Oct. 2000) (mem. op.) (finding that a testifying "appellant's credibility was severely undermined by his lies and omissions to [law enforcement]," which included lying about aspects of what occurred and omitting important details, and then averring to the truth of his in-court testimony); *see also United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) ("But one risk of testifying, recognized long ago, is that the trier of **[*8]** fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt in connection with all the other circumstances of the case.") (citation and internal quotation marks omitted). Considering KB's testimony, along with the evidence corroborating her testimony, we find that the evidence at trial is both legally and factually sufficient to support the military judge's finding of guilty as to rape of a child.

Next, we address appellant's argument that the evidence is legally and factually insufficient to support the findings of guilty to two specifications of child sexual assault. Specifically, whether appellant had a reasonable and honest mistake of fact that KB was 16 years old.

The elements of child sexual assault are:

[1] That the accused committed a sexual act upon a child by causing contact between penis and vulva or anus or mouth; and

[2] That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

MCM, pt. IV, ¶ 45b.b.(3)(a).

A mistake of fact regarding a child victim's age is a defense to a charge of child sexual assault. Rule for Courts-Martial [R.C.M.] 916(j)(2). The accused must prove by a preponderance **[*9]** of evidence that he held a reasonable belief that the child victim "had attained the age of 16 years." UCMJ art. 120b(d)(2); R.C.M. 916(j)(2). The mistake of fact must be both reasonable and honest. *United States v. Zachary*, 61 M.J. 813, 825 (Army Ct. Crim. App. 2005).

A threshold requirement for an accused to avail himself of the defense of mistake of fact as to age is that the accused reasonably believed that the child had attained the age of 16 years. R.C.M. 916(j)(2); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-45b-2, note 3 (10 Sep. 2014) [Benchbook]. The mistake or ignorance must be "reasonable under all circumstances," and "based on information, or lack of it, which would indicate to a reasonable person that [the victim] was at least 16 years old." Benchbook, para. 3-45b-2, note 3. Further, the ignorance or mistake could "not be based on the negligent failure to discover true facts." Benchbook, para. 3-45b-2, note 3. In other words, one cannot unreasonably decline to find out his sexual prey or partner's age and then avoid liability by simply claiming, "I didn't know."

We find that appellant held neither an honest nor reasonable belief that KB was 16 years old. When questioned by law enforcement, appellant denied knowing KB's age at all. Thus, **[*10]** as the government points out in its brief, to the extent that KB said she was 16 years old, appellant did not appear to retain that information and did not act in reliance on it. Considering all of the evidence, as well as appellant's reasonable mistake of fact as to age argument, we find appellant's convictions for sexual assault of a child both legally and factually sufficient.

Finally, we address appellant's claim that the evidence was legally and factually insufficient to convict him of adultery. Specifically, whether his conduct was service discrediting.

The elements of adultery are:

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline

> in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 62.b.

The *MCM* provides guidance concerning the third element:

> To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. . . . Discredit means **[*11]** to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances . . . when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces.

MCM, pt. IV, ¶ 62.c.(2).

There is no requirement that the government show actual damage to the reputation of the military. *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994) (holding that in context of Article 133, UCMJ, prosecution need not prove actual damage to the reputation of the military). Rather, the test is whether appellant's offense had a "tendency" to bring discredit upon the service. *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003); *Hartwig*, 39 M.J. at 130.

The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable **[*12]** doubt that appellant's conduct would tend to bring the service into disrepute if it were known. *See Saunders*, 59. M.J. at 11. "In general, the government is not required to present evidence that anyone witnessed or became aware of the conduct. Nor is the government required to specifically articulate how the conduct is service discrediting. Rather, the government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

In conducting the service discrediting analysis, our Superior Court noted:

> Whether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which [a]ppellant's conduct is known to others. The trier of fact must consider all the circumstances, but such facts—including the fact that the conduct may have been wholly private—do not mandate a particular result unless no rational trier of fact could conclude that the conduct was of a 'nature' to bring discredit upon the armed forces.

Id.

As the government correctly described in its brief, appellant, a married soldier, **[*13]** preyed upon an underage runaway, snuck her onto a military installation, avoided the Charge of Quarters desk, and plied her with alcohol before having sex with her in an Army barracks with another soldier. Private Brooks' presence during appellant's adulterous conduct alone establishes the service discrediting nature of appellant's misconduct. *See United States v. Berry*, 6 U.S.C.M.A. 609, 20 C.M.R. 325, 330 (1956) (noting that adultery "is 'open and notorious,' flagrant, and discrediting to the military service when the participants know that a third person is present"). The fact that this sexual conduct amounted to rape only further denigrates the service.

Based upon the evidence, we find that a rational trier of fact could reason that appellant's adulterous conduct would have "a tendency ... to bring the service into disrepute or ... lower it in public esteem." *MCM*, pt. IV, ¶ 62.c.(2). Thus, a reasonable factfinder could have found all the essential elements of adultery beyond a reasonable doubt, making the evidence legally sufficient. Furthermore, after our independent review of the record and making allowances for not personally observing the witnesses, we are ourselves convinced beyond a reasonable doubt of appellant's guilt.

Sentence Appropriateness ***[*14]***

Appellant asserts that his sentence of twelve years confinement and a dishonorable discharge is inappropriately severe and warrants relief under Article 66(d), UCMJ. We disagree that the sentence is inappropriately severe.

This court reviews sentence appropriateness de novo. *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." UCMJ art. 66(d)(1). "When we conduct a sentence appropriateness review, we review many factors to include: the sentence severity; the

entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017). This court has a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146-48 (C.A.A.F. 2010).

Appellant faced a maximum punishment that included life without the possibility of parole for the child rape conviction. He faced an additional thirty-seven years for the remaining charges. At sentencing, the government asked for twenty years **[*15]** of confinement, while appellant's counsel requested no more than eight and one-half years. The adjudged sentence included confinement for a fraction of the maximum term allowable and was far less than that which was requested by the government.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, appellant's record of service, the record of trial, and other matters presented by appellant in extenuation and mitigation. Finally, we note that Article 66(d), UCMJ, requires us to take into account that the trial court saw and heard the evidence. Given all the circumstances in this case, the adjudged sentence was not outside the range of an appropriate sentence. We hold that the adjudged and approved sentence, to include the characterization of discharge, is not inappropriately severe.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are correct in law and fact. Accordingly, the findings and the sentence are AFFIRMED.

Chief Judge KRIMBILL and Senior Judge BROOKHART concur.

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