UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JUSTIN P. GRANT
United States Air Force

ACM 37898

05 February 2013

Sentence adjudged 14 February 2011 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Martin T. Mitchell (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, consistent with his pleas, of wrongfully attempting to sexually exploit a child, in violation of 18 U.S.C. § 2251, as well as communicating indecent language and wrongfully endeavoring to impede an investigation, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the specifications of communicating indecent language and wrongfully endeavoring to

impede an investigation fail to state an offense because they omit the required terminal element for Article 134, UCMJ, offenses. Finding no error that materially prejudices the appellant, we affirm.

Sufficiency of the Article 134, UCMJ, Specification

Sometime between May and July 2009, the appellant and another Airman met a 14-year-old girl at a store in Great Falls, Montana. After learning her age, the appellant, then 20 years old, procured her cellular phone number. About a week later, he sent her a text message using sexually explicit language and asked the 14-year-old to send him sexually explicit photographs of herself through the cellular phone service. She did not comply with his request.

As part of their investigation into the appellant, agents from the Air Force Office of Special Investigations (AFOSI) arranged to interview the other Airman who had been with the appellant when he met the 14-year-old girl. When he contacted the appellant in advance of the interview, the appellant advised the other Airman to tell the agents the 14-year-old girl had told them she was 18 years old.

For this conduct, the appellant was charged with communicating indecent language to the 14-year-old girl and wrongfully endeavoring to impede AFOSI's investigation of him by instructing the other Airman to lie. Both specifications omitted the terminal element for Article 134, UCMJ, offenses, which the appellant alleges is error.

Whether a charged specification states an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). The failure to allege the terminal element of an Article 134, UCMJ, offense is error. *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). In the context of a guilty plea, such an error is not prejudicial when the military judge correctly advises the appellant of all the elements and the plea inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *Id*. at 34-36.

During the plea inquiry in the present case, the military judge advised the appellant of each element of the Article 134, UCMJ, offenses at issue, including the terminal element. The military judge defined the terms "conduct prejudicial to good order and discipline" and "service discrediting" for the appellant. The appellant explained to the military judge how his misconduct met both elements, given the subject matter of the conversations and his involvement of another military member. Therefore, as in *Ballan*, the appellant here suffered no prejudice to a substantial right, because he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal element of Article 134, UCMJ.

Conclusion

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[*] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).