UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

HUGO I. VALENTIN
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

NMCCA 201000683
GENERAL COURT-MARTIAL

Sentence Adjudged: 15 April 2010.
Military Judge: LtCol Michael Mori, USMC.
Convening Authority: Commanding General, 3d Marine Logistics Group, Marine Corps Base Hawaii, Kaneohe Bay, HI.
Staff Judge Advocate's Recommendation: LtCol J.J. Murphy, USMC.
For Appellant: Mr. William Cassara, Esq., LT Kevin Quencer, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC.

31 January 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

On 17 May 2012, we issued an opinion in this case setting aside the finding of guilty as to one of the specifications of rape of a child, but affirming the lesser included offense of aggravated sexual assault of a child and the remaining findings of guilty, reassessing the sentence to confinement for 13 years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. *United States v.*

Valentin, No. 201000683, 2012 CCA LEXIS 180, unpublished op. (N.M.Ct.Crim.App. 17 May 2012). On 14 September 2012, the Court of Appeals for the Armed Forces (C.A.A.F.) reversed our decision as to the Article 134 offenses (indecent acts with a child) and as to the sentence; affirmed our decision in all other respects; and returned the record of trial to the Judge Advocate General of the Navy for remand to us for further consideration in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). *United States v. Valentin*, 71 M.J. 400 (C.A.A.F. 2012). Consequently, the appellant's case is again before us for review and the sole issue is whether the appellant suffered material prejudice to a substantial right due to the Government's failure to plead the terminal element for the Article 134 offenses. A summary of the facts of the case is included in our earlier opinion.

After reviewing the record in its entirety, under the totality of the circumstances, we find that the Government's error in failing to plead the terminal element of Article 134 did not result in material prejudice to the appellant's substantial, constitutional right to notice, as the evidence was essentially overwhelming and uncontroverted.

Discussion

The appellant's offenses of indecent acts with a child were charged under Article 134, UCMJ, and the two specifications thereunder fail to allege the terminal element that the conduct was prejudicial to good order and discipline or service-discrediting. Pursuant to *Humphries*, citing *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), it is error to omit the terminal element. However, "[t[he existence of error alone does not dictate that relief in the form of a dismissal is available." *Humphries*, 71 M.J. at 212. Rather, whether dismissal is warranted "will depend on whether there is plain error . . . ." *Id.* at 213 (citations and footnote omitted). The appellant has the burden of demonstrating that (1) there was error, (2) that the error was plain or obvious and (3) the error materially prejudiced a substantial right. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). The appellant has failed to demonstrate that the error materially prejudiced a substantial right.

Harmless Error Analysis under *Humphries*

In *Humphries*, C.A.A.F. noted that the issue was "whether [the appellant] was prejudiced by the Government's failure to allege the terminal element of an Article 134, UCMJ, charge . . . ." *Humphries*, 71 M.J. at 216 n.8. The court explained that there were two circumstances under which an appellant would not be prejudiced by a lack of notice: 1) where "notice of the missing element is somewhere extant in the trial record," or 2) where "the element is "'essentially uncontroverted'." *Id.* at 215-16 (citing *United States v. Cotton,* 535 U.S. 625, 633 (2002) and *Johnson v. United States*, 520 U.S. 461, 470 (1997)). The logic of this rule is compelling. With respect to the first circumstance, if there is evidence in the record establishing that an appellant either already knew of the missing element, whether through some pre-existing knowledge or because the appellant was otherwise informed about the missing element through some medium other than the charge sheet, then the Government's failure to include the element on the charge sheet could not have prejudiced the appellant. *See United States v. Liboro*, 10 F.3d 861, 864 (D.C. Cir. 1993) (finding harmless the district court's failure to provide the required notice under Federal Rule of Criminal Procedure 11 when the appellant "was sufficiently apprised of the charges and comprehended them" as a result of the prosecution's statements during the plea proceeding); *see also United States v. Carr*, 303 F.3d 539, 544 (4th Cir. 2002) (finding pretrial brief filed by defense counsel clearly showed notice of element missing from indictment).

The second circumstance in which an appellant is not prejudiced by the Government's failure to provide adequate notice is when the evidence against the appellant with respect to the missing element was "essentially uncontroverted." *Humphries*, 71 M.J. at 216. The "essentially uncontroverted" test was defined in *Neder v. United States*, 527 U.S. 1 (1999), a case cited in *Humphries.* 71 M.J. at 212. In *Neder*, the Supreme Court held that "[w]here . . . a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, *such that the jury verdict would have been the same absent the error*, the erroneous instruction is properly found to be harmless." *Id.* at 17 (emphasis added). *See e.g. United States v. Gomez*, 580 F.3d 94 (2d Cir. 2009) (holding that "to sustain the conviction [based on overwhelming and essentially uncontroverted evidence, the court] must find that the jury would have returned the same verdict beyond a reasonable doubt.").

Before turning to the question of whether the evidence regarding the terminal element in this case was "essentially

uncontroverted" so as to render the lack of notice harmless, it is important to note that we recognize that it is constitutionally impermissible for us to consider any conduct as "per se" or "conclusively" service discrediting or prejudicial to good order and disciple. *United States v. Phillips*, 70 M.J. 161, 164-65 (C.A.A.F. 2011). Rather, instead of simply focusing on the act or acts pled and proven as the first element of the Article 134, UCMJ offense, we must base our determination "upon all the facts and circumstances" surrounding the offenses. *Id.* at 165. With this standard in mind, we turn now to an examination of the evidence in this case.

Overwhelming and Essentially Uncontroverted Evidence

Although the first element in the two Article 134 offenses (indecent acts with a child) – whether the accused committed the acts in question - was contested in the case at bar, we find that the evidence with respect to the second element – whether those acts were prejudicial to good order and discipline or of a nature to be service discrediting – was both overwhelming and essentially uncontroverted. We now look at the evidence pertaining to each theory of liability separately.

First, the evidence was overwhelming and essentially uncontroverted that the appellant's actions in molesting his step-daughter were of a nature to bring discredit upon the armed forces. The appellant was married to the victim's mother, IE, an active duty Gunnery Sergeant (GySgt) of Marines. Shortly after their marriage ceremony, GySgt IE was ordered to deploy to Iraq. While GySGT IE was on deployment, the victim and her younger brother lived with the appellant in Hawaii. Weeks after GySgt IE deployed, and days after the victim's 14th birthday, the appellant started touching the victim's breasts, buttocks, and vagina. The victim attempted to prevent the molestation a number of different ways, to include locking her bedroom door, having her little brother sleep with her, and not washing her hair for an extended period of time an effort to make herself less attractive to the appellant. None of these measures stopped the sexual abuse, which continued even after her mother return from the combat zone. Once the appellant's actions came to light, civilian authorities began an investigation into the appellant's misconduct. As a result, the appellant was incarcerated in a local jail for a period of time. Moreover, the fact the appellant molested his step-daughter became known at the victim's local high school and she suffered from embarrassing teasing and name-calling at the hands of her school mates. Applying these facts to the standard set forth in *Neder,*

whether the evidence was so overwhelming "that the jury verdict would have been the same absent the error," we find that no evidence was presented, nor was there any evidence that could have been presented, such that a reasonable panel member could have found, under the totality of the circumstances, that the appellant's actions were anything other than service discrediting. Accordingly, we find that the appellant was not prejudiced by the Government's failure to provide notice of the terminal element, thus rending that error harmless.

We also find the evidence was overwhelming and essentially uncontroverted that the appellant's actions in molesting his step-daughter were prejudicial to good order and discipline. In addition to the facts set forth above, the evidence at trial showed that the molestation came to light when GySgt IE discovered the appellant in bed with her daughter, with her daughter's pants pulled down.[1] Her daughter immediately began crying and GySgt IE started arguing with and beating the appellant. At one point GySgt IE called 911 and then hung up because she wanted to keep beating the appellant. GySgt IE then retrieved a gun from the top of a cabinet and tried to shoot the appellant, but the gun was unloaded. When the appellant tried to leave the residence, GySgt IE pinned him down with a bar stool and beat him with it. Once the police arrived at the residence, GySgt IE called her supervisor, GySgt MC, in the

[1] The appellant's sexual molestation of the victim in this case occurred between on or about 16 April 2007 and 5 January 2008. Due to signification changes in the law governing sexual assault effective on 1 October 2007, the appellant's various acts of penetrating the victim's genital opening with his finger, and touching her breasts and buttocks with his hand, were charged under two different UCMJ articles. Acts that occurred before 1 October 2007 were charged under Article 134, while similar acts that occurred on or after 1 October 2007 were properly charged under Article 120. Accordingly, any molestation that occurred immediately prior to GySgt IE discovering the appellant with her daughter on 5 January 2008 could only have been charged under Article 120. Nonetheless, we find that GySgt's IE's reactions that evening, nearly all of which clearly evidence a direct and palpable effect on good order in discipline, were the result of the appellant having sexually molesting her daughter, to include the touching charged under Article 134. Thus her reactions that night are properly considered when weighing the evidence regarding prejudice to good order and discipline. However, even assuming *arguendo* that the events of 5 January 2008 should not be considered on the issue of prejudice to good order and discipline regarding the Article 134 offenses, we still find overwhelming and essentially uncontroverted evidence with respect to that element. We base this finding on the totality of the circumstances, with particular emphasis on the fact that the entire molestation, not just the events in January, started a chain of events that caused GySgt IE to leave her command in Hawaii after only one year, and move back to the continental United States two years ahead of schedule.

middle of the night to tell her what had happened. GySgt MC then came to GySgt IE's home and sat with her during police questioning, and eventually drove GySgt IE to the hospital so that the victim could undergo a sexual assault examination. After the abuse became known at the victim's high school, the Marine Corps moved GySgt IE from Hawaii back to the continental United States two years ahead of her regularly scheduled date to execute permanent change of station orders. Applying these facts to the standard set forth in *Neder,* we conclude that the evidence overwhelmingly demonstrated that the appellant's conduct was prejudicial to good order and discipline. Accordingly, we find that the appellant was not prejudiced by the Government's failure to provide notice of the terminal element, thus rending that error harmless.

Conclusion

The findings as to Specifications 1 and 2 under Charge II are affirmed. The sentence to confinement for 13 years, reduction to pay grade E-1, total forfeitures and a dishonorable discharge is again affirmed.

For the Court

R.H. TROIDL
Clerk of Court