IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Richard MCDARMONT, Jr.
Chief Electronics Technician (E-7), U.S. Navy

NMCCA 200102183 Decided 11 January 2005

Sentence adjudged 4 June 2001. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Navy Supply Corps School, Athens, GA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
CAPT FREDERIC MATTHEWS, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REDCLIFF, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempting to communicate indecent language to a child under the age of 16 and violating a lawful general regulation, in violation of Articles 80 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 892. The appellant was sentenced to confinement for 4 months and a bad-conduct discharge.

We have carefully considered the record of trial and the appellant's two assignments of error that certain language he used was not indecent and that the military judge acted improperly in questioning defense sentencing witnesses. We have also considered the Government’s response. After careful reflection, we conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Facts

During work hours, the appellant, a Navy Chief Petty Officer with nearly 20 years of active duty service, used his government computer to access and download adult pornography on numerous occasions from May 1997 through December 1999. He also used his government computer to enter Internet chat rooms to sexually proposition "Katrina" on numerous occasions over most of that two and one-half year period. In several on-line conversations, the appellant was told by Katrina that she was 14 years old, and by November 1999, near the end of their conversations, that she was age 15. On at least one occasion, the appellant telephoned Katrina and spoke to a person he thought was her father. Despite knowing about Katrina's purported age, the appellant repeatedly asked Katrina to tell him what she was wearing, to touch her genitals, and to send him photos.

Unbeknownst to the appellant, Katrina was actually a vice detective from Florida posing as a 14-15 year old female. This detective monitored Internet chat rooms, including those sites visited by the appellant entitled "Dad and daughter sex," "girls and older men," and "family sex." During the course of their extensive conversations, the appellant engaged in sexually explicit banter and sexually specific propositions that subsequently formed the basis for the attempted indecent language offense of which he was convicted.

Providence of the Guilty Plea

In his assignment of error, the appellant claims portions of the statements he made to Katrina were not indecent because they were not grossly offensive to modesty, decency, or propriety. Thus, he asserts that certain language should be stricken from the Specification of the Additional Charge. Appellant's Brief of 9 Sep 2003 at 4. We view this asserted error as challenging the providence of the appellant's guilty plea rather than the legal insufficiency of his conviction. As explained below, we find no merit in the appellant's contentions.

The now challenged statements made by the appellant to Katrina and their context follows:

1. "Would you act like my daughter?" (A statement preceded by, and followed by, statements that the appellant liked to look at his 13-year-old daughter's genitals, that he would like to "do her", and that he once masturbated in front of her. Prosecution Exhibit 4 at 10-11.

2. "Oh I am dying to meet you!" (A statement preceded by comments regarding various sexual acts the appellant would like to commit with Katrina, followed by different suggestions as to how they could meet for sex.) Prosecution Exhibit 4 at 8-13.

We begin our analysis by noting that the military judge properly advised the appellant of the definition of "indecent language" during the providence inquiry, as follows:

> MJ: "Indecent language" is one that is grossly offensive to the community's sense of modesty, decency or propriety, shocks the moral sense of community because of its vulgar, filthy or disgusting nature or its tendency to insight [sic] lustful thought. Language is indecent if it tends reasonabl[y] to corrupt the morals or incite libid[in]ous thoughts that is [sic] *lewd, lustful or salac[]ious connotations either expressly or by implication under the circumstances under which it is spoken*. The *test is* whether or not the particular language employed is calculated to corrupt the morals or incite libidinous thoughts and *not whether the words themselves are impure*.

Record at 25, emphasis added. The appellant expressly acknowledged that he understood the pertinent definitions. *Id*. And in response to a subsequent inquiry by the military judge, the appellant further acknowledged that his language was indecent:

> MJ: Any doubt in your mind as you review the language set out . . . that such language under the circumstances was indecent?"
>
> ACC: No doubt.

Record at 29.

A providence inquiry must sufficiently establish a factual basis for the appellant's plea of guilty to the specification. *See United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The elements of indecent language under Article 134, UCMJ, are:

> 1. That the accused orally or in writing communicated to another person certain language;
> 2. That such language was indecent; 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.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 89b. The Manual defines indecent language as:

> that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting

> nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

Id. at ¶ 89c.

To find a plea of guilty improvident, this Court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ; *see United States v. Mease*, 57 M.J. 686, 687 (N.M.Ct.Crim.App. 2002). "Such a conclusion 'must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty.'" *Id.* (quoting *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim. App.1999)). Our standard of review is not whether the appellant might have challenged the indecency of his language at trial. Rather, "[r]ejection of a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea." *United States v. Fisher,* 58 M.J. 300, 303 (C.A.A.F. 2003)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002), and *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Here, we find no such basis. We further find that the appellant's guilty plea to attempted communication of indecent language is provident under the circumstances of this case.

Impartiality of the Military Judge

The appellant also asserts that the military judge abandoned his impartial role by badgering two defense sentencing witnesses and by asking improper questions of these witnesses.

During the presentencing hearing, the appellant called an active duty Navy Chief Petty Officer, Chief "G" and a retired Navy E-9, Master Chief "C." After a lengthy direct examination and cross-examination, the military judge asked each witness a series of questions related to the witness's knowledge of the extent and timeframe of the appellant's misconduct. The military judge then launched into questions related to the offenses of which the appellant had been convicted to determine whether the witnesses's initial assessment of the appellant stood firm.

We begin our analysis of this assigned error by noting that the appellant did not object to the military judge's questions at trial. Consequently, the appellant forfeited this potential error absent plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Under plain error analysis, the appellant must demonstrate (1) there was an error; (2) it was plain, clear or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); *see* Art. 59(a), UCMJ. He has failed to do so here.

A military judge has wide latitude to ask questions of witnesses. *United States v.* Acosta, 49 M.J. 14, 17 (C.A.A.F. 1998). This latitude, however, is not without limitation, for while a military judge is permitted to "ask questions in order to clear up uncertainties in the evidence or to develop the facts further," a military judge may not abandon his impartial role or conduct questioning in a manner that may appear partisan with respect to one party. *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995); *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987). The test on appeal is whether, taken as a whole in the context of the trial, impartiality was put into doubt by the military judge's questions. *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000). A military judge is not just a "referee" in the case and "properly may participate actively in the proceedings." *Ramos*, 42 M.J. at 396. Additionally, military judges are strongly presumed to be impartial, particularly as to their actions taken during trial. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). Lastly, failure of the defense to challenge the impartiality of a military judge at trial "may permit an inference that the defense believed the military judge remained impartial." *Burton,* 52 M.J. 226 (*citing United States v. Hill,* 45 M.J. 245, 249 C.A.A.F. 1996)).

Under the circumstances of this case, we conclude that the appellant has failed to overcome the presumption of impartiality. Our review of the record of trial leads us to conclude that the military judge asked appropriate aggravation questions related to the witnesses's knowledge concerning the appellant's misconduct as that misconduct bore directly on the witnesses's assessment of the appellant's rehabilitative potential. Such questions would have been clearly admissible and appropriate "to develop the facts further" if court members were the sentencing authority and had not been exposed to the providence inquiry. We further conclude, therefore, that taken as a whole, in the context of this trial, the military judge's questions to the witnesses did not put into doubt his impartiality. There was no prejudice to the appellant's substantial rights.

Moreover, even assuming the military judge erred in asking these questions, we find that the error did not materially prejudice a substantial right of the appellant. Both defense witnesses, senior enlisted personnel with extensive service and experience, were undeterred from expressing their opinions by the military judge's questions. Further, the military judge elicited no information that was not already available to him as the sentencing authority. And as the sentencing authority, the military judge awarded the appellant a relatively lenient sentence, one well below the statutorily authorized maximum punishment urged by the trial counsel. As such, any potential error was harmless.

Considering the entire court-martial from the perspective of a reasonable person, we conclude that the military judge did not put the court-martial's "legality, fairness, and impartiality"

into doubt by his questions. *Ramos*, 42 M.J. at 396 (quoting *Reynolds*, 24 M.J. at 265). Thus, we find no merit in this assignment of error.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court