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

BEFORE

C.A. PRICE **R.W. REDCLIFF** **A. DIAZ**

UNITED STATES

v.

Daniel W. REEDER
Personnelman First Class (E-6), U.S. Navy

NMCCA 9800702 Decided 30 June 2005

Sentence adjudged 27 April 2000. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Amphibious Group Three, Naval Station, San Diego, CA.

LT THOMAS P. BELSKY, JAGC, USNR, Appellate Defense Counsel
LT DEBORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

DIAZ, Judge:

The appellant was tried by a special court-martial composed of officer and enlisted members. Contrary to his plea, the appellant was convicted of wrongful possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C § 934, and 18 U.S.C. § 2252. The members sentenced the appellant to confinement for three months, forfeiture of $670.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority disapproved the adjudged confinement, reduced the adjudged forfeitures to $600.00 pay per month for three months[1], but otherwise approved the remainder of the sentence.

This case is before us a second time. On 15 October 1999, we set aside the appellant's guilty pleas entered on two specifications alleging receipt and possession of child

[1] The convening authority's action contains a scrivener's error in that it states that "only so much of the sentence as provides for $600.00 pay per month for three months . . . is approved . . ." without specifically mentioning that this modification applies to the adjudged forfeitures. The Court will correct this error in its decretal paragraph.

pornography and authorized a rehearing. We concluded that the record contained a substantial basis for rejecting the appellant's pleas based on the appellant's assertion during the providence inquiry that he possessed the pornographic material at issue for "research" purposes. We determined that 18 U.S.C § 2252 is not a strict liability criminal statute, that a valid research purpose could raise a possible defense, and that the military judge failed to adequately resolve the defense before accepting the plea. *United States v. Reeder,* 1999 CCA LEXIS 274 (N.M.Ct.Crim.App. 15 October 1999).

We have carefully considered the record of trial on the rehearing, the appellant's sole assignment of error, and the Government's 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.[2] Arts. 59(a) and 66(c), UCMJ.

The appellant asserts that the military judge abused his discretion by allowing the prosecution to introduce certain statements made by the appellant to a shipmate wherein he expressed a sexual attraction toward minor females. The appellant does not argue that the statements were *per se* inadmissible, rather, he complains that the military judge failed to hold the trial counsel accountable for failing to give the appellant timely notice under MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). We conclude that the appellant is not entitled to relief.

MIL. R. EVID. 404(b) prohibits the introduction of other "crimes, wrongs, or acts," as proof of character in order to show the accused's propensity to commit the charged offense, but it does allow the use of such evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" To be admissible, evidence of uncharged misconduct must: (1) reasonably support a finding that an accused committed prior crimes, wrongs, or acts; (2) make a fact of consequence more or less probable; and (3) possess probative value that is not substantially outweighed by its danger for unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

To prevent unfair surprise to the defense, however, MIL. R. EVID. 404(b) provides that, upon request from the accused, "the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it

[2] We note that Prosecution Exhibits 33 and 34 and Appellate Exhibit XV are missing from the record. These exhibits consisted of 3.5 inch floppy disks and a CD Rom disk containing images of child pornography seized from the appellant's computer. Substituted for the missing exhibits are photographs of those exhibits. While their absence does not prevent us from discharging our duties under Articles 59(a) and 66(c), UCMJ, in this particular case, those exhibits should have been part of the record forwarded for appellate review.

intends to introduce at trial." We review a military judge's decision to excuse the required pretrial notice and admit the challenged evidence for an abuse of discretion. *See generally United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003).

In this case, it is undisputed that the defense requested notice under MIL. R. EVID. 404(b) and that the prosecution failed to comply. Our review of the record shows that this omission was unintentional. Instead, it appears that the prosecution misapprehended the scope of MIL. R. EVID. 404(b), concluding (erroneously) that because the statements were not crimes or wrongs, they fell outside the rubric of the rule. As the military judge correctly pointed out, however, that conclusion was incorrect because at least one of the appellant's statements could be considered indecent language under Article 134, UCMJ. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2000 ed.), Part IV, ¶ 89.[3] Additionally, it appears that the plain language of MIL. R. EVID. 404(b) encompasses even innocuous acts or statements of character, if they are being tendered for the purposes set forth in the text of the rule.

Despite the prosecution's failure to give proper notice, we conclude (as did the military judge) that the appellant had actual advance notice of the existence of the disputed statements. In response to a defense request for discovery, the prosecution provided (at least one month before trial) copies of witness statements, which contained the contested 404(b) evidence. Thus, as the appellant's trial defense counsel candidly admitted, he was prepared to object at the prosecution's first mention of this evidence.

The appellant incorrectly asserts that the military judge failed to make an express finding of "good cause" sufficient to excuse the requirement of pretrial notice prior to allowing the prosecution to introduce the 404(b) evidence. In response to a specific request from the trial defense counsel (Record at 284), the military judge stated that he found good cause to overrule the defense objection because the defense knew of the existence of the evidence for over a month before the trial. *Id.* We find that the military judge: (1) admitted the evidence because it tended to show the appellant's motive, intent, preparation or plan[4]; (2) found good cause to excuse the prosecution's failure to give pretrial notice because the appellant and his counsel

[3] For example, a Government witness testified that, while he and the appellant were watching a movie on board the ship, the appellant stated as to a certain female actress (believed by the witness to be 15 years old), that "she had nice t***, she had a nice a**, I'll bet she'd be a great f***." Record at 335.

[4] Motive and intent were relevant issues in this case, given that the members already had before them the appellant's pretrial statement given to investigators wherein he admitted possessing child pornography, while insisting that he did so for research purposes in conjunction with his work as a brig counselor.

were fully aware that the evidence existed; (3) considered and applied the MIL. R. EVID. 403 balancing test before admitting the evidence; and (4) gave an appropriate limiting instruction to the members regarding their use of the evidence. Accordingly, we conclude that the military judge acted well within his discretion on this evidentiary issue.[5]

We also find no merit in the appellant's claim that his defense strategy (and in particular his cross-examination of the government's witnesses) was scuttled by the lack of reasonable notice. As the Government points out, this issue first surfaced during the prosecution's opening statement, when trial defense counsel objected to the trial counsel's reference to the offending 404(b) evidence. The military judge then called an Article 39(a), UCMJ, session to consider the issue, but he reserved his ruling until the prosecution attempted to offer the evidence on the merits. Trial defense counsel did not object to the military judge's decision to defer, nor did he insist on an immediate ruling. Thus, before the appellant committed to any particular strategy, he and his counsel knew (or reasonably should have known) that the 404(b) evidence remained in play.

Moreover, by the time the military judge admitted the evidence, the Government had presented the following testimony: (1) two witnesses who observed the appellant viewing child pornography onboard his ship (which the appellant never disputed); (2) a military investigator who interrogated the appellant regarding the offense and took appellant's written statement (which also included the appellant's explanation for why he possessed child pornography); (3) an NCIS investigator who compiled the various disks seized from the appellant containing child pornography, and maintained the chain of custody over this evidence; and (4) a portion of the testimony of an FBI computer forensics agent, who analyzed the disks seized from the appellant and opined that several of the depictions included minors and that the pictures appeared to have been downloaded from the Internet. After carefully reviewing trial defense counsel's questions to these witnesses, we fail to see how prior notice of the 404(b) evidence would have altered counsel's cross-examination.

Accordingly, we decline to grant relief on the assigned error.

Conclusion

We affirm the findings as approved by the convening authority. We modify the convening authority's action on the

[5] Alternatively, we believe that this evidence was admissible under the common law theory of contradiction to rebut the appellant's "innocent purpose" defense to possessing child pornography. *See United States v. Tyndale,* 56 M.J. 209, 218-19 (C.A.A.F. 2001)(Crawford, C.J., concurring).

sentence as follows: Only so much of the sentence as provides for forfeiture of $600.00 pay per month for three months, reduction to pay grade E-1 and discharge from the Naval Service with a bad-conduct discharge is approved, and except for the bad-conduct discharge, will be executed. As modified, we affirm the approved sentence.

Senior Judge PRICE AND Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court

Judge REDCLIFF participated in the decision of this case prior to his transfer from the court.