UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JAVIER CENDEJAS
United States Air Force

ACM 34864

10 February 2004

Sentence adjudged 13 September 2001 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 54 months, forfeitures of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Matthew J. Mulbarger.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

PRATT, Chief Judge:

A general court-martial, composed of a military judge sitting alone, convicted the appellant on his mixed pleas of one specification of possession of child pornography, two specifications of communicating indecent language to a child, two specifications of attempting to communicate indecent language to a child, and one specification of using a government computer for non-official purposes, in violation of Articles 134, 80 and 92, 10 U.S.C. §§ 934, 880, 892, respectively. He was acquitted of one specification of attempted carnal knowledge, three other specifications of communicating indecent language to a child, and one specification of communicating indecent material to a child.

The military judge sentenced him to a dishonorable discharge, confinement for 54 months, forfeitures of all pay and allowances, and reduction to airman basic.

On appeal, the appellant cites nine errors for our consideration, several of which warrant discussion below. Ultimately, we resolve these issues against the appellant and affirm.

I. Background

The appellant was a 28-year-old Staff Sergeant assigned to work in the Command Post at Grand Forks Air Force Base in North Dakota. He enjoyed Internet "chatting" through the use of instant message text programs, and engaged in such chats with numerous individuals. In early August 2000, the appellant "met" a 13-year-old Canadian girl from Winnipeg, Canada in an Internet chat. Later that week, the appellant met the girl in person at 0200 hours in a park near her home in Winnipeg. Thereafter, the appellant continued to chat with the girl on the Internet from time to time. At some point, her parents learned of the chatting and contacted the Winnipeg police. The Winnipeg police, in turn, contacted the Air Force Office of Special Investigations (AFOSI) and provided transcripts of some of the chat sessions, indicating that the appellant was attempting to entice the young girl into engaging in sexual activity with him. The Winnipeg police also informed AFOSI that Canadian Customs officials had searched the appellant's car [presumably during a recent trip across the border] and had reportedly seen slips of paper indicating a date with a 17-year-old female.

Based on this information, AFOSI agents conducted a search of the appellant's government computer and discovered that the appellant had been using search profiles to find 13-to-18-year-old females in Winnipeg, Minnesota, North Dakota, Illinois, the United Kingdom and Australia. The agents also discovered three photographs of nude females on the appellant's government computer. Believing that one of the photographs was of a minor, an AFOSI agent subsequently used this information, along with other case information and evidence, to support a civilian search warrant for the appellant's off-base residence in East Grand Forks, Minnesota.

In the meantime, AFOSI agents also contacted the 13-year-old Winnipeg girl and her parents and secured their assistance in an investigation of the appellant for soliciting sex from the minor. In essence, the 13-year-old was requested to continue Internet chatting and email exchange with the appellant without disclosing that their conversations were being monitored by her parents, the AFOSI and the police. These Internet conversations continued through September 2000 and led to a planned rendezvous on 30 September 2000 at a shopping mall in Grand Forks, North Dakota. The plan called for the appellant to meet with the 13-year-old, drive her to a hotel, and engage in sex with her. Of course, at the appointed time and place, AFOSI agents appeared instead of the 13-year-old girl. They apprehended the appellant at his car,

searched the car, and then drove him to his residence. On the way there, the appellant gave written consent to a search of his residence, including his home computer, which yielded evidence of alleged child pornography and further Internet chats with various females. This evidence ultimately served as the primary basis for the charges in this case.

II. Possession of Child Pornography

In Charge II, Specification 1, the appellant was charged with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), made applicable through clause 3 of Article 134, UCMJ. In support of this Charge, the prosecution introduced 20 images recovered from the appellant's home computer as Prosecution Exhibit 6, pages 1 through 20.

At trial, the appellant moved to dismiss the specification on the grounds that the statute, 18 U.S.C. § 2252A(a)(5)(B), coupled with the definition of child pornography in 18 U.S.C. § 2256(8)(B), was unconstitutionally vague and overbroad, citing the decision of the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). Relying on the then-recent decision in *United States v. James*, 55 M.J. 297, 299 (C.A.A.F. 2001), wherein the Court of Appeals for the Armed Forces (CAAF) reached the opposite conclusion, the military judge denied the motion. After a trial on the merits, the military judge ultimately found the appellant guilty of the charged offense, entering special findings through which he specified his determination that 8 of the 20 images proffered by the prosecution constituted child pornography in violation of the statute.

Subsequent to appellant's trial, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (hereafter *Free Speech Coalition*), holding that the language of 18 U.S.C. § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of 18 U.S.C. § 2256(8)(D), sanctioning visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id.* at 256-58. Accordingly, the appellant argues that since 18 U.S.C. § 2252A(a)(5)(B) incorporates that definitional language, it too is unconstitutional and his conviction for violating that statute must be set aside. We disagree with the appellant's logic.

In *Free Speech Coalition*, the Supreme Court did not hold the statute unconstitutional in its entirety, only as it incorporated two of the four definitions contained in 18 U.S.C. § 2256(8). The Court left intact and viable the definition of child pornography proscribing the use of actual minors and reiterated that the government could constitutionally prohibit pornography involving such children. *Id.* at 240. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. § 2256(8)(A).

We must presume that the military judge properly considered the law regarding the elements of the offense of possessing child pornography. Of course, as the law existed at the time of trial in this case, that would have included all of the definitions contained in 18 U.S.C. § 2256(8). Thus, in the wake of *Free Speech Coalition*, we must conclude that it was constitutional error to consider within the definition of child pornography an image or picture that "appears to be" of a minor engaging in sexually explicit conduct (18 U.S.C. § 2256(8)(B)) or one that is "advertised, promoted, presented, described or distributed in such a manner that conveys the impression" that it contains a minor engaging in sexually explicit conduct.

The inquiry, however, does not stop there.[1] We are constrained from reversing a finding on the ground of an error, even constitutional error, unless that error "materially prejudices the substantial rights of the accused." Article 59(a), UCMJ; *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998). "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967).

The question before this Court, then, is whether the trier of fact (in this case, the military judge), in reaching the finding of guilty, may have done so in reliance on the constitutionally impermissible "appears to be" or "conveys the impression" definitions, i.e., whether those definitions "contributed to the . . . verdict." *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *overruled in part on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991).

We consider first whether the "conveys the impression" definition contained in 18 U.S.C. § 2256(8)(D) had an impact on the military judge's finding that the specified 8 images constituted child pornography. Our review of the record discloses no evidence about how these images were "advertised, promoted, presented, described, or distributed." Clearly, then, the judge's conclusions were based upon his examination of the images themselves. We find the definition in 18 U.S.C. § 2256(8)(D) did not play a part in this case. *Neder v. United States*, 527 U.S. 1, 19 (1999). Accordingly, we

[1] The appellant cites us to our superior court's summary disposition in *United States v. Thompson*, 57 M.J. 319 (C.A.A.F. 2002) and we are cognizant of other similar summary dispositions wherein CAAF has set aside findings in litigated cases in the wake of *Free Speech Coalition* and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). However, as summary dispositions, we have limited insight into the precise basis and rationale for those actions and, therefore, the extent to which they may impact similar litigated cases. We feel constrained, then, to apply harmless error analysis to the particular facts, circumstances and posture of the case before us as called for by Article 59(a), UCMJ, and the precedents of our superior courts.

conclude that any error of law in considering that definition was harmless beyond a reasonable doubt.

As to the "appears to be" definition in 18 U.S.C. § 2256(8)(B), the Supreme Court found the language overly broad because it would include "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies which did not involve any actual children in the production process. *Free Speech Coalition*, 535 U.S. at 241. The Supreme Court also took note of the Congressional findings following 18 U.S.C. § 2251 that new technology makes it possible to create realistic images of children who do not exist. *Id.* at 240. In the present case, the images in question were not Renaissance paintings or scenes from Hollywood movies involving actresses over 18 years old. Nor is there any indication in the record, or in the pictures themselves, that the images in question are "computer-generated" or "virtual" photographs.[2]

At trial, the issue of whether the pictures depicted children versus adults who "appeared to be" children was actively litigated. The defense called a computer science professor to testify about pornographic websites, age disclaimer statements contained in certain websites, and the results of his foray through sites that purported to contain adult-only models, some of whom were identified as the same females shown in several of the pictures contained in Prosecution Exhibit 6. Similarly, on appeal, bolstered by the *Free Speech Coalition* decision, the appellant continues to assert the impact of the "appears to be" definition. Ordinarily, in this setting, we would not hesitate to hold that the finding was "tainted" by the now-impermissible "appears to be" definition in 18 U.S.C. § 2256(8)(B). However, the record of trial clearly reflects that none of the images specifically challenged by the appellant was included in the military judge's findings of guilt. As mentioned earlier, the military judge found the appellant guilty of possessing child pornography, but specified that guilt was based on only 8 of the 20 proffered photographs, specifically pages 2, 3, 5, 6, 8, 10, 17 and 20 of Prosecution Exhibit 6. A review of all the pictures evaluated in this case by the military judge indicates that the judge resolved even remotely questionable depictions in favor of the accused and found child pornography in only those pictures that contained obvious minors. Although the judge did not articulate it, his special findings readily reflect that he avoided any

[2] In announcing his finding that the picture on page 19 of Pros Ex 6 did *not* constitute child pornography beyond a reasonable doubt, the military judge commented: "I would note that it looks like in the image that the head is superimposed on the picture." In their appellate brief, appellate defense counsel repeat this statement by the military judge in support of the proposition, not further expanded, that "some of the digital images were altered in order to make adults resemble children." This claim is simply not supported by the record. Even as to the page 19 picture, if the head was indeed superimposed, it does not appear to be "out of sync" with the body in that picture--both appear to be those of a female who might easily be 18 years of age or older. Presumably, this is why the judge did not include it among the pictures he found to contain children. The remaining pictures do not suggest in any way superimposition. Certainly, the pictures included in the judge's finding of guilt, regardless of the possibility of superimposed heads, contain bodies that clearly belong to actual children. As long as real children's bodies are used in the depiction, this form of photo manipulation does not render an image "virtual" instead of "real."

implication that the definition in 18 U.S.C. § 2256(8)(B) may have been relied upon to support his findings.

The issue of "real" versus "virtual" children was not raised at trial.[3] On the issue of whether actual children were involved in the production of images, the photographs themselves cannot be discounted as evidence. *See James*, 55 M.J. at 301; *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002), *cert. denied*, 538 U.S. 954 (2003); *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever."), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Tynes*, 58 M.J. 704 (Army Ct. Crim. App. 2003), *pet. granted*, 59 M.J. 31 (C.A.A.F. 2003); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (*Free Speech Coalition* does not require either direct evidence of the identity of the children in the images or expert testimony that the images are of real children rather than computer generated "virtual" images). *See also United States v. Sanchez*, 59 M.J. 566 (A.F. Ct. Crim. App. 2003). Having reviewed the images, we conclude beyond any reasonable doubt that the children depicted in those photographs are real, not virtual.

On this record, we have no difficulty concluding that the "appears to be" definition in 18 U.S.C. § 2256(8)(B) did not contribute to the judge's verdict in this case and, thus, any error of law relating to consideration of that definition was harmless beyond a reasonable doubt. Having reviewed the record as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c), we find the appellant's conviction for possessing child pornography both legally sufficient, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), *United States v. Reed*, 54 M.J. 37, 41 (2000), and factually sufficient, *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

III. Lascivious Exhibition

The appellant argues that the 8 images that were found to constitute child pornography do not reflect "lascivious exhibition of the genitals or pubic area" and, thus, do not qualify as "sexually explicit conduct" and, in turn then, cannot sustain his conviction for possessing child pornography. We disagree. Having reviewed the images, we find ample evidence of "lascivious exhibition of the genitals or pubic area," as defined by 18 U.S.C. § 2256(2)(E), to support the appellant's conviction for this offense. *See United States v. Pullen*, 41 M.J. 886, 889 (A.F. Ct. Crim. App. 1995); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

[3] See footnote 2.

IV. Preemption of Article 80, UCMJ

The appellant was charged with two specifications of wrongfully communicating indecent language to a child under 16 years of age on divers occasions, in violation of Article 134, UCMJ. The prosecution presented the transcripts of the communications taken from the appellant's computer. The transcripts showed clearly that the appellant believed he was communicating with children under the age of 16 years, but the prosecution was not able to locate the recipients of the offending language and, thus, was not able to prove their actual ages. Thus, the military judge found the appellant not guilty of the charged offenses, but guilty of *attempting* to commit the offenses under Article 80, UCMJ.

The offense of communicating indecent language in violation of Article 134, UCMJ, carries a maximum punishment that includes a bad-conduct discharge and confinement for 6 months. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 89(e)(2) (2000 ed.). However, if the government alleges and proves that the recipient of the indecent language is a child under the age of 16 years, this is an aggravating factor that increases the maximum punishment to include a dishonorable discharge and confinement for 2 years. *MCM*, Part IV, ¶ 89(e)(1). Article 80, UCMJ, proscribes attempts to commit an offense and carries the same maximum punishment as for the commission of the offense attempted. *MCM*, Part IV, ¶ 4(e).

In the case sub judice, then, where the true age of the recipient cannot be proven, the appellant argues that he may only be found guilty of the less serious offense of communicating indecent language to another and not of an attempt to commit the aggravated offense of communicating indecent language to a child. The appellant maintains that the President, in structuring the provisions of the Uniform Code of Military Justice, intended to preempt the application of Article 80, UCMJ, in this situation by providing for conviction of the non-aggravated form of the Article 134, UCMJ, offense of communicating indecent language.

There is a preemption doctrine in the Uniform Code of Military Justice, but it stands for a proposition exactly opposite of that urged by the appellant. "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *MCM*, Part IV, ¶ 60c(5)(a); *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). Thus, where Congress defined the offense of "larceny" under Article 121, UCMJ, the President could not create an offense under Article 134 that was similar to larceny but less rigorous in its elements.

There is no indication that the President intended to "preempt" the application of

Article 80, UCMJ in the manner suggested by the appellant. To the contrary, the *Manual* specifically lists Article 80, UCMJ, as a lesser included offense of communicating indecent language. *MCM*, Part IV, ¶ 89.

V. Service Discrediting

The appellant also contends that his convictions for two specifications each of communicating indecent language and attempting to communicate indecent language are factually and legally insufficient because there was no evidence to show that the language was prejudicial to good order and discipline or was service discrediting. The appellant's assertion is not grounded in the nature of the language itself, for the language used by the appellant was unquestionably vile. Instead, he argues that the recipients did not know he was a military member; therefore, there was no discredit to the service.

We find no merit in this argument. Indeed, we rejected this same contention in *United States v. Maxwell*, 42 M.J. 568 (A.F. Ct. Crim. App. 1995), *rev'd in part on other grounds, aff'd in part*, 45 M.J. 406 (C.A.A.F. 1996). Although the appellant may have intended that his identity as a military member remain unknown, it did not. The appellant is not entitled to escape legal accountability for the fact that his conduct was ultimately discovered, his identity revealed, and discredit to the service was a clearly foreseeable result. The phrase "conduct of a nature to bring discredit upon the armed forces" makes punishable "conduct which has a tendency to bring the service into disrepute or which tends to lower it in the public esteem." *MCM*, Part IV, ¶ 60c(3). 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). The test is whether the 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. We find the evidence of record, viewed in the light most favorable to the government, ample to establish all the elements of these offenses and, thus, to convince a rational fact-finder of the appellant's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319; *Reed*, 54 M.J. at 41. Having weighed the evidence for ourselves, we too are convinced of his guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *Turner*, 25 M.J. at 325).

VI. Automobile Search

When the appellant drove to a shopping mall to rendezvous with the 13-year-old girl from Winnipeg, their ostensive plan was to meet in front of a particular store, and then go to a hotel to engage in sexual activity. When the girl did not show up at the appointed time, the appellant returned to his car in the mall parking lot. As he neared the car, an AFOSI agent approached, identified himself, apprehended the appellant, and conducted a search of the appellant's person incident to the apprehension. At that time, agents then searched the appellant's vehicle and seized a computer floppy disk, a video camera and some blank videotapes. The floppy disk was later determined to contain

copies of some of the Internet chats, which formed part of the evidence supporting two specifications of communicating indecent language to a child.

At trial, the defense counsel moved to suppress the evidence obtained from the search of the vehicle on the grounds that (1) there was insufficient probable cause to support the search, and (2) even if there were probable cause, the "operable vehicle" exception in Mil. R. Evid. 315(g)(3) did not apply under the facts of this case because the appellant's car, once the AFOSI agents seized the keys during the search of the appellant, was no longer "operable" within the meaning of the Rule. The military judge denied the motion, ruling that probable cause did exist and that the appellant's car did qualify as an "operable vehicle" under Mil. R. Evid. 315(g)(3). On appeal, the appellant again attacks the search of his vehicle, but does so on a new ground. He now argues that the military investigators had no authority to conduct a search of non-military property off base without a civilian search warrant.

Issues involving the admissibility of evidence are reviewed for an abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). The military judge's findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record of trial. *United States v. Richter*, 51 M.J. 213, 220 (C.A.A.F. 1999). Although conclusions of law will be reviewed de novo, the ruling of the trial judge will not be overturned unless it was "influenced by an erroneous view of the law." *Id.* at 220 (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)). Applying these standards to the judge's ruling at trial, we see no basis for disturbing it.

Turning to the appellant's new challenge on appeal concerning the authority of military investigators in an off-base setting, this issue is waived, absent plain error, by the appellant's failure to raise this issue at trial and thus give the military judge an opportunity to address it. Finding no error, plain or otherwise, in the actions of the military investigators, we decline to grant the appellant the relief he seeks. *See Maryland v. Dyson*, 527 U.S. 465 (1999); *California v. Acevedo*, 500 U.S. 565 (1991); *Michigan v. Thomas*, 458 U.S. 259 (1982); *United States v. Allen*, 53 M.J. 402 (C.A.A.F. 2000); *United States v. Schmitt*, 33 M.J. 24 (C.M.A. 1991); Mil. R. Evid. 315(e), (g)(3), (g)(4) and (h)(4).

VII. Conclusion

The remaining assignments of error have been carefully evaluated and determined to be without merit. Accordingly, the findings of guilty and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator