UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 39091

UNITED STATES
Appellee

v.

Christopher W. CLUFF
Master Sergeant (E-7), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 27 December 2017

Military Judge: Natalie D. Richardson (arraignment); Shelly W. Schools.

Approved sentence: Dishonorable discharge, confinement for 25 years, and reduction to E-1. Sentence adjudged 17 February 2016 by GCM convened at Aviano Air Base, Italy.

For Appellant: Captain Patrick A. Clary, USAF.

For Appellee: Lieutenant Colonel Joseph F. Kubler, USAF; Major Mary Ellen Payne, USAF; Gerald R. Bruce, Esquire; James W. Beckwith, Legal Extern.[1]

Before HARDING, SPERANZA, and HUYGEN, *Appellate Military Judges*.

Judge SPERANZA delivered the opinion of the court, in which Senior Judge HARDING joined. Judge HUYGEN filed a separate dissenting opinion.

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[1] In accordance with Rule 6.1 of the court's Rules of Practice and Procedure, Mr. Beckwith was at all times supervised by counsel for the Government during his participation in this case.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

SPERANZA, Judge:

Before a military judge sitting as a general court-martial, Appellant pleaded guilty to possessing and viewing child pornography.[2] Contrary to his pleas, Appellant was convicted of producing child pornography. The military judge sentenced Appellant to a dishonorable discharge, 25 years of confinement, forfeiture of all pay and allowances, and reduction to E-1. Except for the forfeiture of all pay and allowances, the convening authority approved the adjudged sentence.[3]

Appellant now claims (A) that his conviction for producing child pornography is legally and factually insufficient, and (B) that his sentence is inappropriately severe. Appellant advances the same arguments he made during the findings portion of trial and clemency, respectively. These arguments remain unpersuasive and we affirm.

I. BACKGROUND

Appellant was admittedly obsessed with child pornography and sought some of the most perverse material the internet had to offer. He amassed a collection of thousands upon thousands of digital images and videos depicting

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[2] Appellant pleaded guilty to viewing digital images of child pornography, viewing digital videos of child pornography, possessing digital images of child pornography, and possessing digital videos of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. While conceding viewing child pornography and possessing child pornography addressed two distinct criminal acts at trial, senior trial defense counsel requested the military judge merge the two viewing specifications and two possession specifications for the purposes of sentencing. After findings, the military judge granted the requested relief, finding the separate viewing specifications and separate possession specifications were an unreasonable multiplication of charges. Now on appeal, Appellant complains pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that the military judge, *sua sponte*, should have granted him additional relief by further merging the viewing and possession specifications for the purposes of findings and sentencing. We disagree and find that the military judge did not abuse her discretion in not doing so.

[3] The military judge awarded Appellant 10 days of confinement credit for Government's failure to comply with a command instruction governing Appellant's pretrial confinement.

children—including toddlers—engaged in sexually explicit conduct. Further, Appellant recorded minors he met in an online video chat room.

II. DISCUSSION

A. Legal and Factual Sufficiency

Investigators searched Appellant's laptop computer and external hard drive. Digital videos of girls engaged in sexually explicit activity while participating in a web cam chat were found on the external hard drive in a file folder named "Faked Out B[*]tches." The Government offered five of these videos as evidence of Appellant's child pornography production.

The Government's expert in computer forensic analysis testified that the five videos were created and edited on the laptop by the user profile "ccluff[]"and then moved to the external hard drive. The expert also used another set of files on the computer to explain how "ccluff[]" created the five videos. The expert demonstrated the following: Appellant engaged in a video chat with a girl in an online chatroom through a particular website; Appellant and the girl chatted about sexually explicit conduct; Appellant and the girl engaged in sexually explicit conduct over their respective webcams so the other could watch; Appellant recorded what he was viewing on his screen, which showed a split-view of himself and the girl engaged in sexually explicit conduct; Appellant saved that recording; Appellant then edited the recording by removing himself and any text and audio chats; and Appellant saved the edited video that only depicted the girl engaged in sexually explicit conduct. The expert opined that Appellant produced the five videos on the laptop in a similar manner and then moved the videos into the "Faked Out B[*]tches" folder on his external hard drive.

The Defense's expert in computer forensic analysis concurred that the five videos were created on Appellant's laptop computer under the user name "ccluff[ ]." This Defense expert also explained that videos created by other people recording and editing chats from the same website could be found and downloaded from the internet.

In addition to the computer forensic analyst, the Defense called an expert "in both general pediatrics and child abuse pediatrics, as well as an expert in child pornography cases," who essentially testified that the females depicted in the five videos could be minors or adults.

The military judge also admitted Appellant's child pornography possession and viewing as evidence of "intent, lack of mistake or accident, and motivation" for the production of child pornography.

Appellant maintains that he is not guilty of producing child pornography because (1) "expert testimony . . . regarding the five females in the videos creates unrebutted doubt about whether the females were actually minors," and (2) "there is an unresolved question of whether the video files created . . . on [Appellant's] laptop were original content that did not previously exist, or whether these files were re-edits of files downloaded from the internet." For these reasons, Appellant concludes that his conviction is legally and factually insufficient.

We review issues of factual and legal sufficiency de novo. Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). The term "beyond a reasonable doubt" does not mean that the evidence must be "free from conflict." *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986) (citing *United States v. Steward*, 22 M.J. 679, 684 (A.F.C.M.R. 1984)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted)

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (alteration in original) (citing *Turner*, 25 M.J. at 325). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399 (alteration in original).

Viewing the evidence, including the five videos and the two experts' testimony that the videos were produced on Appellant's laptop, in the light most favorable to the Government, we find that the military judge could have found Appellant guilty of all of the essential elements of the charged production of child pornography beyond a reasonable doubt. *See United States v. Cendejas,* 62 M.J. 334, 338 (C.A.A.F. 2006) ("[T]he finder of fact can make a determination that an actual child was used to produce the images in ques-

tion based upon a review of the images alone."); *see also United States v. Piolunek*, 74 M.J. 107, 111–12 (C.A.A.F 2015) (confirming the court's straightforward application of the "general verdict rule"). Moreover, we are convinced beyond a reasonable doubt that Appellant produced digital videos of minors engaged in sexually explicit conduct and that Appellant's conduct was of a nature to bring discredit upon the armed forces. Thus, we conclude Appellant's conviction for production of child pornography is legally and factually sufficient.

B. Sentence Appropriateness

Because of his convictions at trial, Appellant faced a maximum punishment that included 50 years of confinement. The convening authority's power to grant Appellant clemency included disapproving the adjudged confinement in whole or in part.

Appellant requested the convening authority defer the reduction in grade and adjudged forfeitures and waive mandatory forfeitures for the benefit of Appellant's dependents. Appellant also requested, *inter alia*, the convening authority reduce what his trial defense counsel deemed a "grossly disproportionate" period of confinement to a "more reasonable" one. In support of this request for reduced confinement, Appellant's trial defense counsel contended the military judge was unsympathetic and presented the convening authority a declaration of Defense's expert computer forensic analyst, who expressed his "surprise at the length of confinement because in [his] experience, it is excessive." The expert compared Appellant's case to several unnamed cases and concluded that "the sentence given by [the military judge] grossly exceeded the sentence norms given by a variety of other Air Force military judges in similar or worse cases."

After deferring Appellant's reduction in grade and adjudged forfeitures and waiving mandatory forfeitures, the convening authority ultimately did not approve the adjudged forfeiture of all pay and allowances. The convening authority otherwise approved the adjudged sentence. Appellant now brings to us the same plea for sentence relief that he made to the convening authority.

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). "Congress has vested responsibility for determining sentence appropriateness in the Courts of Criminal Appeals." *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001). This power "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (alteration in original).

Accordingly, we may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

When arguing sentence disparity and asking us to compare his sentence with others', Appellant bears the burden of demonstrating those other cases are "closely related" to his, and if so, that the sentences are "highly disparate." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999). The United States Court of Appeals for the Armed Forces has indicated cases are "closely related" if there is a "direct nexus between the servicemembers whose sentences are sought to be compared," for example, involvement in a common crime or in parallel schemes. *Id.* If an appellant carries that burden, then the Government must show a rational basis for the sentence differences. *Id.*

Appellant fails to demonstrate how the cases mentioned by his expert witness in a clemency declaration are "closely related" to his. Therefore, we decline to compare Appellant's sentence with those of unnamed, unaffiliated offenders and turn our attention to the particulars of Appellant's case. We recognize that under Article 66(c) we may, in determining whether a sentence is appropriate and ensuring relative uniformity, consider the outcomes of other courts-martial that are not closely related, even though we are not required to do so. *See Wacha*, 55 M.J. at 267; *see also United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985) ("[T]o hold that a trial or appellate court may not consider the sentences in other cases would be folly.").

While we agree with Appellant that his sentence to 25 years of confinement is undeniably severe, it is not inappropriately severe. We readily recognize our responsibility to maintain relative sentence uniformity within our jurisdiction and our authority to consider cases that are not "closely related" to Appellant's; however, we do not grant clemency. Appellant's sentence, which included confinement equal to half of the maximum authorized, is correct in law and fact. Appellant's crimes were appropriately described by his trial defense counsel in clemency as "some of the worst as viewed by society." Having given individualized consideration to the nature and seriousness of these crimes, Appellant's record of service, all other matters contained in the record of trial, and importantly, Appellant, we conclude the sentence is not

inappropriately severe based on the facts and circumstances of this particular case.

III. CONCLUSION

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

HUYGEN, Judge (dissenting):

I respectfully dissent from the majority with regard to factual sufficiency and sentence appropriateness. Applying the test for factual sufficiency, I am convinced beyond a reasonable doubt of Appellant's guilt on the charge of producing child pornography for only one of the five videos offered by trial counsel. Considering the unrefuted testimony of the sole expert on the matter and having reviewed the videos, I am not persuaded that the Government proved beyond a reasonable doubt that the females depicted in four of the five videos were in fact children under the age of 18. Because the Government stipulated the plural "videos" in the specification, I conclude the charge was factually insufficient.

I am also compelled to disagree with my esteemed colleagues on the appropriateness of Appellant's sentence, specifically, the 25 years of confinement. As the majority acknowledges, *Wacha* and other cases decided by the United States Court of Appeals for the Armed Forces establish our discretionary authority to determine sentence appropriateness, separate and apart from assessing sentence disparity in closely related cases. Having considered Appellant's case, I cannot reconcile the adjudged and approved sentence of 25 years of confinement with our responsibility to ensure relative uniformity of sentences in our jurisdiction, specifically, those where the most serious offense is production of child pornography.

Production of child pornography is, for obvious reasons, a more serious offense than viewing or possession of child pornography. Correspondingly, the maximum punishment for production is 30 years of confinement versus the 10 years for viewing or possession. While Appellant viewed and possessed some of the worst child pornography, the facts and circumstances of his production were not those of the typical case, much less the most horrible. The website used for the video chats that Appellant in turn used to create the recordings is on the "open" internet and readily accessible and available to anyone with a computer and a connection. It is neither designed nor advertised

for criminal activity, pornography, or child pornography. None of the five videos offered by the Government contained evidence that Appellant was intending to chat with a child; that Appellant knew the age of the female chatting; or even that Appellant was the one chatting with the female depicted. Even if all those circumstances were true, Appellant's offense still does not resemble the typical case of child pornography production. There was no evidence that Appellant had a prior or existing relationship with any of the five females depicted; that Appellant caused, convinced, or coerced any of them to participate in the chat; or that Appellant prevented any of them from leaving the chatroom. Moreover, Appellant had no in-person or physical contact with any of the five females, and all of the sexual activity in which the females engaged was by the female alone, with the female's knowledge, and of the female's volition. Having evaluated the entirety of Appellant's case, I conclude that 25 years of confinement is not an appropriate sentence. Instead, it is both undeniably and inappropriately severe. An appropriate sentence would not exceed 15 years of confinement.

FOR THE COURT

Katie Potter

KATHLEEN M. POTTER
Acting Clerk of the Court