UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38903

UNITED STATES
Appellee

v.

Michael R. HASSELL
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 March 2017

Military Judge: Matthew P. Stoffel (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1. Sentence adjudged 23 July 2015 by GCM convened at Edwards Air Force Base, California.

For Appellant: Captain Annie W. Morgan, USAF.

For Appellee: Captain Matthew L. Tusing, USAF; Gerald R. Bruce, Esquire.

Before MAYBERRY, SPERANZA, and JOHNSON, *Appellate Military Judges*.

Judge JOHNSON delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge SPERANZA joined.

JOHNSON, Judge:

A general court-martial composed of a military judge sitting alone found Appellant guilty, contrary to his pleas, of one specification of wrongful possession of child pornography in violation of Article 134, Uniform Code of Military

Justice (UCMJ), 10 U.S.C. § 934.[1] The court-martial sentenced Appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant raises two assignments of error: (1) The military judge abused his discretion by failing to suppress evidence obtained from an illegal search; and (2) Appellant's conviction for wrongful possession of child pornography is legally and factually insufficient. We find no relief is warranted and thus affirm the findings and sentence.

I. BACKGROUND

Appellant and Staff Sergeant (SSgt) RT were roommates sharing a house in Rosamond, California, near Edwards Air Force Base, where Appellant was stationed. On 30 January 2013, while on temporary duty assignment to Dyess Air Force Base, Texas, SSgt RT sent digital images of child pornography to an undercover civilian law enforcement agent, Detective JH, using Yahoo Instant Messenger. On 4 March 2013, Detective JH made contact with SSgt RT again by Instant Messenger and requested SSgt RT re-send him certain pictures. In response, SSgt RT asked Detective JH to send him another message in 30 minutes; in the meantime, SSgt RT would go home and see if he still had those pictures and perhaps others he could send. Approximately 30 minutes later, SSgt RT sent Detective JH another message related to the request for pictures.

On 9 March 2013, Detective JH was able to trace the IP address used for SSgt RT's last message to the house SSgt RT and Appellant shared in Rosamond. Detective JH also determined Appellant was the account subscriber for that IP address. With this information, on 15 April 2013, Special Agent IC and other agents of the Air Force Office of Special Investigations (AFOSI) obtained a search warrant from a United States Magistrate Judge. The warrant authorized the search of the residence shared by Appellant and SSgt RT, including any vehicles located there under the dominion and control of the residents. The warrant authorized the seizure of, *inter alia*, "[a]ny computer(s) or electronic storage device(s) capable of storing digital data . . . that may be, or are used to: visually depict child pornography . . . ."

On 16 April 2013, AFOSI agents and other law enforcement personnel executed a search of the residence pursuant to the warrant. At the same time,

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[1] The military judge found Appellant not guilty of one specification of possession of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B) and one specification of shipping child pornography in violation of 18 U.S.C. § 2252A(a)(1), both charged as violations of Article 134, UCMJ, 10 U.S.C. § 934.

Appellant was being interviewed by AFOSI agents as a witness in the investigation of SSgt RT. Once they gained access, the agents were able to determine Appellant used the master bedroom, which they found open and unlocked, and SSgt RT used another bedroom. The agents seized a number of items, including two laptop computers and one external hard drive belonging to Appellant that they found lying in the open in Appellant's bedroom. While still inside the residence, one of the AFOSI agents used equipment with "write-blocking" technology to perform an initial search of Appellant's external hard drive without modifying any of the data therein. This preliminary search revealed suspicious images on Appellant's external hard drive warranting further investigation. The agents contacted their colleagues who were interviewing Appellant, who then advised Appellant he was suspected of possession of child pornography and informed him of his rights under Article 31, UCMJ, 10 U.S.C. § 831.

The seized items were later sent to the Defense Computer Forensics Laboratory (DCFL). AFOSI's review of the data extracted at DCFL identified hundreds of images of suspected minors in stages of undress, exposing their genitals, or performing sex acts, and one image that matched a known child pornography victim in the National Center for Missing and Exploited Children (NCMEC) database, all located on Appellant's external hard drive. Most of these images were located in one of four folders named "PBJ," "PBJ(1)," "PBJ(2)," and "PBJ(3)," which essentially consisted of copies of the same material located in different folders on the hard drive.

AFOSI subsequently reinterviewed Appellant. Appellant admitted he was aware of the PBJ folder, which he had obtained from a friend, Airman First Class (A1C) DC, at his previous duty station in Japan. Appellant further acknowledged looking through the folder and thinking that some of the individuals looked "pretty young," by which he meant under 18 years old, and that he should have gotten rid of the folder. The interview continued:

> Agent: So you have held onto this folder that you yourself said was suspicious for three years knowing that it could put you away for a decade.
>
> Appellant: Yeah. And like I said, I never thought about [it]. Never thought about the folder, and then here we are. Now we are talking about it.
>
> Agent: Okay.
>
> Appellant: Bad choice on my part. I understand that. As soon as I saw that, I should have got rid of it. I didn't, and now I am here.
>
> Agent: What images did you see that you decided that you should get rid of it immediately?

> Appellant: Like I said, they looked too young to be even fake 18, like, fake young, you know, like how they do.
>
> Agent: What about them looked too young?
>
> Appellant: I don't know. Just the face, I guess.
>
> Agent: Talk about that [a] little bit. Flat chested? Did they have braces? Did they have what? Like, tell me about it.
>
> Appellant: I guess it was like body type, I guess. It just didn't seem right. I was like – but then I moved on and didn't think about it again. I was like I am planning to delete this folder anyway, and then I haven't.
>
> Agent: When you looked at these pictures, what was the first age that jumped out at you?
>
> Appellant: I don't know, like, fourteen maybe.
>
> Agent: Okay. So, fourteen?
>
> Appellant: [Nods with an affirmative response.]

Appellant was charged with, *inter alia*, knowingly and wrongfully possessing 21 images of child pornography, specifically minors engaged in sexually explicit conduct, which was of a nature to bring discredit on the armed forces in violation of Article 134, UCMJ. At trial, the Defense moved to suppress the evidence from Appellant's hard drive as illegally obtained. The Defense contended there was insufficient probable cause for the search warrant with respect to Appellant's property, and that the warrant as issued did not authorize a search of Appellant's property as opposed to SSgt RT's property. After receiving evidence and hearing argument, the military judge denied the motion and provided a written ruling. The military judge found the warrant was supported by probable cause and was sufficiently specific.

The military judge found Appellant guilty of knowing and wrongful possession of child pornography with respect to 6 of the 21 charged images. He found Appellant not guilty by exception with respect to the remaining charged images.

II. DISCUSSION

A. Suppression of Evidence from Appellant's Electronic Media

We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge's findings of fact are reviewed under the clearly erroneous standard, but

his conclusions of law are reviewed de novo. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). The sufficiency of a finding of probable cause is a question of law that we review de novo based on the totality of the circumstances. *United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007). In reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the party prevailing at trial. *Id.* at 213.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV. Whether a search is "reasonable" depends, in part, on whether the person subject to the search has a subjective expectation of privacy in the thing to be searched, and that expectation is objectively reasonable. *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014).

Searches conducted pursuant to a warrant or authorization based on probable cause are presumptively reasonable. *United States v. Hoffmann*, 75 M.J. 120, 123–24 (C.A.A.F. 2016). "Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence." *Leedy*, 65 M.J. at 213. Probable cause determinations are inherently contextual and depend on the totality of all factors presented to the issuing magistrate. *Id.* "The duty of the reviewing court is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)) (quotation marks omitted). "Close calls will be resolved in favor of sustaining the magistrate's decision." *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000) (citation and quotation marks omitted).

Search warrants supported by probable cause must also be specific, and specificity has two aspects: particularity and breadth. *United States v. Osorio*, 66 M.J. 632, 635 (A.F. Ct. Crim. App. 2008) (citing *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006)). "Particularity is the requirement that the warrant must clearly state what is sought." *Hill*, 459 F.3d at 973 (citation and quotation marks omitted). "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Id.* The level of specificity required depends on the circumstances of the particular case. *Id.*

On appeal, Appellant contends the military judge abused his discretion in several respects by denying the Defense motion to suppress. We consider each contention in turn.

1. Appellant's Reasonable Expectation of Privacy

First, Appellant asserts the military judge relied on an erroneous view of the law in failing to consider whether Appellant "enjoyed a discreet [sic] privacy interest in his private dwelling (i.e., bedroom) and his personal property contained therein." Appellant notes the agents investigating SSgt RT were aware Appellant resided in the same house, and the agents did not present the magistrate judge with any information that SSgt RT had access to Appellant's electronic media. Appellant further notes the agents were able to identify Appellant's bedroom when they executed the warrant, and the evidence at issue in this case was seized from Appellant's room. Appellant concludes, "By failing to articulate a subjective and objective analysis of Appellant's living space and Appellant's media, the military judge erred as a matter of law."

It appears Appellant is arguing the military judge either failed to recognize Appellant had a privacy interest in his bedroom and his electronic devices located there, or that the military judge mistakenly believed the search warrant "extinguished" that privacy interest. We disagree. Appellant certainly had a reasonable expectation of privacy in his bedroom and the personal effects located therein, and the military judge did not find otherwise. But that is merely the threshold question for further Fourth Amendment analysis. The more relevant question in this case is whether the search warrant was validly issued and executed such that the search and seizure were reasonable under the Fourth Amendment, notwithstanding Appellant's continuing privacy interest. The military judge's written ruling was sparing in its references to legal authorities, but his analysis was appropriate and we do not find it was shaped by an erroneous view of the law.

2. Specificity of the Search Warrant

Appellant next contends the search warrant was insufficiently specific. In particular, Appellant complains there were "no parameters placed on location, neither on the home nor on the vehicles." He further complains the warrant permitted the agents to rummage through all the residents' belongings, and it was not narrowly tailored to distinguish between those items within the control of SSgt RT as opposed to Appellant.

Again, we disagree. The warrant clearly identified the particular residence to be searched. It also particularly identifies the material sought—the list is extensive, but it is also specific. Noting that the degree of specificity required in a warrant will depend on the circumstances of the particular case, *see Hill*, 459 F.3d at 973, we find the authorization to search the entire residence was

not overly broad or insufficiently particular. At the time the warrant was issued, the agents and magistrate had reason to believe SSgt RT kept digital child pornography at the house, but they lacked further information as to where specifically in the house child pornography—or evidence of the possession thereof—was located. The agents believed Appellant and SSgt RT were roommates, but they were unaware of what, if any, areas of the residence were under Appellant's exclusive control. Given the nature of the material sought, it might have been in any of numerous locations throughout the house, and we find no abuse of discretion in the military judge's conclusion that the warrant was sufficiently specific. *See Maryland v. Garrison*, 480 U.S. 79, 85 (1987) ("Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. . . . [T]he discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant.").

Appellant also argues the warrant is facially overbroad in that it authorized the search and seizure of "child erotica" as well as child pornography. Appellant notes the possession of child erotica is not per se illegal, provided the images are not pornographic. He cites the circuit court opinion in *United States v. Griesbach*, 540 F.3d 654, 655–56 (7th Cir. 2008), for the proposition that possession of child erotica does not establish probable cause to believe an individual possesses child pornography. Appellant's argument might have merit if the agents involved in this case had information that SSgt RT had possessed and distributed only child erotica rather than child pornography, but that was not the case. Moreover, law enforcement agents may seek a warrant to search for *evidence* of a crime as well as contraband. *See generally* Military Rule of Evidence (Mil. R. Evid.) 315. Possession of child erotica could indicate a sexual interest in children and support an inference that possession of child pornography was knowing as well as wrongful. The inclusion of child erotica in the warrant as well as child pornography did nothing to vitiate the validity of the warrant in this case.

3. Probable Cause for the Search Warrant

Appellant next argues the search warrant lacked probable cause with respect to Appellant's property as opposed to SSgt RT's property. He contends the military judge erred by limiting his consideration to whether "there was probable cause to believe that evidence of illegal child pornography possession was present in the residence." Instead, Appellant argues the relevant question is whether probable cause existed that such evidence would be found in the specific items of property, to include Appellant's electronic media.

We disagree. The requirement is that probable cause exist with respect to the places and property identified in the search warrant. In this case, the information known to the agents and relayed to the magistrate judge provided

ample probable cause to believe the residence contained evidence of illegal possession of child pornography, to be found, *inter alia*, on electronic devices and media capable of storing and displaying such material. Again, at the time the warrant was issued, the agents believed Appellant was SSgt RT's roommate but had no information that SSgt RT was restricted from accessing any portion of the house. It is true that once the agents executed the warrant they were able to identify Appellant's bedroom from the uniforms hanging in his closet, but even then the room was readily accessible to SSgt RT because it was unlocked and open. More to the point, the fact that upon executing the warrant the agents knew much more specifically where the evidence they sought could be found did nothing to illegitimize the search authorized by the lawfully-issued warrant. Again, "the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant." *Garrison*, 480 U.S. at 85. Search warrants must be specific, but the degree of specificity required depends on the circumstances of the case. In this case, a "practical, common-sense" consideration of the information presented to the magistrate judge indicates "a fair probability that contraband or evidence of a crime [would] be found" on electronic media and storage devices located somewhere within the residence, but not any particular location or device within the residence. *Leedy*, 65 M.J. at 213. Accordingly, we find the military judge did not abuse his discretion in finding sufficient probable cause for the warrant.

4. Scope of the Search Authorized by the Search Warrant

Appellant's final argument regarding suppression is that the preliminary search of Appellant's external hard drive conducted by AFOSI agents at the residence exceeded the scope of the search warrant, which only authorized the "seizure" of the device. Appellant correctly notes that search and seizure are distinct concepts and separate intrusions of Fourth Amendment privacy interests. *See United States v. Dease*, 71 M.J. 116, 120–21 (C.A.A.F. 2012). He asserts the warrant is drafted in such a way that it authorizes the "search" of the residence described in the warrant, but only the "seizure" of the electronic devices and media and other property located there.

The warrant is styled as a "Search and Seizure Warrant." The first page appears to be a general template onto which certain details are typed or handwritten. The warrant recites that a federal law enforcement officer or government attorney has requested a search of a person or property identified in "Attachment A," which in this case is a detailed description of the shared residence in Rosamond, California, to include vehicles located there. The warrant goes on to recite that the identified person or, in this case, the property is believed to conceal "property to be seized" identified in "Attachment B," which in this

case includes, *inter alia*, "[a]ny computer(s) or electronic storage device(s) capable of storing digital data . . . that may be, or are used to: visually depict child pornography . . . ." The warrant continues: "I find that the affidavit(s), or any recorded testimony, establish probable cause *to search and seize the person or property*." (Emphasis added.)

While the warrant is not a model of clarity, it is a fair reading that on its face it authorizes the seizure and search of the evidence sought. That the first page of the warrant describes the property in Attachment B as "to be seized" does not necessarily mean that it was not also to be searched. The following statement that probable cause existed to search *and* seize the "person or property" would reasonably be understood to authorize both the seizure and search of the electronic devices and media identified in Attachment B. *Cf. United States v. Fogg*, 52 M.J. 144, 148 (C.A.A.F. 1999) (officers executing search warrants are required to exercise judgment as to the items to be seized, and in doing so are not obliged to interpret the warrant narrowly provided they make realistic, commonsense determinations based on probable cause).

Our conclusion is reinforced by the fact that Agent IC's affidavit to the magistrate judge seeking the warrant informed her the agents intended to perform exactly the type of preliminary search they conducted on Appellant's external hard drive. Thus, this search would have come as no surprise to the magistrate judge who issued the warrant. In *United States v. Carpenter*, No. ACM 38628, 2016 CCA LEXIS 15 (A.F. Ct. Crim. App. 14 Jan. 2016) (unpub. op.), we addressed a situation where trial defense counsel moved to suppress the results of a computer search because only a seizure and not a search was authorized. Looking in part to the intent of the military magistrate who issued the authorization, we found no abuse of discretion in the denial of the suppression motion. *Id.* at 11. Similarly, the intent of the agents and the magistrate judge was clear in this case, and even if the agents had exceeded the letter of the warrant we find they acted reasonably and in good faith, and their actions did not call for suppression.[2] *See* Mil. R. Evid. 311(c)(3); *United States v. Carter*, 54 M.J. 414, 419–22 (C.A.A.F. 2001) (describing circumstances in which the good faith exception to the exclusionary rule would and would not apply).

B. Legal and Factual Sufficiency of the Evidence

We review issues of factual and legal sufficiency de novo. Article 66(c), 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

[2] We also find the magistrate judge had a substantial basis for finding probable cause, and the AFOSI agents reasonably relied on the warrant in good faith; therefore, even if the warrant had been deficient as Appellant alleges, the military judge would not have abused his discretion by denying the motion to suppress. Mil. R. Evid. 311(c)(3).

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 (C.M.A. 1987); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). The term "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). "[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).

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." *Turner*, 25 M.J. at 325; *see also United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). 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.

Appellant was convicted of a single specification of knowing and wrongful possession of child pornography, specifically six images of minors engaging in sexually explicit conduct, said wrongful and knowing possession being of a nature to bring discredit on the armed forces in violation of Article 134, UCMJ. To sustain the conviction, the Government was required to prove: (1) Appellant knowingly and wrongfully possessed child pornography, to wit: the six specific images he was convicted for; and (2) under the circumstances, the conduct was of a nature to bring discredit upon the armed forces. 10 U.S.C. § 934; *see* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-68b-1. "Child pornography" is defined as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." *Manual for Courts-Martial* (*MCM*), pt. IV, ¶ 68b.c.(1) (2012). "Sexually explicit conduct" includes, *inter alia*, "lascivious exhibition of the genitals or pubic area of any person." *Id.* at ¶ 68b.c.(7)(e). A "minor" is "any person under the age of 18 years." *Id.* at ¶ 68b.c.(4). In this case, the Government charged that the images in question depicted actual minors rather than "visual depictions" of minors.

Appellant challenges the sufficiency of the evidence in several respects. First, he argues the Government failed to prove beyond a reasonable doubt he *knowingly* possessed child pornography. It is true the AFOSI agents did not

review or discuss specific images with Appellant. However, Appellant admitted he knew about the PBJ folder. He obtained the folder from his friend A1C DC while he was stationed in Japan after he looked through the folder on A1C DC's computer and expressed interest in the images there. Appellant later selected and copied the folder to multiple locations on his external hard drive. He admitted to AFOSI he had opened the folder to look through the images in it multiple times, although he denied looking at every image on each occasion. Appellant further admitted the girls in the images looked too young to be even "fake 18," and thought they looked 14 years old. He acknowledged he thought he should get rid of the folder, but never did. A1C DC testified the name he created for the folder, "PBJ," stands for "Pedobear"[3] and "Jailbait," and that Appellant was familiar with this abbreviation; however, Appellant denied knowing what "PBJ" stood for when questioned by AFOSI. In fact, the folder contained numerous images of young females in suggestive poses or situations, including some with text referring to "jailbait," such that depictions of minors is a distinct theme of the folder. We are satisfied the evidence establishes beyond a reasonable doubt Appellant was aware he possessed child pornography.

Next, Appellant contends the Government failed to prove that five of the six images depicted actual minors.[4] He cites the testimony of the Defense's expert in child abuse pediatrics, Commander (CDR) AG, who performed a sexual maturity analysis—commonly known as "Tanner staging"—on the charged images. Based on her review, CDR AG testified there was "a possibility" that each of the images depicted an individual over the age of 18 years.

However, CDR AG's testimony is subject to several important qualifiers. First, on cross-examination CDR AG clarified that Tanner staging measures sexual maturity, not age per se, and one cannot determine chronological age from a Tanner stage. Relatedly, although CDR AG could not rule out that any individual in a charged image was over 18, she testified it was also possible that any or all of them could be 13 years old. CDR AG further agreed that, because of her "extremely conservative" approach to estimating age based on Tanner staging, she would be unable to positively identify most teenagers under 18 who are portrayed in child pornography. Finally, and most importantly, the applicable standard of proof is beyond a reasonable doubt, rather than beyond any possible doubt. The fact that CDR AG was unwilling to positively conclude that each of these images depicted an individual under the age of 18

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[3] A1C DC explained "Pedobear" is an Internet meme of a cartoon bear character depicted chasing or threatening children, created to "make fun of" pedophilia.

[4] DCFL identified one of the six images as matching a known victim of child pornography previously identified by the NCMEC, who was 13 years old at the time the image was created.

years is not fatal to the Government's case. Having reviewed the evidence, we agree with the military judge that each of the six images depicts a minor.

Finally, Appellant contends three of the six images do not depict minors engaged in "sexually explicit conduct." "Sexually explicit conduct" includes, *inter alia*, a "lascivious exhibition of the genitals or pubic area of any person." *Id.* at ¶ 68b.c.(7)(e). In *United States v. Roderick*, 62 M.J. 425, 429–30 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces adopted the six factors developed in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), and widely employed across the federal circuits, to determine what constitutes a "lascivious exhibition." These factors include:

> (1) Whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) Whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
>
> (3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) Whether the child is fully or partially clothed, or nude;
>
> (5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> (6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Roderick, 62 M.J. at 429 (citing *Dost*, 636 F. Supp. at 832). We "combin[e] a review of the *Dost* factors with an overall consideration of the totality of the circumstances." *Id.* at 430.

Appellant argues that although each of the three images depicts nudity, they do not depict unnatural poses, sexually suggestive manners, or genitalia as the focal point of the picture. We disagree. Each of the photos depicts young females who are completely nude except for small items of jewelry. Each appears to be posing for the picture, and genitalia are clearly displayed. The evident purpose of each photo is to display the subjects' nudity, including genitalia. In one photo, the subject is kneeling on a bed; in another, two nude individuals are embracing while looking at the camera. The fact that the third photo appears to be taken by the subject herself does not make it less lascivious. Applying the *Dost* factors, and considering the totality of the circumstances, we readily conclude each image features a lascivious exhibition of the genitals, and therefore constitutes a depiction of a minor engaged in sexually explicit conduct. *MCM*, pt. IV, ¶ 68b.c.(1), (7)(e) (2012).

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," *see Barner*, 56 M.J. at 134, the evidence was legally sufficient to support a finding that Appellant knowingly and wrongfully possessed child pornography, and that under the circumstances his conduct was of a nature to bring discredit upon the armed forces. In addition, having ourselves weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Thus Appellant's conviction for wrongful possession of child pornography is both legally and factually sufficient.

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**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court