UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL R. KOHLER II
United States Air Force

ACM 35643

18 October 2005

Sentence adjudged 2 April 2003 by GCM convened at Kadena Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $1,000.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Captain David P. Bennett, and Ray Taylor, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, the government's answer thereto, and the appellant's reply to the government's answer. The appellant was convicted, contrary to his pleas, of attempted possession and distribution of visual depictions of a minor engaging in sexually explicit conduct, in violation of Article 80, UCMJ, 10 U.S.C. § 880. Finding no error, we affirm.

The appellant alleges that the evidence is factually and legally insufficient to sustain these convictions. The appellant first contends that there was insufficient evidence that the appellant intended to possess visual depictions of actual, rather than virtual, children. Further, the appellant alleges that the government has not proven beyond a reasonable doubt that the appellant himself knowingly attempted to possess and distribute the images in question. Rather, the appellant contends that there were other

individuals with access to his computer, most specifically the appellant's suitemate, who could have used his computer to commit the offenses. He further alleges that the military judge erred in permitting lay testimony under Mil. R. Evid. 701 that the visual depictions in question appeared to be those of actual children.

In regards to the appellant's contention that there was insufficient evidence that it was he who attempted to possess and distribute the images, we have considered all the evidence properly before the court. This includes the large volume of child pornography found on the appellant's computer; the suitemate's testimony that he never used the appellant's computer without permission and that he did not know the appellant's password; evidence that images of child pornography had been e-mailed from the appellant's computer; and the absence either of a motive or a real opportunity for the suitemate or any other individual to have planted such extensive evidence on the appellant.

We also have taken note of the presence in the appellant's desk and elsewhere in his room of hard copies of stories depicting sexual acts between adults and minors; index cards, computer paper, and yellow note pads bearing the names of websites apparently containing child pornography; and a notebook which also contained the names of numerous such websites. A witness testified that he had observed the appellant consulting this notebook as he used his computer, buttressing the conclusion that the notebook's contents were the work of the appellant. All in all, we conclude that it is unreasonable to attribute the attempted possession and distribution of the pornography in question to any person other than the appellant. We hold that the convictions are both legally and factually sufficient. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

We resolve the remaining assignments of error adversely to the appellant. *See United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004); *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir.), *cert. denied*, 540 U.S. 1083 (2003); Mil. R. Evid. 701. The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court