UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER P. MOFFEIT
United States Air Force

ACM 35159 (recon)

18 February 2004

Sentence adjudged 7 February 2002 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Thomas G. Crossan Jr. (sitting alone), Rodger A. Drew, and Ann D. Shane.

Approved sentence: Dishonorable discharge, confinement for 45 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT
UPON RECONSIDERATION

STONE, Senior Judge:

At a general court-martial convened at Shaw Air Force Base, South Carolina, a military judge sitting alone convicted the appellant, contrary to his pleas, of three violations of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was charged with one specification each of receiving and possessing child pornography, contrary to 18 U.S.C. § 2252A, the Child Pornography Prevention Act of 1996 (CPPA). He also was convicted of an additional specification of knowingly persuading, inducing, enticing, or coercing a minor to engage in sexual activity, or attempting to do so, contrary to 18 U.S.C. §

2422(b). He was sentenced to a dishonorable discharge, confinement for 45 months, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant raises four issues for our consideration, only one of which merits discussion. For the reasons set forth below, we affirm.

The appellant first came to the attention of civilian law enforcement officers and the Air Force Office of Special Investigations (AFOSI) when he placed a website on the Internet. The website solicited females between the ages of 13 and 20 from Sumter, South Carolina, to engage in pagan initiation rites involving sexual activity. When questioned by AFOSI agents, he admitted to creating the website, but claimed he was not serious. Rather, he claimed he only intended to anger the people who might view the website. As part of their investigation into the website, AFOSI agents asked the appellant whether he had downloaded child pornography off of the Internet. The appellant initially denied any such activity, but ultimately admitted to downloading child pornography over a one-week period. After obtaining the appellant's consent, the AFOSI seized and examined the appellant's home computer and numerous computer diskettes found throughout his house.

The prosecution introduced into evidence 33 sample images retrieved from four of the diskettes. In addition, the prosecution successfully introduced two VHS tapes, one containing a single video clip and the other containing four video clips. Although the appellant did not assert a constitutional challenge at trial or otherwise argue the images found on the diskettes and tapes did not depict real children, he now asks this Court to set aside the findings of guilty to these two specifications based upon the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), a case which determined that two of the CPPA's definitions of child pornography were unconstitutionally overbroad. The appellant argues that the government did not present proof beyond a reasonable doubt that the "images were real or that real children were harmed in the creation of the images." As a result, the appellant believes the military judge necessarily would have had to conclude that the visual depictions found on his computer disks simply "appeared to be" or "conveyed the impression" of being minors--the CPPA definitions found in 18 U.S.C. § 2256(8)(A) and held to be unconstitutional in *Free Speech Coalition.* We do not agree.

Lieutenant Colonel (Dr.) Susan Brown testified as an expert witness in forensic pediatrics and pediatric/adolescent gynecology. She testified that in her 15 years of clinical experience she has examined more than 10,000 images depicting child pornography. In addition, she has conducted thousands of physical examinations of children and adolescents, including more than 3,000 pelvic examinations. Using conservative estimates, she evaluated the sexual development of the individuals in each of the photographs and video clips and testified that it was her opinion--to a "very high degree of medical certainty"--that each image depicted at least one child who was under

the age of 18. Her testimony provided highly convincing and objective circumstantial evidence to support a finding that the images in question were not virtual, but of actual children being sexually abused and raped. Her testimony clearly focused the trial litigants on the "actual" character of the images as opposed to those that may have been altered or computer-generated. *See United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In fact, Dr. Brown identified one image as being possibly altered. In this photo, the child's pubic area had been obviously colored in, presumably to make the public hair look thicker. The trial participants did not further address this alteration, possibly because the same child appeared in several other images without any alterations to the pubic area.

Moreover, contrary to the appellant's assertions, the photographs themselves provide extraordinarily convincing and objective evidence that actual children were involved in the production of the images. *See United States v. James*, 55 M.J. 297, 301 (C.A.A.F. 2001); *United States v. Sanchez*, 59 M.J. 566, 569 (A.F. Ct. Crim. App. 2003). We are certain that had any of these images only "appeared to be" real children, an expert with the credentials and expertise of Dr. Brown would have noticed and voiced concerns, as she did with the image where pubic hair had been drawn in. We have ourselves carefully examined each image to determine whether the definitions of child pornography struck down in *Free Speech Coalition* contributed to the appellant's conviction. We are convinced beyond a reasonable doubt they did not. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996). Further, we are ourselves convinced beyond a reasonable doubt that the appellant received and possessed on divers occasions one or more images depicting real children engaged in sexually explicit conduct. Article 66(c), UCMJ, 10 U.S.C. § 866(c).[1]

We have reviewed the appellant's remaining assignments of error challenging the legal and factual sufficiency of all of the specifications. Upon careful consideration of the multiple concerns he raises, we nonetheless find them to be without merit. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002).

[1] We have considered our superior court's recent summary dispositions involving child pornography convictions, wherein the Judge Advocate Generals of the various services were directed to take action consistent with *O'Connor*. *See, e.g., United States v. Lee*, No. 03-0071/AF (20 January 2004); *United States v. Harrison*, No. 02-0100/AF (21 Jan 2004). Memorandum opinions are issued for a variety of reasons. *See generally* B.E. Witkin, *Manual on Appellate Court Opinions*, §§ 129-33 (1977 ed.). We do not interpret these recent memorandum opinions as broadly as the appellant suggests. *But see United States v. Thompson*, 57 M.J. 319, 320 (C.A.A.F. 2002) (Sullivan, J., dissenting) (suggesting the majority applied a per se rule of prejudice).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court