UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ROBERT M. PAYNE
United States Air Force

ACM 37594

17 January 2013

ACM 37594

Sentence adjudged 11 September 2009 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Katherine E. Oler.

Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Reggie D. Yager; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Zachary T. Eytalis; Captain Brian C. Mason; Captain Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

HARNEY, Judge:

The appellant was tried by a general court-martial composed of officer members at Joint Base McGuire-Dix-Lakehurst, New Jersey, between 8 and 11 September 2009. Contrary to his pleas, the appellant was convicted of one specification of attempting to communicate indecent language; one specification of attempting to transfer obscene

material to a minor; and one specification of attempting to persuade, induce, entice, or coerce a minor to create child pornography, each in violation of Article 80, UCMJ, 10 U.S.C. § 880. The appellant was also convicted of two specifications of failure to obey a lawful general regulation by misusing his Government-issued computer in connection with his alleged sex offense, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 3 years, and reduction to E-1.

The appellant initially assigned three errors before this Court: (1) the evidence is legally and factually insufficient to support his conviction, (2) the military judge violated the appellant's procedural due process rights by conducting an inadequate competency inquiry, and (3) the appellant's due process rights were violated when he was tried and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. The appellant later assigned two supplemental errors: (1) the military judge committed reversible error by omitting required instructions on the elements of Specification 4 of Charge I, and (2) Specification 4 of Charge I fails to state an offense where it alleges a minor herself can commit the underlying offense of creation of child pornography by sending a nude picture of herself. We disagree and, finding no prejudice to a substantial right of the appellant, affirm.

Factual Background

Between 20 June 2008 and 1 August 2008, the appellant engaged in Internet chat sessions and phone conversations with "Cheergrrr113," a person he believed was a 14-year-old girl named "Marley." The appellant identified himself as a 28-year old male in the Air Force by the name of "Rob" and used "Flyingsolo799" as his screen name. In fact, the person the appellant spoke with was an undercover officer from the Ulster County Sheriff's Department named LV, who was investigating individuals who solicit sex from minors over the Internet.

During their Internet and phone conversations, the appellant told "Marley" he wanted to have sex with her, asked her to send him nude photos of herself, and asked her to meet him in New York for sex. During their first conversation on 20 June 2008, the appellant told "Marley" that he liked her bikini photo on her MySpace profile and asked if she wanted to "talk dirty," to which she responded that she did. When she asked if the appellant minded that she was only 14 years old, he stated he did not. Several chat log entries later, the appellant told "Marley" he was thinking about ejaculating on her. He continued to engage in sexually explicit dialogue and stated "so baby make me cum" and "Plz I am so hard," followed by a request for nude photos:

Flyingsolo799: do u have any nude pics?

Cheergrrr113: no

Flyingsolo799: can u take some

(conversation nonresponsive)

Flyingsolo799: so can u take some nude pics

Cheergrrr113: I can't

Cheergrrr113: I don't have a cam

Although "Marley" declined to provide or take any nude photographs during their initial online chat sessions, the appellant continued to engage in sexual discourse with her that day.

The appellant continued to speak with "Marley" on future occasions and repeated his request for nude photographs. On 30 June 2008, he asked "Marley" for some nude photographs and also asked when the two of them could "do some phone," meaning phone sex. On 16 July 2008, the appellant told "Marley" "I love looking at this pic of u on myspace in ur bathing sute and think about how bad I want to f*** ur young hot body." On 21 July 2008, the appellant sent "Marley" a photograph of his nude and erect penis and stated that he was "hard" and "now I wish I could see one of u." On 22 July 2008, the appellant stated "I wish I could see a pic of u nude" and offered to send "Marley" a nude picture of himself if she would send one of herself. On 23 July 2008, the appellant asked "Marley" "can I video us having sex" during their planned meeting. On 31 July 2008, during a sexually explicit chat, the appellant stated, "I can't wait to video u rideing it." During the same chat, the appellant sent "Marley" a video of himself masturbating.

On 31 July 2008, the appellant drove from his home in Philadelphia to rural New York State to meet Marley the following morning for a pre-planned camping trip. On 1 August 2008, while parked at a grocery store waiting for "Marley," the appellant was arrested by local law enforcement authorities. At the time of his arrest, the appellant had with him a sleeping bag and four condoms. He admitted to the arresting officer that he had traveled to New York to have sex with a 14-year-old girl.

The appellant was charged with four separate attempt offenses under Article 80, UCMJ, for his online interactions with "Marley." He was convicted, in part, of attempting to persuade, induce, entice, or coerce a minor to create child pornography in violation of Article 80, UCMJ, as set forth in Specification 4 of Charge I:

In that STAFF SERGEANT ROBERT M. PAYNE, United States Air Force, 360th Recruiting Group, McGuire Air Force Base, New Jersey, did, within the continental United States, on divers occasions, from on or about 1 June 2008 to on or about 1 August 2008, wrongfully and knowingly attempt to persuade, induce, entice, or coerce "Marley," someone he believed was a female 14 years of age, who was, in fact, [LV], an Ulster [County] New York Sheriff's Office undercover detective, to create child pornography by requesting that "Marley" send nude photos of herself to the said STAFF SERGEANT ROBERT M. PAYNE, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Specification 4 of Charge I: Creation of Child Pornography

At the outset, we note that the parties differ as to the underlying offense set forth in Specification 4 of Charge I. The appellant asserts that the specification alleges a solicitation offense under Article 134, UCMJ. The Government disagrees and asserts that it alleges an Article 80, UCMJ, offense for an attempt to commit conduct analogous to that proscribed by 18 U.S.C. § 2251(a), which is prejudicial to good order and discipline or service discrediting under Article 134, UCMJ.

After reviewing the record of trial and the language of Specification 4 of Charge I, we agree with the Government. Our superior court has previously upheld convictions when "[t]he criminal conduct and mens rea set forth in the specification satisfy the requirements of [an Article 80, UCMJ, attempt,] clauses 1 and 2 of Article 134, UCMJ, and describes the gravamen of the offense proscribed by [18 U.S.C. § 2251(a)]." *United States v. Leonard*, 64 M.J. 381, 383 (C.A.A.F. 2007). "[N]either clause 1 nor clause 2 requires that a specification exactly match the elements of conduct proscribed by federal law." *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985) ("Federal [crimes] may be properly tried as offenses under clause (3) of Article 134, but . . . if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one of those [clauses]." (quoting *United States v. Long*, 2 C.M.R. 60, 65 (C.M.A. 1952) (internal quotations omitted)). Under this analysis, we conclude that Specification 4 of Charge I describes the attempt at the gravamen of conduct analogous to that proscribed by 18 U.S.C. 2251(a) that, if completed, would have been a violation of Clause 1 or 2 of Article 134, UCMJ, as charged under Article 80, UCMJ.

We now turn to the three errors the appellant has raised with respect to Specification 4 of Charge I: (1) whether the evidence was legally and factually sufficient to support his conviction thereon; (2) whether the military judge properly instructed the members on the elements of attempt; and (3) whether the specification states an offense.

1. Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support Specification 4 of Charge I. He asserts that his conviction cannot stand because: (1) his request for nude photographs from "Marley" did not equate to a request for photographs of a lascivious nature, and (2) more than mere nudity is required to transform an image of a minor into child pornography. He also asserts that evidence of a request that a picture *be sent* does not satisfy the specification's allegation that a picture *be created*. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "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. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). In resolving legal-sufficiency questions, "[we] [are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal 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 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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

In determining whether a particular photograph constitutes a "lascivious exhibition," we will combine a review of the totality of the circumstances with the factors articulated in *United States v. Dost*, 636 F. Supp 828, 832 (S.D. Cal. 1986). Those factors are as follows: (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; (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. *United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006). *See, e.g., United States v. Barbieri*, 71 M.J. 127 (C.A.A.F. 2012) (holding that four electronic images depicting accused's stepdaughter in various stages of undress were not child pornography within the meaning of the Child Pornography

Prevention Act because they did not contain an exhibition of the child's genitals or pubic area).

In this case, the military judge instructed the members that "child pornography" means any visual depiction of a minor engaging in sexually explicit conduct. She further instructed that "sexually explicit conduct" includes masturbation or lascivious exhibition of the genitals or pubic area of any person. The military judge also instructed that "lascivious" means exciting sexual desires or marked by lust, that not every exposure of genitals constitutes a lascivious exhibition, and that consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition.

The nude photographs the appellant requested from "Marley" were never produced because of a legal impossibility. When placed in context, however, the evidence supports the findings of the members that the appellant requested a "lascivious exhibition of the genitals or pubic area" of "Marley," as contemplated under *Dost*. The evidence presented at trial showed that the appellant asked "Marley" for photographs that made her genitals the focal area in order to elicit a sexual response from him. First, the appellant believed that "Marley" was a 14-year-old minor. Second, at the time the appellant requested the nude photographs from "Marley," he was engaged in sexually explicit conversations with her, which at least provided some context to the nature and purpose of the photographs requested. In the chat logs, the appellant spoke about sex and sexual acts with "Marley" even before asking her for any nude photographs. Third, the appellant provided "Marley" with photographs of his erect penis, as well as a video depiction of himself masturbating, which provided her with examples of the type of images he had in mind. Fourth, his actions suggested that the photographs were intended for sexual gratification. After not receiving nude photographs despite multiple requests, the appellant began to send the graphic photographs of his penis and the video of himself masturbating, and then told "Marley" that he would send more nude photographs of himself if she would send some nude photographs of herself. Finally, after multiple sexual chats with "Marley," the appellant drove several hours to meet her in order to have sex with her.

Nonetheless, the appellant argues that the specification is "nonsensical" because the act of *sending* a photograph does not *create* a type of photograph. The appellant's argument fails when placed in context with his requests for the photographs. We read the specification to allege that when the appellant asked "Marley" to send him nude photographs of herself, he was asking that she create or produce those photographs, if none existed at the time of the request. Indeed, the facts presented at trial establish that when the appellant requested the photographs, "Marley" stated she did not have any to send. When the appellant asked if "Marley" could take some photographs, she stated she did not have a camera to take any such photographs. In this context, the evidence shows that the appellant was aware that "Marley" did not have any photographs to send him.

Thus, his request that she take some photographs contemplated that she create child pornography.

After considering the evidence in a light most favorable to the prosecution, drawing every reasonable inference from the evidence in the Government's favor, we find that the evidence is legally sufficient to support the appellant's conviction under Specification 4 of Charge I. Additionally, upon a de novo review of the facts in this case, making allowances for not personally observing the witnesses, we find the evidence is also factually sufficient to support said conviction.

2. Instructions on the Elements

The appellant next argues that the military judge erroneously instructed the members on Specification 4 of Charge I when she failed to instruct on the elements of attempt set forth in Article 80, UCMJ. We disagree.

We review de novo the instructions given by the military judge. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006); *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001); *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). "When a judge *omits entirely* any instruction on an element of the charged offense, this error may not be tested for harmlessness because, thereby, the court members are prevented from considering that element at all" and "[i]t is not for us to determine what the court members would have found had they been properly advised on the elements." *United States v. Mance*, 26 M.J. 244, 254-55 (C.M.A 1988) (italics in original) (citations omitted). *See also United States v. Gilbertson*, 4 C.M.R. 57, 61 (C.M.A. 1952) (inadequacy of instructions on an element requires reversal). Conversely, "when a judge's instruction adequately identifies an element to be resolved by the members and adequately requires the members to find the necessary predicate facts beyond a reasonable doubt, then an *erroneous* instruction on that element may be tested for harmlessness." *Mance*, 26 M.J. at 256 (italics in original). *See also United States v. Glover*, 50 M.J. 476, 478 (C.A.A.F. 1999); *United States v. Goddard*, 4 C.M.R. 67, 68 (C.M.A. 1952) ("[U]nder certain circumstances," an instructional error on an offense "might be an unimportant error.").

The military judge provided both sides a draft of her findings instructions for review and asked if either side objected to the instructions as written. Defense counsel objected to the instructions on the attempt specifications on the grounds that the Government failed to identify with enough specificity what offenses the appellant was charged with attempting to commit, either when summarizing the general nature of the charges or in the flyer provided to the members.[1] After acknowledging the defense

[1] At trial, the civilian defense counsel phrased the objection as follows:

> CDC: Regarding your instructions for all four specifications under Charge I, we object to your instructions because we do not believe that the government in its pleadings identified the offenses

objection, the military judge then instructed the members on the attempt specifications, as drafted in her written findings instructions.

> The military judge first instructed on the elements as follows:
>
> (1) that . . . the accused attempted to persuade, induce, entice, or coerce "Marley," someone he believed was a female 14 years of age, to commit the offense of creating child pornography, by requesting that she send nude photos of herself to the accused;
>
> (2) that the accused intended that the person he thought was "Marley" actually produce one or more visual depictions of her nude body to send him electronically or through the mail; and
>
> (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was a nature to bring discredit upon the armed forces.

She then instructed the members on the burden of proof and intent, as follows:

> MJ: Proof that the accused actually persuaded "Marley" to send nude photographs of her to him is not required. However, it must be proved beyond a reasonable doubt that, at the time of the acts, the accused intended to persuade, or attempted to persuade, "Marley," whom he thought was a 14-year-old female, to send nude photographs of herself to him.
>
> To be guilty of this offense, the accused must have specifically intended that the offense of creating child pornography be committed. You must also be convinced beyond a reasonable doubt that the accused's statements constituted a serious request that the offense be committed. Unless you are satisfied beyond a reasonable doubt that the accused was not communicating in jest when the statements were made, and that the accused specifically intended that "Marley" produce visual depictions of a minor engaged in sexually explicit conduct, as I have defined that term for you, you may not convict the accused of this offense.

The military judge continued with an instruction on the issue of impossibility:

> to which you are listing elements. We believe that based on what trial counsel stated when she read the identity of the elements to us and later to the members in their initial discussion about these findings instructions as you've memorialized on the record, and even at present, we believe that these elements are not necessarily a fair parsing of what was pled in each of the four specifications in Charge I.

> MJ: The evidence has raised the issue that it was impossible for the accused to have committed the offense of soliciting a minor to create child pornography because the person that the accused thought was a 14-year-old girl named "Marley" was actually an undercover detective from the Ulster County Sherriff's Office named [LV]. If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of attempting to persuade, induce, entice, or coerce a minor to create child pornography, the accused may be found guilty of attempting to solicit a minor to create child pornography, even though under the facts as they actually existed it was impossible for the accused to complete the offense of persuading a minor to create child pornography. For this offense to be completed, it is sufficient for the accused to have tried to persuade what he thought was a 14 year old to create child pornography. The burden of proof to establish the accused's guilt beyond a reasonable doubt is upon the [G]overnment. If you are satisfied beyond a reasonable doubt of all the elements of the offense as I have explained them to you, you may find the accused guilty of attempting to solicit a minor to create child pornography.

The correct elements of an attempt offense under Article 80, UCMJ, were: (1) that the accused did a certain overt act, (2) that the act was done with the specific intent to commit a certain offense under the code, (3) that the act amounted to more than mere preparation, and (4) that the act apparently tended to effect the commission of the intended offense. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 4.b (2008 ed.). "To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which tends to accomplish the unlawful purpose." *MCM*, Part IV, ¶ 4.c.(1).

The elements of a Clause 1 or Clause 2 Article 134, UCMJ, offense are: (1) that the accused did or failed to do certain acts, and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 60.b. At the time of trial, prosecutions concerning child pornography were consistently charged and upheld in the military under Article 134, UCMJ. *See United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004); *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006); *United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006); *United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007); *United States v. Ober*, 66 M.J. 393 (C.A.A.F. 2008); *United States v. Kuemmerle*, 67 M.J. 141 (C.A.A.F. 2009).

Notably, under 18 U.S.C. § 2251(a), it is a crime to "persuade[], induce[], entice[], or coerce[] any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." 18 U.S.C. § 2251(a). Although 18 U.S.C. § 2251(a)

does not list out separate elements similar to UCMJ offenses, two federal circuits have stated the elements as follows: "(1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce." *United States v. Broxmeyer*, 616 F.3d 120, 124 (2d Cir. 2010) (quoting *United States v. Malloy*, 568 F.3d 166, 169 (4th Cir. 2009) (internal quotations omitted)).

We find that, although the military judge's instructions on attempts lacked some specificity, they included all the required elements and adequately instructed the members to find the necessary predicate facts beyond a reasonable doubt. We further find the lack of specificity in her instructions was harmless beyond a reasonable doubt and met all four of the required elements of Article 80, UCMJ. *Mance*, 26 M.J. at 256.

First, the instructions described the overt act requirement, such as the appellant allegedly "requesting" that "Marley" "send of nude photos of herself to the appellant" when "Marley" was a person the appellant "believed to be a female 14 years of age." Second, the military judge instructed that the members must find that the appellant committed the overt act with the intent that "Marley" "actually produce one or more visual depictions of her nude body to send to him electronically" and that the appellant "must have specifically intended that the offense of creating child pornography be committed." Third, she instructed the members that they "must also be convinced" the appellant's actions were "a serious request to commit the requested act," thereby finding that the appellant's overt act was a substantial step amounting to more than mere preparation. Finally, she instructed that the members could find that the appellant's act would tend to effect the commission of the intended offense if they found that the act was prejudicial to good order and discipline or service discrediting, because Article 134, UMCJ, criminalizes such conduct. Additionally, such a request would have affected the commission of the offense if "Marley" had actually been a 14-year-old female and not an adult. Ultimately, the military judge's instructions did not relieve the Government of its burden to prove the elements beyond a reasonable doubt and did not remove the issues from the members' consideration. The members were instructed they had to find that the appellant would have completed the underlying offense but for the fact that "Marley" was not an actual minor.[2]

[2] In *United States v. Winckelmann*, 70 M.J. 403 (C.A.A.F. 2011), our superior court held that the evidence was legally insufficient to establish a substantial step toward enticement to support a conviction for attempted enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). Although the focus in *Winckelmann* was whether the evidence was legally sufficient to establish a substantial step, the Court noted that the military judge had improperly instructed the members on what constitutes a substantial step. In dicta, the Court stated that the "better practice" would be for the military judge to "craft an instruction that provides definitional guidance to the members." *Id*. at 407, n. 5. The Court also noted that the judge must provide instructions that "sufficiently cover the issues in the case and focus on the facts presented by the evidence." *Id*. In this case, we find that the military

Moreover, the military judge's instructions included conduct analogous to 18 U.S.C. § 2251(a). While the instructions clearly stated an act done by the appellant that was prejudicial to good order and discipline or service discrediting, they specifically required the members to find: (1) that the subject of the appellant's actions was someone the appellant believed to be a minor; (2) that he attempted to persuade, induce, entice, or coerce her to take a pornographic picture of herself and send it to him; and (3) that such child pornographic image would have been sent electronically or through the mail, meeting the interstate commerce requirement.

Finally, the appellant argues that the military judge erred by not defining for the members the term "create" or "creating" in the context of child pornography. We disagree. These terms are well understood, and there is nothing in the record to indicate that these terms were used in a way other than their normal definitions. Our superior court has declined to find error in cases where the military judge did not define well-understood terms. *Ober*, 66 M.J. at 406-07 (finding no error when the military judge failed to define the term "uploading" for the members); *Glover*, 50 M.J. at 478 (finding no error when the military judge failed to define the term "wrongful" for the members). In light of these cases, we decline to find that the military judge erred in not providing a specific definition for the term "create."

3. Failure to State an Offense

The appellant argues that Specification 4 of Charge I fails to state an offense because it alleges that a minor can commit the offense of creating child pornography by sending a photograph of herself, an act he claims is a legal impossibility. Whether a specification is defective is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial (R.C.M.) 307(c)(3).

The appellant relies, in part, on *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010).[3] The appellant in *Sutton* was charged under Article 134, UCMJ, for asking his stepdaughter to lift up her shirt and offering her money to do so. The specification stated that the appellant "wrongfully solict[ed] his dependant step-daughter . . . to engage in indecent liberties by asking her to lift up her shirt and show him her breasts for $20.00

judge did craft instructions that sufficiently covered the issues in the case, focused on the facts presented by the evidence, and provided definitional guidance for the members.

[3] The appellant also argues that Specification 4 of Charge I fails to state an offense because "it is questionable" whether the UCMJ prohibits a service member from soliciting a civilian to commit a crime; a civilian who is a minor cannot be solicited to commit a crime; and a minor cannot be prosecuted for creating child pornography, because to do so would violate the minor's constitutional rights to privacy and free speech. We have considered the appellant's arguments and find them to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

. . . with intent to gratify [his] lust." *Id*. at 458. During the trial, the military judge asked the trial counsel whether the appellant was charged with indecent liberties with a minor, or with solicitation to commit indecent liberties with a minor, both offenses under Article 134, UCMJ. After considerable discussion, trial counsel finally stated that the offense charged was for solicitation to commit indecent liberties with a minor. *Id*. at 457. The military judge instructed the members accordingly and the members convicted the appellant of the solicitation offense.

On appeal, our superior court addressed whether a minor child could be solicited to commit the offense of indecent liberties when she would be both the victim and perpetrator of the crime. The Court answered "no," holding that the elements of an indecent liberty with a child contemplate two actors, the accused and the victim. As such, a minor "cannot commit the offense of indecent liberties with a child on herself" because of the separate "with a child" element of indecent liberties. *Id*. at 459. The Court stated that the appropriate way to charge the appellant's conduct would have been as an indecent liberty with a child, not as a solicitation. *Id*. *See also United States v. Miller*, 67 M.J. 87, 90-91 (C.A.A.F. 2008) (a live Internet feed of the appellant masturbating his penis to a person he thought was a minor was not an attempted indecent liberty with a child, based on a lack of physical presence that is required for that offense);[4] *United States v. Rodriguez-Rivera*, 63 M.J. 372 (C.A.A.F. 2006).

We find the case before us distinguishable from *Sutton*. Here, the appellant was charged with an Article 80, UCMJ, attempt to solicit the creation of child pornography, in violation of Article 134, UCMJ. Specification 4 of Charge I does not allege attempted solicitation to commit indecent liberties with a minor. He was not in the physical presence of the undercover detective, but Article 134, UMCJ, does not require physical presence. Unlike indecent liberties with a child, child pornography offenses under Article 134, UMCJ—and 18 U.S.C. § 2251(a) for that matter—envisions the minor as both a victim and an actor involved in the offense. Thus, we find that Specification 4 of Charge I states an offense.

Mental Competency

The appellant next argues that his due process rights were violated when: (1) the military judge conducted an inadequate competency inquiry at trial, and (2) he was tried

[4] In *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008), the Court reasoned that indecent liberties with a child require that the liberties be taken in the "physical presence" of the child. Thus, the Court refused to find that the appellant's "constructive presence" via the web camera was enough to satisfy a physical presence requirement "without completely disregarding the plain meaning of 'physical presence' as used in the *Manual for Courts-Martial, United States* (*MCM*) explanation of the offense." The Court noted that the *Manual* does not define "presence." The Court also noted, however, that the *Manual* explanation states that "the liberties must be taken in the physical presence of the child, but physical contact is not required." *See MCM*, Part IV, ¶ 87.c.(2) (2008 ed.). The Court further noted that "[a]lthough MCM explanations are not binding on this Court, they are generally treated as persuasive authority." *Miller*, 67 M.J. at 89.

and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. We disagree.

1. Colloquy with the Military Judge

A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b). The trial may proceed unless it is established by a preponderance of the evidence that the accused "is presently suffering from a mental disease or defect rendering him or her mentally incompetent" to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(e). If it appears to any commander, counsel, or other officers of the court that there is reason to believe that the accused lacks the capacity to stand trial, that fact and its basis shall be transmitted to the person authorized to order an inquiry into the mental condition of the accused. R.C.M. 706(a). Before referral of charges, the convening authority orders the inquiry. R.C.M. 706(b)(1). After referral of charges, the military judge orders the inquiry. R.C.M. 706(b)(2). "The phrase . . . 'understand the nature of the proceedings . . . or to conduct or cooperate intelligently in the defense of the case' [] means that the accused 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him.'" *United States v. Procter*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)).

Prior to trial, the appellant's trial defense counsel requested a sanity board, arguing that the appellant had been treated for depression and bipolar disorder during the period of the charged offenses. The request for a sanity board was granted and the sanity board took place between 31 March 2009 and 8 April 2009. The board involved psychological testing, interviews with the appellant, and review of his available mental health records. The sanity board concluded that the appellant did not suffer from a mental disease or defect at the time of the offenses, was able to appreciate the wrongfulness of his actions, was not suffering from a severe disease or defect at the time of prosecution, and had the mental capacity to cooperate intelligently in his defense.

At one point during trial, the trial counsel played the audio-taped confession of the appellant for the members. Immediately thereafter, the appellant's civilian defense counsel (CDC) asked for a break, because his client appeared "dazed," "out of it," and "kind of sleepy." The military judge granted the request. After the break, the CDC told the military judge that his client was ready to proceed:

> CDC: My client, Staff Sergeant Payne, has consulted with the psychologist and has gotten some assistance from his family member and from the consulting forensic psychologist for the defense and I believe he is prepared to assist in the defense for the remainder of today. I just ask leave of the

court if it appears that he is again getting drowsy or woozy as he appeared during the playing of the interrogation tape that he be allowed a brief recess to take care of it. As the court is aware from information provided prior, he is under mental health treatment. We have had a sanity board in this case and we are doing our best to ensure that he is alert and able to fully participate in his defense.

MJ: Understood. So there was a sanity board that concluded that at the time of the alleged offenses he was?

CDC: He was responsible for his conduct and that he was competent to assist in the defense of his case.

MJ: And prior to taking the last recess, I mean, have you had concerns that as we have gone through today that he has not been able to participate in his own defense?

CDC: During – I noticed him getting woozy and looking asleep during portions of the interrogation tape which is why I asked for the recess in order to take care of that.

The military judge then turned her attention to the appellant, and engaged in the following colloquy:

MJ: Understood. Sergeant Payne?

ACC: Yes, ma'am.

MJ: It's obviously very important for your case that you be able to articulately and intelligently help your counsel in your defense. You understand that, right?

ACC: Yes, ma'am.

MJ: If at any point you feel too tired to go on, if you get dizzy – I mean, I don't know what meds you are taking right now so I don't know what the side effects are and I recognize that the whole court-martial is a very stressful event in your life. If at any point you need a break for any reason, you just indicate that to your counsel and he will take care of asking for it and we won't let the members know that anything is going on. Okay?

ACC: Yes, ma'am.

MJ: Were you able to listen to the tape? I mean, were you –

ACC: Absolutely.

MJ: Okay. So you were mentally present while that tape was playing?

ACC: Yes, ma'am, I was.

MJ: All right. Anything else – and are you prepared to proceed now?

ACC: Absolutely. Yes, ma'am.

In his post-trial declaration, the appellant avers the following:

> During the trial I found it very difficult to keep attention on what was going on. I couldn't stay focused. I also was extremely drowsy. I can remember my attorneys admonishing me, but there was nothing I could do to change my action. At one time in the trial, [the CDC] asked for a break so that I could collect myself, the judge directed me to call my doctor on the base. I called and was told there was nothing that could be done; I just had to deal with it. Just side effects.

Because mental competence to stand trial is a question of fact, we will overturn the military judge's determination on appeal only if it is clearly erroneous. R.C.M. 909(e)(1); *United States v. Barretto*, 57 M.J. 127, 130 (C.A.A.F. 2002); *Proctor*, 37 M.J. at 336. We conclude that the colloquy between the military judge and the appellant was sufficient and is supported by the record. The appellant seems to suggest that his competency was at issue because he was drowsy and woozy, was under mental health treatment, and was on medications. These particular facts did not raise a preponderance of the evidence sufficient to overcome the presumption that the appellant was competent to stand trial. Rather, the colloquy with the military judge suggests that the appellant was fully aware of what was happening around him. He answered "yes, ma'am" to the questions the military judge asked, with the exception of the questions "[w]ere you able to listen to the tape" and "are you prepared to proceed now," to which the appellant answered "Absolutely."

Additionally, the appellant's defense counsel assured the military judge that the sanity board found the appellant competent to assist in his defense, that the appellant was prepared to assist in his defense for the remainder of that day's proceedings, and that the appellant had access to the services of a forensic psychologist on base and at trial. Given all these facts, we cannot say that the military judge was required to conduct a more detailed inquiry with the appellant. The appellant cogently answered the military judge's questions, he affirmed that he was "absolutely" able to proceed with his defense, his counsel agreed that he was able to proceed and participate in his defense, and the sanity board report stated that he was able to participate in his defense. *See United States v. Riddle*, 67 M.J. 335, 338-40 (C.A.A.F. 2009); *see also Proctor*, 37 M.J. at 336. After

reviewing the record using the "clearly erroneous" standard, we find that the military judge did not err.

2. Competence to Stand Trial

In his post-trial declaration, the appellant asserts that his diagnosis of bipolar disorder was incorrect. He states that, during his initial hospitalization at Baylor, his provider diagnosed him as bipolar and prescribed numerous psychotropic drugs. He further states that another provider confirmed the bipolar diagnosis and prescribed him stronger psychotropic drugs and increased the dosages. As previously noted, the appellant asserts that the medications affected him physically and mentally and that during the trial, he was inattentive, lacked focus, and was extremely drowsy. During his confinement, the appellant states that his doctor concluded that his bipolar diagnosis was incorrect, took him off all medications, and he has retained his normal faculties. He claims that it was fundamentally unfair for him to be tried and convicted while rendered incompetent by a "concoction" of psychotropic medications.

We have reviewed this assignment of error in light of the record of trial and find it to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). The facts in the record undermine the appellant's argument that the drugs made him incompetent. Prior to trial, the appellant was taking the same or similar drugs as those he took during his court-martial. The sanity board found that the appellant reported only mild sedation and weight gain as side effects from these drugs. Additionally, the sanity board found that the appellant understood the legal proceedings, charges, and potential punishments associated with those charges and understood the role of the judge, members, defense, prosecution, and witnesses. The sanity board also found that the appellant did not suffer from a mental disease or defect, was able to appreciate the wrongfulness of his actions, was not then suffering from a severe disease or defect, and had the mental capacity to cooperate intelligently in his defense. Finally, the colloquy between the military judge and the appellant showed that he was aware of the proceedings and able to participate in his defense.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with and the date of completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

Chief Judge Orr participated in this decision prior to his retirement.

OFFICIAL

STEVEN LUCAS
Clerk of the Court