**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman PATRICK T. RAYNOR**
**United States Air Force**

**ACM 35449**

**14 March 2005**

Sentence adjudged 14 March 2002 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

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

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

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of assault consummated by a battery on a child under 16 and two specifications of possession of child pornography, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928, 934.[1] The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, 6 years' confinement, and reduction to E-1. The convening authority approved the sentence as adjudged.

[1] The appellant was also charged with two specifications of indecent acts with a child. These specifications were withdrawn after the announcement of findings.

The appellant has submitted three assignments of error: (1) Whether the plea to assault consummated by a battery was improvident; (2) Whether the plea to possession of child pornography was improvident; and (3) Whether the military judge erroneously admitted uncharged misconduct during the presentencing portion of the trial. Finding error, we order corrective action.

*Background*

The appellant was assigned to the Mission Support Squadron at Minot Air Force Base (AFB), North Dakota. He was friendly with the parents of the two victims in this case, 7- and 8-year-old sisters, EV and TV. On the day in question, and with the parents' permission, the appellant took the girls to a movie and subsequently checked in to a Days Inn Motel. At the motel, he took the victims swimming, after which they ordered pizza. Later, the appellant produced a sex toy, a vibrator, from among his belongings and touched both victims on their bodies, to include their genital areas. During a subsequent investigation, agents of the Air Force Office of Special Investigation searched the appellant's computer and found images of children engaging in sexually explicit conduct. These acts formed the basis of the charges and specifications.

*Providence of the Guilty Pleas*

The standard of review for the providence of a guilty plea is whether the military judge abused his discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). In examining that question, this Court must determine whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If "the factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

*A. Assault Consummated by a Battery Upon a Child Under 16*

The elements of this offense are as follows:

(a) That the accused did bodily harm to a certain person;

(b) That the bodily harm was done with unlawful force or violence; and

(c) That the person was then a child under the age of 16 years.

*Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 54b(3)(c) (2002 ed.). "'Bodily harm' means any offensive touching of another, however slight." *MCM*, Part

IV, ¶ 54c(1). *See United States v. Sever*, 39 M.J. 1 (C.M.A. 1994) (unwanted kiss); *United States v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000) (unwanted backrub).

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." Rule for Courts-Martial (R.C.M.) 910(e). "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). Our superior court has advised against "the use of conclusions and leading questions that merely extract from [the appellant] 'yes' and 'no' responses." *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004). The use of leading questions is not invariably fatal, however. Our superior court in *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995), concluded that a providence inquiry consisting of leading questions, considered in light of the record as a whole, fully supported the determination that a factual basis existed for the guilty pleas.

As stated above, in the case sub judice, the appellant entered a plea of guilty to assault and battery upon a child under 16. The providence inquiry between the military judge and the appellant included the following:

> MJ: I want you to tell me why you're guilty of the offense . . . in violation of Article 128 of the Uniform Code of Military Justice.
>
> ACC: I offensively touched [TV], a child who was under the age of 16 and could not give consent.
>
> MJ: Okay.
>
> ACC: With the vibrator.
>
> MJ: Okay you did this on the 25th of July of 2000?
>
> ACC: Yes, Your Honor.
>
> MJ: And where did this occur[?]
>
> ACC: In Minot, North Dakota, at the Days Inn.
>
> . . . .
>
> MJ: And what exactly did you do?

ACC: I took a vibrator and moved it around her body and in doing so during that time I unwittingly touched their vagina.

MJ: Okay, now when you were touching them, what were you doing?

ACC: We were tickling each other, playing with the device, back and forth; me to the girls, the girls to me, the girls to each other. They were jumping on the bed, moving around the room.

MJ: Okay, and then you had a vibrator?

ACC: Yes, Your Honor.

MJ: And you touched [TV] with the vibrator?

ACC: Yes, all over her body.

MJ: And you knew what this was, the vibrator?

ACC: Yes, Your Honor.

MJ: Now when you say, "all over her body" what do you mean?

ACC: Arms, legs, chest[.]

MJ: Up and down her legs?

ACC: Yes, Your Honor, all over.

. . . .

MJ: Now you said that [TV] didn't consent; what do you mean by that if you were tickling each other and it was a mutual thing?

. . . .

ACC: Your Honor, if I may explain how it happened. Basically what had happened was . . . the instrument had turned on in my bag. The girls inquired what the sound was. I took it out showed 'em. They wanted to feel what it was like so I handed it to 'em and we began tickling each other back and forth. During that time I touched [TV]'s vagina, which she did not give me permission to do, as being under the age of 16.

MJ: Did you; you said that you touched her vagina, did you do that in that area on purpose?

ACC: No, Your Honor, I did not do it on purpose.

MJ: Upper leg?

ACC: Upper leg, yes, Your Honor, it was completely unintentional but the act did occur.

. . . .

MJ: Now based upon what you've told me, what is it about your actions that constitute unlawful force?

ACC: Your Honor, by using that device on that age of a person would constitute that, them not knowing what it was for . . . .

MJ: Well, that actually gets us . . . to the bodily harm. Bodily harm means any offensive touching of another person; however slight. Now what you're telling me is that by using the vibrator and touching these girls, anywhere, would constitute bodily harm.

ACC: Yes, Your Honor, that's correct.

MJ: Just because of the nature of the object.

ACC: Yes, Your Honor, that's correct.

MJ: And you feel that by touching her, by touching [TV] with the vibrator on her body, that would be unlawful, correct?

ACC: Yes.

. . . .

MJ: Now although I think that it certainly constitutes offensive touching; touching a 7-year-old-child with a vibrator that's operating, what makes it unlawful in my opinion is that he placed it upon [TV]'s female sex organ and that he did that intentionally. And what I'm getting from the accused is that he didn't do it intentionally. I am going to take a break, I'm not satisfied at this point.

The military judge recessed the court. The trial resumed nearly 90 minutes later. At that time, the military judge summarized for the appellant the discussions he had with counsel during the recess:

> MJ: Now during these discussions I essentially laid out to both sides that I was just having a very difficult time accepting your plea to Specification 1 of the Additional Charge as we were talking about before the break. And the reason for that is the fact that I don't think . . . I can't get it through my head that it could possibly be an "accidental" touching as you alleged . . . . Okay, you understand?
>
> ACC: Yes, Sir.
>
> . . . .
>
> MJ: My position is not to try to get you to plead guilty . . . I am not the one that's supposed to be convincing you. You need to convince me that you are, in fact, guilty. Okay?

The military judge then reread the elements of the offense and summarized the facts that the appellant had supplied up to that point. Then he continued:

> MJ: And so what I need to know, is why this would be termed a battery by your accidental touching of her female sex organ . . . .
>
> ACC: Your Honor, while not actually penetrating the vagina with the vibrator, I did go out over the outer labia and the pubis area and that in its self [sic] would be an unwanted act.
>
> MJ: Okay, did you do that on purpose[?]
>
> ACC: Yes, I was using it all over her body.
>
> MJ: Okay, so you touched her with the vibrator all over her body.
>
> ACC: All over; and in doing so I did touch that area that would be considered offensive.
>
> MJ: So you were touching her all over and tickling her all over and you touched her with the vibrator and actually touched her intentionally . . . upon her female sex organ.
>
> ACC: Yes, Your Honor.

MJ: And she didn't consent to that?

ACC: No, Your Honor, she did not consent to that.

The military judge asked a few more questions and then proceeded to conduct the providence inquiry as to the second assault specification, this one involving [EV]. His questioning followed a similar line as with the previous specification, except that the appellant did not aver that his touching of [EV]'s genital area was unintentional.

MJ: Now, you intended to touch her all over her body with the vibrator?

ACC: Yes, Your Honor, I did.

MJ: And, encompassed within that intent, you intended to touch her upon her female sex organ with a vibrator.

ACC: Yes, Your Honor.

MJ: And you had no legal justification or excuse for these actions?

ACC: No, Your Honor, I do not.

. . . .

MJ: And you didn't touch her upon her female sex organ accidentally did you?

ACC: I, no, Your Honor, all over her body.

MJ: Okay, when you touched her with the vibrator, whether it was on other parts of her body or upon her female sex organ, you did it on purpose?

ACC: Yes, Your Honor, I did.

MJ: Okay, I just want to make sure that, that is what you're telling me. I am not trying to put words in your mouth.

ACC: Yes, Your Honor, I understand that.

MJ: Okay, and in fact, is that what you did?

ACC: Yes, Your Honor, that is what I did.

MJ: And you intended to do it.

ACC: Yes, Your Honor, I did.

At the conclusion of the providence inquiry, the military judge found the appellant guilty of both specifications of assault consummated by a battery upon a child under the age of 16.

The appellant now contends that his plea was improvident because he merely responded affirmatively to leading questions. Furthermore, the appellant contends that the military judge did not adequately resolve the factual inconsistency regarding intent. We do not agree.

While, as stated previously, leading questions are not a favored method of conducting a providence inquiry, we do not find that they predominated in the appellant's case. In response to open-ended questions, the appellant stated that: (1) he visited the Days Inn in Minot, North Dakota, with the victims; (2) he had in his possession a vibrator; (3) the victims expressed curiosity about the vibrator when it "turned on" in his bag; (4) he touched the victims all over their bodies with the vibrator; (5) the vibrator came in contact with the victims' vaginal area; (6) the victims did not give him permission to touch them in that location; and (7) the touching was offensive because of the nature of the device and the area of the body upon which it was used.

Therefore, he, himself, supplied most of the facts underlying the offense. Only when he denied any intent in touching the vaginal areas of the victims did the judge express concern as to the providence of the plea. Under the circumstances, we conclude that the ensuing leading questions were a reasonable means to establish the factual basis of the plea and to resolve the inconsistency inherent in the appellant's earlier answers.

In addition, we conclude that the military judge satisfactorily resolved this inconsistency, which appears most logically to have resulted from the appellant's efforts to minimize the seriousness of his offenses. Indeed, the appellant's own distinction between having touched the surface of the genital areas rather than having penetrated seems to have been an effort to address the dilemma. We conclude that the appellant did "state in his own words" facts sufficient to resolve the inconsistency. *See Outhier*, 45 M.J. at 326. We hold that the military judge did not abuse his discretion by accepting the plea of guilty as to the two specifications of assault and battery upon a child under 16.

*B. Possession of Child Pornography*

In charging the appellant with possessing child pornography, the government alleged a violation of 18 U.S.C. § 2252A, popularly known as the Child Pornography

Prevention Act (CPPA). During the *Care*[2] inquiry, the military judge advised the appellant as to the definition of child pornography as contained in 18 U.S.C. § 2256(8). At that time, the statute provided that child pornography included any visual depiction that is or "appears to be" of a minor engaging in sexually explicit conduct.

However, after trial in the case sub judice, the Supreme Court issued its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down part of the CPPA. Specifically, the Court held, among other things, that the phrase "appears to be" is unconstitutionally vague and overbroad, in that it would extend to depictions which did not involve actual children in its production. Subsequently, our superior court issued its opinion in *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003). In that case, the court found a plea of guilty to possessing child pornography to be improvident due to its reliance upon the stricken portions of the CPPA.

In the case sub judice, the military judge, in advising the appellant of the elements of the offense, provided an unconstitutionally overbroad definition of child pornography. We therefore hold that the appellant's plea as to these two specifications was improvident, for the same reasons as the court found in *O'Connor*. In light of our holding, we conclude that we do not need to address the remaining assignment of error.

*Conclusion*

The findings of guilty as to the Charge and Specifications 3 and 4 thereof, and the sentence, are set aside. A rehearing, both as to Specifications 3 and 4 of the Charge, as well as the sentence, may be ordered. The findings of guilty as to the Additional Charge and its specifications are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator

[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).