UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Master Sergeant GEORGE E. ROLLINS
United States Air Force

ACM 34515

24 December 2003

Sentence adjudged 2 September 2000 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, confinement for 7 years, and reduction to E-5.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial found the appellant guilty, contrary to his pleas, of one specification of indecent assault, three specifications of indecent acts with a child, two specifications of indecent liberties with a child, and one specification of receiving child pornography shipped in interstate commerce contrary to 18 U.S.C. § 2252(a)(2), all in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 8 years, and reduction to E-5. The convening authority disapproved the findings of guilt for two specifications of indecent liberties with a child and one specification of indecent acts with a child, and modified the findings of guilt for two other specifications. The convening authority approved a sentence of a bad-conduct discharge, confinement for 7 years, and reduction to E-5. The

convening authority forwarded the case for mandatory review by this Court under Article 66, UCMJ, 10 U.S.C. § 866.

The appellant raises several allegations of error. He alleges that: (1) His convictions for indecent acts and indecent assault upon a child must be set aside because the court members were not required to determine that the offenses fell within the statute of limitations; (2) The convening authority abused his discretion in failing to order a rehearing on sentencing after taking corrective action; (3) The conviction for indecent acts with a child, JG, is legally and factually insufficient; (4) The evidence is legally and factually insufficient to support the appellant's conviction for receiving child pornography contrary to 18 U.S.C. § 2252(a)(2); and (5) The convictions for indecent assault and indecent acts upon B, a child under 16 years, are multiplicious or an unreasonable multiplication of charges. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant also contends that the military judge erred by admitting hearsay statements contained in documents seized from the appellant's computer, and that the testimony of the appellant's wife was inadmissible under the husband-wife communication privilege. We find no error and affirm.

I. Statute of Limitations

Article 43, UCMJ, 10 U.S.C. § 843, establishes the statute of limitations for offenses under the UCMJ. That statute provides, in pertinent part, that a person is "not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges . . . ."

The appellant was charged with numerous offenses against three child victims, B, JG, and KC, including offenses occurring more than five years before receipt of sworn charges on 21 July 2000. Three specifications were wholly outside the five-year period preceding receipt of charges, and two specifications included time periods both within and without the five-year period.

Immediately after arraignment, trial defense counsel moved to dismiss the affected specifications, asserting a violation of the statute of limitations. The military judge denied the motion to dismiss, relying on this Court's decision in *United States v. McElhaney*, 50 M.J. 819 (A.F. Ct. Crim. App. 1999), which held that 18 U.S.C. § 3283, extending the statute of limitations for child abuse offenses until the victim reaches age 25, applied to courts-martial. The court-martial found the appellant guilty of the five specifications that included offenses committed more than five years before the receipt of sworn charges.

After trial, but before the convening authority took action on the findings and sentence, our superior court released its opinion in *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000), reversing this Court's decision and holding that 18 U.S.C. § 3283

was inapplicable to courts-martial. In a post-trial session under Article 39a, UCMJ, 10 U.S.C. § 839a, convened in accordance with Rule for Courts-Martial (R.C.M.) 1102, trial defense counsel moved to dismiss the findings of guilt affected by the statute of limitations and also moved for a mistrial on the grounds that the prejudicial effect of the error tainted all the findings and the sentence. The military judge denied the motions.

The staff judge advocate advised the convening authority of the developments with regard to the applicable statute of limitations and suggested corrective action. The staff judge advocate recommended that the convening authority disapprove the findings of guilt for the three specifications wholly outside the five-year limitations period and that he approve only so much of the findings of the remaining affected specifications that occurred within the permissible charging period. The convening authority took the recommended action on the findings. The staff judge advocate also advised the convening authority of the need to take corrective action on the sentence. He recommended approving the sentence but reducing the confinement to 5 years. The convening authority approved only so much of the sentence as called for a bad-conduct discharge, confinement for 7 years, and reduction to E-5.

The appellant maintains that it was error for the convening authority to modify the findings for the two specifications in order to approve convictions for offenses within the statute of limitations. In a single paragraph of argument, the appellant suggests that the convening authority could not properly amend the specifications to conform to the statute of limitations.

It is clear the convening authority has the power to take corrective action on the findings. Congress specifically provided that "[t]he authority . . . to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." Article 60(c)(1), UCMJ; 10 U.S.C. § 860(c)(1). Congress further provided that the convening authority,

> in his sole discretion, may–
>
> (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or
>
> (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Article 60(c)(3), UCMJ.

The appellant also avers that the amendment of the findings by the convening authority was improper because the members were never called upon to determine

whether any of the alleged offenses occurred after 21 July 1995. The appellant argues, "there is no way to discern what the members would have done in this situation." However, the members were instructed of the elements of each charged offense, including the alleged timeframe. They were also instructed that, if they had a doubt about the time, place, or manner in which the offenses were committed, they could modify the language of the specifications to reflect their findings. The military judge emphasized that point by instructing, "For example, you may make slight changes to the date or places alleged, or strike certain language that you find inapplicable." There is no evidence suggesting the court members did not follow these instructions properly; we will presume they did so. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000); *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). In fact, the members made changes to one of the affected specifications, finding the appellant not guilty of attempted rape, but guilty of indecent assault by placing his penis near the victim's vagina. The members' detailed findings included a finding that the offenses occurred on divers occasions between 17 July 1989 and 18 October 1995.

The issue before this Court is whether the evidence is legally and factually sufficient to support the findings as approved by the convening authority. Under Article 66(c), UCMJ, we may approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court holds that 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," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The Specification of Charge I alleged that the appellant attempted to rape B on divers occasions between 27 July 1989 and 19 October 1995. The victim testified that the appellant touched her around the area of her vagina and anus with his penis. She testified that the conduct continued for many years, and occurred about once every two weeks. She specifically recalled that the appellant stopped putting his penis near her vagina in October 1995 because she began menstruating.

As noted above, the members found the appellant not guilty of attempted rape, but guilty of indecent assault by placing his penis near the victim's vagina on divers occasions between 17 July 1989 and 18 October 1995. The convening authority approved the findings, amending the time frame to 21 July 1995 to 18 October 1995. The evidence is legally sufficient to support the findings as amended by the convening authority. We are also convinced beyond a reasonable doubt of the appellant's guilt of the offenses as approved by the convening authority.

Specification 1 of Charge II also included allegations both within and outside the five-year statute of limitations. That specification alleged that the appellant committed indecent acts upon B, a child under 16 years of age, on divers occasions between 27 July 1989 and 26 July 1997, by fondling her breasts and rubbing her vaginal area with his hands. The victim testified in detail about the incidents, and specifically related them to locations where the appellant was stationed. Much of the testimony concerned incidents occurring within the five-year statute of limitations.

The members found the appellant guilty as charged. The convening authority amended the members' findings to include only that period between 21 July 1995 and 26 July 1997. The evidence is legally sufficient to support the findings as amended by the convening authority. We are also convinced beyond a reasonable doubt of the appellant's guilt of the offenses as approved by the convening authority.

II. Sentence Rehearing

The appellant avers that the convening authority abused his discretion by taking corrective action on the sentence rather than ordering a rehearing on the sentence. We find no abuse of discretion under the unique circumstances of this case.

As discussed above, the convening authority is empowered to take corrective action on the sentence of a court-martial. Our superior court holds that such corrective action may be taken when the convening authority is convinced that the sentence, as reassessed, is no greater than the sentence that the original court-martial would have imposed, absent the error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). We review sentence reassessment after corrective action for an abuse of discretion. *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000); *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999).

In this case, the servicing staff judge advocate properly advised the convening authority that he could reassess the sentence if he was able to determine that the sentence would have been at least of a certain magnitude absent the error, and that otherwise a rehearing was required. Thus, we must review the corrective action take by the convening authority on the sentence for an abuse of discretion.

The appellant notes that, as a consequence of the corrective action taken on the findings to conform to the statute of limitations, the maximum possible period of confinement dropped from 53 years to 32 years. We considered the appellant's argument about the reduction in the maximum possible sentence. We recognize that service members are not sentenced based upon some arithmetical formula derived from the maximum punishment, but it may be a factor. The corrective action reduced the maximum possible period of confinement from 53 years to 32 years. While this is a

substantial reduction in the amount of possible confinement, it did not "drastically change[] the penalty landscape." *Harris*, 53 M.J. at 88 (maximum confinement changed from life imprisonment to 18 months confinement). Considered as a fraction of the maximum possible punishment, the reduced confinement approved by the convening authority is not substantially greater than the sentence adjudged by the court-martial.

An important factor in reviewing the convening authority's reassessment of the sentence is determining whether the quantum of evidence considered by the court-martial on the sentence would have been substantially different absent the error. We examine first the specification of attempted rape of B on divers occasions between July 1989 and October 1995. The court-martial found the appellant guilty of indecent assault on divers occasions, and the convening authority approved the findings to include only offenses between 21 July 1995 and 18 October 1995. Notwithstanding the statute of limitations, the evidence of the appellant's indecent assaults upon B from July 1989 to 21 July 1995 would have been admissible to show parental coercion, *United States v. Henley*, 48 M.J. 864, 871 (A.F. Ct. Crim. App. 1998) (similar crimes which fall outside the statute of limitations may be admitted on the issue of consent where parental coercion is in issue); *United States v. Hansen*, 36 M.J. 599, 603-04 (A.F.C.M.R. 1992); to show the appellant's similar acts of sexual molestation under Mil. R. Evid. 413 or 414, *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000); *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000); or to show the impact of the crimes on the victim, *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990); R.C.M. 1001(b)(4). Considering the unique circumstances of this case, we find that the error regarding the statute of limitations did not result in allowing otherwise inadmissible evidence to be presented to the court-martial for consideration in sentencing.

In the same way, the other evidence of the appellant's conduct admitted at trial but barred from prosecution by the statute of limitations, including indecent acts upon B between July 1989 and 21 July 1995, indecent liberties with JG in November 1990 and between December 1991 and January 1992, and indecent acts upon KC between 1 and 30 June 1993, would have been admissible under Mil. R. Evid. 413 or 414, and R.C.M. 1001(b)(4). *Henley*, 53 M.J. at 490; *Nourse*, 55 M.J. at 232.

We find that the convening authority did not abuse his discretion in reassessing the sentence after corrective action. We are also convinced the sentence is no more severe than the sentence the court-martial would have adjudged absent the error.

III. Indecent Acts with a Child

The appellant contends that his conviction for committing indecent acts with JG is legally and factually insufficient. We disagree.

In Specification 5 of Charge II, the appellant was charged with committing an indecent act with JG "by giving him a pornographic magazine and by requesting that they masturbate together." The evidence presented at trial revealed that the appellant took JG to a movie and thereafter drove to an adult bookstore. The appellant entered the adult bookstore alone and later emerged with a paper bag. The appellant then drove to a spot behind a local grocery store and parked the car. He gave JG the pornographic magazine he had purchased at the adult bookstore and invited JG to masturbate with him in the parked car behind the grocery store. At the time, JG was only 17 years old and was a relative of the appellant. The appellant testified and admitted that he gave the magazine to JG, but denied suggesting that they masturbate together.

The appellant argues that he cannot be convicted of committing indecent acts with another because JG did not "participate" in the alleged acts. In *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987), the court held that "[t]he offense of committing indecent acts with another requires that the acts be done in conjunction or participating with another person." The offense need not involve physical touching, nor must it be consensual. *See United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994). For an indecent act to be "with" another, it must involve specific interaction with a particular person or persons.

In this case, the indecent acts were providing a 17-year-old male relative, JG, with a pornographic magazine and asking him to masturbate with the appellant in a vehicle parked behind a grocery store. The appellant directed the magazine and the lewd request to the victim, JG, specifically. We find that this constituted sufficient interaction to fulfill the requirement that the indecent acts be "with" another.

We are also mindful of (then) Chief Judge Cox's admonition in his concurring opinion in *Eberle*, 44 M.J. at 375, that there is little point in quibbling about the precise definitions of indecent acts, indecent liberties, indecent exposure, or general neglects. The offense in question was a violation of Article 134, UCMJ, which sanctions all disorders and neglects prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The crime was created by Congress, not the Punitive Articles section of the *Manual for Courts-Martial*. To echo Chief Judge Cox's observation, everybody in the civilized world knows it is wrong to provide a pornographic magazine to a 17-year-old boy and invite him to join in mutual masturbation in a parked car behind a grocery store. We have no difficulty in determining that this was conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The appellant also argues that his "activities with the pornographic magazine should be deemed as protected under the First Amendment of the Constitution," so that handing the "legal" magazine to someone who was almost 18 years old cannot be a crime. This argument is groundless. Regardless of whether the appellant has a First

Amendment right to possess such a magazine, that right does not extend to any and all uses of such material. The indecency of the appellant's conduct is examined under all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the public location of the intended acts. *See generally United States v. Brinson*, 49 M.J. 360, 364 (C.A.A.F. 1998).

IV. Receiving Child Pornography—18 U.S.C. § 2252(a)(2)

The court-martial also convicted the appellant of knowingly receiving a visual depiction of a minor engaged in sexually explicit conduct that had been transported in interstate or foreign commerce contrary to 18 U.S.C. § 2252(a)(2), in violation of Article 134, UCMJ. The appellant now contends the conviction is both legally and factually insufficient. We do not agree.

As part of the formal investigation of this case, the Air Force Office of Special Investigations (AFOSI) obtained and examined the appellant's home computer. The prosecution introduced into evidence eleven images, and the electronic information accompanying the transmissions, retrieved from the hard drive of the appellant's computer. Captain (Dr.) Tamara Pistoria testified as an expert witness in pediatrics. She evaluated the sexual development of the individuals in the images, and testified that they were consistent with children under 18 years of age. The appellant testified and admitted downloading the images, but claimed that he thought they were over 18 years of age.

The appellant contends the evidence is legally and factually insufficient because the government did not prove that real children were harmed in the creation of the images. Relying on the decision of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the appellant contends that there was "no way of knowing whether these were actual human beings or computer generated" images. We do not agree.

The photographs themselves are some 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. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002), *cert. denied* 123 S. Ct. 1646 (2003); *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever."), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Tynes*, 58 M.J. 704, 707 (Army Ct. Crim. App. 2003).

We note that the decision in *Free Speech Coalition* focused on the language of 18 U.S.C. § 2256 which defined child pornography in such a way that it included images that "appeared to be" children or were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material depicts minors engaged in sexually explicit activity. However, the appellant was charged under

18 U.S.C. § 2252, an earlier statute that defined child pornography as images made using actual minors. *Free Speech Coalition*, 535 U.S. at 241. The definition of child pornography from 18 U.S.C. § 2252 was retained in 18 U.S.C. § 2256(8)(A), and was found to pass Constitutional muster. *Id.* We further note that the military judge's instructions to the members defining the offense made it clear that they were required to find that an actual child was involved in the production of the image in question. The military judge specifically advised that a required element of the offense was "[t]hat the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." Thus, the finding of guilt was a finding that the images depicted actual children.

The appellant also argues that the evidence is insufficient because the government did not prove that the people depicted in the images were under 18 years of age. The appellant complains that Dr. Pistoria should not have been allowed to use Tanner Staging as part of her evaluation of the age of the children in the images. We find no merit in this argument. Clearly Dr. Pistoria was a highly qualified pediatrician, whose expertise was relevant, reliable, and helpful to the fact finder. *See United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994); *United States v. Pollard*, 128 F. Supp. 2d 1104, 1108-09 (E.D. Tenn. 2000). The evidence was sufficient to prove beyond a reasonable doubt that the children in the images were under 18 years of age.

Finally, the appellant argues that the images do not reflect "sexually explicit conduct" so that they cannot be considered a violation of 18 U.S.C. § 2252(a)(2). We reviewed the exhibits and find images sufficient to constitute a "lascivious exhibition of the genitals or pubic area" as defined by 18 U.S.C. § 2256(2)(E). *See United States v. Pullen*, 41 M.J. 886, 889 (A.F. Ct. Crim. App. 1995); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987).

V. Multiplicity and Unreasonable Multiplication of Charges

The appellant argues that his conviction for indecent assault upon B is "multiplicious" with his conviction for indecent acts upon the same victim. The cornerstone of the argument is the appellant's contention that the facts that form the basis of the conviction for indecent assault–placing his penis near the victim's vagina and anus–are identical to the acts which form the basis for the conviction for indecent acts, i.e. touching the victim's breasts and vagina with his fingers.

We find no merit to this argument. These were separate acts, which were separately chargeable and punishable, even if they occurred during the same general time frame as other offenses. *See United States v. Neblock*, 45 M.J. 191 (C.A.A.F. 1996).

VI. Hearsay Statements in Seized Files

The appellant was charged with receiving images of child pornography which had been shipped in interstate commerce, in violation of 18 U.S.C. § 2252(a)(2). The prosecution offered into evidence eleven electronic images retrieved from the hard drive of the appellant's computer. Along with each image, the prosecution offered the "header" and "footer" of the messages that accompanied the transmissions, that is, computer-generated data showing the sites from which the data originated, the times and dates of transmission, the paths through the Internet, and the Internet addresses at which the data were downloaded. The exhibits containing computer-generated data were offered to prove the truth of the matters asserted, such as the dates and times of the transmissions and that the files had been transported over the Internet.

Trial defense counsel objected to specific portions of the data as hearsay, among other objections. The military judge heard evidence and argument, and overruled the hearsay objection. He held that the computer-generated data were not hearsay because they were not statements made by people. Alternatively, he ruled they were admissible as records of a regularly conducted activity under Mil. R. Evid. 803(6). The appellant now asserts the military judge erred. We find no error.

It is important to distinguish between computer-stored data and computer-generated data. Computer-stored data is hearsay, because it consists of out-of-court assertions by people that are simply stored in an electronic medium. The data at issue in this case were computer-generated, that is, created by the electrical and mechanical operation of the computer system. Thus, it was not an assertion of a person and was not hearsay. *See United States v. Duncan*, 30 M.J. 1284, 1288-89 (N.M.C.M.R. 1990); *State v. Armstead*, 432 So. 2d 837, 839-40 (La. 1983) ("the evidence in this case was generated solely by the electrical and mechanical operations of the computer and telephone equipment, and was not dependent upon the observations and reporting of a human declarant"); *People v. Holowko*, 109 Ill. 2d 187, 191 (1985); 2 John W. Strong, et al., *McCormick on Evidence* § 294 (5th ed. 1999).

> Computer generated records are not hearsay: The role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy. . . . In this case, the record reflects that persons with special knowledge about the operation of the computer system gave evidence about the accuracy and reliability of the computer tracing so as to justify the admission of the computer printouts.

State v. Dunn, 7 S.W.3d 427, 432 (Mo. Ct. App. 1999) (quoting *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998), *cert. denied*, 526 U.S. 1089 (1999)). "Because such records are not the counterpart of a statement by a human declarant . . . they should not be treated as hearsay, but rather their admissibility should be determined on the basis of the reliability and accuracy of the process involved." Strong, *supra*.

VII. Husband-Wife Privilege

At trial, the appellant's wife testified about statements the appellant made in response to his wife's queries. Specifically, the appellant's wife testified that he admitted fondling the victim, saying, "Yes, I touched her. It only happened once. I'm sorry. I'll get help." She also testified that the appellant said if asked he would deny it–"It will be her word against mine." At the time of trial, she had filed for divorce from the appellant. The defense did not raise any objection based upon any marital privilege at trial.

The appellant now contends it was plain error for the military judge to allow the appellant's wife to testify about confidential communications. He cites Mil. R. Evid. 504(b)(1), which holds that "a person has a privilege during and after the marital relationship . . . to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law." We find no merit to this contention, however. Mil. R. Evid. 504(c)(2)(A) provides that there is no marital privilege in proceedings in which one spouse is charged with a crime against the person or property of a child of either spouse.

VIII. Conclusion

The 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; *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court