UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DAVID W. VANDENHECKE
United States Air Force

ACM 35850

27 March 2006

Sentence adjudged 9 June 2003 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash.

Approved sentence: Dishonorable discharge, confinement for 21 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, Captain Diane M. Paskey, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Jesse Coleman (legal intern).

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was tried at Yokota Air Base, Japan, by a general court-martial consisting of officer members. He pled guilty to a single specification of disorderly conduct,[1] in violation of Article 134, UCMJ, 10 U.S.C. § 934. Contrary to his pleas, the court members found the appellant guilty of rape, carnal knowledge, possession of child

[1] The appellant surreptitiously videotaped his stepdaughter with a camera that he had hidden in her bedroom closet. He twice filmed her naked when she returned to her room after taking a shower.

pornography, and an indecent act, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. The court members sentenced the appellant to a dishonorable discharge, confinement for 21 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant asserts two errors: Whether the evidence supporting his conviction for possessing child pornography is legally and factually sufficient, and whether the military judge abandoned his impartial role and became a partisan advocate for the government. Finding no error, we affirm the findings and sentence.

Legal and Factual Sufficiency

The appellant was charged with wrongfully and knowingly possessing "visual depictions of a minor engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces." The visual depictions consisted of some 700 images of suspected child pornography seized from the appellant's home computer and separate disks. The images were admitted into evidence.

The government presented testimony by an Air Force Office of Special Investigations (AFOSI) computer crime investigator, Special Agent (SA) David Gilbert, who was qualified as an expert in computer forensic analysis. Within his area of expertise, SA Gilbert described how computer images might be created through three techniques: virtual imaging, morphing, and cut and paste (or composite) image creation. He was also allowed to describe, as lay opinion under Mil. R. Evid. 701, how he assesses whether suspected child pornography images are of actual minors. SA Gilbert explained the assessment factors he used in the context of four representative images seized from the appellant's collection.

SA Gilbert's methodology was fairly simple: pay close attention to detail. In each image, he identified certain distinctive points or "abnormalities" such as what appeared to be redness on the stomach of one subject (possibly an insect bite, he testified), bruises, and a "mottling" of another subject's skin. Once SA Gilbert identified what he considered to be a distinctive detail, he looked for – and found – the same detail in other images of the same child. In his opinion, the recurring abnormalities "would be difficult to render that consistently so that it's in the same position and looks real. I think it would be difficult to do that."

The military judge instructed the members about the lay aspects of SA Gilbert's testimony four separate times, repeatedly emphasizing that the members were to draw their own conclusions about the images and not feel in any way bound by SA Gilbert's opinions.

He further instructed the members that, to convict the appellant, they must find he knowingly and wrongfully possessed at least one computer image that contained visual depictions of a minor engaged in sexually explicit conduct. The military judge defined "minor" to be "any person under the age of eighteen years." He defined "person" to mean an "actual person, versus a computer-generated depiction, i.e., virtual image, 'morphed' image, or 'cut and paste' image of an actual person."

While recognizing appellant was charged under clauses 1 and 2 of Article 134, appellate defense counsel contend the government was required to prove the images possessed were of real minors.

We may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the elements of the offense 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 has clearly determined that, "in cases prosecuted under clauses 1 and 2, the Government bears no burden of demonstrating that the images depict actual children – with or without expert testimony." *United States v. Cendejas*, 62 M.J. 334, ___ n.5 (C.A.A.F. 2006). Accordingly, the government was not required to prove that the images possessed by the appellant were of actual persons.

Nevertheless, military factfinders can determine whether particular images are of real children or not. *United States v. Wolford*, 62 M.J. 418 (C.A.A.F. 2006); *Cendejas*, 62 M.J. at 338. Given the evidence in this case about the state of technological capability to create virtual images, the number and nature of the images in this case, and the ability of court members to make a common sense assessment of those images (whether using SA Gilbert's methodology or something akin to it), we conclude that a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt.

Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). Viewing the representative images used during the trial ourselves, we are convinced beyond a reasonable doubt that they are of actual children under the age of 18. *See Cendejas*, 62 M.J. at 338. *See also United States v. Anderson*, 60 M.J. 548, 552 n.4 (A.F. Ct. Crim. App. 2004); *United States v. Appeldorn*, 57 M.J. 548, 550 (A.F. Ct. Crim. App. 2002).

The appellant also contends that there was no evidence that his conduct was either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. There is no merit to his argument; the misconduct he engaged in is prejudicial to good order and discipline and service-discrediting "for the very reason that it *is* (or has been) generally recognized as illegal; such activity, by its unlawful nature, tends to prejudice good order or to discredit the service." *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988). *See also United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006); *Anderson*, 60 M.J. at 555 ("Again, as indicated earlier, a review of the 25 images admitted into evidence by the prosecution readily bears out the appellant's belief beyond any question. These graphic images remove any reasonable doubt that they are—*whether of actual or 'virtual' children*—of a nature to bring considerable discredit upon the armed forces"); *United States v. Nygren*, 53 M.J. 716, 718 (C.G. Ct. Crim. App. 2000).

Impartiality of the Military Judge

The appellant's contention that the military judge abandoned his impartial role and became a partisan advocate for the government is based on this brief, but important, exchange with the victim:

> Q [MJ]: You told Defense Counsel that based upon that comment that your friend, Ian, had made, that it confirmed your belief that your dad had penetrated you at the first alleged rape, correct?[2]
>
> A: Correct.
>
> MJ: Okay. Do you have any doubt that your dad penetrated you during the alleged second, third or fourth rape?
>
> A: I have no doubt.
>
> Q: Okay. You knew that happened two, three and four?
>
> A: I know. For sure.

A central issue was whether penetration occurred during the first alleged rape. On direct examination, the trial counsel did not specifically ask the victim whether the appellant had penetrated her. The military judge's question did reach the issue left open by the trial counsel, but it was a factual gap already significantly closed by the victim in response to a cross-examination question from the trial defense counsel regarding the comment by her friend Ian:

[2] Sometime after the first alleged rape, the victim testified that she had sexual intercourse with a young man named Ian. She testified that he said she did not feel like a virgin.

Q: And at that point, that was one of the factors that solidifies in your head that [the appellant] penetrated you the first time, correct?

A: That's correct.

We assess whether, "'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (quoting *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987)). This test is applied from the viewpoint of the reasonable person. *Ramos*, 42 M.J. at 396 (citing S. Childress & M. Davis, 2 *Federal Standards of Review* § 12.05 at 12-38 (2d ed. 1992)).

Article 46, UCMJ, 10 U.S.C. § 846, and Mil. R. Evid. 614, "provide wide latitude to a military judge to ask questions of witnesses called by the parties." *United States v. Acosta*, 49 M.J. 14, 17 (C.A.A.F. 1998). It is clear to us from the record that the military judge did not abandon his impartial role, either by the nature of the questions he asked or the manner in which he asked them. This case involved a significant number of motions and evidentiary issues. The 7-volume record of trial included a 782-page trial transcript. The military judge did a meticulous job of resolving the issues raised by both sides, and the record shows he acted fairly and impartially throughout the proceedings. We are convinced that a reasonable person would not question the legality, fairness, and impartiality of the appellant's trial. *See Ramos*, 42 M.J. at 396.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court