UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JEREMY R. WALLACE
United States Air Force

ACM 36174

30 October 2006

Sentence adjudged 18 October 2004 by GCM convened at Travis Air Force Base, California. Military Judge: Anne L. Burman.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, contrary to his pleas, of one specification each of carnal knowledge, sodomy with a child under the age of 16, and possession of child pornography, in violation of UCMJ Articles 120, 125, and 134, 10 U.S.C. §§ 920, 925, 934. The general court-martial, consisting of officer and enlisted members sentenced him to a dishonorable discharge, confinement for 6 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before us, the appellant claims, inter alia, that the evidence is legally and factually insufficient to sustain his carnal knowledge conviction, because he presented a valid

mistake of fact defense as to the child's age. Under the facts of this case, we disagree and affirm.

Background

The appellant was a 25-year-old aircraft maintainer stationed at Travis Air Force Base (AFB), California, when he met TD, a 14-year-old girl, via the Internet, sometime in June or July 2002. The appellant was married and the father of two children; TD was a military dependent, living on Travis AFB. Both the appellant and TD were going through difficult times at home, and they each lent the other a sympathetic ear. Within a short time, they agreed to meet face-to-face. About two to three weeks after meeting online, the appellant's relationship with TD had progressed to the point that he had inserted his fingers into her vagina and she had performed oral sodomy on him.

The appellant and TD continued to correspond online through the summer and fall of 2002. For some period of time thereafter, TD stopped communicating with the appellant because her parents learned about her online conversations and ordered her to stop, but she later resumed their correspondence. In November 2002, TD told the appellant it was her birthday. A few months later, in February 2003, TD and the appellant agreed to meet on Valentine's Day at his home on base. During that meeting, the appellant engaged in oral and anal sodomy with TD, as well as vaginal intercourse. TD was 15 years old at the time.

The appellant's point of contention stems from TD's testimony that, although 14 years old when she met the appellant, she claimed at the time to be 15 years old. Thus, the appellant claims, while he knew TD was under the age of 16 at the time of their first encounters in the summer of 2002, he labored under a mistake of fact as to her age when they consummated their sexual relationship in 2003. Appellant claims since TD told him about her birthday in November 2002, he reasonably believed she was 16 years old.

Noting that the appellant bears the burden of proving the affirmative defense of mistake of fact, the government contends that the appellant has failed to make his case. The government highlights: (1) the nature of the meetings between the appellant and TD, which were brief, clandestine encounters; (2) the appellant's claim to government investigators that TD was "sketchy" about her age; (3) the appellant's claim, in a sworn statement, to have been unsure of TD's exact age;[1] and (4) TD's youthful appearance and demeanor in court. Taking into account all of the evidence, the government contends, the appellant's mistaken belief -- if it existed at all -- was not reasonable.

[1] The appellant variously claimed TD told him she was "16, 17, and 18 but never told [him] an exact age."

Mistake of Fact

We review the appellant's claims of legal and factual insufficiency de novo, examining all of the evidence admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, as the prevailing party at trial, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of his guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The appellant's assignment of error requires us to apply these standards in a rather novel way. The appellant does not challenge any of the elements of the offense of carnal knowledge: first, that he engaged in an act of sexual intercourse with TD; second, that TD was not his spouse; and third, that at the time of the sexual intercourse, TD was under the age of 16. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45(b)(2) (2005 ed.).[2] Moreover, after reviewing the record independently, we find the evidence both legally and factually sufficient to establish all of those elements beyond a reasonable doubt. Instead, as noted above, the appellant contends he proved by a preponderance of the evidence that TD was more than 12 years of age, and that he believed TD to be at least 16 years of age, at the time of the intercourse. Such a belief, if reasonable, amounts to a complete defense to the offense of carnal knowledge. The appellant bears the burden of persuasion on this type of defense; the standard is proof by a preponderance of the evidence. *MCM*, Part IV, ¶ 45(c)(2).

As the government pointed out at trial, the appellant's secretive behavior during his affair with TD could plausibly be construed as indicative of his belief that she was too young. While the interpretation urged by the appellant; that he tried to keep his relationship with TD secret because he was married and not because he feared she was underage, is also reasonable, we evaluate this evidence in the light most favorable to the prosecution. *Quintanilla*, 56 M.J. at 82. We concur with the argument of appellate government counsel that, considering the appellant's admission that TD was "sketchy" about how old she was and gave him three different stories about her age – stories that could not all have been true – the members could rationally have concluded that reliance on what she told him was not reasonable. Finally, the government at trial pointed to TD's youthful appearance and demeanor in court, arguing that the appellant could not have

[2] The 2002 edition of the *MCM*, in effect at the time of the appellant's trial, contained provisions substantially identical to the current edition.

reasonably believed her to be of age. Appellate government counsel offers the same argument on appeal. We have previously held that such personal observations by the trier of fact may be sufficient to defeat a claim of mistake of fact, and renew that holding here. *See United States v. Magee*, ACM S29513 (A.F. Ct. Crim. App. 2000) (unpub. op.). S*ee also United States v. Cendejas*, 62 M.J. 334, 338 (C.A.A.F. 2006) (factfinder may determine whether individual is of age based on physical appearance alone).

We find that a rational trier of fact could have concluded the appellant failed to meet his burden of proof. Further, taking into account all of evidence in the record of trial, we are ourselves unpersuaded that the appellant reasonably believed TD was of age. This assignment of error is without merit.

Other Assignments of Error

We resolve the remaining assignments of error adversely to the appellant. The appellant's written consent permitted the government investigators to search his residence, as well as his computer, and to seize any contraband or items they considered to be evidence of a crime. The military judge found that the appellant's consent was freely given and was not withdrawn until after the child pornography had already been discovered on his computer. We conclude the military judge did not abuse her discretion in denying the appellant's motion to suppress. *See United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). We likewise conclude that, in light of the appellant's failure to inform his trial defense counsel at any time prior to the conclusion of his trial that he might have been elsewhere at the time the pornography was downloaded, his counsel were not ineffective in failing to put on an alibi defense. *See United States v. Polk*, 32 M.J. 150, 152-53 (C.M.A. 1991).

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

AFFIRMED.

Judge STONE and Judge SMITH participated prior to their reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court