UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant PATRICK J. HUEY, JR.
United States Air Force

ACM 38139

4 December 2013

Sentence adjudged 29 March 2012 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Jefferson B. Brown (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 4 years and 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Grover H. Baxley; Major Matthew T. King; and William E. Cassara, Esq.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

HARNEY, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of rape, knowing and wrongful possession of one or more visual depictions of a minor engaged in sexually explicit conduct, and drunk driving, in violation of Articles 120, 134, and 111, UCMJ, 10 U.S.C. §§ 920, 934, 911. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 4 years and 9 months, and reduction to E-1.

The appellant raises four issues for our consideration: (1) Whether the general verdict of guilt for Charge II rested on conduct that was constitutionally protected because at least one of the images presented to the finder of fact was not child pornography; (2) Whether the military judge's failure to explain on the record the factors he considered on the offense of possession of images of minors engaged in sexually explicit conduct, alleged under clause 2 of Article 134, UCMJ, deprived the appellant of appellate review of his conviction; (3) Whether the evidence is legally and factually sufficient to support a finding of guilty of knowing possession of child pornography; and (4) Whether the evidence is legally and factually sufficient to support a finding of guilty to rape. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant, a 27-year-old Staff Sergeant (SSgt), and LH, a 16-year-old British national, met through MySpace and began dating. The relationship was sexual in nature and LH permitted the appellant to take and record sexually explicit images of her. Some of the images showed LH topless while others depicted her displaying her genitals or pubic area. All of the images were created while LH was under the age of 18 years.

The appellant kept the images of LH on his computer in an electronic file "folder" with LH's name, which was located in a folder called "Girls." At some point during their relationship, while using the appellant's computer, LH saw that he also had a folder named "Hannah" within the "Girls" folder. LH looked at the "Hannah" folder and saw that it contained naked pictures of a friend of hers, HF. HF was a year younger than LH. After seeing the images of HF, LH deleted them from the appellant's computer.

While engaging in rough but consensual sexual activity with the appellant, LH sustained an injury to her vagina. She sought medical treatment and was advised to abstain from sexual activity. Even so, the appellant pressed LH to have sex with him. LH relented, allowing him to masturbate over her and to put only the tip of his penis into her vagina. However, he would penetrate her vagina more deeply than they had agreed, which upset LH and caused her physical pain. When LH complained to the appellant about his behavior, he told her he would attend Sexaholics Anonymous.

One night after going to bed together, the appellant pulled LH's shorts aside and began having sexual intercourse with her. There was no foreplay beforehand, which typically preceded intercourse during their relationship. LH was shocked at first and then told him to get off of her. He responded: "Shh, you'll wake your brother up." LH tried to push the appellant off of her but was unable to do so. When he continued with the sexual intercourse, LH shouted at him, "Get the f[*]ck off me[!]" When he nevertheless continued, LH bit him in the shoulder as hard as she could. The appellant flinched his shoulder back and finally stopped having sex with LH.

LH broke up with the appellant a few days later. Eventually she began dating another Air Force member, SSgt CS. When she disclosed the rape to SSgt CS, he encouraged her to report it. While the appellant was deployed to Afghanistan, LH reported the incident to local British authorities, and a search warrant was issued for the appellant's house in the United Kingdom. A number of his items were seized, including his computer. The British authorities subsequently surrendered jurisdiction to the United States, and the items seized from the appellant's house were turned over to the Air Force Office of Special Investigations (AFOSI) for investigation. A subsequent forensic analysis of the appellant's computer revealed evidence of child pornography.

LH also testified that one night the appellant drove his vehicle while intoxicated. LH, the appellant, and a friend went out drinking at some pubs and clubs. The appellant was so intoxicated that he was staggering when he walked and he threw up in a parking lot. LH wanted to walk home and tried to discourage him from driving, but he insisted on doing so even though he was extremely intoxicated. When they got home and parked in the driveway, LH got out of the car. The appellant then locked the doors to the car and passed out. LH tried to wake him by banging on the windows and shouting for nearly half an hour. He did not respond and appeared to still be passed out. LH telephoned an ambulance, which arrived after about fifteen minutes. The responding personnel tried unsuccessfully to rouse him by banging on the windows. The appellant eventually responded to the attempts to wake him and unlocked the doors to the car.

At trial, the Government introduced 114 images/videos in their case-in-chief. These visual depictions are contained in Prosecution Exhibits 11, 14, and 15. Although several were of LH, the majority of the images/videos depicted unknown young children having sex with adults, being orally or anally sodomized, or lasciviously displaying their genitals or pubic area. There was no discussion on the record concerning the reason why any of the images were introduced.

Mr. BC, a forensic computer examiner, examined the appellant's desktop computer that was seized pursuant to the British search warrant. Mr. BC noted that there was only one user-created profile on the computer, named "Patrick," which is the appellant's first name. Mr. BC testified that the images contained on Prosecution Exhibit 14 were found in the computer's "volume shadow service," which indicated that at some point the files resided on the computer. Mr. BC also noted there was evidence the appellant had an encrypted external hard drive called "IronKey," which was not recovered. Evidence further indicated that there was a folder on the IronKey device titled "secret sh[*]t." The images located in Prosecution Exhibits 14 and 15 were located in a temporary file and were at some point saved onto the IronKey external hard drive.

General Verdict of Guilt and Legal and Factual Sufficiency – Child Pornography Charge

The appellant contends that some of the images offered by the Government to prove Charge II – possession of visual depictions of minor children engaging in sexually explicit conduct – are constitutionally protected. The appellant asserts that, in accordance with *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012), his conviction must be set aside. The appellant also asserts that the evidence was legally and factually insufficient to support finding him guilty of knowing possession of child pornography. Because these two issues are closely related, we will address them together.

As a preliminary matter, the parties seem unable to agree whether Charge II was based on 18 U.S.C. § 2252A, the Child Pornography Prevention Act (CPPA), or on clause 2 of Article 134, independent of the CPPA. The confusion is caused, in part, by the fact that this was a judge alone case and no instructions were given, which would indisputably resolve what elements and definitions were employed. The Government suggests that this case was charged as a straight clause 2 offense.[1] The Government further contends that the military judge was not "constrained" by the definitions in the CPPA or by the *Dost*[2] factors and could define "sexually explicit conduct" much broader than it is defined in the CPPA. The appellant contends that because this was a judge-alone litigated case and no instructions were therefore provided, there was a question about which definition of "sexually explicit conduct" the military judge used.

Unlike the parties, we find the record of trial clearly demonstrates the charge incorporates the CPPA. We further find that the military judge considered the charge to be based on the CPPA and applied the legal definitions consistent with the CPPA. The specification of Charge II alleges that the appellant "wrongfully and knowingly possess[ed] one or more visual depictions of minor children engaging in sexually explicit conduct." The terms "sexually explicit conduct,"[3] "visual depiction,"[4] "engaging in,"[5] and "minor,"[6] are all terms and phrases taken directly from the CPPA. In our opinion, this is overwhelming evidence that the charge in question was based on the CPPA. If the charge was not based on the CPPA, we find it unlikely that the Government would have used language pulled directly from the statute.

[1] Our decision in this case makes moot any analysis of a charge under Article 134, clause 2, independent of the Child Pornography Prevention Act (CPPA). We note, however, that analysis of a child pornography charge "independent of the CPPA" would involve an unresolved question concerning the "fair notice" of such a charge.
[2] *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F. 2d 1239 (9th Cir. 1987). *See United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006) (adopting test combining *Dost* factors and consideration of totality of the circumstances to determine "lascivious exhibition.").
[3] 18 U.S.C. § 2256(2).
[4] 18 U.S.C. § 2256(5).
[5] 18 U.S.C. § 2256(8).
[6] 18 U.S.C. § 2256(1).

Furthermore, the military judge clearly treated the charge as though it was based on the CPPA. Although the term appeared nowhere on the charge sheet, both the military judge and the counsel for both sides repeatedly referred to "child pornography."[7] Additionally, in motion argument on the defense challenge to a search, the military judge referred to "factors" that would have to be considered to determine if the images were in fact child pornography. Although the military judge did not specifically identify these as the *Dost* factors, in the same discussion the trial counsel did refer to them as the *Dost* factors and the military judge did not correct counsel. Clearly, the military judge did not correct counsel because he was in fact referring to the *Dost* factors. The *Dost* factors are those factors that have been adopted by our superior court, combined with an overall consideration of the totality of the circumstances, to determine what constitutes a lascivious exhibition of the genitals or pubic area under 18 U.S.C. § 2252A. *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006).

Having concluded that the charge incorporated the CPPA, we must now determine if any of the images offered in support of the receipt and possession specifications failed to satisfy the requirement that they be visual depictions of minors engaging in "sexually explicit conduct," and are, thus, constitutionally protected. If none of the images in question are entitled to constitutional protection, then the general verdict returned in this case is not in question. To determine whether the images were visual depictions of minors engaging in "sexually explicit conduct," we must conduct a review of the legal and factual sufficiency of the evidence.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty we determine to be correct in both law and fact. 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. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Moreover, "[i]n resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *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). 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).

[7] As noted by Judge Stucky in his concurring opinion, the words "child pornography" "impart a certain legal definition in light of the Child Pornography Prevention Act (CPPA)." *United States v. Barberi*, 71 M.J. 127, 133 (C.A.A.F. 2012).

The Government introduced 114 images/videos in their case in chief. The images included pictures of LH and other children in various stages of undress. These visual depictions are contained in Prosecution Exhibits 11, 14, and 15. Although the appellant contends all of the images were offered to prove up the possession of child pornography charge, we disagree. Admittedly, there was no discussion on the record about why any of the images were introduced. However, it would require us to suspend common sense to entertain an argument that images 003954708 and 00395369 in Prosecution Exhibit 11 were offered as direct evidence of possession of child pornography. The two images in question are images of LH and the appellant and depict only the two from the shoulders up. We find it extremely unlikely the military judge considered these images as possible child pornography.

The other 112 images/videos offered were likewise introduced without any explanation on the record as to whether they were all visual depictions the Government wanted the military judge to consider as direct evidence on the possession of child pornography charge. As such, we have reviewed these 112 images to determine whether any of them are entitled to constitutional protection.

We find 94 of the 112 images in question constitute visual depictions of a minor engaging in sexually explicit conduct. These 94 images/videos depict minors either engaged in sexual acts or lasciviously displaying their genitals or pubic area and clearly satisfy the definition of "sexually explicit conduct." We further find that the evidence supports a conclusion that the appellant knew he possessed these images. Considering the evidence in the light most favorable to the prosecution, we find that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.

While 94 of the 112 images depicted minors engaged in sexually explicit conduct, we find 18 of the images/videos introduced at the appellant's court-martial either do not meet the legal definition of sexually explicit conduct or the age of the person depicted cannot reasonably be determined. These images are:

> Prosecution Exhibit 11: Images 00395505; 00394392; 00395408; 00395454; and 0036548.
>
> Prosecution Exhibit 14: Third and fourth image on page 5[8]; second image on page 7; image on page 9; image on page 12; and image on page 14.

[8] Based solely on the images on page 5 of Prosecution Exhibit 14, it is difficult to determine the age of the person depicted. However, these images are clearly screen captures from a video contained in Prosecution Exhibit 14. The video leaves no doubt the female in question is under the age of 18 years.

Prosecution Exhibit 15: Image 00180276 in "Non NCMEC CP" folder, and images on pages 11; 14; 29; 31; 41; and 42 in Word document titled "PE_Thumbnails."

Because we have found 18 of the 112 images that served as the basis for the appellant's convictions do not meet the legal requirements to be visual depictions of a minor engaging in sexually explicit conduct and are, therefore, constitutionally protected, we must now determine whether our superior court's decision in *Barberi* requires that we set aside the findings of guilt to the specification in question. In *United States v. Piolunek*, __ M.J. ___ (A.F. Ct. Crim. App. 2013), we recognized that our superior court's holding in *Barberi* did not require the setting aside of a general verdict on every case involving images that were constitutionally protected. To the contrary, we need not set aside a general verdict if this Court determines beyond a reasonable doubt that the error was harmless, *i.e.* did not contribute to the verdict of guilty. *See Barberi*, 71 M.J. at 132; *Chapman v. California*, 386 U.S. 18, 21-24 (1967).

In *Piolunek*, we identified three factors to consider to determine "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman*, 386 U.S. at 23 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). These three factors are: (1) The quantitative strength of the evidence; (2) The qualitative nature of the evidence; and (3) The circumstances surrounding the offense as they relate to the elements of the offense charged. Based upon an examination of these factors, we can conclude beyond a reasonable doubt that the 18 images were unimportant in relation to everything else the military judge considered, and thus the error of admitting the 18 images was harmless beyond a reasonable doubt.

First, in considering the quantitative strength of the evidence, we conclude that the number of images introduced at trial that were not afforded constitutional protection, versus the number protected, strongly supports a finding of harmlessness under *Chapman*. In *Barberi*, four out of six, or two-thirds, of the images introduced by the Government in support of the charge were found to be legally and factually insufficient to support the charge based on constitutional grounds. In this case, only 18 of the 112, or 16%, of the images were legally and factually insufficient to support the charges. As noted in *Piolunek*, we do not believe the *Barberi* court intended to suggest that a conviction must be set aside in every case where even one image, offered into evidence as a visual depiction of a minor engaging in sexually explicit conduct, is later determined to be constitutionally protected. Such a reading would result in the absurd outcome of vacating a conviction for possessing 10,000 images of minors engaging in sexually explicit conduct because one image did not include a lascivious display of the genital or pubic area. The glaring difference between the number of images in this case that were not constitutionally protected versus those that were supports a determination that the error in admitting the constitutionally protected images was harmless.

Second, turning to the qualitative nature of the evidence, we find, as noted above, the images that were not entitled to constitutional protection provide very strong evidence that the introduction of the constitutionally protected images was harmless beyond a reasonable doubt. The 94 images in question clearly constitute a minor engaging in sexually explicit conduct. In contrast to constitutionally protected images, these 94 images depict young children having sex with adults, being orally or anally sodomized, or lasciviously displaying their genitals or pubic area.

Lastly, the circumstances surrounding the appellant's possession of the images strongly support a conclusion that admission of the 18 constitutionally protected images was harmless beyond a reasonable doubt. With respect to the images of LH, the appellant did not accidently discover these images, nor was he unaware of her age or the nature of the images. In fact, the appellant himself took the photos of LH in question. Those images of LH not entitled to constitutional protection clearly depict a lascivious display of the genitals or pubic area. The pornographic images of the unknown children, while not created by the appellant, were not accidently in the possession of the appellant. The fact that many of these images were saved in a folder titled "secret sh[*]t" is extremely strong evidence of the appellant's knowing possession of these images.

Even when one disregards the 18 images in question, the evidence of the appellant's guilt is overwhelming. We find no material prejudice because 94 images were clearly visual depictions of a minor engaging in sexually explicit conduct and, based on the record as a whole, made the consideration of the 18 images unimportant in relation to everything else the military judge considered on the question of guilt. The quantitative strength, qualitative nature of the images, and the circumstances surrounding the possession of images all support a finding that the error was harmless. We have no doubt the 18 images in question did not materially contribute to the finding of guilt because of the evidence relating to the other 94 images. We are convinced "'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *McDonald*, 57 M.J. at 20 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Failure of Military Judge to Articulate Factors

The appellant asserts the military judge erred because he did not state, on the record, the factors he used to determine whether the visual depictions in this case were illegal. As noted in our discussion of the first assignment of error, we have no doubt the military judge applied the elements and legal definitions based on 18 U.S.C. § 2252A and which are contained in the Military Judge's Benchbook. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). A military judge is not required to "instruct themselves" in order to create a record evidencing the fact that they applied the correct law.

Legal and Factual Sufficiency – Rape Charge

The appellant argues that the evidence is legally and factually insufficient to support his conviction for rape, as set forth in Charge I. To convict the appellant of rape by force, the Government had to prove that the appellant caused another person of any age to engage in a sexual act by using force against the other person. *Manual for Courts-Martial, United States*, Part IV, ¶ 45.a.(a) (2008 ed.). We find the evidence legally and factually sufficient to support the appellant's conviction for rape. At trial, LH testified that the charged incident occurred in early 2008. After a night out, the two ended up together at LH's house. The appellant was somewhat intoxicated. At some point, the appellant just pulled LH's shorts aside and started having sex with her. The appellant ignored her statements telling him to stop and her attempts to push him off of her. It was not until she bit him as hard as she could on the shoulder that he stopped.

Despite these facts, the appellant argues that the evidence is insufficient because (1) LH did not describe a rape as a matter of law; (2) he may have been unconscious during the incident; (3) LH had a history of lying; and (4) LH had a motive to fabricate the allegations against him. We disagree.

The appellant argues that LH did not describe a rape as a matter of law because she and the appellant had a history of consensual sexual intercourse, including rough sex. According to the appellant, LH failed to manifest her lack of consent prior to sex on previous occasions, but when she did manifest lack of consent, the appellant would stop. On the night in question, the appellant asserts that LH failed to manifest her lack of consent prior to sex. Moreover, he points to testimony from LH, where she stated that the appellant may not have heard or understood her when she told him to get off her.[9] It was only when she bit him in the shoulder that he stopped. Along these same lines, the appellant asserts that the evidence shows he was unconscious due to intoxication before LH indicated her lack of consent and, as a result, this raises a reasonable doubt as to his guilt. Our review of the evidence shows that LH demonstrated her lack of consent by yelling, pushing, and biting the appellant when he penetrated her vagina. The evidence

[9] LH testified on cross examination as follows:

> Q. . . . Now, you indicated that at some point during this sexual encounter that you said "Get off of me."
> A. Yes.
> Q. And that he said "Ssh, you'll wake up your brother," or something to that effect.
> A. His exact words were "Ssh, you'll wake your brother."
> Q. Okay. And you said during direct examination that that confused you.
> A. Yeah; I wasn't confused about the events, but I was confused as to why that was his response; as it seemed like he hadn't heard what I said; or not that he hadn't heard, but that he had heard but - - I don't know. It was like he was responding to something in a completely different matter. I don't know. His response was completely juxtaposed to the situation.

also shows that the appellant was conscious during the incident because he admonished LH to be quiet so as not to wake her brother.

The appellant also argues LH (a) had a history of lying and (b) had a motive to fabricate the allegations against him. With respect to the first allegation, the appellant asserts LH lied to the paramedics when they arrived at her house the night the appellant passed out in his car. The appellant further asserts that LH lied to the court-martial about how and when she turned over to local authorities certain chat logs between her and the appellant. The appellant hints that LH may have altered the chat logs before turning them in, after which the logs somehow disappeared from her computer. With respect to the second allegation, the appellant argues that LH was an unstable, jealous "drama queen" who craved attention and was pleased when she had a new boyfriend who would shower her with the attention she needed. According to the appellant, LH's unstable behavior with the appellant likely filtered into her new relationship, thus causing her to fabricate the allegations against him.

We find both of these assertions to be without merit. LH admitted she lied to the paramedics, stating she and the appellant had an argument because she did not want to get the appellant in trouble for driving while intoxicated. Moreover, after reviewing the testimony from LH about the chat logs, we conclude that much of what the appellant argues is speculation. Finally, we have a difficult time accepting the appellant's assertion that LH fabricated the rape allegation because she had a new boyfriend who, at least from her testimony, encouraged her to report the rape to the authorities.

The military judge heard the testimony and personally observed the witnesses. The evidence need not be free of all conflict for a rational fact finder to convict an appellant beyond a reasonable doubt. As occurred in this case, the military judge may believe "one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see also United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Considering the evidence in the light most favorable to the prosecution, and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt of rape beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Additionally, considering the evidence in the light most favorable to the prosecution, we find that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist