UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ALEXANDER F. FIOREY
United States Air Force

ACM 36319

16 July 2007

Sentence adjudged 10 March 2005 by GCM convened at Lackland Air Force Base, Texas. Military Judge: James L. Flanary

Approved sentence: Confinement for 1 year 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 Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Mathew S. Ward, and Major Martin J. Hindel.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

The appellant stands convicted, contrary to his pleas, of five specifications of attempting to wrongfully and knowingly receive and view images of child pornography, in violation of Article 80, UCMJ, 10 U.S.C. § 880.[1] A panel of officers sentenced him to be confined for 1 year and reduced to the grade of E-1. The convening authority approved the sentence as adjudged.

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[1] The appellant was charged with actually receiving and viewing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court-martial found him not guilty of that offense, but guilty of the lesser-included offense of attempt.

The appellant raises four allegations of error. He asserts: 1) The military judge improperly admitted uncorroborated admissions the appellant made to a police detective; 2) The evidence is legally and factually insufficient to support his conviction; 3) The military judge improperly instructed the members as to the maximum possible sentence[2]; and 4) The court-martial order does not accurately reflect the result of trial or the convening authority's unit.[3]

After an initial review of the record, the Court specified two additional issues: 1) Whether the record of trial is an accurate and substantially verbatim record; and 2) Whether submission to the members of evidence ruled inadmissible by the military judge violated the appellant's constitutional right to due process and whether such error substantially prejudiced the appellant. Finding no error, we affirm.

Background

The appellant came to the attention of civilian law enforcement authorities during investigation of a website purported to be involved in the trafficking of child pornography. Posing as a person interested in viewing the site, an agent of the Federal Bureau of Investigation (FBI) purchased access via credit card, but found the site was no longer active. Continuing in his role as an ordinary customer, the enterprising agent filed a complaint with Site Key, the credit card processing company serving the defunct web site.

In reply, Site Key indicated the site was likely to remain inactive for some time, but offered the agent a list of 50 alternative websites which, according to the company, contained similar content. The FBI purchased access to 13 of the proffered sites and found that all appeared to contain child pornography. Agents also examined the cover pages of the remaining 37 sites, and found they too appeared to contain child pornography.

Armed with this information, the FBI obtained a warrant for Site Key's customer records. The Site Key customer database included the names of individuals, including the appellant, who had purchased access to websites containing what appeared to be child pornography. That information was distributed to law enforcement offices across the United States for further investigation of the purported buyers by their own jurisdictions. The appellant's name showed a San Antonio address, so federal officials sent his information to the Bexar County, Texas, Sherriff's Department for investigation.

[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The government concedes the court-martial order is inaccurate and urges the Court to direct correction.

The Site Key information on the appellant indicated he bought access to four suspected child pornography sites in 2001, some on more than one occasion. The Site Key information included the appellant's name, street address, e-mail address, internet service provider, site names, dates accessed, and credit card numbers used to pay for the access. Through records obtained from the internet service provider and the banks operating the credit card accounts, Bexar County investigators confirmed that the e-mail account and credit cards listed belonged to the appellant. The credit card records confirmed some of the appellant's purchase information on the Site Key database and showed transactions with companies in Latvia and Russian known by the detectives to run child pornography websites. However, none of the websites purportedly accessed by the appellant were included on the list of 50 sites examined by the FBI. Further, no one conducted a timely review of the sites visited by the appellant to determine if they also depicted child pornography.

In January 2004, Bexar County and FBI agents obtained a warrant and conducted a thorough search of the appellant's residence, including his personal computer and all computer media. The search found no evidence of child pornography in the appellant's home. However, while the search was underway the lead Bexar County investigator, Detective M, interviewed the appellant and secured a verbal confession, in which he admitted purchasing access to the sites at issue and looking at "juvenile males" or "children", engaged in "sexual contact" or "sexual acts". With regard to the nature of the websites, the appellant told Detective M that his "preference" was for "children", "young boys", or "juvenile boys".

Corroboration

The appellant contends the military judge improperly admitted his confession to Detective M. He argues that no child pornography was found in his possession and no one ever looked at the sites he visited to confirm they depicted child pornography. As a result, he asserts his confession to Detective M lacked sufficient corroboration.

We review the military judge's decision to admit the appellant's statements for abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). In doing so, we evaluate the military judge's factual findings under a "clearly erroneous" standard, while reviewing conclusions of law de novo. *Id.; see also United States v. Young*, 49 M.J. 265, 266-67 (C.A.A.F. 1998).

Mil. R. Evid. 304(g) requires corroboration before an accused's inculpatory statements may be used as evidence against him. However, "corroboration" within the context of this rule does not equate to "proof". Rather, the rule only

requires that independent evidence raise an "*inference* of the truth" of the essential fact(s) admitted. (Emphasis added.). This is a very low threshold, with the quantum of corroboration needed only "very slight". *United States v. Grant,* 56 M.J. 410, 416 (C.A.A.F. 2002); *United States v. Baldwin*, 54 M.J. 464, 465 (C.A.A.F. 2001). Applying this standard, we find no abuse of discretion.

In ruling on the defense motion to suppress the appellant's confession, the military judge adopted all of the facts propounded in the trial defense motion. Such facts are supported by the evidence of record and we adopt the military judge's factual findings as our own.

The absence of direct evidence, either in the form of pictures or eye witness testimony from someone who saw such pictures, does not *per se* mean that the appellant's confession lacked sufficient corroboration. Corroboration can also be provided through circumstantial evidence. Here, several facts raise at least an inference of truth of the appellant's admissions to Detective M.

First, Site Key, the credit card verification service used by the appellant to access the sites, was one which had been found by the investigators to process credit card charges for child pornography sites. The investigators did not view every single website on the Site Key database, and so could not state with certainty that Site Key *only* verified charges for child pornography sites; however, each of the 50 sites checked by the investigators appeared to display child pornography. The fact that Site Key verified charges for child pornography sites at all, and that all the sites actually checked did include child pornography, has at least some inferential value.

Second, authorities were able to trace the appellant's charge account information found on the Site Key database to him through documentation obtained from the internet service provider and the banks administering the credit cards. Several of the companies listed on the appellant's credit card records were also known by the detectives to be associated with child pornography websites.

Third, the names of the websites which the documents show the appellant accessed, and on which he admitted to viewing child pornography, were: "www.boys-shock.com"; "www.xangelsx.com"; "www.boys-extasy.com"; and "www.new-boys.com". While these titles could of course refer to something else entirely, the names are at least suggestive and therefore provide some additional inference of the truth of the appellant's admission that he viewed child pornography involving juvenile males on those sites.

While none of the above evidence individually provides strong corroboration, it does meet the "very slight" corroboration threshold established

by controlling case law. That corroborative value is increased when all of such evidence, and the inferences that may reasonably be drawn from it, are considered in the aggregate.

Legal and Factual Sufficiency

In his second assignment of error, the appellant claims the evidence was legally and factually insufficient to support his conviction. He decries again the absence of pictures and asserts that Detective M's testimony as to the nature of his confession is too imprecise to be reliable.

We review the appellant's claim of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial, and applying the standards established by our superior courts. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Although Detective M was unable to remember the appellant's exact words, he was adamant the appellant admitted to receiving and viewing what he and Detective M understood within the context of their discussion to be child pornography. That being the case, Detective M's inability to precisely remember if the appellant used the words "young boys", "juveniles", or "children" engaged in "sexual contact" or "sexual acts" to describe what viewed, or even whether the appellant simply responded "yes" to questions asked by Detective M in that regard, is not critical. The testimony of Detective M, viewed in the light most favorable to the prosecution, provided a sufficient basis for a rational trier of fact to conclude beyond a reasonable doubt that the appellant committed the offenses of which he was found guilty. Further, we ourselves are convinced beyond a reasonable doubt the appellant is in fact guilty of those offenses.

Remaining Issues

We have examined the appellant's assertion that the military judge incorrectly instructed the members as to the maximum possible sentence and find it without merit. *See United States v. Leonard*, 64 M.J. 381 (C.A.A.F. 2007). We have also reviewed the information provided by the parties in response to the additional issues specified by the Court. Based on the un-rebutted affidavits provided by the Appellee, we are satisfied that evidence excluded by the military judge was not improperly published to the court-martial panel and that the errors in transcription and assembly of the record do not materially prejudice the substantial rights of the appellant.

The appellant correctly asserts that the court-martial order is in error. It does not accurately reflect the command of the convening authority, it incorrectly indicates the appellant pled guilty to all specifications, it misstates the numbering of the charge, it states the wrong finding as to the charge, and it does not accurately reflect the date the sentence was adjudged. We direct publication of a new order correcting these deficiencies.

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

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator