UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARK S. BRISBANE
United States Air Force

ACM 35384

5 November 2004

Sentence adjudged 4 September 2002 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. The clinical social worker was not "functioning as a mere conduit for military authorities" nor was there evidence of an understanding between her and military authorities "designed to subvert the purposes of Article 31."[1] *United States v. Moreno*, 36 M.J. 107, 117 (C.M.A. 1992). To the contrary, in interviewing the appellant she was acting in accordance with the Family Advocacy Program, which established a basis for inquiry into allegations of sexual abuse independent of the criminal justice system. *See United States v. Raymond*, 38 M.J. 136, 138 (C.M.A. 1993). *See also* Air Force Instruction (AFI) 40-301, *Family Advocacy* (22 Jul 1994). We

[1] Article 31, UCMJ, 10 U.S.C. § 831.

conclude that she had no obligation to advise the appellant of his rights under Article 31, UCMJ. Therefore, we hold that the military judge did not abuse his discretion in admitting statements made by the appellant to the social worker. In light of this, we hold the second assignment of error, that the Air Force Office of Special Investigations (AFOSI) questioned the appellant without an appropriate cleansing warning, to be moot.

The appellant has also alleged that the specifications are neither legally nor factually sufficient. We have considered all the evidence properly admitted at trial. We find that the appellant showed his stepdaughter three photographs of adult nude women in sexually suggestive poses. We find his statement to the AFOSI that he did so for educational purposes to be self-serving and unconvincing. We conclude that he displayed the photographs to his stepdaughter with the requisite intent as spelled out in the *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 87b(2)(e) (2000 ed.). *See United States v. Orben*, 28 M.J. 172 (C.M.A. 1989).

Furthermore, we find that the appellant possessed numerous photographs of minors which were lascivious within the meaning of *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). The focal points of these pictures are the children's pubic areas; the settings of the pictures are sexually suggestive; the children are depicted in unnatural poses or attire; the children are fully or partially nude; and these pictures appear intended to elicit a sexual response in the viewer. *See also United States v. Pullen*, 41 M.J. 886, 889 (A.F. Ct. Crim. App. 1995).

We conclude that the appellant's possession of these pictures was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. *See United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004) (the accused was convicted of possessing on his personal computer sexually explicit images of young girls, in violation of clauses 1 and 2 of Article 134, UCMJ). *See also United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000). We also conclude that the absence of evidence that the pictures were of actual minors is not fatal to the specification. "The receipt or possession of 'virtual' child pornography can, like 'actual' child pornography, be service-discrediting or prejudicial to good order and discipline." *United States v. Mason*, 60 M.J. 15, 20 (C.A.A.F. 2004). *See also United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004).

Therefore, we hold that the appellant's conviction for committing an indecent act by showing his stepdaughter photographs of adult nude women, as well as his conviction for possession of visual depictions of nude minors, are both legally and factually sufficient. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator