UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JEFFERY M. BULLER
United States Air Force

ACM 38145

17 October 2013

Sentence adjudged 3 April 2012 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Matthew D. van Dalen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 14 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Matthew T. King.

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

Before

ROAN, 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, consistent with his pleas, of one specification of violating a lawful general regulation; one specification of making a false official statement; four specifications of indecent conduct; and one specification of knowingly duplicating "a representation of data that depicted a person under the age of 18 years engaged in an act of sexual conduct," in violation of Articles 92, 107, 120 and 134, UCMJ, 10 U.S.C. §§ 892, 907, 920, 934. The adjudged sentence consisted of a bad-conduct

discharge, confinement for 14 months, and reduction to E-1. The convening authority approved the sentence as adjudged, but waived automatic forfeitures for the benefit of the appellant's dependents.

On appeal, the appellant asserts his plea to knowingly duplicating a representation of data that depicted a person under the age of 18 years engaged in an act of sexual conduct was improvident. We disagree.

Background

In November 2010, the appellant's 17-year-old sister-in-law, LG, came to live with the appellant and his wife. Unbeknownst to LG, one day the appellant hid his cell phone in the bathroom just before she entered to shower. Using the camera in the cell phone, the appellant videotaped LG undressing and showering. The video captured by the appellant showed LG fully nude.

On a separate occasion, while LG was in the bathroom showering, the appellant hid his cell phone in LG's bedroom knowing she would return to the room to get dressed. When LG returned to her room to get dressed after her shower, she was videotaped by the camera in the appellant's cell phone. This video also showed LG fully nude.

Using the videos of LG while she was changing and dressing, the appellant created still images of LG. The still images were screen captures of video that showed LG in a complete state of undress. The appellant subsequently stored and viewed these still images on his Government computer.

Sometime in 2010, the appellant was having lunch at the on-base home of his friend and coworker, Staff Sergeant (SSgt) JH. While there, the appellant used his friend's personal computer. When the appellant opened the start menu, he noticed what appeared to be a partially nude image of a woman in the recent documents folder. Rather than ignoring the image, the appellant opened the file and viewed the image. Upon opening the file, the appellant recognized the person depicted as Mrs. PH, the wife of SSgt JH. The image showed the bare breasts of Mrs. PH. Without the knowledge or consent of either SSgt JH or Mrs. PH, the appellant e-mailed the image to his personal e-mail account so he could view the image again later.

In the spring of 2010, the appellant found a cell phone in the parking lot outside the building where he worked. The appellant examined the cell phone in order to determine its owner so that he could return it. Upon discovering that it belonged to a friend and coworker, Senior Airman (SrA) JC, the appellant decided to search the cell phone in hopes of finding naked pictures of SrA JC. The appellant's search revealed six partially nude images of SrA JC on the cell phone. The appellant then removed the memory card from the cell phone and inserted it into his own cell phone so that he could

copy the six images onto his cell phone. After copying the images, the appellant e-mailed them to his personal e-mail account. The appellant eventually returned the cell phone to SrA JC without disclosing what he had discovered or that he had e-mailed the images to himself.

In mid-2010, the appellant saw a cell phone in a cubby just outside his work area. He recognized the cell phone as belonging to a coworker, SrA ML. Hoping the cell phone contained naked pictures of SrA ML, the appellant removed the cell phone's memory card and inserted it into his own cell phone. The appellant copied the contents of the memory card to his own cell phone then returned the memory card to SrA ML's cell phone. When he later reviewed the contents of what he had downloaded, the appellant discovered two partially nude images of SrA ML. The appellant e-mailed these images to his personal e-mail account and then saved them on his personal computer.

The appellant devised a plan in the spring of 2011 to obtain more naked pictures of SrA JC and SrA ML. Creating a Facebook account under the fictitious name "Rick Venus," the appellant sent the two women messages via Facebook requesting naked pictures. When SrA JC inquired as to his real identity, the appellant stated he was Lieutenant (Lt) MH, the then-supervisor of the appellant, SrA JC, and SrA ML.

SrA JC and SrA ML reported the Facebook messages to their First Sergeant. SrA JC suspected that "Rick Venus" was the appellant based on some of the things she knew about him. The appellant's commander ultimately investigated the matter in order to determine the true identity of "Rick Venus."

On 28 March 2011, after waiving his Article 31, UCMJ, 10 U.S.C. § 831, rights, the appellant was questioned by his commander. The appellant falsely denied to his commander that he had ever used a Facebook account under the name "Rick Venus" or that he had ever represented himself to be Lt MH.

Providency of Plea

"[W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322. "In reviewing the providence of Appellant's guilty pleas, we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). A military judge abuses this discretion when accepting a plea if he does not ensure the accused provides an

adequate factual basis to support the plea during the providency inquiry. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). This is an area for which the military judge is entitled to much deference. *Inabinette*, 66 M.J. at 322 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Our reviewing standard for determining if a guilty plea is provident is whether the record presents "'a substantial basis' in law and fact for questioning [it]." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). At trial, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, and the judge must be satisfied that the accused understands the law applicable to his acts (why he is guilty) and that he is actually guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. at 250–51); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

In Specification 5 of Charge IV, the appellant was charged under Article 134, UCMJ, clause 2, with "knowingly duplicat[ing] a representation of data that depicted a person under the age of 18 years engaged in an act of sexual conduct, which conduct was of a nature to bring discredit upon the armed forces." The appellant now asserts his plea of guilty to that specification was improvident.

When the Government essentially creates an offense under Article 134, clause 1 or 2, they are bound by the language they allege and must prove the facts supporting the language in the specification beyond a reasonable doubt. The wording used in such a charge is important because this is what puts the accused on notice as to the elements against which he or she must defend. See *United States v. Vaughan*, 58 M.J. 29 (C.A.A.F. 2003); *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988). The question raised here is whether the record provides an adequate factual basis to support the appellant's plea to the specification.

Most of the essential components of the specification, as alleged, are not in dispute. The evidence in the record clearly supports the appellant duplicated a representation of data and the duplication was done knowingly. It is also not in dispute that the subject of the image, LG, was under the age of 18 years. Furthermore, the service discrediting nature of the conduct was clearly evidenced on the record. The issue is whether the image in question was of LG "engaged in an act of sexual conduct."

The military judge defined for the appellant what "sexual conduct" meant in the context of this charge.[1] After the military judge explained and discussed the provided definition of sexual conduct, the appellant did not object to the definition nor did he seek

[1] The military judge defined "sexual conduct" by stating it "…can include actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person." The military judge also advised the appellant of the factors to consider in determining whether the images depicted a lascivious exhibition of the genitals or pubic area.

to withdraw his plea of guilty based on that definition. Rather, he readily admitted he duplicated images that met the definition provided by the military judge.

The gist of the appellant's argument is that, in defining "sexual conduct" consistent with "sexually explicit conduct," the military judge erred because the phrase "sexually explicit conduct" is broader and covers more behavior than the more narrow in scope phrase "sexual conduct." Alternatively, the appellant argues that even if "sexual conduct" is interpreted to mean something very similar to "sexually explicit conduct" as that phrase is defined in the Child Pornography Prevention Act[2] (CPPA), the evidence does not establish that LG was "engaged in an act of" sexual conduct.

Although conceding "sexual conduct" is not expressly defined in the *Manual for Courts-Martial* (the "*Manual*"), the appellant argues that the manner in which the phrase is used in the *Manual* requires an actual sexual act or sexual contact as opposed to just a lascivious exhibition of the genitals or pubic area, which would be included within the definition of sexually explicit conduct. We disagree that such a clear definition of sexual conduct can be drawn from the phrase's various appearances within the *Manual*. In some places within the *Manual*, the phrase may appear to be used in such a context as to suggest it is a "catchall" for the terms "sexual act" and "sexual contact." However, there are other places in the *Manual* where the use of the phrase "sexual conduct" clearly means something different. For example, in the version of Article 120, UCMJ, in effect at the time the appellant committed his offenses, the *Manual* states "…it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct were married to each other." *Manual for Courts-Martial, United States (MCM)*, A28-2, ¶ 45.a.(q)(1) (2012 ed.). If sexual conduct was, as the appellant suggests, simply a catchall for sexual act and sexual contact, then its use in this context would have been redundant or superfluous which we do not believe to be the case. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (when interpreting the language of a statute, we should, where possible, "avoid rendering superfluous any parts thereof.")

We do not believe a clear definition of sexual conduct can be gleaned from the *Manual*; therefore, it was incumbent on the military judge to determine an appropriate definition based on the common meaning of the words and we believe he did so. Furthermore, the military judge's decision to define "sexual conduct" in the manner he did is not without support. While not all states have a statutory definition of "sexual conduct," some do define the phrase. Of the jurisdictions that define the phrase, 18 states and the District of Columbia define it to include exhibition of the genitals or pubic area.[3] We therefore find no error in the definition crafted by the military judge.

[2] 18 U.S.C. § 2252A (2009).

[3] *See* ARK. CODE ANN. § 5-27-401 (West 2013); CAL. PENAL CODE § 311.3.(B)(5) (West 2013; D.C. CODE § 22-3101 (2013); FLA. STAT. ANN. § 827.071 (West 2013); HAW. REV. STAT. §707-750 (West 2013); IND. CODE ANN. § 35-42-4-4(A) (West 2013); KY. REV. STAT. ANN. § 531.300 (West 2013); MICH. COMP. LAWS ANN. § 752.364 (West 2013);

The appellant also contends his plea and the evidence on the record fails to establish that LG *engaged in an act of* sexual conduct. The appellant urges this Court to adopt a strictly literal reading of "engaged in" focusing on the conduct of LG rather than the appellant's intent when duplicating the images. Here case law analyzing charges under the CPPA is helpful because of the statute's language requiring an image be of a "minor *engaging in* sexually explicit conduct," which can be satisfied by a lascivious display of the genitals or pubic area. 18 U.S.C. § 2252A (2009) (emphasis added). While the language in the statute seems to focus, as the appellant has argued here, on the conduct of the subject of the image, federal and military case law has rejected such a reading. The focus in determining whether a minor has engaged in sexual conduct is on presentation established by the photographer or viewer. *See United States v. Roderick*, 62 M.J. 425, 430 n.3 (C.A.A.F. 2006) (stating that the majority of federal circuit courts hold that "[t]he 'lascivious exhibition' is not the work of the child, whose innocence is not in question, *but of the producer or editor of the video.*") (quoting *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999)) (emphasis in original); *United States v. Pullen*, 41 M.J. 886 (A.F. Ct. Crim. App. 1995); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (noting that "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles."); *United States v. Larkin*, 629 F.3d 177 (3rd Cir. 2010); *United States v. Villard*, 885 F.2d 117 (3rd Cir. 1989); *United States v. Nolan*, 818 F.2d 1015 (1st Cir. 1987); *Horn*, 187 F.3d 781, 790 (finding a lascivious display of the genitals or pubic area where defendant freeze-framed images of young girls "at moments when their pubic areas are most exposed, as, for instance, when they are doing cartwheels . . ."); *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994). In the present case, the appellant captured images from a video to create still images depicting a lascivious display of the pubic area. It does not matter that the subject of the images, LG, did not herself create the lasciviousness of the image through her conduct.

Although not specifically raised, the appellant argues on brief that if this Court rejects his position on the issue presented, we should still find his plea improvident because not all of the captured images offered by the Government depict a lascivious display of the genitals or pubic area. The appellant cites *United States v. Barberi*, 71 M.J. 127 (C.A.A.F. 2012) in support of his position. We reject this argument.

The appellant pled guilty and was found guilty in accordance with his plea before the images, contained on a CD admitted as Prosecution Exhibit 6, were offered and admitted into evidence. Since the images themselves were not used to determine the providence of the appellant's plea, *Barberi* is inapplicable. *Barberi* applies to cases

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MINN. STAT. ANN. § 617.241 (West 2013); MISS. CODE ANN. § 97-29-103 (West 2013); NEV. REV. STAT. ANN. § 200.700 (West 2011); N.H. REV. STAT. ANN. § 571-B:1 (2013); N.D. CENT. CODE ANN. § 12.1-27.1-01 (West 2013); OKLA. ST. ANN. TIT. 21 § 1024.1 (West 2013); 18 PA. CONS. STAT. § 5903 (West 2013); S.C. CODE ANN. § 16-15-305 (2012); TENN. CODE ANN. § 39-17-901 (West 2013); TEX. PENAL CODE ANN. § 43.25 (West 2013); WYO. STAT. ANN. § 6-4-301 (West 2013).

where a conviction is *based* on conduct that is constitutionally protected. *See Id.* In the present case, the providency of appellant's plea and acceptance of that plea were not based on the images.

We agree not all of the images contained on Prosecution Exhibit 6 depict a lascivious display of the genitals or pubic area. This does not, however, undermine the providency of the appellant's plea. First, many of the images on Prosecution Exhibit 6 do depict a lascivious display of the genitals or pubic area. Based on the wording of the specification, all that was needed to satisfy the legal requirements of the specification was the duplication of one image of a minor engaged in an act of sexual conduct as defined by the military judge.[4] There were more than enough images contained on Prosecution Exhibit 6 to satisfy the elements of the charged offense. Second, the images on Prosecution Exhibit 6 that do not meet the definition of "sexual conduct" as provided by the military judge, were relevant as aggravation evidence directly related to the appellant's conviction of Specification 1 of Charge III.[5] The images of a naked LG contained in Prosecution Exhibit 6 that do not contain a lascivious display of the genitals or pubic area were created from the video the appellant unlawfully made of LG. A military judge is presumed to know the law and apply it correctly, absent evidence to the contrary. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)). We have no reason to believe the military judge considered the images for anything other than their proper purposes.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] In Specification 5 of Charge IV, the appellant was charged with knowingly duplicating "***a*** representation of data." (emphasis added).

[5] In Specification 1 of Charge III, the appellant was charged with wrongfully committing indecent conduct by videotaping LG's genitalia, buttocks, and areola without her consent and contrary to her reasonable expectation of privacy.