UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ZACHARY N. CAPPS
United States Air Force

ACM 38160

09 October 2013

Sentence adjudged 6 April 2012 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Terry O'Brien (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Patrick E. Neighbors and Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

WEBER, Judge:

Contrary to his pleas, a general court-martial composed of a military judge sitting alone convicted the appellant of two specifications of committing an indecent act, in violation of Article 120(k), UCMJ, 10 U.S.C. § 920(k). Specifically, the military judge convicted the appellant of wrongfully sending a photograph of his penis to a 13-year-old girl, and wrongfully requesting that she send him a photograph of herself without a shirt

and a bra.[1] The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 4 months, and reduction to the grade of E-1.

Before this Court, the appellant alleges three errors: 1) The indecent acts UCMJ Article is constitutionally void for vagueness, as it failed to provide him fair notice of the criminality of his actions; 2) Specification 2 (requesting that the girl send an image of herself without a shirt and a bra) failed to state an offense; and 3) The military judge abused her discretion when she denied the appellant's motion to suppress a statement he made to investigators, along with derivative evidence from this statement.

Background

In March 2011, at the time of the charged offenses, the appellant was a newly-married 19-year-old Airman who had served on active duty for less than a year. The appellant's mother was dating the father of CT, who turned 13 years old shortly before the charged offenses. The appellant and his wife met CT at a gathering of the two families a month or two before the charged offenses. After the gathering, CT requested and received the cell phone numbers of the appellant and his wife from the appellant's mother. She then texted both of them and occasionally communicated with the appellant through other electronic means. During this time, the appellant was physically located in a different state than CT.

On or about 8 March 2011, the appellant initiated a text message conversation with CT. At the time, he believed CT was 12 years old, not realizing she had recently turned 13. After a brief exchange, the appellant texted a picture of his unclothed penis to CT. CT responded with a text that in substance read, "Hey to you too – laughing out loud – just kidding,"[2] followed by a "smiley face" emoticon. CT then texted a picture of herself clad only in a bra from the waist up. The appellant responded by asking CT to take off her bra. When CT responded, "But…," the appellant replied, "Please." CT deflected the appellant's request by suggesting she could "flash" him the next time she saw him, to which the appellant responded that this would be "not the same" as providing a picture of herself topless. Finally, CT informed the appellant that she needed to go to bed, ending the conversation.

Shortly after this, CT's mother looked through CT's phone with the aid of another daughter and discovered the images. CT's mother brought the phone to a civilian police department. After CT was interviewed, local authorities turned the case over to the Air Force Office of Special Investigations (AFOSI). AFOSI determined that the case did not fall within its purview to investigate, since there was no evidence of child pornography or physical contact between the two. However, AFOSI decided to jointly participate in the

[1] The military judge excepted the words "on divers occasions" from the second specification.
[2] Quotes from text messages have been translated to plain English throughout this opinion.

appellant's interview with an investigator from the Security Forces investigations section (SFOI). Although AFOSI procedures normally require subject interviews to be videorecorded, and although the AFOSI investigator served as the primary questioner, AFOSI elected not to record this interview, since it considered the investigation to belong to SFOI and SFOI did not require videorecording.

At the outset of the interview, before informing the appellant of his rights under Article 31, UCMJ, 10 U.S.C. § 831, the AFOSI agent directed the appellant to complete an "administrative questionnaire," requiring certain identifying information about the appellant. One item of requested information on the form was the appellant's phone number, and in response the appellant listed his cell phone number that he had used to text CT. After the appellant completed the questionnaire, the agent informed the appellant of his Article 31, UCMJ, rights. The appellant waived his rights, and after initially denying that he sent and received the messages and images in question, he confessed to his actions.

At trial the appellant unsuccessfully moved to dismiss the Charge and its specifications on two grounds – that the underlying criminal prohibition on indecent acts was unconstitutionally void for vagueness, and that the Charge and its specifications failed to state an offense. He also unsuccessfully moved to suppress his confession to investigators and all derivative evidence on the grounds that the questionnaire constituted a violation of his Article 31, UCMJ, rights.

Due Process Right to Notice

The appellant first contends that his constitutional Due Process right to fair notice was violated because the indecent acts Article failed to provide fair notice or warning as to what conduct was prohibited, and improperly encouraged arbitrary and discriminatory enforcement. Specifically, he asserts that the definition of "indecent" was not specific enough to notify him or those charged with the Article's enforcement that "sexting"[3] among these two teenagers was criminally prohibited.

Whether a statute provides adequate notice of what is criminally prohibited is a question of law this Court reviews de novo. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003) (citing *United States v. Hughes*, 48 M.J. 214, 216 (C.A.A.F. 1998)).

The Due Process Clause of the Fifth Amendment[4] "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)). Due process "also requires

[3] "Sexting" refers to the exchange of sexually explicit text messages, including photographs, via cell phone. *United States v. Broxmeyer*, 616 F.3d 120, 123 (2d Cir. 2010).
[4] U.S. CONST. amend. V.

fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974)). In other words, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker*, 417 U.S. at 757 (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)). Possible sources of "fair notice" for military criminal prohibitions include federal law, state law, military case law, military custom and usage, and military regulations. *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006). In short, a void for vagueness challenge requires inquiry into whether a reasonable person in the appellant's position would have known that the conduct at issue was criminal. *See, e.g.*, *Vaughan*, 58 M.J. at 31 (upholding a conviction under the General Article for leaving a 47-day-old child alone on divers occasions for as long as six hours; while the Article did not specifically list child neglect as an offense, the appellant "should have reasonably contemplated that her conduct was subject to criminal sanction, and not simply the moral condemnation that accompanies bad parenting"); *United States v. Sullivan*, 42 M.J. 360, 366 (C.A.A.F. 1995) ("In our view, any reasonable officer would know that asking strangers of the opposite sex intimate questions about their sexual activities, using a false name and a bogus publishing company as a cover, is service-discrediting conduct under Article 134," UCMJ (citing *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994))).

In addition, due process requires that criminal statutes be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This "more important aspect of vagueness doctrine" requires that the statute "'establish minimal guidelines to govern law enforcement'" rather than "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974)).

The statutory prohibition against indecent conduct applicable to the appellant provides that "[a]ny person . . . who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(k) (2008 ed.). The *Manual* defines "indecent conduct" as "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45.a.(t)(12).

We agree with the military judge that the appellant had fair notice that his conduct was criminal under the indecent acts statute. The appellant was nearly 20 years old at the time of his misconduct and was married. He texted an image of his unclothed penis to CT, a girl who had just turned 13 (and who the appellant believed was still 12 years old). When she responded by sending an image of herself clad only in a bra on her upper half, the appellant pressed her to send an image of her breasts, asked her to "please" comply with his earlier request, and rejected her counteroffer to "flash" him in person.

In addition, the appellant's conduct after this incident demonstrates his knowledge of the wrongfulness of his actions. After receiving the image of CT, the appellant deleted it, and when questioned, he initially denied committing the conduct at issue.[5] We reject the appellant's contention that his conduct represents the sort of "digital flirting" he asserts is becoming more commonplace among teenagers. The appellant and CT were not peers and there was no evidence of a lawful romantic relationship between CT and the appellant that might have given the appellant reason to believe his conduct was not prohibited. In addition, military case law aids in providing the appellant fair notice of the criminality of his actions, as court-martial convictions have ensued from somewhat similar behavior between consenting participants. *See, e.g.*, *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010) (appellant convicted of possessing child pornography for possessing sexually explicit images of his 17-year-old girlfriend). To the extent that the indecent acts statute might lend itself to "close cases" as to whether an accused's conduct is indecent, "[t]he problem is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States v. Williams*, 553 U.S. 285, 306 (2008). The appellant was on fair notice that his conduct was "grossly vulgar, obscene, and repugnant to common propriety." Likewise, there is no reason to believe that the Article encourages arbitrary and discriminatory enforcement. The appellant had fair notice of the criminality of his actions and Article 120(k) is not unconstitutionally void for vagueness.[6]

Failure to State an Offense – Specification 2

The appellant next alleges that his conviction as to Specification 2 should be set aside, asserting that the Specification failed to state an offense in that there was no completed indecent act. Specifically, he alleges that because CT never sent an image of herself without a bra on, he is guilty at most of an attempted indecent act.

Whether a specification states an offense is a question of law that is reviewed de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). In reviewing the adequacy of the specification, our analysis is limited to the language as it appears in the specification, which must expressly allege the elements of the offense, or do so by necessary implication. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *United States v. Fleig*, 37 C.M.R. 64, 65 (C.M.A. 1966).

[5] We recognize that these actions do not necessarily demonstrate that the appellant understood his actions to be criminal, and that he merely may not have wanted others to find out about this behavior. Nonetheless, they provide some indication that he may have understood his actions were "grossly vulgar, obscene, and repugnant to common propriety," and that they may tend to "excite sexual desire or deprave morals with respect to sexual relations." *Manual for Courts-Martial* (*MCM*), Part IV, ¶ 45.a.(t)(12) (2008 ed.).

[6] We do not discount the importance of providing specific notice of what is prohibited in this area, given the pervasiveness of technology and the apparent prevalence of sexting behavior. We note that since the conduct at issue in this case, Congress has more specifically addressed some forms of technology-based sexual misconduct. *MCM*, Part IV, ¶¶ 45.b., c. (2012 ed.).

In *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012), our superior court reviewed whether a similar specification alleging an indecent act failed to state an offense. King was charged with requesting that his 14-year-old stepdaughter expose her breasts to him during an Internet audiovisual communication session. King alleged that the specification failed to state an offense because his request constituted "indecent language" which was not included under the definition of "indecent conduct." *Id.* at 52. The Court disagreed with the contention that King's misconduct was necessarily limited to "indecent language." Instead, the Court found that language can be conduct, and King's request was an "overt act" that constituted "direct movement toward the commission" of an indecent act. *Id.* The Court determined that "[b]ut for his stepdaughter's refusal to lift her shirt, King would have 'view[ed]' his stepdaughter's breasts using the webcam." *Id.* (second alteration in original). The Court found that "at a minimum, the facts support an attempted indecent act," and rather than request briefing as to whether the evidence was sufficient to establish the charged offense rather than the lesser included offense of attempt, the Court determined that it could affirm a finding of attempt that would not change the sentencing landscape, particularly since Congress had replaced Article 120(k), UCMJ, before the Court issued its decision. *Id.* at 52-53.

King does not stand for the proposition that a request to view a young teenager's breasts via electronic means can *never* constitute a completed indecent act. However, we do not find it necessary to hold that the appellant completed an indecent act. Consistent with our superior court's example, we affirm the lesser included offense of an attempted indecent act, which does not change the sentencing landscape.[7] We are confident that the military judge would have adjudged the same sentence had she found him guilty of this lesser included offense. *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We reassess the sentence to that adjudged, and we find that this sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Admission of Evidence

Finally, the appellant avers that the military judge erred by failing to suppress his confession to law enforcement investigators, along with all derivative results of that confession. He asserts that the appellant's confession resulted after investigators violated his Article 31, UCMJ, rights by requesting that he complete the administrative questionnaire which included a line for the appellant to list an incriminating piece of information (his phone number).

"In our consideration of a military judge's ruling on a motion to suppress under Article 31(b), [UCMJ,] we apply a clearly-erroneous standard of review to findings of

[7] *See United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012); *MCM* , Part IV, ¶ 4.e. (2008 ed.).

fact and a *de novo* standard to conclusions of law." *United States v. Norris*, 55 M.J. 209, 215 (C.A.A.F. 2001) (citing *United States v. Moses*, 45 M.J. 132, 135) (C.A.A.F. 1996); *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

No person subject to the UCMJ may compel any person to incriminate himself or to answer any question the answer which may tend to incriminate him. Article 31, UCMJ. An interrogation or request that a person suspected of an offense provide a statement must be preceded by a rights advisement notification. *Id.* Where a technical violation of the Article 31, UCMJ, rights advisement requirement is followed by a proper rights advisement and then a confession, the subsequent confession is not presumed to be tainted. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990). The appropriate inquiry in this situation is "whether the subsequent confession was voluntary considering all the facts and circumstances of the case including the earlier technical violation of Article 31(b)," UCMJ. *Id.* at 265.

After extensive motion practice on this issue, the military judge found that before interviewing the appellant, AFOSI had already obtained the appellant's cell phone number from a unit alpha roster. She found that the administrative questionnaire presented to the appellant was a standard form routinely used by AFOSI to collect personnel data for administrative purposes for witnesses, subjects, and alleged victims. She further found that the questionnaire did not facially appear to call for incriminating responses, but that in this case, the appellant's cell phone number was relevant to the offenses in question and could incriminate him. She also found that following completion of the questionnaire, the AFOSI agent properly advised the appellant of his rights (albeit without a cleansing statement to cover the appellant's provision of his cell phone number on the questionnaire), and that the appellant waived his rights and answered questions about the offenses at issue. The military judge ruled, as a conclusion of law, that asking the appellant for his phone number was likely to incriminate him under the facts of this case, and that this "arguably [] would be in violation of Article 31[, UCMJ,] rights." However, the military judge found the error harmless under the inevitable discovery exception since evidence of the appellant's cell phone number would have been obtained (and in fact, had already been obtained from the unit alpha

roster).[8] Finally, she found that under the totality of the circumstances, the appellant's subsequent confession was voluntary based on a variety of factors surrounding the appellant's waiver of his rights.

The military judge did not abuse her discretion in denying the motion to suppress the confession and derivative evidence. Assuming that the request for the appellant's cell phone number constituted an Article 31, UCMJ, violation, such violation was technical and provided no information investigators did not already have. This questionnaire did not overcome the appellant's ability to exercise his rights as it provided little incriminating evidence. After waiving his rights, the appellant denied committing the misconduct at issue for several minutes before being presented with the text messages and images, indicating his provision of his cell phone number did not compel him to confess his misconduct. The military judge's ruling was a proper exercise of her discretion.[9]

Conclusion

The approved findings, as modified, and the sentence, as reassessed, 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 findings, as modified, the and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[8] The Government informed the military judge that it did not intend to offer the questionnaire with the appellant's cell phone number into evidence, rendering moot the question of whether the admission of the questionnaire should be suppressed.

[9] At trial, the appellant also moved to suppress the results of his confession because the Air Force Office of Special Investigations (AFOSI) failed to videorecord the interview. In essence, the appellant sought a prophylactic rule that demands suppression for AFOSI's failure to follow its own procedures requiring subject interviews to be recorded. The military judge denied this motion, and the appellant does not resurrect this claim on appeal. While AFOSI's decision not to record the subject interview in this instance appears ill-advised, we agree with the military judge that the appellant has no constitutional right to have an interview videorecorded, and thus suppression of the confession was not required.