UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JAMES N. DURBIN
United States Air Force

ACM 36969

10 December 2008

Sentence adjudged 16 December 2006 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Bryan D. Watson.

Approved sentence: Bad-conduct discharge, confinement for 1 year, and reduction to E-2.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Timothy M. Cox, Captain Griffin S. Dunham, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Nurit Anderson, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial found the appellant guilty of one specification of wrongfully possessing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, one year confinement, and a reduction to E-2.

On appeal, the appellant asserts that: (1) the military judge erred by ruling that the appellant's wife's statements made during a private marital conversation were not privileged under Mil. R. Evid. 504; (2) the military judge erred by ruling that the appellant's act of showing his wife his laptop computer to confirm that he had deleted the pictures was non-communicative such that it was not protected by the marital communications privilege; (3) the military judge erred by allowing evidence of the appellant's viewing of adult pornography and legal child model pictures[1] to prove plan, opportunity, lack of mistake, knowledge, and access since it was irrelevant and/or unduly prejudicial; (4) the evidence is legally and factually insufficient to support a finding that the appellant knowingly possessed the images found in prosecution exhibit 1 during the charged timeframe; (5) the evidence is legally and factually insufficient to support a finding that the appellant knowingly possessed the images found in prosecution exhibit 2 during the charged timeframe; (6) the cumulative errors in this case compel reversal of the findings; and (7) due to the conditions at the Oklahoma county jail that violated Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, (7 Apr 2004) the appellant should receive sentence relief.[2] Finding no prejudicial error, we affirm.

Background

Around midnight on a night in March 2005, Ms. GD, then the appellant's wife, was doing homework on the appellant's laptop computer whereupon she discovered what she believed to be child pornography. After discovering the images, she woke the appellant and demanded an explanation. After initially denying knowledge of how the images got on his computer, the appellant admitted that "it was just a one-time thing" and promised to delete the images. The appellant grabbed the laptop, entered key strokes, and showed the laptop screen to his wife. Ms. GD told the appellant that he was sick, that he needed help, and demanded that he leave their residence.

On 25 August 2005, Ms. GD reported the appellant to the Air Force Office of Special Investigations (AFOSI). On that same day, she provided the AFOSI agents the appellant's laptop computer. On 29 August 2005, she consented to a search of her residence, and the AFOSI seized three additional computer hard drives from the appellant's residence.

A computer forensic analysis revealed that: (1) one hard drive contained approximately 1800 adult pornography movie files; (2) another hard drive contained 14 images of suspected child pornography and 200 images/movies of adult pornography; and (3) the hard drive from the appellant's laptop computer contained 4 pictures of known child pornography, 14 pictures of suspected child pornography, and several hundred pictures of clothed, preteen girls in modeling poses. The analysis also revealed that

[1] The appellant downloaded the "legal child model" pictures from websites depicting clothed, preteen and early teen girls in various positions.
[2] The seventh issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

someone used the appellant's laptop computer to search the Internet for "preteen queens," "sweet girls," "sweet sexy preteens," "sweet young girls," and "young hotties." Finally, the analysis revealed that someone had used the appellant's Yahoo e-mail account to log onto a website entitled "young p0rn."

At trial, the appellant moved to suppress: (1) his statement to Ms. GD that "it was just a one-time thing" and his promise to delete the images; (2) his actions of grabbing the laptop computer, typing in key strokes, and showing the laptop computer screen to Ms. GD; (3) Ms. GD's statements to him after she discovered what she believed to be child pornography on his laptop computer; and (4) the fact that he had visited and downloaded material from adult pornography sites and child modeling sites. The military judge suppressed the appellant's statements to Ms. GD, but allowed evidence of the other aforementioned matters.

Discussion

Admissibility of Ms. GD's Statements

We review a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003); *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000). "Whether a communication is privileged is a mixed question of fact and law." *McCollum*, 58 M.J. at 335-36 (citations omitted). In such a case, "a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). We consider the evidence in the light most favorable to the prevailing party. *United States v. Larson,* 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

Mil. R. Evid. 504(b) provides, in part, "A person has a privilege during and after the marital relationship to . . . prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law . . . the privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf." Mil. R. Evid. 504(b)(3).

The military judge did not abuse his discretion in admitting Ms. GD's statements to the appellant. It is clear from Mil. R. Evid. 504(b) that only the person who made the confidential communication, in this case Ms. GD, has the right to prevent its disclosure. *See id.*; *United States v. Vandyke*, 56 M.J. 812 (N.M. Ct. Crim. App. 2002); Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 504 (6th ed. 2006). In the instant case, Ms. GD opted to disclose her communications she had with the appellant, and the military judge did not abuse his discretion in admitting her statements.

Admissibility of the Appellant's Act of Showing Ms. GD his Laptop Computer

We review the military judge's decision on whether to admit or exclude the appellant's act of showing Ms. GD his laptop computer under an abuse of discretion standard. *McCollum*, 58 M.J. at 335; *McElhaney*, 54 M.J. at 132. Mil. R. Evid. 504(b) provides, "A person has a privilege during and after the marital relationship to . . . prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law." Mil. R. Evid. 504(b)(1). The rule also defines a communication as "'confidential' if made privately by any person to the spouse of the person and . . . not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication." Mil. R. Evid. 504(b)(2). Lastly, the rule provides, "The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf." Mil. R. Evid. 504(b)(3).

Although the acts of one spouse generally do not constitute confidential communications with the other, they do constitute confidential communications when they are intended to convey a private message to the spouse. *Compare United States v. Lustig,* 555 F.2d 737, 748 (9th Cir. 1977) *with United States v. Lewis,* 433 F.2d 1146, 1151 (D.C. Cir. 1970) ("Some acts conceivably may so convey a message, and may so bespeak a trust, as to necessitate nothing more to demonstrate entitlement to the privilege."). Since no test has been devised which can be universally applied to categorize acts either as communicative or noncommunicative, each case must be resolved on its facts. *See* 8 Wigmore, *Evidence* § 2337 (McNaughton rev. 1961).

In the case sub judice, the military judge made extensive findings of fact and conclusions of law. In so doing, he determined the appellant's act of showing Ms. GD his laptop computer was noncommunicative because it was not manifested by the appellant's intent to communicate a message to Ms. GD. The military judge's finding in this regard is clearly erroneous. As the facts indicate, the appellant told Ms. GD that he would delete the child pornography images from his laptop computer after she confronted him about the images. He then proceeded, as Ms. GD surmised, to delete the images and showed Ms. GD the laptop screen. Nothing could be clearer, given the context and timing of the appellant's actions, that by making the key strokes and showing Ms. GD the laptop screen, he was telling Ms. GD that he had deleted the images. His actions were a confidential communication and the military judge abused his discretion in admitting evidence of such.

However, this does not end the inquiry. We must now determine whether the military judge's error had "a substantial influence on the findings." *McCollum*, 58 M.J. at 342-43. We evaluate prejudice from an erroneous evidentiary ruling by weighing the: (1) strength of the government's case; (2) strength of the defense's case; (3) materiality of the evidence in question; and (4) quality of the evidence in question. *United States v.*

Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999) (citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985)). Applying this standard, we hold that the military judge's error was harmless. Several points led to this conclusion.

First, the government's case was exceedingly strong. The hard drives seized from the appellant, with Ms. GD's consent, contained 32 known or suspected images of child pornography. Additionally, Ms. GD testified to seeing the child pornography on the appellant's laptop computer, a computer used almost exclusively by the appellant, and all who used the appellant's computers provided testimony that they did not view or download child pornography on the appellant's computers.

Equally damning was evidence that someone had used the appellant's Yahoo e-mail login to search a website entitled, "young p0rn" and had conducted a search for the following terms using the appellant's laptop computer: (1) "preteen queens;" (2) "sweet girls;" (3) "sweet sexy preteens;" (4) "sweet young girls;" and (5) "young hotties."

Second, the defense's case was, by contrast, very weak. It attempted, to no avail, to shift the blame to a myriad of other individuals who had access to the appellant's computers. Finally, the quality of the evidence at issue was not very significant because of the overwhelming amount of evidence, previously discussed, from which a fact finder could reasonable conclude the appellant was the culprit. In short, our analysis of these factors convinces us that the admission of appellant's act with the laptop computer did not have a substantial effect on the findings.

Admissibility of Evidence of the Appellant's Viewing of Adult Pornography and Legal Child Model Pictures

We review the military judge's decision on whether to admit or exclude the evidence of the appellant's viewing of adult pornography and legal child model pictures under an abuse of discretion standard. *McCollum*, 58 M.J. at 335; *McElhaney*, 54 M.J. at 132. "Mil. R. Evid. 404(b), like its federal rule counterpart, is one of inclusion. . . . The nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense." *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000).

Uncharged misconduct may be admitted to show "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mil. R. Evid. 404(b). The admissibility of uncharged misconduct is tested using a three-prong analysis:

1. Does the evidence reasonably support a finding by the court members that [the] appellant committed prior crimes, wrongs or acts?

2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?

3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted).

The military judge made essential findings in support of his decision to admit evidence of the appellant's viewing of adult pornography and legal child model pictures. He found, inter alia, that: (1) in March 2005, Ms. GD was doing homework on the appellant's laptop computer whereupon she discovered what she believed to be child pornography; (2) during the course of her marriage to the appellant, Ms. GD observed the appellant viewing adult pornography and teen model sites on their desktop computer; (3) in August 2005, the AFOSI agents seized all the computers from the appellant's residence; (4) a computer forensic analysis of the computer hard drives revealed adult pornography, child model pictures, and the charged child pornography; (5) while several individuals had access to the appellant's computers, none of the individuals viewed pornographic images on the computers; and (6) the defense may challenge the identity of the appellant as the one who possessed the child pornography. The findings of fact are not clearly erroneous, and we adopt them as our own.

The military judge's conclusions of law are also correct. Applying the *Reynolds* test, he properly held: (1) the evidence, namely Ms. GD's testimony and the appellant's admission to the AFOSI that he used the computers to search for adult pornography and that he was addicted to adult pornography, reasonably supports a finding by the fact finder that the appellant previously used the seized computers to view adult pornography and child model sites; (2) that these other acts are relevant on the issue of identifying the individual(s) who used the seized computers to download child pornography; and (3) the probative value of these other acts is not substantially outweighed by the danger of unfair prejudice.

In short, the military judge did not abuse his discretion in admitting evidence that the appellant previously used the seized computers to view adult pornography and child model sites.

Legal and Factual Sufficiency

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 fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting

United States v. Turner, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specification of which the appellant was convicted.

Specifically, we note the following evidence legally supports a conviction in this case: (1) Ms. GD's testimony about discovering child pornography on the appellant's laptop computer, a computer used almost exclusively by the appellant; (2) testimony that those who had access to the appellant's computers did not view or download child pornography on the appellant's computer; (3) evidence that the seized hard drives contained 32 known or suspected images of child pornography and that the files were downloaded onto the respective hard drives in October 2002; (4) evidence that someone last accessed six of the known or suspected child pornography images on the appellant's desktop hard drive in May 2005, June 2005, and August 2005; (5) evidence that someone had used the appellant's Yahoo e-mail login to search a website entitled "young p0rn" and had conducted a search for the following terms using the appellant's laptop computer: (a) "preteen queens;" (b) "sweet girls;" (c) "sweet sexy preteens;" (d) "sweet young girls;" and (e) "young hotties;" and (6) evidence that the appellant previously used the seized computers to view adult pornography and child model sites.

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the charge and specification of which he was convicted.

Cumulative Error

We may order a rehearing based on the accumulation of errors that do not individually warrant a reversal. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (5th Cir. 1993) (citation omitted)). Under the cumulative error doctrine, we are required to: (1) review all errors

preserved for appeal and all plain errors; and (2) consider each such claim against the background of the case as a whole, paying particular weight to factors such as: (a) the nature and number of the errors committed; (b) their interrelationship, if any, and combined effect; (c) how the military judge dealt with the errors as they arose; and (d) the strength of the government's case. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996); *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993).

Additionally, courts are far less likely to find cumulative error "[w]here evidentiary errors are followed by curative instructions" or when a record contains overwhelming evidence of a defendant's guilt. *Dollente*, 45 M.J. at 242 (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)).

In the case at hand, we found only one error—the military judge's clearly erroneous finding of fact that the appellant's act with the laptop computer was non-communicative and thus not privileged under Mil. R. Evid. 504(b). However, this error was harmless beyond a reasonable doubt. As such the cumulative error doctrine is not applicable to this case. Moreover, assuming arguendo that additional errors exist, the cumulative error doctrine would be inapplicable because evidence of the appellant's guilt is overwhelming. *Id.*

AFI 31-205 Violation

Without question, "a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests." *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007) (citing *United States v. Dillard*, 8 M.J. 213, 213 (C.M.A. 1980)). "AFI 31-205 reflects a decision by the Air Force to ensure that [pretrial] servicemembers who are housed in civilian jails are treated in a manner that recognizes the presumption of innocence." *Id.* However, confinement in violation of AFI 31-205 does not create for the appellant a per se right to sentencing credit; it only provides the military judge with the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities. *Id.* at 23-24.

> [U]nder R.C.M. 305(k), a servicemember may identify abuses of discretion by *pretrial* confinement authorities, including violations of applicable service regulations, and on that basis request additional confinement credit. A military judge's decision in response to this request is reviewed, on appeal, for abuse of discretion.

Id. at 24 (citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999) (emphasis added)).

Here the appellant complains that during his post-trial confinement, Oklahoma county jail officials violated numerous provisions of AFI 31-205. In support of his assertion, he makes reference to the request for clemency submitted by his trial defense counsel. Trial defense counsel's assertions in the petition for clemency are unsworn and unsubstantiated and hardly qualify as evidence of AFI 31-205 violations.

Additionally, even if such assertions were evidence of AFI 31-205 violations, the appellant has failed to show he is entitled to sentencing credit for post-trial violations of AFI 31-205. *Adcock* and its progeny recognized that military judges have the discretion to award additional sentencing credit for abuse of discretion by pretrial confinement authorities not post-trial confinement authorities. *Id.* at 23-24.

Case law that discusses post-trial violations of confinement norms examines such claims not for violations of service regulations but for violations of the Eighth Amendment of the United States Constitution and Article 55, UCMJ, 10 U.S.C. § 855. *See United States v. Wise*, 64 M.J. 468 (C.A.A.F. 2007). In the instant case, the appellant has not alleged that such violations amount to cruel and unusual punishment in violation of the Eighth Amendment and Article 55, UCMJ, and we decline to so hold. Put simply, we find no AFI 31-205 violations and assuming such violations exist they do not constitute cruel and unusual punishment.

Post-Trial Delay

An issue not raised on appeal is the length of the post-trial delay. In this case, the overall delay in excess of 18 months between the docketing of this case with this Court and completion of review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id.* at 135.

When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court