UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER J. GURRY
United States Air Force

ACM 37145

20 May 2009

Sentence adjudged 18 June 2007 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Grant L. Kratz.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Jack B. Zimmerman, Esquire (civilian counsel) (argued), Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Captain Ryan N. Hoback (argued), Colonel Gerald R. Bruce, and Major Jeremy S. Weber.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of committing an indecent act upon the body of CKM, a female under the age of 16 years, and of wrongfully and knowingly possessing visual depictions of a nude minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to E-1.

The appellant asserts the following six assignments of error:

I.

WHETHER THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS NOT ADVISED BY HIS DEFENSE ATTORNEYS THAT HE COULD TESTIFY TO REBUT BOTH NEW TESTIMONY AND TESTIMONY EMPHASIZED BY REPETITION THROUGH QUESTIONING BY THE MEMBERS AFTER THEY RECALLED FIVE OF SIX GOVERNMENT WITNESSES DURING DELIBERATIONS.

II.

WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS AND TO PRESENT A DEFENSE WHEN HE WAS NOT ADVISED THAT HE COULD TESTIFY TO REBUT BOTH NEW TESTIMONY AND TESTIMONY EMPHASIZED BY REPETITION THROUGH QUESTIONING BY THE MEMBERS AFTER THEY RECALLED FIVE OF SIX GOVERNMENT WITNESSES DURING DELIBERATIONS.

III.

WHETHER THE COURT-MARTIAL WAS WITHOUT JURISDICTION BECAUSE THE COMMANDER, 72d AIR BASE WING, HAD NO AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL WHEN HE PURPORTEDLY MODIFIED THE CONVENING ORDER ON 1 JUNE 2007 AND WHEN THE COURT WAS ASSEMBLED ON 12 JUNE 2007, AFTER SUCH AUTHORITY HAD BEEN WITHDRAWN EFFECTIVE 30 MAY 2007 BY THE SECRETARY OF THE AIR FORCE.

IV.

WHETHER THE EVIDENCE AS TO SPECIFICATION 2 OF THE CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

V.

WHETHER THE EVIDENCE AS TO SPECIFICATION 4 OF THE CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

VI.

WHETHER SPECIFCATION 4 FAILED TO STATE AN OFFENSE BECAUSE IT DID NOT GIVE PROPER NOTICE AND WAS VOID FOR VAGUENESS.

Background

Sometime in March 2006, the victim in this case, CKM, met the appellant on an Internet cite known as "Hot or Not." The appellant gave CKM his e-mail address, and they subsequently began communicating with each other through instant messenger. When they first started communicating, CKM informed the appellant that she was only 13 years old, to which the appellant, who was 22 years old at the time, replied, "Wow, that's young."[1] CKM informed the appellant what grade she was in, the name of her school, and that she was taking an orchestra class. At some point, the appellant indicated that he wanted to meet CKM. She was a little nervous so she decided to meet the appellant at her church.

The appellant and CKM met for the first time at St. Eugene's Catholic Church in Oklahoma City on Palm Sunday. Since CKM was too young to drive, she was taken to the church by her grandmother. The appellant and CKM sat together during the mass, away from her grandmother. After the mass ended, the appellant sent CKM a text indicating that he had wanted to kiss her but decided not to because her grandmother was there.

The appellant and CKM met for the second time the following week on Easter Sunday. The appellant picked her up at the same church and took her to a house where he was house-sitting. The appellant was interested in having sex but CKM repeatedly told him that she was too tired. The appellant attempted to kiss her but nothing more of a sexual nature occurred. The appellant then drove CKM back to the church.

[1] Since CMK was only 13 years old at the time and one of the requirements to create a "Hot or Not" account is that the individual must be 18 years old, her cousin set up the "Hot or Not" account for her.

After the second meeting, CKM thought that the appellant was angry with her for not having sex with him because the appellant would not respond to her texts and phone calls. CKM then called the appellant using her mother's phone and was able to reach him. During this conversation, the appellant indicated that he would forgive her if she "made it up to him."

The third time the appellant and CKM met was at CKM's house. This occurred sometime in April of 2006. CKM believed the purpose of the meeting was to engage in sex, and although she was not interested in sex, she still agreed to meet the appellant because he complimented her, made her feel good about herself, and she needed his friendship. The appellant arrived at her house around 1630. CKM lived with her mother, KM, who at the time was away at work. When the appellant arrived, there was no car in the driveway, and CKM was still in her school uniform. The appellant entered the house through the living room where CKM's school book bag and viola were both visible for him to see.

The appellant then led CKM to her bedroom. Her room was painted pink, there was no door to her room, and she had Mary-Kate and Ashley bed sheets with matching pillowcases. The appellant led her to her bed and they started kissing. He proceeded to remove her shirt and bra and started kissing her breasts. He also digitally penetrated her vagina. CKM wanted him to stop but didn't say anything because she did not want him angry at her again. The appellant then removed his pants.[2] At this point, CKM became scared and pretended that she heard a text message from her phone. She wrapped her comforter around her body and proceeded to the living room. She then told the appellant that her cousin was coming over. He immediately got dressed and left.

Initially, after the first visit to CKM's house, the appellant refused to respond to CKM's phone calls. However, at some point the appellant sent CKM a text message while she was at school requesting that she take some nude pictures of herself and send them to him. He wanted a picture of her breasts, one of her vagina, one with her masturbating, and he wanted her to shave her pubic hair. CKM agreed to send the pictures because she did not want to lose the appellant. She took several nude pictures of herself using the camera feature on her cell phone. She selected four pictures and sent them via her phone to the appellant's e-mail account. CKM sent one picture at a time because she did not know how to send multiple pictures at the same time. This occurred on or about 22 April 2006. After the appellant received the nude photos of CKM, he resumed communicating with her.

On 2 May 2006, the appellant's fourth and final meeting with CKM occurred at her house. They again met after school. KM was at work, and there was no car in the driveway. Upon arrival, the appellant took CKM to her room and removed her pants and

[2] The appellant was not wearing any underwear, and CKM observed his erect penis.

underwear. He kissed her on the mouth and repeatedly inserted his fingers in her vagina. The appellant put on a red condom and rubbed his penis on her vagina. However, before they engaged in sexual intercourse, CKM informed the appellant that her mother would soon be coming home. The appellant responded by throwing the condom into the trash can and telling CKM it was something to remember him by.[3] He then put on his clothes and left.

On Friday, 5 May 2006, while CKM was at an appointment with her therapist, KM asked for her cell phone so that she could play a game while CKM was meeting with the therapist. While KM had CKM's cell phone, she found a file that contained 30 nude pictures of CKM. KM decided to confront CKM in the car on their way home. KM asked CKM if there was something she needed to tell her and, not knowing the reason, CKM responded, "Did Chris text?" KM became upset so CKM decided to tell KM about her relationship with the appellant. KM wanted to know how far the relationship went so later that night she pretended to be CKM and sent the appellant a text message using CKM's cell phone. On Sunday, 7 May 2006, the appellant responded with a text message that said, "Hey, hottie." KM responded by asking the appellant what he remembered about their last encounter and, he replied, "playing with your clit." KM sent another text saying that she was scared and his reply was, "Why? I'm not that big." KM then asked the appellant, "What if my mom finds out?" He replied, "Maybe she'll join us." At this point KM informed the appellant that she, not CKM, was really sending the text messages. The appellant then wanted to speak with KM on the phone. During this conversation, the appellant admitted knowing CKM was only 13 when he came to the house the second time. KM also informed the appellant that she knew he had nude photos of her daughter on his computer, which he acknowledged and indicated that he needed to delete them.

On 9 May 2006, KM contacted Special Agent (SA) KB of the Air Force Office of Special Investigations (AFOSI). The case was initially investigated by the Oklahoma Police Department; however, in mid-June 2006, the case was transferred to AFOSI.

On 19 June 2006, after advising the appellant of his rights under Article 31, UCMJ, SA KB interviewed the appellant. Initially during this interview, the appellant, in describing his relationship with CKM, stated that he saw her as a little sister and he was attempting to be her big brother. The appellant also indicated that there were no sexual conversations between the two of them whatsoever. Upon further questioning, the appellant changed his story and said that at some point CKM started sending him nude pictures of herself even though the appellant had never requested the photographs. The appellant also said that during his second visit to her house, CKM tried to kiss him and when he said no she became belligerent and started screaming at him, so he decided to

[3] The red condom used by the appellant was collected as evidence during the investigation of this case.

leave. Concerning CKM's age, the appellant stated he learned her age when he visited her at her home the first time.

The prosecution also called Mr. JB, Computer Forensic Examiner, Defense Computer Forensics Lab (DCFL). He testified as an expert in computer forensics. He conducted an examination of the appellant's computer and testified that he found four nude photographs, identified as prosecution Exhibits 5 to 8, in the unallocated space on the appellant's computer.[4]

Ineffective Assistance of Counsel

The appellant was represented at trial by two civilian defense counsel and a detailed area defense counsel. His lead civilian defense counsel, Ms. DM, is an experienced criminal defense lawyer who had 18 years of experience at the time of trial. According to the affidavits from the appellant and his counsel submitted on appeal, at the conclusion of the government's case, the appellant and his counsel agreed that it was not necessary for him to testify because they felt that the government had not proven its case.

During deliberations, the members recalled five government witnesses. According to Ms. DM, although she was a former Army Judge Advocate, she was not familiar with this procedure as it had never occurred in any of her cases while she was on active duty. Ms. DM also asserts that she did not know that the appellant had the right to change his election to remain silent and testify after the members concluded their questioning. No one on the defense team advised the appellant that he had this right and Ms. DM claims that she would have advised the appellant to testify in rebuttal as the evidence elicited from the members' questions bolstered the government's case.

Specifically, the appellant wanted to rebut the testimony of the government's expert witness, Mr. JB, who testified that with yahoo e-mail, photographs are generally transmitted as attachments to e-mails and are accessed by clicking on a hyperlink. Mr. JB also testified that each photograph would have its own hyperlink which, when accessed, would create an imprint of the photograph on the computer's hard drive. The appellant claims that this led the members to conclude that after he opened the first e-mail he would have been on notice that the contents of the remaining e-mails contained nude photographs of CKM. Had he been afforded the opportunity to take the stand, the appellant asserts that he would have testified that all of the photographs were instantly visible when he when he opened the e-mail from CKM.

The appellant's second contention is that he was further prejudiced by not being made aware that he could elect to testify to rebut the testimony concerning when he

[4] Mr. JB testified that unallocated space is an area on a computer's hard drive where files can no longer be accessed, yet they still exist. This occurs after files have been deleted.

learned CKM's true age. The appellant's lead defense counsel asserts that the testimony elicited during deliberations changed the complexion of the trial. Ms. DM claims that the evidence elicited during deliberations bolstered the government's case which she believed was insufficient when she initially advised the appellant to remain silent at the conclusion of the government's case. The appellant asserts that he wanted to take the stand to testify he did not learn CKM's age until during the last visit to her residence.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. *Id.* at 689. Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Id.* at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 244, 248 (C.A.A.F. 1997).

Rules for Courts-Martial (R.C.M.) 921(b), provides in relevant part, "Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of such discretion, grant such request." Our superior court has affirmed the right of a court-martial to call its own witnesses. *United States v. Jones,* 26 M.J. 197, 199 (C.M.A. 1988). Under R.C.M. 913(c)(5), "The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested."

The appellant's trial defense counsel were not ineffective in this case. For purposes of this opinion, we will assume that the appellant would have requested to take the stand if so advised by his trial defense counsel. The first issue is whether the trial defense counsel's performance fell below the performance ordinarily expected of competent lawyers. In this case, the appellant's lead trial defense counsel states that she erred and would have advised the appellant to testify had she known the rules. Assuming the military judge would have allowed the defense to reopen its case under R.C.M. 913 (c)(5), the issue becomes whether the appellant's testimony would have affected the outcome of the case. We hold that it would not.

Considering the testimony of CKM, the victim's mother, KM, and SA KB, the appellant knew CKM's true age before he came to her house the second time. This was essentially reiterated during the recall of the witnesses during deliberations. With regard to rebutting the government's expert, Mr. JB, about whether the nude pictures of CKM

arrived as an attachment to an e-mail or in the body of the e-mail, the appellant admitted to KM on 7 May 2006 that he still needed to delete the pictures. Further, if the appellant had testified, the government most likely would have attempted to introduce his civilian conviction for giving false information to a police officer.[5] Therefore, if the appellant had testified, the outcome would have, at a minimum, remained the same. Accordingly, we find that his trial defense counsel were not ineffective.

Due Process Violation

The appellant's second assignment of error is that he was denied his constitutional right to due process and to present a defense when the military judge did not advise him that he had the right to testify after the members had recalled additional witnesses during their deliberations. The appellant asserts that the military judge should have called an Article 39(a), UCMJ, 10 U.S.C. §839(a), session *sua sponte*, and advised him that he had the right to present evidence, to include taking the stand, and to rebut any evidence elicited during deliberations. As a result, the appellant claims he did not receive a fair trial. In his assignment of errors, the appellant concedes that this is an issue of first impression.

In *United States v. Belizaire*, 24 M.J. 183, (C.M.A. 1987), our superior court held that a military judge is not required to advise an accused, or insure he has been advised, of the right to testify on the issue of guilt or innocence. *Id.* at 184. Citing *Belizaire*, this Court has held, "because the right to testify in one's own behalf is of a firm, fundamental, personal nature, and deemed to be common knowledge, the military judge is not required to advise an accused, or insure that an accused has been advised, of the right to testify on the issue of guilt or innocence." *United States v. Dewrell*, 52 M.J. 601, 613-14 (A.F. Ct. Crim. App. 1999). The appellant essentially claims that the holding in *Belizaire* should not apply to this case because it is not common knowledge that an accused has the right to testify after the members have recalled witnesses during deliberations. We disagree.

As stated above, the appellant did not have an absolute right to testify after the members recalled witnesses during deliberations. Since the appellant had already completed the presentation of his case, the appellant would have had to request and been granted permission by the military judge to reopen his case under R.C.M. 913(c)(5). If the request had been granted by the military judge, then the appellant would have had the same right to testify as he did during the presentation of his case during findings. Since the appellant would have been in the same situation as during the findings portion of his trial, there would have been no greater need for the military judge to advise him of his right to testify than during the findings portion of his trial. Accordingly, we hold that the military judge was not required to advise the appellant that he had a right to testify after

[5] In a post-trial submission, the government submitted a letter of reprimand (LOR), dated 23 June 2005, the appellant received for falsely reporting that his car had been stolen at gunpoint. The appellant was subsequently convicted in an Oklahoma civilian court of "Giving False Information to a Police Officer/Filing a False Report."

the members recalled the witnesses during deliberations and, therefore, the appellant's due process rights were not violated.

Jurisdiction

The appellant asserts that the court-martial was without jurisdiction because the commander, 72d Air Base Wing (72 ABW/CC), had no authority to amend the convening orders when, on 1 June 2007, he excused three officer members and two enlisted members and detailed additional members to the court.

Below are the relevant facts pertaining to this issue:

On 5 September 2006, the charge and specifications were preferred against the appellant. On 18 December 2006, the charge was referred for trial by general court-martial pursuant to Special Order A-JA-001. The General Court-Martial Convening Authority (GCMCA), 72 ABW/CC, referred the charge pursuant to the authority granted to him by the Secretary of the Air Force in a memorandum dated 2 September 2005.

On 19 April 2007, pursuant to a request from the appellant for enlisted members, 72 ABW/CC detailed six enlisted members to the general court-martial by Special Order A-JA-002.

On 1 June 2007, 72 ABG/CC relieved and replaced three officer members and two enlisted members through Special Order A-JA-003.

On 11 June 2007, the Secretary of the Air Force signed a designation of general court-martial convening authority appointing the Oklahoma Air Logistics Center (OC-ALC) commander as the GCMCA for Tinker Air Force Base (AFB). This memorandum designated 30 May 2007 as the effective date in order to coincide with the appointment to command of the incoming OC-ALC commander. The memorandum further stated that the 72 ABW/CC was authorized to convene only special courts-martial. On 18 June 2006, the legal office at Tinker AFB received a copy of the memorandum signed by the Secretary of the Air Force.

Between 11 June 2007 and 19 June 2007, the appellant was tried by general court-martial and convicted of the charge and two specifications.

On 7 September 2007, the appellant submitted a post-trial motion to dismiss for lack of jurisdiction. On 23 September 2007, the military judge denied the motion to dismiss finding that the intent of the Secretary of the Air Force was not to retroactively remove general court-martial convening authority from 72 ABW/CC, but rather only to relieve 72 ABW/CC of his general court-martial convening authority as of the date of the memorandum, 11 June 2007. On 1 June 2007, when 72 ABW/CC relieved and appointed

new members, he was the GCMCA, as the Secretary of the Air Force had not acted to relieve him of this authority.

Jurisdiction is a legal question which we review de novo. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). The interpretations of statutes and regulations are questions of law to be reviewed de novo. *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999). Court-martial jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred. *See* Article 25, UCMJ, 10 U.S.C. § 825; R.C.M. 201(b); R.C.M. 503; R.C.M. 504; R.C.M. 505; *United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008). "A court-martial composed of members, who are barred from participating by operation of law, or who were never detailed by the convening authority, is improperly constituted and the findings must be set aside as invalid." *Adams*, 66 M.J. at 258 (citing *McLaughry v. Deming*, 186 U.S. 49, 63-65 (1902)). Those officials who are empowered to convene general courts-martial are set forth in Article 22(a), UCMJ, 10 U.S.C. § 822(a). As concerns the Air Force, Article 22, UCMJ, subsections (a)(4) and (a)(7), specifically designate the Secretary of the Air Force and the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force to convene general courts-martial. Additionally, Article 22(a)(8), UCMJ, empowers the Secretary of the Air Force to designate any other commander to convene general courts-martial.

We find that the court-martial had jurisdiction to try the appellant. We agree with the military judge that on 1 June 2007, when 72 ABW/CC relieved and replaced five members, he was still acting as GCMCA because the Secretary of the Air Force had not yet relieved him of that authority. According to the plain reading of the Secretary's memorandum, dated 11 June 2007, the OC-ALC commander was authorized to exercise general court-martial convening authority, effective 30 May 2007, the date in which he took command of OC-ALC. However, 72 ABW/CC also retained general court-martial convening authority until 11 June 2007, the date of the Secretary's memorandum. On 1 June 2007, when 72 ABW/CC last acted on this case, he was still authorized to act as the GCMCA. Accordingly, the appellant's court-martial had proper jurisdiction.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain findings of guilty to specifications 2 and 4 of the Article 134, UCMJ charge. In accordance with Article 66(c), UCMJ, 10 USC § 866(c), 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, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*,

66 M.J. 172, 173 (C.A.A.F. 2008) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

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." *Turner*, 25 M.J. at 325. 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, *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Specification 2 of the Charge alleged that on or about 2 May 2006, the appellant committed an indecent act upon the body of CKM, a female under 16 years of age, by removing her clothing, kissing her on the mouth, fondling her breasts, repeatedly inserting his fingers into her vagina and attempting to insert his penis into her vagina, with the intent to arouse, appeal to, or gratify his lust, passions, or sexual desires.[6] This specification concerns the second time the appellant visited CKM at her home.

There is ample evidence in the Record of Trial that the appellant committed the charged offense. CKM testified in detail about the indecent acts committed by the appellant at her home on 2 May 2006, to include the red condom used by the appellant that was seized as evidence during the investigation of this case. Additionally, KM testified that when she pretended to be CKM and sent a text message to the appellant asking what he remembered about their last encounter, the appellant replied, "playing with your clit." The main issue in the case was not whether or not the indecent acts occurred but rather at what point the appellant actually learned CKM's true age. Considering the testimony of CKM, her mother, KM, and SA KB, the appellant at the very latest knew CKM's true age before he came to her house the second time. Accordingly, 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 the appellant committed the offense alleged under specification 2, and we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Specification 4 of the Charge alleges that between on or about 9 April 2006 and on or about 9 May 2006, the appellant wrongfully and knowingly possessed visual depictions of a nude minor, which conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces. The evidence clearly shows that CKM sent four nude photos of herself in various sexually explicit poses to the appellant. CKM testified that she sent the appellant nude photographs of herself which were found by government's computer expert, Mr. JB, in the unallocated space on the appellant's computer. Further, KM testified that when she informed the appellant that he had nude

[6] The appellant was found guilty of this specification, except for the words "fondling her breasts."

photos of her daughter on his computer, he acknowledged their existence and indicated he needed to delete them. Accordingly, 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, and concluded that the appellant committed the offense alleged under specification 4. Furthermore, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Failure to State an Offense

The appellant's final assignment of error is that specification 4 of the charge failed to state an offense. As stated above, this specification alleged that the appellant:

Did, at or near Oklahoma City, Oklahoma, between on or about 9 April 2006 and on or about 9 May 2006, wrongfully and knowingly possess visual depictions of a nude minor, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

"The question of whether a specification states an offense is a question of law, which this Court reviews de novo." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *Dear*, 40 M.J. at 197). Failure to object does not waive the issue of a specification's legal sufficiency. R.C.M. 905(e). "If, however, a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained 'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" *Crafter*, 64 M.J. at 211 (quoting *Mayo*, 12 M.J. at 288).

This issue was not raised at trial nor did the appellant request a Bill of Particulars. The appellant's position is that alleging "possession of visual depictions of a nude minor" alone, without alleging that the images contain "sexually explicit conduct," does not state an offense. In support of his position, the appellant asserts that parents routinely possess nude photos of their children which does not violate the law. Although this may be true in a general sense, in this case the specification specifically alleged the appellant knowingly and wrongfully possessed the nude photographs between 9 April 2006 and 9 May 2006, and that the possession of those photographs was conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. We find that the specification alleged, either expressly or by implication, every element of the offense and gave the appellant proper notice of his criminal conduct. Accordingly, this assignment of error is without merit.

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