UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DANIEL W. HONZIK
United States Air Force

ACM 34667

26 November 2003

Sentence adjudged 20 June 2001 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, Major Patricia A. McHugh, Major Karen L. Hecker, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting as a general court-martial tried the appellant at Schriever Air Force Base (AFB), Colorado. The court-martial convicted the appellant, contrary to his pleas, of one specification of possessing images of child pornography shipped in interstate commerce contrary to 18 U.S.C. § 2252A(a)(5)(B), and one specification of using a means of interstate commerce to attempt to persuade, induce, entice or coerce a child under 18 years of age to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), made applicable through Article 134, UCMJ, 10 U.S.C. § 934. He was also convicted, contrary to his pleas, of three specifications of attempting to communicate indecent language to children less than 16 years of age, in violation of Article 80, UCMJ,

10 U.S.C. § 880. The appellant was acquitted of one specification of attempted carnal knowledge, one specification of attempted sodomy with a child under 16 years of age, and two specifications alleging the wrongful communication of indecent language. The military judge sentenced the appellant to a dishonorable discharge, confinement for 8 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence adjudged, except that he reduced the period of confinement to 7 years.

The appellant raises several issues for our consideration. He alleges: (1) His conviction for possessing child pornography in violation of 18 U.S.C. § 2252A is unconstitutional in the wake of the decision of the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); (2) His conviction for using means of interstate commerce to attempt to entice a child under 18 years of age to engage in sexual activity is unconstitutional, because Congress cannot prohibit persons from engaging in speech with people who are not actually children; (3) The convictions for attempting to communicate indecent language are unsupportable because the offense is not authorized under the UCMJ, the language is constitutionally protected, and the language was not indecent; (4) The military judge erred in failing to suppress the seizure of the appellant's computer;[1] (5) The military judge erred in allowing an expert witness to opine that the appellant is a pedophile when the expert had not personally examined the appellant; and (6) The appellant's sentence is inappropriately severe.[2] We find error in an issue not raised by the appellant, take corrective action, and affirm.

I. Background

The appellant was a space weather forecaster, stationed at Schriever AFB and living in Colorado Springs, Colorado. He frequently used his computer to access the Internet. His Internet service provider was Freewwweb.com, a company then located in Connecticut. The appellant used the screen name "dhonzik," and set up a profile on the "Yahoo" web site with his name, photograph, and other personal information. The appellant visited a web site on "Yahoo" dedicated to "Older Men for Younger Girls." Someone using the screen name, "udo2ic" put the appellant's screen name on her "buddy list," and the appellant was notified of that contact. A Yahoo profile for "udo2ic" indicated she was a 13-year-old girl named "Kendra" who lived in Kansas.

On 17 April 2000, the appellant sent an instant message to "udo2ic" introducing himself. He immediately asked her where in Kansas she was from, revealing that he had seen her profile. After a short discussion, he asked if he could meet her in person and she indicated she would be willing to meet him in Manhattan, Kansas. After a few more questions, he asked if he could kiss her. "Kendra" sent a photograph of herself, which

[1] The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] The appellant raises the portion of this argument which offers sentence comparison to unrelated cases pursuant to *Grostefon*, 12 M.J. at 435.

the appellant downloaded. He acknowledged that she was only 13 years old. They discussed the clothes she might wear to their meeting, and the appellant suggested that she not wear panties so that he could "finger" her. The appellant offered to buy her lingerie, and jewelry (a pendant) for her birthday. He discussed taking pictures of her. Finally, the appellant indicated he wanted to spend the night with her and engage in sexual relations. He also asked her to shave her pubic area.

Over the next few days, the appellant sent additional messages to "Kendra," making arrangements to meet in Manhattan, Kansas. He sent her information about his hotel reservations and the telephone number. The appellant also sent her a digital post-card greeting, and later suggested, in explicit terms, that she perform fellatio on him.

The appellant worked that night, got a few hours sleep, and drove from Colorado Springs to Manhattan, Kansas, on 20 April 2000. Shortly after he arrived at the hotel, he received a telephone call from someone who identified herself as "Kendra" and they arranged to meet that night at a nearby park. "Kendra" agreed to wear a yellow hat.

The appellant drove to the park and walked towards a female sitting on a park bench, wearing a yellow hat. As he approached, someone called out, "You're doing a good job." The appellant became wary and stopped. "Kendra" called out, "Dan?" and he nodded. She approached him; he began to back away. "Kendra" went after him and advised him he was under arrest.

In fact, "Kendra" was not a 13 year-old girl. The "Kendra" who chatted with the appellant on-line was a private citizen who was a member of a civilian Internet watchdog group called PedoWatch, dedicated to reporting child pornography and those who solicit children on-line. The PedoWatch volunteer reported the appellant's contacts to the Riley County Police Department. The "Kendra" in the photograph was an undercover police officer. The "Kendra" who called the appellant at his hotel room was an adult female working with the police department in Riley County, Kansas. Finally, the "Kendra" wearing the yellow hat on the park bench was Officer Gretchen Bertrand of the Riley County Police Department.

The Riley County police arrested the appellant in the park and put him in a patrol car. He signed a consent form allowing the police to search his vehicle. They found a pendant on a gold chain and a printout of the photograph "Kendra" sent to the appellant.

Detective David Falletti of the Riley County Police Department advised the appellant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and questioned him about his contact with "Kendra." The interview was recorded. At first the appellant denied any intent to engage in sexual activities with "Kendra," but later he admitted that he hoped to engage in sexual relations with her. The appellant also wrote a

statement describing what had occurred. He also consented to a search of his hotel room, which revealed a digital camera, a palm pilot, and maps of Manhattan, Kansas.

The civilian authorities held the appellant in pretrial confinement. The following day he signed an Air Force Form 1364, Consent for Search and Seizure, authorizing investigators to search his apartment in Colorado, including his computer and all his media storage devices. Investigators from the Air Force Office of Special Investigations (AFOSI) seized his computer and related equipment. Investigators found a computer directory containing files of Internet chat sessions between the appellant and others that contained sexually explicit language. Analysis of the data on the computer also revealed about 2,600 graphic image files; the vast majority of them depicted nudity and sexual conduct. Several of these indicated that the image was received through Internet chat sessions. Investigators sent 40 images to an expert at the Armed Forces Center for Child Protection for a sexual maturity rating.

II. Possession of Child Pornography

The government charged the appellant with possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) made applicable through clause 3 of Article 134, UCMJ. The prosecution introduced into evidence the 40 images recovered from the appellant's computer as Prosecution Exhibits 32 through 71, inclusive. The parties entered into a stipulation of fact that the appellant participated in Internet chat sessions and that, "Prosecution Exhibits 32 through 71 were seized from the accused's computer. Prosecution Exhibits 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 47, and 48 each contain at least one person under the age of 18." (Prosecution Exhibit 80, pp. 2, 5.)

At trial, the appellant moved to dismiss the specification on the grounds that the definitions of child pornography in 18 U.S.C. §§ 2256(8)(B) and (D) were unconstitutional, citing the decision of the Ninth Circuit in *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999). Relying on *United States v. James*, 55 M.J. 297, 299 (C.A.A.F. 2001), the military judge denied the motion. The military judge found the appellant guilty of the charged offense.

About one year after the appellant's trial, the Supreme Court released its opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), hereinafter cited as *Free Speech Coalition*. In *Free Speech Coalition*, the Supreme Court found that some of the language in 18 U.S.C. § 2256, defining child pornography, unconstitutionally infringed upon free speech. Specifically, the Court found that the language of § 2256(8)(B), proscribing an image or picture that "appears to be" of a minor engaging in sexually explicit conduct, and the language of § 2256(8)(D), sanctioning visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a depiction of a minor engaging in sexually explicit conduct," were overly broad and, therefore, unconstitutional. *Id.* at 256-58.

Nonetheless, the Supreme Court reiterated that the government could constitutionally prohibit pornography involving actual children. *Id.* at 240. *See generally New York v. Ferber*, 458 U.S. 747 (1982); 18 U.S.C. § 2256(8)(A).

The appellant argues that his conviction for possessing child pornography is "void," following the decision of the Supreme Court in *Free Speech Coalition*. We find no merit in this argument. Had the Supreme Court struck down the statute in its entirety, we might agree. However, as discussed above, only portions of the statute were declared unconstitutional. Our task is to determine whether the unconstitutional portions of the statute tainted the appellant's conviction.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We consider first the legal sufficiency of the conviction. Of course, we review questions of law de novo. *United States v. McElhaney*, 54 M.J. 120, 125 (C.A.A.F. 2000). *See* 1 Steven Childress & Martha Davis, *Federal Standards of Review* § 2.13 (3d. ed. 1999) ("the question of whether specific conduct is constitutionally protected is ultimately an issue of law"). It is clear the military judge properly considered the law regarding the elements of the offense of possessing child pornography as it existed at that time. *See* 18 U.S.C. §§ 2252A, 2256(8); *James*, 55 M.J. at 299. However, that law changed with the decision of the Supreme Court in *Free Speech Coalition*. Conducting our de novo review in light of *Free Speech Coalition*, we must conclude that it was an error of law to consider within the definition of child pornography an image or picture that "appears to be" of a minor engaging in sexually explicit conduct (10 U.S.C. § 2256(8)(B)), and visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a depiction of a minor engaging in sexually explicit conduct" (18 U.S.C. § 2256(8)(D)).

Having found an error of law, we must determine whether the appellant was prejudiced thereby. Article 59(a), UCMJ, 10 U.S.C. § 859(a). "[W]hile Courts of Criminal Appeals are not constrained from taking notice of otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse unless the error 'materially prejudices the substantial rights of the accused.' . . . Article 59(a) constrains their authority to reverse . . . ." *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998). "[A]n otherwise valid conviction should not be set aside if the reviewing court

may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991), *overruled on other grounds*, *Estelle v. McGuire*, 502 U.S. 62 (1991). "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . . it should not find the error harmless." *Neder v. United States*, 527 U.S. 1, 19 (1999).

Turning to the case at bar, it appears the military judge improperly considered some definitions relevant to the offense. The error may be analogized to improperly instructing the jury on an element of an offense. *California v. Roy*, 519 U.S. 2, 5 (1996) (per curiam). The Supreme Court holds that such errors are subject to review under the harmless error standard. *See Neder*, 527 U.S. at 9 ("an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair"); *Johnson v. United States*, 520 U.S. 461, 470 (1997) (harmless error applied although the judge did not submit the element of materiality to the jury); *Yates*, 500 U.S. at 402 (constitutionally erroneous instruction shifting the burden of proof subject to harmless error review); *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (harmless error analysis appropriate, even though trial court improperly instructed the jury on an element of an obscenity charge); *Rose v. Clark*, 478 U.S. 570, 576 (1986) (harmless error inquiry appropriate where jury incorrectly instructed on the element of malice in a murder trial).

We must review the record of trial to determine whether the error was harmless. *Neder*, 527 U.S. at 19; *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless"). Specifically, we must examine the record to determine whether the definitions of child pornography struck down by the decision in *Free Speech Coalition* "contributed to the . . . verdict," as explained by the Supreme Court. *Yates*, 500 U.S. at 403.

We consider first whether the definition contained in 18 U.S.C. § 2256(8)(D) concerning images that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that the material was child pornography had an impact on the verdict. Reviewing the record, there was no evidence presented about how these images were "advertised, promoted, presented, described, or distributed." Any conclusion about whether the images constituted child pornography was based upon an examination of the images themselves. We find the definition in 18 U.S.C. § 2256(8)(D) did not play a part in this case. *Neder*, 527 U.S. at 19. We conclude

that any error of law in considering that definition was harmless beyond a reasonable doubt.

We next consider the definition of child pornography contained in 18 U.S.C. § 2256(8)(B), relating to an image that "appears to be" a minor engaging in sexually explicit conduct. The Supreme Court found the language of 18 U.S.C. § 2256(8)(B) overly broad because it would include "computer-generated images," "a Renaissance painting depicting a scene from classical mythology," or scenes from Hollywood movies which did not involve any children in the production process. *Free Speech Coalition*, 535 U.S. at 241. The Supreme Court also took note of the Congressional findings following 18 U.S.C. § 2251 that new technology makes it possible to create realistic images of children who do not exist. *Id.* at 240. Here, the images in question were not Renaissance paintings or scenes from Hollywood movies involving actresses over 18 years old. Nothing in the record indicates the images in question are "computer-generated" or "virtual" photographs. To the contrary, the appellant entered into a stipulation of fact that, "Prosecution Exhibits 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 47, and 48 each contain at least one person under the age of 18." (Prosecution Exhibit 80, p. 5.) During the providence inquiry, the military judge specifically inquired about that fact, and the appellant assured him it was true.[3] We hold that any error of law in considering the "appears to be" language from 18 U.S.C. § 2256(8)(B) as part of the definition of child pornography was harmless beyond a reasonable doubt.

Before this Court, the appellant dismisses the significance of the stipulation on the grounds that he did not state that they were "real or actual" children. We do not find this argument persuasive. Normal usage and common-sense suggest that describing a person as a minor or a child indicates the subject is a real person, unless there is some limiting language such as "appears to be," "virtual," or "computer-generated." Indeed, 18 U.S.C. § 2256(8)(A), which passed constitutional scrutiny under *Free Speech Coalition*, does not use either word to modify the term "minor." *See James*, 55 M.J. at 301 (appellant's admissions that the images "depicted young females under the age of eighteen" and "minors" reasonably suggested depiction of actual minors). As discussed above, the appellant stipulated that several of the exhibits in question "contain at least one person under the age of 18." This case is distinguishable from *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), because in that case there was some indication that the appellant's plea may have been based upon the "appears to be" language of the statute later struck down in *Free Speech Coalition*.

The appellant contends the prosecution presented no evidence that the images depicted "real" children. We do not agree. Certainly the photographs themselves are some evidence that actual children were involved in the production of the images. *See*

[3] We also note that the parties agreed it was not a confessional stipulation because the parties were not stipulating to the pornographic nature of the images or that they were shipped in interstate commerce.

James, 55 M.J. at 301; *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1646 (2003); *United States v. Richardson*, 304 F.3d 1061, 1064 (11th Cir. 2002) ("We have examined the images shown to the jury. The children depicted in those images were real; of that we have no doubt whatsoever."), *cert. denied*, 537 U.S. 1138 (2003); *United States v. Tynes*, 58 M.J. 704 (Army Ct. Crim. App. 2003), *pet. granted*, 59 M.J. 31 (C.A.A.F. 2003). We are convinced beyond a reasonable doubt that the appellant possessed images of child pornography involving actual children.

"Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." Article 59(b), UCMJ, 10 U.S.C. § 859(b). Considering our disposition above, however, it is not necessary to consider whether the evidence was sufficient to support a conviction for the attempted possession of child pornography under 18 U.S.C. § 2252A(b)(2), or a general disorder under Article 134, UCMJ.

III. Attempted Enticement - 18 U.S.C. § 2242

The appellant was also charged with using a means of interstate commerce to attempt to persuade, induce, entice, or coerce a child under 18 years to engage in sexual activity that would be a criminal offense in violation of 18 U.S.C. § 2422(b), made applicable through Article 134, UCMJ. At trial, the prosecution introduced transcripts of the appellant's electronic "conversations" with "Kendra" between 17 April and 20 April 2000. The appellant stipulated that he accessed the Internet through an Internet service provider located in Connecticut, and that information transmitted through these Internet e-mail systems travels across state lines or to other countries. The adult volunteer from PedoWatch who posed as "Kendra" for the on-line chats also testified at trial. The military judge convicted the appellant of the charged offense.

The appellant now contends that the appellant cannot lawfully be convicted of violating 18 U.S.C. § 2422(b). Analogizing the decision in *Free Speech Coalition*, the appellant argues that he cannot be convicted of a crime by engaging in unlawful speech where there was no actual child taking part in the conversation. According to the appellant, "Congress cannot prohibit a citizen from engaging in speech with people who are not actual children." We disagree.

18 U.S.C. § 2422(b) (2000) provided:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with

> a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

The statute does not regulate the content of speech; rather it criminalizes conduct that incidentally involves speech. *United States v. Kufrovich*, 997 F. Supp. 246, 254 (D. Conn. 1997), *overruled in part on other grounds*, 284 F.3d 338 (2d Cir. 2002). The First Amendment does not give the appellant the right to attempt to persuade minors to engage in illegal sex acts. *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *cert. denied*, 532 U.S. 1009 (2001). We conclude the appellant's conviction under 18 U.S.C. § 2422(b) does not offend the Constitution. *See United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), *cert. denied*, 537 U.S. 1176 (2003); *United States v. Farner*, 251 F.3d 510 (5th Cir. 2001); *United States v. Riccardi*, 258 F. Supp. 2d 1212, 1226 (D. Kan. 2003).

IV. Attempts to Communicate Indecent Language

The appellant maintains we must set aside his conviction for three specifications of attempted communication of indecent language to a child under 16 years of age. He argues that the charged offense as defined by the President preempts the application of Article 80, UCMJ, so that attempt is not a lesser included offense. He also argues that his language was constitutionally protected, and that the language was not indecent under the circumstances. We find no merit in these arguments.

The appellant was charged with two specifications of wrongfully communicating indecent language to a child under 16 years of age. One specification related to communications with a person using the screen name "S@R@H," and the other related to communications with a person using the screen name "Amanda16k." The prosecution presented the transcripts of the communications taken from the appellant's computer, but no evidence indicating the identity or age of those engaged in these communications. At trial, the defense argued there was insufficient evidence to prove these communications really involved children under the age of 16 years. The military judge found the appellant not guilty of the charged offenses, but guilty of attempting to commit the offenses under Article 80, UCMJ.

The appellant was also charged with attempt to communicate indecent language to "jennie," a child under 16 years of age. However, "jennie" was actually Special Agent Geoffrey Binney of the Federal Bureau of Investigations, who was working on the Innocent Images Task Force, a nationwide program dedicated to ferreting out sexual predators on the Internet. The prosecution introduced transcripts of the communications, and the parties stipulated they were on the appellant's computer. The military judge found the appellant guilty of this charge.

The appellant was also charged with two specifications of communicating indecent language to others (not children), with the screen names "Desert Dweller" and

"Tonja." The transcripts of the communications entered into evidence from the appellant's computer portrayed the individuals as adults. The transcripts included sexually explicit language. At trial, the appellant argued that the language was not indecent because it was exchanged between consenting adults. The military judge found the appellant not guilty of these specifications.

The appellant argues that the charged offense as defined by the President preempts the application of Article 80, UCMJ, so that attempt is not a lesser included offense. He notes that the offense of communicating indecent language is defined in paragraph 89 of the Punitive Articles section, within the *Manual for Courts-Martial* as an offense under Article 134, UCMJ, and that communicating indecent language to a child less than 16 years old is an aggravating factor that increases the maximum possible punishment. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 89e(1) (2000 ed.). He reasons that where the government cannot prove that the recipient of the appellant's communications was under 16 years, the appellant can only be convicted of indecent language with another, and not attempted indecent language with a child. The appellant argues that "the President's drafting of paragraph 89 of the Punitive Articles preempts the application of Article 80 [UCMJ]."

There is a preemption doctrine in the UCMJ, but it stands for a proposition exactly opposite of that urged by the appellant. "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." *MCM*, Part IV, ¶ 60c(5)(a); *United States v. Robbins*, 52 M.J. 159, 160 (C.A.A.F. 1999); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). Thus, where Congress defined the offense of "larceny" under Article 121, UCMJ, the President could not create an offense under Article 134 that was similar to larceny but less rigorous in its elements.

There is no indication that in drafting paragraph 89 of the Punitive Articles section the President intended to "preempt" the application of Article 80, UCMJ. To the contrary, paragraph 89 specifically lists Article 80, UCMJ, as a lesser included offense of communicating indecent language.

The appellant also maintains the language in question is constitutionally protected. Extrapolating from the decision in *Free Speech Coalition*, he argues that the government's ability to restrict free speech is severely limited in cases where no actual children are involved in the conversation. He argues further that, because the government did not prove there were actual children involved in the challenged communication, they must be treated as though they were communications with adults. Under that standard, he argues, the language was not criminally indecent.

What the appellant overlooks is the essence of the crime of "attempt." Article 80, UCMJ, provides, "An act, done with specific intent to commit an offense under [the UCMJ], amounting to more than mere preparation and tending, even though failing, to

effect its commission, is an attempt." Here the appellant specifically intended to communicate indecent language to people he believed to be children under 16 years of age. He sent electronic messages though his computer that would have effected the commission of the offense, had the recipients actually been children. "A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt." *MCM*, Part IV, ¶ 4c(3).

Finally, the appellant argues that his convictions for communicating indecent language may not be affirmed because the evidence was insufficient to show that the conduct actually caused prejudice to good order and discipline, or lowered someone's esteem for the armed forces. We find no merit in this argument. There is no requirement that the government show actual damage to the reputation of the military. *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994). The test is whether the appellant's offense had a "tendency" to bring discredit upon the service. *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003); *Hartwig*, 39 M.J. at 130; *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972). The phrase "conduct of a nature to bring discredit upon the armed forces" makes punishable "conduct which has a tendency to bring the service into disrepute or which tends to lower it in the public esteem." *MCM*, Part IV, ¶ 60c(3).

V. Factual Sufficiency of the Evidence–"Amanda16k"

Our review of the record reveals an error that the appellant did not raise as an issue. The appellant was found guilty under Specification 4 of Charge I of attempted communication of indecent language to "an individual known as 'Amanda16k,' a child under the age of 16 years." The evidence consisted of a copy of an Internet chat session on 17 April 2000 between the appellant using the screen name "Nova," and an individual identified as "Amanda16k," which was recovered from the appellant's computer and entered into evidence as Prosecution Exhibit 74. From the context of the message, "Amanda16k" appears to be of school age and living at home. However, unlike the correspondents in the other specifications, there is no indication in the text of the communication of her exact age. The parties stipulated that the appellant's computer had a directory subheading named, "Amanda," and that it contained "30 images of a girl identified on Yahoo as 'Amanda16k.'" One image of "Amanda16k" was admitted into evidence as Prosecution Exhibit 65.

There is no evidence indicating specifically the age of "Amanda16k." We are unable to determine beyond a reasonable doubt that she was under 16 years of age simply by reviewing the image admitted as Prosecution Exhibit 65. If the designation "16" within the screen name "Amanda16k" was meant to indicate her age, it would tend to show that she was not under the age of 16 as required for the offense. While the appellant engaged in similar discussions with others who indicated they were less than 16 years old, he also participated in lascivious conversations with those who represented

themselves as adults. We are not convinced beyond a reasonable doubt that the evidence proved that the appellant believed "Amanda16k" to be a child under the age of 16 years.

We next consider whether the evidence supports the lesser included offense of attempting to communicate indecent language. *See* Article 59(b), UCMJ. Our superior court holds that "indecent language" under Article 134, UCMJ, must be "calculated to corrupt morals or excite libidinous thoughts." *United States v. Brinson*, 49 M.J. 360, 364 (C.A.A.F. 1998); *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990). In determining whether the language is indecent, we consider several factors, including community standards, the personal relationship between the speaker and the audience, the probable effect of the communication, and the precise circumstances surrounding the communication. *Brinson*, 49 M.J. at 364; *French*, 31 M.J. at 60 (citing *United States v. Linyear*, 3 M.J. 1027, 1030 (N.C.M.R. 1977)).

The language clearly communicates a sexual message–indeed, the appellant invited "Amanda16k" to engage in oral sodomy.[4] The record does not provide much evidence of the relationship between the appellant and the person responding as "Amanda16k," other than the fact that they communicated on-line several times, and shared electronic images of one another. From the text of the electronic conversation, "Amanda16k" seems to be a willing recipient of the appellant's messages. The absence of evidence bearing upon these various factors makes us hesitate to conclude that the appellant's language–however vile and offensive–meets our superior court's definition of "indecent." *Brinson*, 49 M.J. at 363-64. Therefore, we are not convinced beyond a reasonable doubt that the appellant is guilty of the included offense of attempting to communicate indecent language. The finding of guilt for Specification 4 of Charge I is factually insufficient.

VI. Motion to Suppress Search Results

At trial, the defense moved to suppress the evidence seized from the appellant's home computer, on the grounds that his consent was not voluntary. The military judge took evidence on the motion. The prosecution presented the appellant's signed consent and the testimony of the investigators involved in obtaining the consent.

The appellant also testified on the motion. He asserted that while in the custody of the Riley County Police he spoke to his first sergeant, and was told that if he did not consent to the search of his apartment the Air Force would get a warrant. The appellant contended that he did not feel he could really refuse consent. The trial counsel cross-examined the appellant about his reasons for consenting to the search.

[4] While that was an offense at the time of trial, the recent decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), calls that into question.

Q. So what was different about your consent to search the hotel that was different from your consent to search your room?

A. Because they would have gotten a search warrant and they could have based it on the information they already had.

Q. Well, I guess, I'm not following. What about–why do you feel you didn't have a choice to consent to the search of your residence, but you did feel you had a choice to consent to search your car and your hotel room? What was different?

A. My First Shirt said the best thing to do was cooperate and I figured that by cooperating with OSI it would show up, I would get maybe some leniency toward the actual sentence.

Q. So you were actually thinking, how can I help myself in this situation basically. Right?

A. Basically, yes.

Q. And you decided that the way to help yourself in this situation was to cooperate?

A. That's correct.

Q. And the decision to cooperate in your mind was a free and voluntary decision because you were hoping to get a benefit from it? Correct?

A. Well, I was just hoping that they would consider that.

The military judge entered findings of fact on the motion. The military judge found, by clear and convincing evidence considering the totality of the circumstances, that the appellant knew he had the right to refuse to consent to search his apartment. He found that by consenting the appellant "was not acquiescing to authority, but he was acquiescing to the circumstances," believing that it would be better for him to consent. The military judge denied the motion to suppress.

We considered carefully the military judge's findings of fact and conclusions of law, and found them to be well supported by the evidence. We find the military judge did not abuse his discretion in denying the motion to suppress.

VII. Expert Testimony

The appellant contends the military judge abused his discretion by allowing an expert witness to testify during the sentencing proceedings that the appellant was a pedophile. Specifically, the appellant argues that the expert's opinion was improper because the expert did not personally evaluate the appellant and because the appellant did not meet the diagnostic criteria for pedophilia. We find this argument to be without merit.

It is not required that a psychologist personally interview an accused before testifying. *Barefoot v. Estelle*, 463 U.S. 880, 903-04 (1983); *United States v. Stinson*, 34 M.J. 233, 239 (C.M.A. 1992). Here, the witness was qualified as an expert, the testimony was within the limits of his expertise, it was based upon a sufficient factual basis to make it relevant, and the relevance outweighed the potential for unfair prejudice. *Stinson*, 34 M.J. at 238-39. We hold that the military judge did not abuse his discretion in admitting this testimony.

VIII. Sentence Appropriateness

The appellant contends that his sentence is inappropriately severe, based upon the nature of the offenses, his record of otherwise good service, and the sentences received by others in similar cases. We do not agree.

Article 66(c), UCMJ, requires this Court to approve only that sentence, or such part or amount of the sentence, as it finds correct in law and fact and determines should be approved. The determination of sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); *United States v. Alis*, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998). Sentence appropriateness should "be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *Snelling*, 14 M.J. at 268 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Sentence comparison is generally inappropriate, unless this Court finds highly disparate sentences in closely related cases. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985).

We find no basis for engaging in sentence comparison in this case. The cases cited by the appellant do not involve "coactors involved in a common crime,

servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Lacy*, 50 M.J. at 288.

We do not find this sentence inappropriately severe, considering this appellant and the specific nature of his crimes. The appellant repeatedly targeted young and vulnerable children for his indecent communications and demonstrated his willingness to carry out his lascivious proposals. Considering all the circumstances of the case, including his "continuous course of conduct involving the same or similar crimes," *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001) (quoting *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)), we are convinced the sentence approved was appropriate to punish the appellant, protect society from him, and provide an opportunity for his rehabilitation.

IX. Sentence Reassessment

Because we found the evidence legally and factually insufficient to support the appellant's conviction for Specification 4 of Charge I, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id*.

Under the unique circumstances of this case, we find that we can reassess the sentence in accordance with the established criteria.

At trial, the appellant faced a maximum punishment of a dishonorable discharge, confinement for 26 years, forfeiture of all pay and allowances, a fine, and reduction to E-1. Setting aside the conviction for Specification 4 of Charge I, the maximum possible punishment would be the same except that the maximum possible confinement would be reduced to 24 years. Thus the correction would have had little impact on the maximum punishment.

We also note that, even setting aside Specification 4, Charge I, there was a considerable amount of evidence showing the appellant's course of similar conduct. He was found guilty of using the Internet to attempt to entice "Kendra" to engage in unlawful sexual activity. Moreover, the specification set aside was only one of three specifications charging his attempts to communicate indecent language to children less than 16 years of age. In addition to the evidence supporting these three specifications, the military judge admitted evidence of additional communications from the appellant to "karenfl14," a law enforcement agent from the State of Florida posing as a 14-year-old girl, for the limited purpose of showing the appellant's intent and "modus operandi." Thus, there was a substantial amount of evidence demonstrating the nature and extent of the appellant's misconduct, even absent any error.

Finally, we note that the most serious offense before the court-martial involved the appellant's attempt to induce someone he believed to be a child to engage in unlawful sexual activities. That offense alone carried a maximum period of confinement of 15 years. 18 U.S.C. § 2422(b). The appellant also stands convicted of two specifications of attempting to communicate indecent language to persons he believed were children less than 16 years old--these offenses are significant in light of the risk of immediate harm to the intended victims. The appellant's possession of child pornography was the least serious offense, because of the more remote potential for harm to the actual victims. Considering these factors, we find that dismissing Specification 4 of Charge I does not substantially diminish the totality of the misconduct before the sentencing authority.

We hold that reducing the appellant's confinement to six years will cure any error. *Doss*, 57 M.J. at 185. We are satisfied that, absent the error, the sentence would not have been less than a dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

X. Conclusion

The finding of guilt for Specification 4, Charge I, is set aside and the Specification is dismissed. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court