UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER R. MILLER
United States Air Force

ACM 36829 (f rev)

30 April 2009

Sentence adjudged 31 July 2006 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

FRANCIS, Senior Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial found him guilty of one specification of attempting to take indecent liberties with a child, and two specifications of attempting to communicate indecent language to a child under the age of 16, in violation of Article 80, UCMJ, 10 U.S.C. § 880. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for three months, reduction to E-1, and a reprimand. This Court subsequently affirmed the findings and sentence. *United States v. Miller*, 65 M.J. 845 (A.F. Ct. Crim. App. 2007).

By decision issued 3 December 2008, the Court of Appeals for the Armed Forces affirmed this Court's holding as to Specifications 2 and 3 of the Charge (the attempted indecent language specifications), but reversed as to Specification 1 of the Charge (the attempted indecent liberties specification) and the sentence. *United States v. Miller*, 67 M.J. 87, 91 (C.A.A.F. 2008). In doing so, our superior court specifically found that the offense of attempted indecent liberties requires that the acts at issue take place in the "physical presence" of the alleged victim, and that the evidence of record was insufficient to establish the required physical presence. *Id.* at 89-90. The Court remanded the case for our determination as to whether the evidence is nonetheless legally and factually sufficient to support a finding of guilty to the lesser-included offense of attempted indecent acts with another and, if so, for reassessment of the sentence or ordering a rehearing on the sentence, as appropriate. *Id.* at 91. Having again considered the record, we find the evidence is legally and factually sufficient to support a finding of guilty to the lesser-included offense of attempted indecent acts with another, so find, and reassess the sentence.

Background[1]

The appellant was netted by a sting operation in which a civilian police detective posed in an Internet chat room as a 14-year-old girl. On 15 September 2005, soon after introducing himself to the "girl," and being informed by her of her supposed age, he began, via instant messaging, discussing sexual activities with her. The extremely graphic conversation included questions by the appellant regarding the "girl's" breast size, questions about her prior sexual experiences, descriptions of the sexual acts he would like to perform upon her, and an assertion that he liked young girls and "never had one but always wanted to try." Approximately ten minutes into the conversation, he used his web-camera to send the "girl" a live feed of himself masturbating. He continued to engage in sexually explicit instant messaging with her while masturbating and, after ejaculating, asked her if she liked what she saw. When she responded affirmatively and asked him how it felt, he replied: "felt good would have felt better if i [sic] had someone else's hand on it." The appellant carried on a similar conversation, *sans* masturbation, with the "girl" on 4 October 2005.

Lesser Included Offense of Attempted Indecent Acts with Another

When a finding of guilty to a charged offense is set aside on appeal, appellate courts have the power to nonetheless affirm a finding of guilty to a lesser-included offense if such lesser offense is supported by the evidence of record. Article 59(b), UCMJ, 10 U.S.C. § 859(b); *Miller*, 67 M.J. at 91; *United States v. Augustine*, 53 M.J. 95, 96 (C.A.A.F. 2000); *United States v. Anderson*, 60 M.J. 548, 552 (A.F. Ct. Crim. App.

[1] The relevant facts of record were fully reported in this Court's original decision. *United States v. Miller*, 65 M.J. 845 (A.F. Ct. Crim. App. 2007). For ease of reference, we repeat them here, with minor additions.

2004). "That authority, however, is not without limits. An appellate court may not affirm an included offense on 'a theory not presented to the' trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *United States v. Standifer*, 40 M.J. 440, 446 (C.M.A. 1994)).

Attempting to commit indecent acts with another is a lesser included offense of attempting to take indecent liberties with a child. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶¶ 4.d., 87.d.(1) (2005 ed.);[2] *Miller*, 67 M.J. at 91. However, unlike the charged offense, the offense of indecent acts with another does not contain a "physical presence" requirement. *Miller*, 67 M.J. at 91. Rather, proof of indecent acts with another only requires proof: "(1) That the accused committed a certain wrongful act with a certain person; (2) That the act was indecent; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces." *MCM*, Part IV, ¶ 90.b. An act is done "with" someone if it is "done in conjunction or participating with another person." *Miller*, 67 M.J. at 91; (quoting *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987)); *United States v. Proctor*, 58 M.J. 792, 799 (A.F. Ct. Crim. App. 2003). Although an "'affirmative interaction' between the accused and the victim" is required, that interaction can be verbal and need not be "in the same physical space." *Miller*, 67 M.J. at 91 (quoting *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994)).

The evidence of record, including a stipulation of expected testimony of the civilian police detective with whom the appellant engaged in the Internet chat and a transcript of their instant messaging conversation, establishes all the required elements of the lesser-included offense beyond a reasonable doubt. In this regard, we specifically find that although the appellant was not physically present at the same location as his intended victim, there was an "affirmative interaction" between the two. Before the appellant started masturbating in front of the live feed camera, he affirmatively obtained the victim's assurance that she did not mind if he showed her his penis. Further, the appellant continued to engage the victim in sexually explicit instant messaging conversation while masturbating and then asked her if she liked what she had seen, obtaining an affirmative reply. These affirmative interactions, though done at long distance over the Internet, are sufficient to meet the elements of the lesser-included offense of attempted indecent acts "with" another. Moreover, affirming a finding of guilty to that lesser-included offense does not require invocation of a theory of liability not presented to the trier of fact, but relies on all of the very same facts and circumstances presented at trial in connection with the charged offense.

Consistent with the above, Specification 1 of the Charge is amended to read as follows:

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[2] The 2005 version of the *Manual for Courts-Martial, United States (MCM)* was in effect at the time of the appellant's offenses and trial. Indecent liberties with a child offenses and indecent acts offenses have subsequently been subsumed under Article 120, UCMJ, 10 U.S.C. § 920. *MCM*, Part IV, ¶¶ 45.a.(j)-(k) (2008 ed.).

In that STAFF SERGEANT CHRISTOPHER R. MILLER, United States Air Force, 4th Equipment Maintenance Squadron, Seymour Johnson Air Force Base, North Carolina, did, within the state of North Carolina, on or about 15 September 2005, attempt to wrongfully commit an indecent act with another by masturbating in front of a camera while transmitting the image, via the Internet, to a person the accused believed to be a female under the age of 16 years of age, with the intent to gratify the sexual desires of the said Staff Sergeant Christopher R. Miller.

Applying the tests enunciated by our superior court in *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987), we find the evidence of record legally and factually sufficient to support a finding of guilty to the lesser-included offense set forth in the amended specification, and so find.

Sentence Reassessment

"Where there has been an error causing a modification of the findings, we can reassess the sentence (instead of ordering a sentencing rehearing) if we can determine that the sentence would have been at least of a certain magnitude absent the error." *United States v. Hammer*, 60 M.J. 810, 829 (A.F.C.C.A. 2004) (citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). Such is the case here.

Although the attempted indecent liberties offense of which the appellant was convicted exposed him to a slightly longer maximum period of confinement (7 years versus 5 years), that difference is relatively insignificant and is of little consequence when compared to the adjudged and approved period of confinement of three months. Further, all of the same facts and circumstances properly before the judge in connection with the charged offense are equally applicable to the lesser-included offense and thus would have been part of the sentencing evidence. Considering the evidence of record, we are satisfied beyond a reasonable doubt that had the appellant been found guilty at trial of the lesser-included offense, the military judge would still have adjudged a sentence no less than that originally adjudged. We reassess the sentence accordingly and find the sentence, as reassessed, appropriate.

Conclusion

The findings, as modified, and the sentence, as reassessed, are correct in law and fact and no other error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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