UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SERGIO J. RICHO
United States Air Force

ACM 36628

31 August 2007

Sentence adjudged 8 December 2005 by GCM convened at Ramstein Air Base, Germany. Military Judge: Adam Oler and Gordon R. Hammock (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Major Nurit Anderson and Captain Daniel J. Breen.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was convicted of one specification of violating a no-contact order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Contrary to his pleas, he was convicted of one specification of taking indecent liberties with a child under the age of 16, one specification of possessing child pornography, and one specification of distributing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a bad-conduct discharge, confinement for 30 months, and reduction to E-1.

Background

Sometime after February 2003 when Mrs. V's husband, SSgt V-D, deployed, the appellant and Mrs. V developed a romantic relationship. Upon SSgt V-D's return in July 2003, Mrs. V decided to give her marriage another try. The appellant questioned Mrs. V as to when and what it would take for her to leave her husband. Mrs. V explained she would only leave her husband if he hurt the children. Mrs. V had two children, WM, a 2-year old daughter from a previous relationship, and SVD, a 5-month old son.

During the trial, and without objection, Mrs. V testified that around October – November 2003, the appellant called Mrs. V and asked for her assistance. He indicated something was wrong with his computer and he wanted to see if she had the same problem. He took her step-by-step to some hidden files on the computer which included what appeared to be emails between SSgt V-D and "Tracy."[1] These emails were never produced. Mrs. V did some investigative work and determined that there never was a "Tracy." Mrs. V suspected the appellant of placing these emails on the computer.

In January 2004, Mrs. V noticed a strange icon on her computer. She called the appellant.[2] The appellant was able to direct Mrs. V to files hidden on her "C-drive." These files were entitled "DVD" and included child pornography – pictures, movies and stories. Included in these files was a picture of Mrs. V's 2-year old daughter, WM. WM was bent over with her diaper around her ankles. After this discovery, SSgt V-D was arrested. The computer equipment from his home was seized.

When Mrs. V was questioned, she indicated she suspected the appellant of "planting" the evidence on the computer. Based upon this information, a pretext phone call was arranged. During the call, the appellant indicated he wanted to be truthful with Mrs. V but he didn't want to talk about it on the phone. A meeting was arranged, and Mrs. V was outfitted with a wire. At the meeting, the wire failed, but the appellant told Mrs. V he had done it for her, he hadn't hurt her daughter, and he was "just trying to play God." The appellant was then arrested and computer equipment from his home and office was seized.

The evidence at trial supported that child pornography was on the appellant's home computer. Additionally, the child pornography on the computer of Mrs. V (and SSgt V-D) was downloaded from "foreign media" such as a floppy disk, PDA, or CD-Rom and was not downloaded from the Internet. A PDA was seized from the appellant.

The photograph of WM was taken with a digital camera and, although no camera was found, analysis of the appellant's computer indicated a digital camera had been

---

[1] SSgt V-D had previously told Mrs. V about two affairs, neither of which involved a "Tracy".

[2] Mrs. V knew the appellant was computer savvy. In fact, he was the NCOIC, Communications Requirements/Flight Information Manager.

attached at an earlier date. Further, the appellant stated to Mrs. V that if she ever left him, she should leave him her daughter. He wanted to teach WM about men. Further, he told Mrs. V that little girls, who knew nothing about sex or lust, flirted with him as if they were looking for something.

Discussion

The appellant raised six issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). The first two are whether the evidence was factually and legally insufficient to sustain the findings for specifications 1 and 3 of Charge II. We have carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for these specifications. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude the evidence for both is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

The third issue is that the trial judge's finding as to specification 3 of Charge II was ambiguous in light of Rule for Courts-Martial (R.C.M.) 603. The appellant was charged with distributing child pornography on divers occasions between on or about 1 February 2003 and on or about 30 January 2004. The trial judge did not make a "change" as addressed by R.C.M. 603, but rather announced his finding by exceptions and substitutions. The law requires a verdict to be certain, definite and free from ambiguity. *United States v. King*, 50 M.J. 686, 687 (A.F. Ct. Crim. App. 1999) (citing *United States v. Dilday*, 47 C.M.R. 172, 173 (A.C.M.R. 1973). The verdict in this case is clear, certain, and not ambiguous.

The next issue is that the delay in the appellant's pretrial investigation was prejudicial. A due process violation exists if there is an egregious or intentional tactical delay and actual prejudice to the appellant results. The burden of proof falls to the appellant. *See United States v. Reed*, 41 M.J. 449 (C.M.A. 1999). The appellant has failed to meet this burden.

The final assignments of error are that there was improper testimony regarding emails found on the Mrs. V's computer and that trial counsel's argument was improper. Neither of which were objected to at trial. The standard is plain error. *United States v Bungert*, 62 M.J. 346, 347 (C.A.A.F. 2006). *See also United States v. Ramos*, 42 M.J. 392 (C.A.A.F. 1995). Again, the appellant has failed to meet this burden.

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, 10

U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court