UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHARLES N. YOHE
United States Air Force

ACM 37950

09 April 2013

Sentence adjudged 27 April 2011 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: William C. Muldoon.

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Daniel J. Breen; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

Contrary to his pleas, the accused was convicted, by a general court-martial composed of officer members, of one specification of wrongfully and knowingly possessing sexually explicit depictions of minor children as well as one specification of wrongfully and knowingly viewing sexually explicit depictions of minor children, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for 9 months and reduction to the grade of E-1. The convening authority reduced the punitive discharge to a bad-conduct discharge and approved the remainder of the sentence as adjudged.

On appeal, the appellant raises four issues, paraphrased as follows:

(I) Whether the appellant's conviction for wrongfully possessing child pornography is factually and legally sufficient, where the evidence did not establish that the appellant (1) knew of the image's presence, (2) could access or otherwise control the images, or (3) he actively sought illegal images;

(II) Whether the appellant's conviction for wrongfully viewing child pornography is factually and legally sufficient, where the evidence did not establish that (1) the appellant viewed images stored on his hard drive's unallocated space and (2) the two images he viewed via Limewire.com depicted minors engaged in sexually explicit conduct;

(III) Whether the military judge violated the appellant's right to confrontation by admitting testimonial hearsay into evidence; and

(IV) Whether the military judge erred by allowing into evidence video files not found on the appellant's computer as well as three images that do not depict sexually explicit conduct and whose relevance was substantially outweighed by their prejudice.

Background

The appellant was an Airman First Class in the 55th Security Forces Squadron, Offutt Air Force Base, Nebraska. He lived on base in a single occupancy dorm and did not have a roommate. In May of 2009, an investigator with the Nebraska State Patrol, using a special computer software program called "Peer-Spector," received an indication that the appellant was downloading possible child pornography. Peer-Spector is a law-enforcement, web-scanning computer program which detects the use of key words associated with peer-to-peer sharing of child pornography. It detected the download of two movies to the appellant's Internet protocol address. One title suggested sexual activity with a fifteen-year-old and the other described sexual activity by a seven-year-old. The appellant's computer was eventually seized and searched.

The search of the appellant's computer did not reveal the two movies detected by Peer-Spector, but information on the computer showed these two movies were previewed at the time they were being downloaded. The forensic computer report did not indicate how much or which parts of each movie was previewed. However, a Nebraska state investigator assigned to the Federal Bureau of Investigations cyber-crimes task force testified that movies and other digital files have "hash values" which are identifiers, formed using a mathematical logarithm based on characteristics of that particular movie or file. At trial, hash values were equated to DNA testing in humans, only thousands of times more reliable. Thus, each hash value of the movies downloaded was specific to

each movie and no other. Using the hash values of the movies downloaded to the appellant's computer, investigators were able to identify the exact movies and matched those hash values to the hash values of movies kept by investigators in a data library maintained for law enforcement purposes. By this process, the prosecution was able to show trial members the same movies that were downloaded to the appellant's computer even though they were not found on the appellant's hard drive at the time it was searched.

The appellant's computer hard drive contained multiple depictions of child pornography in the unallocated space and several search-terms associated with child pornography Internet searches. According to the expert witness, one way data can get onto the unallocated space of a hard drive is when it is deleted. Data on unallocated space is not actually removed; it is merely designated as "unallocated" space which can then be overwritten at a later time. One cannot retrieve images on unallocated space without a special computer retrieval program. The average computer user would not have such a program and the appellant did not have that type of program on his computer. Hence, the images on the unallocated space were retrieved by computer experts. There is no way to tell how or when an image or data on unallocated space was so designated or by whom. Some of the search terms associated with child pornography were not in unallocated space.

Sufficiency of the Evidence

Under Article 66(c), UCMJ, 10 U.S.C. § 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). *See also United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011). To determine legal sufficiency, we consider the evidence in the light most favorable to the prosecution, and decide whether a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. Article 66(c), UCMJ. *See also United States v. Bethea*, 46 C.M.R. 223, 224 (C.M.A. 1973) (noting that Article 66, UCMJ, limits review to action "on the basis of the entire record . . . recognizing that the trial court saw and heard the witness.").

Given the facts of this case and subject to our discussion below concerning the Confrontation Clause,[1] a rational trier of fact could have concluded, beyond a reasonable doubt, that the appellant knowingly possessed and viewed child pornography, and determined the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The appellant lived alone in a dorm room on base. The computer forensic expert, using the report from the Defense Computer Forensic

[1] U.S. CONST. amend. VI.

Laboratory (DCFL), showed the appellant's computer was used to search for files with terms known to find child pornography such as "pedopedo" and "preteen hardcore," among others. The evidence showed child pornography was downloaded to the appellant's computer using a computer program an expert witness identified as one commonly used to access child pornography. One of the movies was downloaded multiple times and viewed twice, about a week apart. The other movie was downloaded three times and viewed once. While reasonable people viewing one of the movies might disagree on whether one, both, or none of the two individuals shown was under 18 years old, there is no question that the young girl engaging in sexual behavior in the other movie was under 18 years old. The expert witness testified that deleting the movies is an explanation as to why the actual movies were not found stored on the appellant's hard drive.

Besides the two movies mentioned above, several "thumbnail" pictures were discovered. Thumbnails can be either smaller copies of photographs that were opened by the computer user or a single still picture from a movie that was downloaded. They were found in a file associated with either the computer's backup system or cache files, rather than in regularly stored files. Thumbnails will also remain in the "thumb cache" even after the original file or picture was deleted. Some of the thumbnails found on the appellant's computer depicted obviously young, preteen boys engaging in homosexual acts and other obvious preteen children engaged in sexual acts and suggestive poses.

Applying the standards discussed above, we conclude a rational fact finder could have determined that the appellant wrongfully and knowingly searched for, possessed, viewed, and then deleted sexually explicit visual depictions and movies of minors. Additionally, after reviewing the record and weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. Thus, the evidence is both legally and factually sufficient.

Hearsay

The hearsay issue centers on the admission of portions of a report from the DCFL, which were admitted into evidence over the defense's objection. The report contained references to the National Center for Missing and Exploited Children (NCMEC). Page 7 of 27 of the report contained the following paragraph:

> The exhibits presented in this report are flagged as **Agent Selected Files**. Exhibits flagged with **NCMEC** indicate thumb nail picture files were identified for containing known child victims by the [NCMEC]. The files were analyzed against the latest available NCMEC database, dated 10 Jan 11.

The report then discussed almost 35 "agent selected" files. Only, two pictures of these were identified as containing a known child victim, based on analysis by the NCMEC. No individual at NCMEC was identified as the person who analyzed the pictures or rendered the opinion as to the children's age. No person from NCMEC testified at trial. Yet, the NCMEC identifications were allowed into evidence by the military judge, because the forensic computer expert witness was going to testify, and, pursuant to Mil R. Evid. 703, experts are allowed to base their conclusions on otherwise inadmissible hearsay.

The defense raised two primary objections to the report and some of the depictions, one on the basis of hearsay and the other on the basis of the Confrontation Clause of the United States Constitution. On appeal, he raises only the Confrontation Clause issue.

While a military judge's decision to admit evidence is reviewed applying an abuse of discretion standard, *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009), the decision as to whether the admitted evidence violates the Confrontation Clause is reviewed de novo. *See, e.g., United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). If we find a violation of the Confrontation Clause, we cannot affirm the decision unless this Court is convinced beyond a reasonable doubt that the error was harmless. *See Rankin*, 64 M.J. at 358.

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees an accused the right to be confronted with witnesses who are giving testimony against him unless the witnesses were unavailable to appear at trial and the accused had a prior opportunity to cross examine them. *See Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court of the United States addressed this issue in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). There, the trial court admitted into evidence affidavits from state forensic laboratory analysts reporting the results of their examination of a substance alleged to be cocaine. *Id.* at 308. The results were sworn to by the analysts before a notary public. *Id.*

In finding that the admission of this evidence violated the accused's rights under the Confrontation Clause, the Court identified several "core" classes of testimonial statements covered by the Confrontation Clause. In *Melendez-Diaz*, the forensic affidavits attesting to "the fact in question"—that the substance tested was in fact cocaine—was "the precise testimony the analysts would be expected to provide if called at trial." *Id.* at 310. The Court explained that the affidavits were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* (quoting *Davis v. Washington* 547 U.S. 813, 830 (2006)). *See, e.g., United States v. Cavitt*, 69 M.J. 413, 414 (C.A.A.F. 2011); *United States v. Dollar*, 69 M.J. 411 (C.A.A.F. 2011).

We find that, with respect to the two pictures identified by NCMEC as "child victims," the appellant's right to be confronted by the witnesses against him was violated. We also find the error harmless beyond a reasonable doubt.

The "fact in question" that the NCMEC opinion addressed was the age of the children in the three pictures. The report from the DCFL identified NCMEC as the entity who described them as "known child victims," leaving no doubt that, for purposes of this trial, that possessing these pictures meant the accused was possessing child pornography. Clearly, this opinion evidence was testimonial in nature, and no individual at NCMEC was even identified as the opinion giver, much less present at trial and subject to confrontation by the accused. The age of the children in these two photographs was a key element of the offense which, if not proven, would result in a finding of not guilty. However, the testimony on this ultimate question was given by an out-of-court, unknown and unidentified witness in a forensic report. The accused could not cross-examine the report. Just like the substance in *Melendez-Diaz* had to be proven to be cocaine in order to prove possession of a controlled substance, so too the children in the photographs had to be under the age of 18 to establish the offense of possession of child pornography. In both cases, the essential fact establishing an element of the charged offense was proven by testimony in a report given in out-of-court testimony by a witness whom the accused was unable to confront.

Further, under *Crawford*, we should also ask whether the out-of-court statements were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52; *United States v. Sweeney*, 70 M.J. 296, 302 (C.A.A.F. 2011).

Earlier in the appellate process, we granted a motion by appellate defense counsel to submit an excerpt from NCMEC's website that provided an overview of the organization's Child Victim Identification Program (CVIP), which included helping "prosecutors get convictions by proving that a real child is depicted in child pornography images."[2] Given this, there is no question that an objective witness could reasonably believe that the statement would be available for use at a later trial.

Two other important *Crawford* factors come into play in this case. There was no showing that the person who actually opined that the children depicted in the photographs were under age was unavailable to testify. Nor was there a showing that the accused had the opportunity to cross examine him or her prior to trial. These are two important parts of the Confrontation Clause analysis under *Crawford* which were not addressed at trial.

In *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), the Supreme Court looked at the propriety of an expert witness testifying at trial about another expert's forensic opinion contained in a laboratory report prepared by the non-testifying expert. *Id.* The

[2] Available at: http://www.missingkids.com.

Court summed up the Confrontation Clause problem simply enough: "the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 2716. The reason this is prohibited is that the person testifying at trial does not know enough about what the out-of-court witness "knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715. The Court also pointed out that the in-court witness doesn't know whether the out-of-court expert "followed the protocol in every instance." *Id.* at 2716 n.8.

An important distinction between this case and *Bullcoming* is that, in *Bullcoming*, the expert witness who testified at trial was the same type of scientist as the one who performed the actual test on Bullcoming's blood alcohol sample and was qualified as an expert in his own right. They apparently worked in the same state laboratory, so he was familiar with all of the tests, protocols and procedures. Despite this similarity of expertise, the Supreme Court found a violation of the Confrontation Clause. Here, the facts are more troublesome. The expert witness in the appellant's trial was not qualified as an expert in identifying underage children. Rather, he was a computer forensic examiner who held a degree in Internet systems software technology and was recognized by the court as an expert in the field of forensic computer examination. At least in *Bullcoming*, the in-court expert and the preparer of the scientific report were experts in the same field. That is not the case here. This adds an additional level of tension with the Confrontation Clause that was not present in *Bullcomings*.

However, the Government argues that this violation was harmless error. We agree.

Effect of Error

We assess the impact of admission of such testimonial hearsay de novo to see whether this constitutional error is harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Sweeney*, 70 M.J. at 306 (C.A.A.F. 2011); *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Among the factors we consider are: (1) the importance of the testimonial hearsay to the prosecution's case, (2) whether the testimonial hearsay was cumulative, (3) the existence of other corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case. *Sweeney*, 70 M.J. at 306 (quoting *Van Arsdall*, 475 U.S. at 684). Under the circumstances of this case, we find the admission of testimonial hearsay harmless beyond a reasonable doubt.

First, the images of the children were snapshots from pornographic movies. The snapshots themselves were of clothed individuals not engaged in sexual acts at the time

they were extracted from the movies. As such, they were minimally important to the Government's case.

Second, approximately 20 other depictions in the report were not labeled as containing known child victims identified by NCMEC. A review of these other images leaves no reasonable doubt that the children depicted performing sexual acts on other children and adults were under the age of 18 years. Several are clearly under the age of ten. Because of the overwhelming amount of other compelling and corroborating evidence that was not the subject of a NCMEC opinion, we find that allowing NCMEC's identification of two pictures was minimally impactful.

Third, the NCMEC comment that these children were under the age of 18 was not relied upon by trial counsel and the members were not informed of the significance of the NCMEC reference. Third, the Nebraska state investigator had his own knowledge of the young age of some of the children in the images, and he was present and testified about it, subject to cross examination. Finally the appellant's trial defense strategy did not hinge on the age of the victims in the images. Their defense was predicated on whether there was proof of knowing possession and viewing of the images as well as whether some of the images were of sexual activity. The age of the people depicted was never an issue. The reason for this is understandable because the very young age of some of the children was obvious. Based on the forgoing, we find that, although there was Constitutional error, the error was harmless beyond a reasonable doubt.

Evidentiary Challenge

The final issue is whether it was error to admit into evidence two movies never proven to be on the appellant's hard drive and three pictures of fully clothed individuals that do not depict sexually explicit conduct.

We review a military judge's decision to admit evidence applying an abuse of discretion standard. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009). Military judges are given wide discretion under Mil. R. Evid. 403, which allows exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. *Id.* Judges are given less deference if they do not articulate their Mil. R. Evid. 403 balancing test on the record. *United States v. Collier*, 67 M. J. 347, 353 (C.A.A.F. 2009).

Even assuming, but not ruling, that the military judge's Mil. R. Evid. 403 balancing test did not merit deference, we find the military judge did not abuse his discretion by admitting the evidence in question. The basis of the defense's appeal is that the two videos admitted into evidence were not actually found on the appellant's computer. As discussed above, the search of the appellant's computer did not reveal the two movies detected by Peer-Spector, but information on the computer did show these two movies were previewed as they were being downloaded. The Nebraska state police

investigator was able to determine exactly which videos were downloaded and previewed on the appellant's computer through the use of their hash values. The court members were able to view copies and see precisely what movies were previewed. We do not find that the military judge abused his discretion, nor do we find that the members would have been confused or misled or that the appellant was unfairly prejudiced by admitting the videos. We also find no error with respect to the still images that were saved as thumbnails on the appellant's computer. These were images of clothed individuals taken from videos. Even though the videos themselves were not found on the appellant's computer, the Government introduced evidence that the videos they came from depicted child pornography. The thumbnails however, saved automatically by the computer, prove the videos were once on the appellant's computer. We do not believe pictures of clothed children who are not engaging in sexual activity in and of themselves would cause a danger of unfair prejudice, confusion of the issues or mislead the members. As proof that certain videos were once on the appellant's computer, and thus we find them to be relevant evidence in this case. Thus, we find the military judge did not abuse his discretion in admitting these still images.

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.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court