

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20220450

Private First Class (E-3)

JUSTIN M. SCOTT

United States Army

Appellant

Tried at Fort Hood, Texas, on 8, 30, and 31 August 2022, before a general court-martial convened by the Commander, Headquarters, III Corps and Fort Hood, Lieutenant Colonel Tiffany Pond and Lieutenant Colonel Joseph T. Marcee, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error¹

I. WHETHER APPELLANT'S CONVICTION FOR THE CHARGE AND ITS SPECIFICATION IS FACTUALLY INSUFFICIENT WHERE APPELLANT RAISED THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT AS TO AGE.

Statement of the Case

On 30 August 2022, a military judge sitting as a general court-martial convicted appellant, Private First Class (PFC) Justin M. Scott, contrary to his

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

pleas, of one specification of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 920b. (R. at 195; Statement of Trial Results). On 31 August 2022, the military judge sentenced appellant to a reduction to E-1, a reprimand, sixty days restriction, sixty days hard labor without confinement, and a dishonorable discharge. (R. at 248).

On 22 September 2022, the convening authority took no action. (Convening Authority Action). On 27 September 2022, the military judge entered judgment. (Judgment of the Court). On 14 January 2023, this court docketed appellant's case. (Referral and Designation of Counsel).

Statement of Facts

Appellant's court-martial consisted of one charge and one specification of a violation of Article 120b, UCMJ. (Charge Sheet). Within the single specification, the government alleged appellant committed lewd acts against [REDACTED] via indecent communication and indecent conduct. (Charge Sheet). [REDACTED] correct date of birth is 9 September 2005. (R. at 22). At the time of the incident, [REDACTED] was fifteen years old. (R. at 31). However, at the time of the offense, [REDACTED] did not list her age on social media. (R. at 23).

In 2021, [REDACTED] met appellant through another soldier, [REDACTED], while the three were playing online video games. (R. at 30). [REDACTED] met [REDACTED] when she

was fourteen, and she told [REDACTED] she was fourteen. (R. at 28). [REDACTED] began playing online games with [REDACTED] and would play video games with [REDACTED] and would on occasion play games with some of [REDACTED] friends or her friends. (R. at 30). Prior to meeting appellant, [REDACTED] played online games with [REDACTED] for approximately three to four months. (R. at 31).

When [REDACTED] met appellant, she explained she was either “underage” or a “minor.” (R. at 30-31). [REDACTED] used those terms because her understanding was both terms implied an individual was under the age of eighteen. (R. at 53 and 57). However, [REDACTED] admitted that at certain points she would list her age on social media accounts as eighteen. (R. at 60-61). [REDACTED] played video games online “at least three times a week, if not more.” (R. at 32). Each online gaming session lasted at least five hours. (R. at 32).

On 12 June 2021, [REDACTED] was playing online video games with appellant and [REDACTED]. (R. at 38). At appellant’s request, [REDACTED] began communicating with appellant through an online application called Snapchat.² Through Snapchat, appellant sent [REDACTED] a message that read, “So if I sent dick pics accidentally is

² Snapchat is “a camera service” that allows users to “capture what it’s like to live in the moment . . . that means most messages – like Snaps and Chats – sent in Snapchat will be automatically deleted by default from [its] servers after [it] detect[s] they’ve been opened y all recipients or have expired.” <https://snap.com/en-US/privacy/privacy-policy/> (last visited 31 May 2023).

that okay?” (R. at 41; Pros. Ex. 2). [REDACTED] testified she was confused by this because she did not know whether appellant was serious. (R. at 41). [REDACTED] testified appellant then sent her a photo in which he was fully-clothed but she could see an erection. (R. at 42). After the photo was sent, [REDACTED] still did not say she was fifteen but rather that she “never said [she] was 18.” (Def. Ex. B).

I. WHETHER APPELLANT’S CONVICTION FOR THE CHARGE AND ITS SPECIFICATION IS FACTUALLY SUFFICIENT WHERE APPELLANT RAISED THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT AS TO AGE.

Additional Facts Relevant to Assignment of Error

During her testimony, [REDACTED] provided several different answers about how she communicated her age. First, when [REDACTED] met [REDACTED], she testified she told him she was fourteen. (R. at 28). Second, when asked if she discussed her age while playing online games [REDACTED] stated, “I would always state my accurate age, or at least that I was underage.” (R. at 30). Third, and without specificity, [REDACTED] stated both she and [REDACTED] told appellant her age. (R. at 31). She also testified she told appellant she was starting her freshman year on her birthday, but did not specify high school or college. (R. at 35). Under cross-examination, [REDACTED] admitted she never discussed starting high school with appellant. (R. at 52). Fourth, on cross-examination, [REDACTED] testified that, to her, “underage” meant

under eighteen. (R. at 53). Fifth, on cross-examination and despite previously testifying she always listed her accurate age, ██████ admitted she previously listed her age on social media accounts as eighteen. (R. at 61). Finally, on re-direct examination ██████ stated both she and ██████ told appellant she was fifteen. (R. at 65-68).

Likewise, during his testimony, ██████ provided different answers about ██████ age. On direct examination, ██████ stated he informed appellant on multiple occasions that ██████ was fifteen. (R. at 100-102). On cross-examination, ██████ admitted that, on other occasions, he described ██████ as simply being under eighteen. (R. at 115). He provided this answer once while speaking to a sheriff's office in Idaho and once when interviewed by appellant's civilian defense counsel. (R. at 115). On redirect examination, ██████ provided a non-specific answer of "You know, she's underage. You know, sometimes I would specify her age as 14 or 15. And that's it, sir [sic]." (R. at 116). Finally, in responding to questions from the military judge about whether he used a specific age for ██████ when talking to either the authorities in Idaho or the civilian defense counsel ██████ stated, "To be honest, Your Honor, I don't think I did . . . [and] I do not think so. No, Your Honor." (R. at 119). However, ██████ also testified he does not believe either of them asked about a specific age. (R. at 119).

Appellant testified and explained why he believed [REDACTED] was over sixteen. Appellant testified he met [REDACTED] online between December 2020 and January 2021. (R. at 143). Appellant testified he thought [REDACTED] was around [REDACTED] T's age because of "the way she carried herself, the way she handled the conversations, the sexual innuendos, the jokes, the cussing." (R. at 145). Appellant further testified that, prior to 12 June 2021, he viewed [REDACTED] Facebook profile and her date of birth was listed as 9 September 2002, which indicated [REDACTED] was eighteen and almost nineteen. (R. at 148; Def. Ex. E).

Additionally, appellant admitted he sent the message to [REDACTED] asking if it would be okay to "accidentally [send her] a dick pic." (R. at 150). He further testified that he did send her a photo of himself clothed from the waist down. (R. at 151-152). On cross-examination, Appellant testified that [REDACTED] did mention "maybe once or twice" that [REDACTED] was underage but denied ever being told she was fifteen. (R. at 155-162).

Standard of Review

Pursuant to the UCMJ, Article 66(d)(1)(B)(i) (2021), this court may consider whether a finding is factually sufficient "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Once made, this court "may weigh the evidence and determine controverted questions of fact" subject to the

following: (1) “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence”; and (2) “appropriate deference to findings of fact entered into the record by the military judge.” UCMJ, Article 66(d)(1)(B)(ii) (2021). After review, if this court is “clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.” UCMJ, Article 66(d)(1)(B)(iii) (2021).

In this case, the question is whether this court is clearly convinced the finding of guilty, which required the military judge to find appellant did not establish the defense of mistake of fact as to age by a preponderance of the evidence, was against the weight of the evidence. *Cf. United States v. Robinson*, ARMY 20220043, 2023 CCA LEXIS 235, at *6 (Army Ct. Crim. App. 2 Jun. 2023) (summ. disp.) (focusing factual sufficiency inquiry on whether the military judge’s rejection of appellant’s parental discipline defense beyond a reasonable doubt was against the weight of the evidence).

Law

For a prosecution under UCMJ, Article 120b(c), “it need not be proven that the accused knew that the other person engaging the . . . lewd act had not attained the age of 16 years” 10 U.S.C. § 920b(d)(2). However, it is a defense that “at the time of the offense, the child was at least 12 years of age, and the accused

reasonably believed that the child had attained the age of 16 years.” Rule for Courts-Martial [R.C.M.] 916(j)(2). An accused is required to prove this defense by a preponderance of the evidence. *Id.*

To prove the defense, an accused must prove he held “as a result of ignorance or mistake, an incorrect belief that the person engaging in the sexual conduct was at least 16 years old.” Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 3A-44B-3d., Note 1 (29 Feb. 2020) [Benchbook]. Furthermore, “[t]he ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.” *Id.* “To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that [the alleged victim] was at least 16 years old.” *Id.* Finally, “the ignorance or mistake cannot be based on the negligent failure to discover true facts.” *Id.*

Argument

Appellant proved the defense of a mistake of fact as to age by a preponderance of the evidence. Appellant mistakenly believed [REDACTED] was at least sixteen years of age and his belief was reasonable under the circumstances. Furthermore, appellant’s belief was based on information which would indicate to a reasonable person that [REDACTED] was at least sixteen. There is a deficiency in

proof to rebut the defense that resulted in the finding of guilty being against the weight of the evidence.

First, as [REDACTED] testified, she would play video games for several hours at a time. (R. at 32). There was no testimony that she had to stop playing video games because her parents told her to stop, because she had to eat dinner, or because of homework. Appellant was not apprised of any constraints, let alone what a reasonable person would view as parental constraints, on [REDACTED] ability to do as she pleased. It was a reasonable belief that [REDACTED] was an individual over the age of sixteen with the freedom to spend her time as she wished.

Additionally, the trial testimony of both [REDACTED] and [REDACTED] revealed less than definitive claims of [REDACTED] age. [REDACTED] could not definitively testify she told appellant she was under sixteen. Although she claimed she told appellant her age, (R. at 31), she also testified that while online she would “always state my accurate age, *or at least that I was underage.*” (R. at 30). Critically, to [REDACTED] “underage” meant “under eighteen.” (R. at 53). If [REDACTED] simply informed appellant she was “underage” she likely did not tell him she was under sixteen. Likewise, [REDACTED] testified he would describe [REDACTED] as being under eighteen. (R. at 115). Both witnesses attempted to establish they affirmatively told appellant [REDACTED] was fifteen. However, considering the numerous days and hours [REDACTED]

played online games with groups of people before and while appellant joined, it is not clear whether this information was relayed to appellant.

Most importantly, appellant's belief was not based on a negligent failure to discover true facts. [REDACTED] admitted she previously listed her age on social media accounts as eighteen. (R. at 61). Appellant testified that, prior to the date of the incident, he viewed [REDACTED] Facebook profile which listed her date of birth as 9 September 2002. (R. at 148; Def. Ex. E). Not even [REDACTED] could testify on whether her accurate age was listed on her social media accounts. (R. at 60-63). Moreover, even after appellant sent the alleged photograph, [REDACTED] simply stated, "[REDACTED] I'm still not 18." She never stated, "I'm fifteen."

Based on that, appellant reasonably believed [REDACTED] was at least eighteen.

Conclusion

Appellant proved the defense of mistake of fact as to age by a preponderance of the evidence and there was insufficient proof to rebut the defense resulting in the finding of guilty being against the weight of the evidence. Therefore, appellant requests the court set aside his conviction.



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Appendix: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Appellant, through Appellate defense counsel, personally requests that this court consider the following matters:

WHETHER THE MILITARY JUDGED ERRED BY NOT REQUIRING PRODUCTION OF A PHOTO IN VIOLATION OF MILITARY RULE OF EVIDENCE 1002.

Additional Facts Relevant to Assignment of Error

The alleged photograph in question was part in parcel to The Specification of The Charge because the specification read, in pertinent part, that appellant “[engaged] in indecent conduct, to wit: sending a snapchat photo of his clothed erect penis” (Charge Sheet).

Both appellant and ██████ testified about photograph appellant sent. Both testified appellant was clothed. (R. at 42 and 151). Although their descriptions differ slightly, both testified it was aimed at the lower half of appellant’s body. ██████ testified “[t]he angle that the picture was at, it was pretty straight down when it was angled at his crotch” (R. at 42). Appellant testified “[b]asically, I just stood up out of my chair and took a picture from the lower half of my body.” (R. at 151).

The two differ on whether there was an erection. [REDACTED] testified “[h]e sent me a picture of this erection” and “you could see the outline of it.” (R. at 42). Appellant testified “[t]here was no erection . . . these were cotton thick shorts. They were not basketball shorts; they were what I call around the house shorts. Just something comfortable.” (R. at 153).

On cross-examination, appellant admitted the photo he sent looked bad. (R. at 167-68). Furthermore, appellant admitted he deleted the photo from Snapchat. (R. at 168).

During the government’s case-in-chief, it called [REDACTED] [REDACTED]. (R. at 75). [REDACTED] is a detective in Blain County, Idaho, and worked the case prior to its transfer to the Army Criminal Investigation Command (CID). (R. at 125-26). During questioning by the trial counsel, [REDACTED] testified he served a warrant on Snapchat and received a return. (R. at 79). Detective [REDACTED] testified he did not receive from Snapchat any communications between appellant and [REDACTED] or any photos between appellant and [REDACTED]. (R. at 79). The government did not introduce a subpoena return from Snapchat.

At trial, three different CID agents testified, [REDACTED] [REDACTED], (R. at 82-96), [REDACTED], (R. at 128-139),

and [REDACTED], (R. at 176-178). [REDACTED] testified about Snapchat's functionality. (R. at 83-90). [REDACTED] testified she conducted a digital forensic examination of appellant's phone and found no Snapchat communications between appellant and [REDACTED]. (R. at 176-178). None of the three SAs testified to attempting to secure data from Snapchat.

During [REDACTED] testimony, appellant's civilian defense counsel did not make a Military Rule of Evidence [Mil. R. Evid.] 1002 objection.

In reference to appellant's first message, "So if I send dic pics 'accidentally' is that ok . . . I'm sure you'll get a good laugh." (Pros. Ex. 2).

Standard of Review

Pursuant to Rule for Courts-Martial [R.C.M.] 905(e)(2) objections not made prior to case adjournment are forfeited absent affirmative waiver. Forfeited objections are reviewed for plain error. *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007). To obtain relief under plain error, "an appellant must show: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights." *Id.*

The Court of Appeals for the Armed Forces (C.A.A.F.) analyzes where an error was plain or obvious by asking "whether the error was so obvious 'in the context of the entire trial' that 'the military judge should be

‘faulted for taking no action’ even without an objection.” *United States v. Gomez*, 76 M.J. 76, 81 (C.A.A.F. 2017) (quoting *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009)).

To establish prejudice for an unpreserved, non-constitutional error, an appellant must “ ‘show a reasonable probability that, but for the error,’ the outcome of the proceeding would have been different.” *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004)); *See also United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) (explaining the Molina-Martinez test applies to unpreserved, non-constitutional errors).

Law

Under Mil. R. Evid. 1002, “An original . . . photograph is required in order to prove its content unless these rules, this Manual, or a federal statute provides otherwise.” Military Rule of Evidence 1004 provides four exceptions for when an original is not required. Namely, an original is not required where: (1) all originals are lost or destroyed, and not by the proponent acting in bad faith; (2) an original cannot be obtained by any available judicial process; (3) the original is in the possession of the

opponent; and (4) the original is not closely related to a controlling issue.

Mil. R. Evid. 1004.

In analyzing the first two Mil. R. Evid. 1004 exceptions, this court has found that simply because an original was deleted “this does not mean all ‘originals’ were lost or destroyed” *United States v. Grindstaff*, 2022 CCA LEXIS 524, *22 (Army Ct. Crim. App. 2022). In *Grindstaff*, this court found declined to assume all originals were lost or destroyed absent the government attempting to obtain an original via a subpoena. *Id.* at *23. Therefore, the government cannot satisfy the first exception without attempting to use its subpoena power.

Argument

The military judge committed plain error by allowing testimony of the alleged photograph without requiring the production of an original. Furthermore, the government did not establish the application of one of the Mil. R. Evid. 1004 exceptions.

A. The Error

There was error because Mil. R. Evid. 1002 requires production of an original unless an exception under Mil. R. Evid. 1004 applies.

1. Inapplicability of Mil. R. Evid. 1004(a).

The government assumed all originals were lost or destroyed. This assumption was based on the testimony of [REDACTED], Detective Hansen, and appellant. In particular, [REDACTED] testified he did not receive from Snapchat any communications or photographs between [REDACTED] and appellant. (R. at 79). However, there was no testimony as to exactly what was in the Snapchat warrant return. This presents a similar factual situation as in *Grindstaff*.

In *Grindstaff*, it was discussed that an Officer testified “he ‘also attempted to contact Snapchat to see if [he] could pull it from their records which [he] was unable to do.’” *Grindstaff*, 2022 CCA LEXIS at *22-23. In addressing this testimony, this court stated, “the reason [REDACTED] could not retrieve the video from Snapchat is unknown. It could be because all originals were destroyed, which would satisfy Mil. R. Evid. 1004(a). It could be because [REDACTED] needed a subpoena to obtain the video, in which case the government would not have satisfied the rule.” *Id.* at *23.

Although not an identical, the reason for [REDACTED] not receiving any Snapchat communications or photographs between appellant and [REDACTED] is unknown. As stated in *Grindstaff*, it could be because all originals were lost or destroyed. However, it could also be because Snapchat required additional

information. While it is unknown why the government did not attempt to introduce [REDACTED] warrant return from Snapchat, it is a leap to assume it is because no records exist.

2. Inapplicability of Mil. R. Evid. 1004(b).

There were at least three SAs working the case. However, none of the three testified about any attempt to secure communications from Snapchat via judicial process. As in *Grindstaff*, this court should dismiss the exception under Mil. R. Evid. 1004(b) “as the government never attempted to obtain the video via subpoena or other judicial process.” *Id.* At best, the government simply relied on information from [REDACTED] without confirming whether providing additional information to Snapchat would reveal an original.

3. Inapplicability of Mil. R. Evid. 1004(c).

Although appellant admitted to deleting the video shortly after sending it, Mil. R. Evid. 1004(c) is inapplicable. At the time appellant deleted the photo, he was not on notice the original would be a subject of proof at a trial or hearing. At best, appellant knew that [REDACTED] was upset by the alleged photo.

4. Inapplicability of Mil. R. Evid. 1004(d).

The exception under Mil. R. Evid. 1004(d) is inapplicable because the photograph in question is closely related to a controlling issue. As part and parcel

of The Specification of The Charge, the photo was of central importance.

Therefore, the photo was not a collateral matter.

B. The error was plain and obvious.

Here, the error was so obvious ‘in the context of the entire trial’ that ‘the military judge should be ‘faulted for taking no action’ even without an objection.’” *United States v. Gomez*, 76 M.J. 76, 81 (C.A.A.F. 2017) (quoting *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009)).

Within the context of the entire trial, the photograph was the focal point. During [REDACTED] direct testimony it was clear appellant’s text about sending a “dick pics” is not what bothered here as she stated when she received that message she “didn’t entirely know if he was serious or not.” (R. at 41). Furthermore, in reference to the phrase “dick pics,” [REDACTED] testified, “. . . I do know that it is usually a picture of a penis. But the type of joking person that [REDACTED] was I thought he was just going to send a picture of a rooster, or something, or some type of animal.” (R. at 42). It was not until a photograph was sent that [REDACTED] was bothered.

Unlike *Grindstaff*, this is not a situation where the photograph could be considered a type of secondary or contemporaneous evidence. No one other than

appellant and [REDACTED] saw the photograph. Therefore, the original photograph is the only evidence that can prove the photograph's actual content.

C. But For the Error, the Outcome of the Trial Would Have Been Different

Had the military judge excluded the photograph, there is a reasonable probability the outcome of the trial would have been different because [REDACTED] believed the first message about "dick pics" was likely a joke. Specifically, [REDACTED] testified that although she knew a "dick pic" is a picture of a penis, she thought "the type of joking person that [REDACTED] was . . . he was just going to send a picture of a rooster, or something.

If left with just her impression the message was a joke, then it is likely appellant would have been acquitted of The Specification in its entirety.

Conclusion

Wherefore, appellant respectfully requests this court provide the requested relief.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on June 5, 2023.



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