

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230640

First Lieutenant (O-2)
JUSTIN R. ROBINSON,
United States Army,

Appellant

Tried at Fort Novosel, Alabama, on 7
September 2023 and 11–12
December 2023 before a general
court-martial convened by
Commander, Headquarters, U.S.
Army Aviation Center of Excellence,
GCMCA, Lieutenant Colonel Pamela
Jones and Lieutenant Colonel Sasha
N. Rutizer, Military Judge, presiding.

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

Assignments of Error¹

**I. WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING EVIDENCE OF APPELLANT’S
ALLEGED COMMUNICATIONS WITH MINORS
IN VIOLATION OF MIL. R. EVID. 404(b).**

**II. WHETHER APPELLANT’S CONVICTION IS
FACTUALLY INSUFFICIENT.**

**III. WHETHER THE WORDING OF THE
SPECIFICATION OF THE CHARGE TOGETHER
WITH THE MILITARY JUDGE’S ERRONEOUS**

¹ The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

**UNDERSTANDING OF THE UNIT OF
PROSECUTION AND ALIBI RENDERED
APPELLANT UNABLE TO DEFEND HIMSELF.**

Statement of the Case

On 12 December 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of wrongful possession of child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [UCMJ].² (R. at 226). The military judge sentenced appellant to confinement for sixteen months and a dismissal. (R. at 263). The convening authority took no action on the adjudged sentence. (Action). On 18 January 2024, the military judge entered judgment. (Judgment).

Statement of Facts

On 20 October 2022, Yahoo! alerted the National Center for Missing and Exploited Children (NCMEC) that an email, containing videos of apparent minors engaging in sexually explicit conduct, was sent from the email account, [REDACTED] that day between 1916 and 2022 UTC. (R. at 54, 103–05, 185, 204–05; App. Ex. VII-A). The National Center for Missing and Exploited Children (NCMEC) in turn notified the Internet Crimes Against Children (ICAC) Unit. (R. at 41, 45–46, 170–71). Lieutenant ST, head of the ICAC Unit, signed a

² All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM] with the 2020 and 2021 National Defense Authorization Act Amendments.

subpoena for the IP address NCMEC identified. (R. at 41, 45–46). Once he received the results of that subpoena, i.e. the CyberTip, he assigned it to the Dale County Sheriff’s Office to investigate. (R. at 46).

Based on that CyberTip, Investigator (INV) CJ identified appellant as the suspect, connected his IP address to his residence on Fort Novosel, and then coordinated with the Criminal Investigation Division (CID) to determine he was a Soldier. (R. at 50–51, 55, 186, 192). On 15 December 2022, they obtained a search authorization to search any storage devices that would or could store files such as digital media and executed the search that night. (R. at 51, 58–59, 61; Pros. Ex. 2).

When they arrived on scene, only appellant was home. (R. at 51, 56, 61, 71). Law enforcement found and seized several electronic devices, including a Dell laptop with a sticker on its cover sitting open on the dining room table and several chatrooms open.³ (R. at 51–52, 54, 61, 63, 135, 141, 174; Pros. Ex. 4, 5; Pros Ex. 10 (sealed)). Later that night when appellant’s then-wife MW returned home, they interviewed her to determine the laptop’s user. (R. at 68, 71).

After securing the laptop, CID obtained authorization to search it before transferring the laptop to Special Agent (SA) SS, from the Alabama Law

³ Special Agent SE recalled that the laptop was sitting on the kitchen table with a game open on the screen. (R. at 61).

Enforcement Agency (ALEA), to conduct a digital forensic examination (DFE). (R. at 54, 66–67, 74, 76, 79–80; Pros. Ex. 3). When he completed the DFE, SA SS returned the laptop to CID along with a hard drive containing the logical extraction of that laptop and the forensic report. (R. at 93, 96, 105–06; Pros. Ex. 6, 8; Pros. Ex. 10 (sealed), 11 (sealed)).

Special Agent SS, testifying as the government’s DFE expert, recalled finding child sexual abuse materials on the laptop.⁴ (R. at 159, 163–65, 170, 172; Pros. Ex. 8; Pros. Ex. 10 (sealed)). The evidence he extracted included videos of child pornography with some children appearing to be ten years old or younger. (R. at 96–97). These files were in a folder entitled, “Users/Justin Robinson/Documents/Documents/G-3/Extremism Stand-Down Day/Extremism Stand-Down Day/faith forum/Topic/.” (R. at 162–65; Pros Ex. 8 at 3). Some file names included the term, “PTHC,” which stood for “preteen hardcore” pornography. (R. at 163–64). Special Agent SS also found two child sexual abuse images in the Discord⁵ cache, suggesting a user viewed them through Discord’s social media service. (R. at 172).

⁴ He recalled two other images of investigative interest on appellant’s iPad Mini 4. (R. at 159; Pros. Ex. 8 at 1, 16 n.1 (Item Number A09UA)).

⁵ Discord is an application that allows users to chat with others via voice, video, and text.

In court, MW confirmed this was appellant's personal laptop.⁶ (R. at 140–41; Pros. Ex. 10 (sealed)). She had access to it only when he permitted her to see it and after he had already logged into it.⁷ (R. at 141–42, 146). Nevertheless, MW did not know the terms “Extremism Stand-Down Day,” “G-3,” “faith forum,” or “PTHC.” (R. at 142). She also recalled being shocked when, in September 2022, she saw sexually suggestive messages on this laptop. (R. at 137–39, 149; Pros. Ex. 12, p. 1). MW stated that appellant used Discord to send these sexually suggestive messages to individuals purporting to be thirteen or fourteen-year-old girls while twenty-five-year-old appellant pretended to be seventeen years old. (R. at 137–39, 149; Pros. Ex. 12, p. 1).

Additional facts are incorporated below.

⁶ MW also provided the agents with her personal devices per their request, though they returned them to her hours later. (R. at 146–47).

⁷ MW also testified that she had access to appellant's cell phone when he permitted her to have access. (R. at 146). But she admitted that owing to mistrust in their marriage, she would monitor appellant's activity by downloading apps from his iCloud that she saw he downloaded on his phone and that she could sometimes successfully guess his password. (R. at 139, 145, 148).

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE OF APPELLANT'S ALLEGED COMMUNICATIONS WITH MINORS IN VIOLATION OF MIL. R. EVID. 404(b).

Additional Facts

Prior to trial, the government provided Mil. R. Evid. 404(b) notice to defense regarding MW seeing appellant's messages to individuals online as "evidence of knowledge or intent to engage in sexual conversations with minors." (R. at 39, 137). Defense did not file a motion to exclude. (R. at 137).

In the government's opening statement, trial counsel referred to appellant as a "manipulator of children online" before asserting MW "identified that [appellant] was posing as a minor online and attempting to talk to minors." (R. at 35, 37). Defense again did not object. (R. at 35, 37). However, the military judge seemed to react, so the government assured the court it had given defense proper notice. (R. at 39). The military judge reminded counsel of the importance of litigating motions ahead of time. (R. at 39). Defense acknowledged. (R. at 39).

At trial, when the government sought to elicit MW's reaction to seeing messages between appellant and the purported minors, defense objected based on hearsay and relevance. (R. at 135–37). The following exchange ensued:

DC: [I]f we're looking at the effect on the listener, there's no relevance. This is uncharged conduct.

MJ: It is uncharged conduct.

DC: It's not an element of any of the offenses, what the perception is of the witness.

MJ: Okay. Did you give 404 notice of this?

STC: Yes, Your Honor. The government did provide M.R.E. 404(b) notice to show that the messages that were exchanged demonstrate some type of knowledge or intent to engage in sexual conversations with minors.

MJ: Okay; did you get this 404?

DC: We did, Your Honor. We would object now, indicating that the individual didn't know it was a minor, has no personal knowledge.

MJ: . . . Do you agree you got 404 notice and you didn't give any motion to preclude its submission to this court?

DC: No, Your Honor.

(R. at 136–37). Subsequently, the government elicited testimony from MW that in September 2022, she was shocked when she saw that appellant had sent hidden messages via the Discord application on his laptop. (R. at 137). He sent messages flirting and talking about masturbation with purported thirteen- or fourteen-year-old girls while he claimed he was seventeen years old. (R. at 137–38).

Thereafter, the military judge asked defense, “Having heard what I just heard, what objection, if any, do you have?” (R. at 138). Defense offered no Mil. R. Evid. 404(b) arguments. (R. at 138). Instead, defense reiterated their hearsay

objection that MW’s perception of these responding individuals’ ages did not mean they were truly minors, before eventually conceding, “If it’s for the perception, that’s fine.” (R. at 138–39). The military judge proceeded to admit the testimony “for the value that it deserves.” (R. at 139).

In the government’s closing argument, trial counsel again asserted that appellant “manipulated children online.” (R. at 218). The same “manipulator of children online” phrase appeared in the government’s closing slides, which defense counsel reviewed. (App. Ex. VIII, p. 2). Defense did not object. (R. at 217–18).

Standard of Review

This court reviews waiver de novo. *United States v. Ahern*, 77 M.J. 194, 197 (C.A.A.F. 2017). A valid waiver leaves no error for this court to correct on appeal. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020).

Absent an affirmative waiver, issues are forfeited and reviewed for plain error. R.C.M. 905(e). To prevail under a plain error standard, an appellant must prove (1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced a substantial right of the appellant. *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008).

Law

A. Waiver and Forfeiture.

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. at 331. Forfeiture is the failure to make the timely assertion of a right. *Id.* Whereas forfeiture is a mere oversight, waiver is a deliberate decision. *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020); *see also United States v. Elespuru*, 73 M.J. 326 (C.A.A.F. 2014) (considering “certain concessions to the military judge”); *United States v. Malone*, ARMY 20230151, __ M.J. ___, 2025 CCA LEXIS 75, at *7 (Army Ct. Crim. App. 25 Feb. 2025) (citing *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008)).

Nevertheless, this court may overlook that waiver with respect to the sentence for good cause. *See* UCMJ art. 66(d)(1)(A) (2021);⁸ *United States v. Steele*, 83 M.J. 188 (C.A.A.F. 2023) (holding that a CCA may consider issues of “cause and prejudice” under Article 66, UCMJ (2019)).

B. Mil. R. Evid. 404(b).

Evidence of a crime, wrong, or other act is not admissible to prove a

⁸ As the sole finding of guilty and adjudged sentence in this case were for an offense committed after 1 January 2021, but before 27 December 2023, the Article 66, UCMJ, amendments of the 2021 National Defense Authorization Act (NDAA) apply. *See generally United States v. Ramirez*, ARMY 20210376, 2022 CCA LEXIS 667, *18 (Army Ct. Crim. App. 16 Nov. 2022) ([mem op.](#)); Pub. L. No. 117-18, § 539E(f), 135 Stat. 1703, 1706 (2022 NDAA).

person's character to show that on a particular occasion the person acted in accordance with the character. Mil. R. Evid. 404(b)(1). However, this is a rule of inclusion, not exclusion. *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002). The sole test is whether the evidence is offered for some purpose other than to demonstrate appellant's predisposition to crime. *Id.* (quotation omitted). The evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Mil. R. Evid. 404(b)(2).

Military courts evaluate the admissibility of evidence under Mil. R. Evid. 404(b) using a three-pronged test: (1) whether the evidence reasonably supports a finding by the court members that appellant committed prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of this evidence; and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). If the evidence fails any of these three prongs it is inadmissible and should be tested for prejudice. *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992); *see generally* UCMJ art. 59(a).

C. Prejudice.

An erroneous admission of evidence under Mil. R. Evid. 404(b) is not of constitutional magnitude. *See Harrow*, 65 M.J. at 203. As such, the government

has the burden of demonstrating that the error did not have a substantial influence on the findings. *United States v. Pablo*, 53 M.J. 356, 359 (C.A.A.F. 2000).

The government meets this burden by showing there is no “reasonable probability that, but for the error, the outcome of the proceeding would have been different.” *United States v. Tovarchavez*, 78 M.J. 458, 464 n.10 (C.A.A.F. 2019) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)). Reviewing courts consider four factors in evaluating whether the erroneous admission of government evidence is harmless, weighing: (1) the strength of the government’s case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Argument

A. Appellant affirmatively waived any Mil. R. Evid. 404(b) objection and there is no good cause to overlook that waiver.

Appellant intentionally relinquished the right to object to evidence that MW saw him engaging in sexually explicit conversations with individuals purporting to be minors. During trial, the military judge afforded defense the opportunity to specifically address Mil. R. Evid. 404(b), even though defense referred to “uncharged conduct” in the context of a relevance and foundation objection. (R. at 137). Despite this opportunity, defense argued hearsay, relevance, and foundation:

that MW's perception of the individuals' ages did not make it true. (R. at 137).

Similarly, during opening statements, defense counsel did not raise a Mil. R. Evid. 404(b) objection despite an open court discussion of the rule.⁹ (R. at 39).

Considering these explicit opportunities to address Mil. R. 404(b), the court should find defense's failure to raise Mil. R. Evid. 404(b) was not a mere oversight; defense intentionally relinquished a known right. *See Rich*, 79 M.J. at 475.

Further, although this court has the broad discretion to overlook waiver with respect to the sentence, there is no good cause to do so. *See* UCMJ art. 66 (2021); *cf. United States v. Conley*, 78 M.J. 747 (Army Ct. Crim. App. 2019) (considering evidence of impropriety, government overreach or excess, or other matter that might weigh in favor of noticing a waived issue); *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, *10–11 (Army Ct. Crim. App. 1 Apr. 2021) ([mem op.](#)) (considering perceptions of unfairness). As the parties did not litigate the merits of the issue and the military judge never issued a Mil. R. Evid. 404(b) ruling, an undeveloped record should weigh against overlooking waiver. Instead, the fact that appellant argues for the first time on appeal that the government introduced evidence for impermissible propensity purposes should weigh against the exercise of this court's broad discretion.

⁹ Prior to trial, appellant received notice of the evidence at issue and did not file any motion to exclude. (R. at 137).

B. To the extent this court finds appellant merely forfeited a Mil. R. Evid. 404(b) objection, there was no plain or obvious error.

1. MW's testimony established appellant engaged in sexually explicit online conversations with individuals purporting to be minors.

MW testified about the nature of the messages she personally read; namely, that appellant sent flirtatious messages and talked about masturbation with purported thirteen- and fourteen-year-old girls. (R. at 137–39, 149). Even assuming MW's testimony was admitted contrary to Mil. R. Evid. 1002, her recollection was sufficient to meet the low evidentiary threshold of the first *Reynolds* prong, that the evidence reasonably supports a finding that appellant knowingly committed these prior acts.¹⁰ See *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (citing *United States v. Dorsey*, 38 M.J. 244, 246 (C.A.A.F. 1993)); *United States v. Levitt*, 35 M.J. 108, 110 (C.A.A.F. 1992) (“[D]irect evidence is not necessary, and circumstantial evidence may be utilized to meet the preponderance-of-evidence standard[.]”).

2. The evidence made appellant's intent and knowing possession of child pornography more probable.

Although the record is limited with respect to Mil. R. Evid. 404(b), trial counsel articulated the permissible use of this evidence as knowledge and intent.

¹⁰ To the extent this court finds a Mil. R. Evid. 1002 objection applied here, appellant forfeited the objection, and the error was not plain because the record does not establish whether the Discord messages were still in appellant's possession or obtainable by the government. See Mil. R. Evid. 1004(b)–(c).

(R. at 39, 137). Mil. R. Evid. 404(b)(2). Knowing possession is an element of appellant's crime. UCMJ article 134b(1)(a). Evidence of intent and lack of accident may be admitted regardless of whether an appellant argues lack of intent because the prosecution must prove every element of a crime. *United States v. Harrow*, 65 M.J. 190, 303 (C.A.A.F. 2007) (citing *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)). Further, by arguing appellant could not have sent the emails containing child pornography, defense put knowledge and intent at issue, as it implies appellant did not intentionally or knowingly possess child pornography on his laptop. *Cf. United States v. Wilson*, 84 M.J. 383, 393-394 (C.A.A.F. 2024) (“[I]ntent is *always* at issue in a criminal case—even when the defense chooses not to contest it.”). The fact that he engaged in sexually explicit conversations with purported minors on the same app and laptop where he viewed child pornography images makes his intent and knowing possession of child pornography videos on that laptop more probable; those videos were not on his laptop by accident.

3. Assuming arguendo there was error, it did not materially prejudice appellant's substantial rights.

The defense's case was weak. Defense argued (i) appellant did not send the email triggering NCMEC, ICAC, and the CyberTip because he did not return home until after 1530 CDT and (ii) MW had access to his devices. (R. at 209–12). The fact that MW saw the Discord messages on appellant's laptop supported defense's

latter argument. (R. at 223). However, MW was not home at the time the email was sent. (R. at 216–17). Appellant controlled and limited MW’s access to the laptop. (R. at 141–42, 146). She did not know its login credentials. (R. at 141). She also had no understanding of the military terms used in the relevant folder name and nor the acronym “PTHC” that was used in at least one of the video files. (R. at 142). Regardless, appellant was charged for possession of illicit videos contained on his personal laptop, not ones which may have been contained solely in his email. *See* discussion *infra* AE III.B.

The government’s case was strong. Six agents testified about the search and seizure operation as well as chain of custody of the laptop. (Pros. Ex. 2, 3, 4, 5; Pros. Ex. 10 (sealed)). Special Agent SS testified about his forensic examination and finding the videos of purported minors engaging in sexually explicit conduct in a folder on that laptop. (R. at 159, 163–65, 170, 172; Pros. Ex. 6, 8; Pros. Ex. 10 (sealed), 11 (sealed); App. Ex. IX). Appellant does not dispute the content of those videos. MW established appellant exclusively controlled the use of his personal laptop. (R. at 141–42, 146). The fact that these videos were hidden on the laptop in subfolders named with military terminology such as “G-3” and “Extremism Stand down” further demonstrates appellant’s knowing possession.

The evidence in question was material, but it was of low quality. Although MW’s testimony regarding the Discord messages provided circumstantial evidence

of appellant's intent and knowing possession of child pornography on his personal laptop, it was cumulative evidence. As discussed above, there was more than enough evidence to prove intent and knowing possession: the laptop belonged to appellant, appellant exclusively controlled the use of his laptop, the videos were hidden in subfolders with military terminology, and SA SS's testimony that he found two child sexual abuse images in the Discord cache. (R. at 172).

Moreover, to the extent the military judge reached the correct result for the wrong reasons, this court may still affirm. *United States v. Vargas*, 83 M.J. 150 (C.A.A.F. 2023) ("A judgment below may be affirmed on any ground permitted by the law and record."). Here, the military judge admitted the evidence under Mil. R. Evid. 801 and 803 statement of a party opponent and effect on the listener. (R. at 136–39). Defense agreed and conceded on both grounds. (R. at 136–39). The court can presume the military judge considered the evidence for these lawful purposes. *See United States v. Leipart*, 85 M.J. 35, 42 (2024) (citation omitted).

Assignment of Error II

WHETHER APPELLANT'S CONVICTION IS FACTUALLY INSUFFICIENT.

Standard of Review

Questions of factual sufficiency are reviewed de novo. *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *5 (C.A.A.F. 2024). Further, this Court's assessment

of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

A. Factual Sufficiency.

In any case in which every finding of guilty entered into the record is for an offense that occurred on or after 1 January 2021, the court may consider whether the findings of guilty are correct in fact upon appellant's request if appellant makes a specific showing of a deficiency in proof. Uniform Code of Military Justice art. 66(d)(1)(B), 10 U.S.C. § 866(d)(1)(B) (2021); *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502 at *5; *see generally* Pub. L. No. 116-283, 134 Stat. 3611–12.

After appellant has made such a showing, the court may weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *5. In weighing the evidence, the court affords “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge.” UCMJ art. 66(d)(1)(B). “Appropriate deference” will depend on the nature of the evidence at issue. *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *8. But it does not create a presumption that in reviewing a conviction, a court of criminal appeals presumes an appellant is in fact guilty. *Id.* at *12.

If the 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 art. 66(d)(1)(B). This court must satisfy two requirements to be “clearly convinced” (i) that the evidence, as the court has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt and (ii) of the correctness of this decision. *Harvey*, __ M.J. __, 2024 CAAF LEXIS 502, at *11–12.

B. UCMJ art. 134.

Article 134, UCMJ criminalizes possession of child pornography. The elements of the crimes are, in relevant part:

- (a) That [appellant] knowingly and wrongfully possessed . . . child pornography; and
- (b) That, under the circumstances, the conduct of the accused was . . . was of a nature to bring discredit upon the armed forces[.]

UMCJ article 134b(1). “Child pornography” means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct. MCM, pt. IV, ¶ 95c(4). “Possessing” means exercising control of something. MCM, pt. IV, ¶ 95c(8). It must be knowing and conscious. *Id.* It is also possible for more than one person to possess an item simultaneously, as when several people share control over an item. *Id.*

Argument

Appellant requests this court consider whether the record established (i) knowing possession and (ii) the material containing the child pornography. (Appellant's Br. 19–21). Assuming *arguendo* appellant has made a specific showing of deficiency in proof, the court should determine the evidence proved appellant knowingly possession child pornography on his laptop.

A. The evidence established knowledge beyond a reasonable doubt.

The evidence admitted at trial relevant to this issue was the testimony of MW, SA SS, and the forensic report. Namely, the fact that the illicit material was in subfolders, some named with military terminology, suggests appellant took steps to hide his knowing possession. Further, in September 2022, MW personally saw appellant's sexually suggestive messages, sent via Discord on this laptop, to individuals purporting to be thirteen- or fourteen-year-old girls while twenty-five-year-old appellant pretended to be seventeen. (R. at 137–39, 149; Pros. Ex. 12, p. 1). Again, these messages were hidden, demonstrating knowledge of the images' illicit nature and his consciousness of guilt. Special Agent SS also found two child sexual abuse images in the Discord cache, suggesting a user viewed them through Discord's social media service. (R. at 172). As discussed *supra* AE I, this evidence circumstantially demonstrates appellant's knowing possession.

B. The evidence established appellant possessed child pornography on his personal laptop beyond a reasonable doubt.

The evidence relevant to this issue include the testimonies of Lieutenant ST, INV CJ, SA SE, MW, and SA SS, the search and seizure authorizations, chain of custody documents, appellant's laptop, ALEA forensic report, the hard drive containing the forensic extraction, and videos.

First, the record established the laptop's chain of custody from its seizure to presentation at court. Lieutenant ST and INV CJ testified about the CyberTip linking appellant's IP address to his residence on Fort Novosel. (R. at 41, 45–46, 50–51, 55, 170–71, 186, 192; Pros. Ex. 2). Investigator CJ and SA SE testified that they found and seized a laptop open and running on a table in appellant's residence.¹¹ (R. at 51–52, 54, 61, 63). The CID chain of custody documents and ALEA forensic report identified the laptop, in relevant part, by description "Dell Latitude"¹² and Service Tag/Service Number "6K67WD2." (Pros. Ex. 4, pp. 1–3; Pros. Ex. 5; Pros. Ex. 8, p. 1). In court, Special Agent SS confirmed this was the laptop from which he conducted his examination. (R. at 159). MW identified the laptop as appellant's personal device. (R. at 135; Pros. Ex. 10 (sealed)). Each of

¹¹ INV CJ recalled the device on the dining room table with chatrooms pulled up, while SA SE recalled the device on the kitchen table with a game pulled up. (R. at 51, 61).

¹² The CID EPCD lists the laptop as Latitude 7480 (Pros. Ex. 4, p.1 (Item Number 1LH22)), while the ALEA forensic report lists the laptop as Latitude 7481. (Pros. Ex. 8, p. 1 (Number UHW4C)).

the witnesses recognized the laptop by the sticker on its cover. (R. at 63, 83, 135, 141, 174, 187; Pros. Ex. 10 (sealed)).

Second, this was appellant's laptop. MW confirmed the laptop was password protected and that she had access only with his permission. (R. at 135, 141; Pros. Ex. 10 (sealed)). As Special Agent SS testified, the forensic report listed appellant's name as the user. (R. at 165; Pros. Ex. 8, p. 2). When agents arrived at his residence, the laptop was on, logged into appellant's account, and only appellant was home. (R. at 51, 56, 61, 63, 71). Moreover, the military terms used in the name of the folder such as "Extremism Stand-Down" and "G-3" circumstantially link appellant to the files and subfolders contained therein. (R. at 142; Pros. Ex. 8, p. 2).

And third, there were videos of purported minors engaging in sexually explicit conduct on appellant's laptop. The forensic report reflects sixty-eight child sexual abuse video and image files in the folder, including four videos depicting purported minors engaging in sexual intercourse, masturbation, lascivious exhibition, and sodomy. (R. at 163–65; Pros. Ex. 8, p. 3, p. 5 ¶ 11, p. 10 ¶ 52, p. 11 ¶ 1i, p. 13 ¶ 4a). Those four videos were admitted into evidence without objection. (R. at 161; Pros. Ex. 11 (sealed)). Thus, the record proved that appellant possessed child pornography on his personal laptop beyond a reasonable doubt.

Assignment of Error III

WHETHER THE WORDING OF THE SPECIFICATION OF THE CHARGE TOGETHER WITH THE MILITARY JUDGE’S ERRONEOUS UNDERSTANDING OF THE UNIT OF PROSECUTION AND ALIBI RENDERED APPELLANT UNABLE TO DEFEND HIMSELF.

Additional Facts

On 5 December 2023, defense moved to dismiss the Specification of The Charge for failure to state an offense. (App. Ex. III). The government filed its response on 8 December 2023. (App. Ex. IV). The parties litigated the motion on 11 December 2023, the morning of the first day of trial. (R. at 17–34). The military judge denied defense’s motion in an oral ruling and subsequently issued a written ruling on the same day. (R. at 34; App. Ex. VI).

Standard of Review

Whether a specification fails to state an offense is reviewed de novo. *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020).

Law

The military is a notice pleading jurisdiction. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). A specification is sufficient if it alleges every element expressly or by necessary implication. R.C.M. 307(c)(3). The test is not whether the language can be more definite and certain, but whether it contains the

elements of the offense intended to be charged and sufficiently apprises appellant of what he must be prepared to meet. *United States v. Williams*, 40 M.J. 379, 382 (C.A.A.F. 1994).

The underlying principles in analyzing whether a specification states an offense are whether the specification (1) contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and (2) enables appellant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Fosler*, 70 M.J. at 229. Courts examine the entire record of trial to determine double jeopardy protection. *United States v. Haugen*, ARMY 20180375, 2019 CCA LEXIS 412, *8 (Army Ct. Crim. App. 25 Oct. 2019) (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)) ([mem op.](#)).

Argument

A. Appellant was on sufficient notice of the charge against which he needed to defend because the specification need not specify the “material.”

A specification for possession of child pornography under Article 134, UCMJ, need not specify the material containing the visual depictions in the specification. Instead, the Specification as charged followed the model specification that alleges every element of the offense. *Compare* Charge Sheet, *with* MCM, pt. IV 95e. The phrase “child pornography” and its definition are

sufficiently definite in legal meaning to have put appellant on notice of the charges against him.

Appellant's reliance of *United States v. Forrester* is inapposite. 76 M.J. 479, 484 (C.A.A.F. 2017). The *Forrester* holding applies to the unit of prosecution for purposes of multiplicity, not notice pleading requirements. 76 M.J. 479, 484 (C.A.A.F. 2017) (considering allegations of multiple violations of the same statute). Here, the government charged one specification; thus, the danger of multiple punishments for the same offense is not present.

Moreover, even if this court were to consider the reasoning in *Forrester* applicable, the Court of Appeals of the Armed Forces concluded the President intended to separately criminalize and punish possession of each material that contains child pornography. *Id.* at 487. In other words, if emails were to be considered a "material that contains," it would be proper for the government to charge appellant for the two distinct crimes of possessing child pornography on his email and his laptop. That appellant had an alibi defense for one material (his email) but not for another (his laptop) does not implicate double jeopardy; he can be separately punished for these distinct acts.

Nevertheless, double jeopardy attached to the emails on appellant's laptop. When litigating defense's motion to dismiss, counsel explained the divers materials that could have been charged, including appellant's cell phone, iPod, and emails

that may be accessible from devices other than appellant's laptop. (R. at 24). The military judge confirmed multiple times with both counsel that the emails triggering the CyberTip were on appellant's laptop. (R. at 25–34). This discussion and resulting ruling treated possession of child pornography on appellant's laptop as inclusive of those emails. (App. Ex. VI).


B. Appellant could adequately plead his conviction in bar of future prosecutions for the same offense because his laptop was the sole “material” at issue.

The court is permitted to look beyond the language of the charge sheet to determine whether appellant can adequately plead his conviction. *See Haugen*, 2019 CCA LEXIS 412, at *8 (considering the military judge's special findings, bill of particulars, and testimony in addition to the charge sheet). Here, the government's reply, disclosures, and preliminary hearing report reflect appellant's personal laptop as the “material” at issue.¹³ (Preliminary Hearing Officer Report, p. 3 ¶ 2a(1)(i) (“The Cybertip, the forensic report, and my review of the files support a finding that the items on the computer of [appellant] are videos and photos of child pornography.”); App. Ex. IV (referencing laptop throughout)).

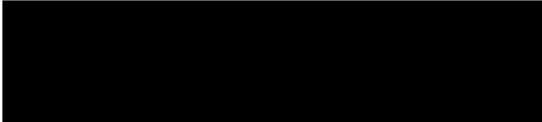
¹³ A bill of particulars may be requested to inform appellant of the nature of the charge with sufficient precision. *See* R.C.M. 906(b)(6) Discussion. While at trial, the government correctly believed such a remedy was unnecessary because the sole material at issue was appellant's personal laptop (App. Ex. IV, p. 5), appellant never requested a bill of particulars as to the specific material. (App. Ex. III, p. 3).

Conclusion

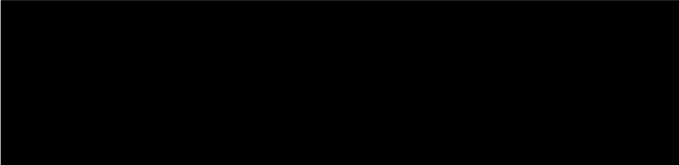
WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.



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CERTIFICATE OF SERVICE, U.S. v. ROBINSON (20230640)

I certify that a copy of the foregoing was sent via electronic submission to
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