

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20230473

Sergeant (E-5)

JOHN PENALOZA,
United States Army,

Appellant

Tried at Wheeler Army Airfield, Hawaii, on 2 May, 28 July, and 28-29 August 2023, before a general court-martial appointed by the Commander, 25th Infantry Division, Colonel Rebecca Farrell and Lieutenant Colonel Michael Korte, military judges presiding.

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

Assignments of Error¹

I. BY NOT ARRIVING WITH CASH, APPELLANT DID NOT TAKE A SUBSTANTIAL STEP TOWARDS COMPLETING THE OFFENSE OF ATTEMPTED SEX TRAFFICKING OF A CHILD

II. THE GOVERNMENT ENTRAPPED APPELLANT BY INTRODUCING THE CRIMINAL SCHEME WHEN HE WAS NOT PREDISPOSED TO ENGAGE IN ATTEMPTED SEX TRAFFICKING OF A CHILD

III. WHETHER THE MILITARY JUDGE IMPROPERLY TOOK JUDICIAL NOTICE OF AN ESSENTIAL ELEMENT WHEN SHE DID SO AFTER CLOSING THE COURT FOR DELIBERATIONS AND SHE ERRONEOUSLY INDICATED

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.

THE GOVERNMENT HAD REQUESTED HER TO DO SO DURING REBUTTAL ARGUMENT

Statement of the Case

On 29 August 2023, a military judge sitting as a general court-martial convicted appellant, Sergeant John Penaloza, contrary to his plea, of attempted sex trafficking of a child in violation of Article 80, Uniform Code of Military Justice. (R. 307; Statement of Trial Results). That same day, the judge sentenced appellant to sixty days confinement. (R. 363).

On 14 September 2023, the convening authority took no action on the findings and sentence and disapproved appellant's requests to defer confinement as well as disapprove 30 days confinement. (Convening Authority Action). On 20 September 2023, the judge entered Judgment. (Modified Judgment of the Court). This court docketed appellant's case on 23 April 2024. (Referral and Designation of Counsel).

Statement of Facts

1. [REDACTED] targeted and contacted appellant on an online dating application

In December 2022, the Hawaii Criminal Investigative Division [CID] launched Operation Intercept – a proactive undercover online initiative focused on

human trafficking of minors. (R. 105, 154, 160, 179) *infra* Second and Third Assignments of Error.

██████████ worked as an undercover “chatter” for the operation. (R. 104, 152). This was ██████████ time acting as a chatter after she attended the Internet Crimes Against Children Task Force [ICAC] Undercover Concepts and Techniques Course [Chatter’s Course] in 2022. (R. 193, 159).

██████████ created a profile on an adult (eighteen and over) dating application called “Bumble.” (R. 105-06). She adopted the persona of “██████████,” an 18-year-old woman living on Schofield Barracks interested in “[m]aking [m]oney” and “[t]he [g]ame” and seeking “something casual.” (Pros. Ex. 1, p. 1, 3, 5).² ██████████ profile affirmatively indicated she was “18.” *Id.*

On 12 December 2022, ██████████ found appellant’s Bumble profile wherein he described himself as “[g]overnment [p]roperty” on Schofield Barracks. (R. 108; Pros. Ex. 2, p. 1-3). The profile did not convey anything to indicate appellant was predisposed to paying someone under eighteen years old for sex. (Pros. Ex. 2).

² Appellant will refer to ██████████ without alternating to ██████████.

Having found a likely servicemember, ██████ initiated the contact with appellant. (R. 108, 114, 190).³

2. ██████ initiated the idea of sex, appellant paying for sex, and only later then changed her age claiming to be sixteen years old

After appellant asked her “[w]hat kinda fun you looking for on here[?]”, ██████ responded “[t]he exciting kind” with a devil emoji. (Pros. Ex. 3, p. 1). The answer piqued appellant’s interest, who presumed ██████ was stationed on Schofield Barracks. (Pros. Ex. 3). Upon SA ██████ request, the conversation switched from Bumble to Snapchat. (Pros. Ex. 3, p. 2).

Approximately five minutes into their Snapchat conversation, appellant asked ██████ “when we linking up for some fun[?]” (Def. Ex. C, p. 2, Pros. Ex. 4, p. 1). In response, ██████ told appellant that her kind of fun was not free and asked “RU ok w \$50 for BJ or like \$200 for normal sex[?]” (Pros. Ex. 4, p. 1).

Appellant did not immediately answer her question and asked ██████ to “snap” him and send a video. (Pros. Ex. 4, p. 2). ██████ claimed to have sent

³ ██████ could not remember if she also was the first to “swipe” or select to initiate the “matching” of profiles that allows for communication when questioned by the military judge. (R. 260).

appellant a “selfie” and a video of herself leaned back on a couch in the CID office. (R. 124-25).⁴

After appellant asked how she came to be on Schofield Barracks, [REDACTED] disclosed that she recently moved there to live with her aunt, who was a Soldier. (Pros. Ex. 4, p. 3-4). Appellant then asked how old [REDACTED] was and whether she wanted to “hang.” (Pros. Ex. 4, p. 4).

At this point, nearly twenty-seven minutes into their later conversation, [REDACTED] disclosed that she was “almost” seventeen-years old. (R. 224; Pros. Ex. 4, p. 4). Appellant questions that premise, but it is not discussed much further. (Pros. Ex. 4, p. 4).

3. [REDACTED] and appellant only discuss exchanging cash for sex

After appellant tells her that he will pay cash for sex, [REDACTED] said “Ok u cool w \$200? Do you have cash on u?” (Pros. Ex. 3, p. 6). Appellant told [REDACTED] that he would immediately withdraw cash from an automated teller machine to and sent her a screenshot of a bank account proving he had the means to pay her. (Pros. Ex. 6-8).⁵

⁴ [REDACTED] failed to preserve whatever images and videos she sent appellant which is discussed in AE III. (R. 198).

⁵ [REDACTED] admits that this screen-shot had to be older since SnapChat does not allow for sharing a screen-shot and it would have had to be have been an image from the phones gallery/archives.

Appellant later represented to [REDACTED] that he withdrew \$200 in cash and had it on his person. (Pros. Ex. 4, p. 17).

[REDACTED] and appellant never discussed using anything other than cash in exchange for sex. Appellant never sent [REDACTED] a screenshot of actual cash.

4. After failing to arrange a time to meet, [REDACTED] continues to suggest that appellant “hang out” with her on 13 December 2022 and reengages the conversation once it goes silent

For the next five hours, the two tried and failed to arrange a meeting. (Pros. Ex. 4, p. 8, 12, 14-16). During their back and forth, appellant told [REDACTED] that he had never paid for sex. (Pros. Ex. 4, p. 13-14). Skeptical, appellant tried to confirm [REDACTED] age, whether from talking to her over the phone to seeing some form of identification. [REDACTED] ignored those requests. (Pros. Ex. 4, p. 17-18). Their conversation ended with [REDACTED] suggestion that the two “hang out 4 lunch tomorrow.” (Pros. Ex. 4, p. 20-21).

Appellant later sent [REDACTED] videos of his exposed chest, stomach, and penis with the captions “Come take a seat” and “Let’s go on a little drive.” (R. 142; Pros. Ex. 4, p. 22, Pros. Ex. 7, 8).

5. [REDACTED] again, initiated contact with appellant by sending him a suggestive picture of herself

The next morning, [REDACTED] initiated contact by sending an image of her wearing a bathrobe captioned with “Want to come cuddle[?]” (Pros. Ex. 4, p. 24).

Appellant asked ██████ responded to her invitation to come over, to which she asked whether appellant withdrew cash the previous day. (Pros. Ex. 3, p. 23).

Appellant represented that he did. (Pros. Ex. 4, p. 23). ██████ suggested appellant meet her at Watts Field. (Pros. Ex. 4, p. 23-24).

On his way to meet ██████ at Watts Field, appellant called her and said words to the effect of, “Oh, you’re actually real. I didn’t think you were real until now.” (R. 242).

When appellant arrived at Watts Field, law enforcement agents quickly arrested him. (R. 143; Pros. Ex. 4, p. 25). A search of appellant and his vehicle revealed a condom, his cellphone, and a wallet. However, appellant did not have cash on him. (R. 145).

The government did not introduce evidence that appellant withdrew cash on 12 or 13 December 2022. The government did not introduce evidence that appellant had ever paid for sex before or even inquired about the topic.

At trial, ██████ acknowledged that she did not contemplate appellant paying for sex in any other way aside from cash. (R. 254).

In closing, the government argued that appellant took a substantial step towards completing the offense of sex trafficking by arriving at Watts Field to

meet █████ – they did not discuss his specific intent to use cash or pay for sex and its absence. (R. 283).⁶

I. BY NOT ARRIVING WITH CASH, APPELLANT DID NOT TAKE A SUBSTANTIAL STEP TOWARDS COMPLETING THE OFFENSE OF ATTEMPTED SEX TRAFFICKING OF A CHILD

Standard of Review

Once an appellant makes a specific showing of a deficiency in proof, [this court] conduct[s] a *de novo* review of the controverted questions of fact.” *United States v. Scott*, 83 M.J. 778, 779 (Army Ct. Crim. App. 2023); *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

The test for legal sufficiency is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

⁶ The government, on redirect of █████ attempted to expand the possible potential methods of payments beyond their original theory of the case. The military judge then questions █████ who admits that only “cash” was contemplated and no other form of payment was discussed or allowed by █████.” (R. 253-54)

Law

A. Attempts

Article 80, UCMJ, defines an attempted offense as “[a]n act, done with specific intent, to commit an offense. . . amounting to more than mere preparation and tending, even though failing, to effect its commission.” The elements include:

1. that the accused did a certain overt act;
2. that the act was done with the specific intent to commit a certain offense under the UCMJ;
3. that the act amounted to more than mere preparation; and,
4. that the act apparently tended to effect the commission of the intended offense.

When determining what constitutes the overt act, the courts must focus on whether the act was something more than mere preparation to commit the crime.

United States v. Payne, 73 M.J. 19 (C.A.A.F. 2013).

Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. Manual for Courts-Martial, Part IV, Para. 4c(2).

The overt act must be a “substantial step” towards the commission of the crime. *Id.* at 19. The Court of Appeals for the Armed Forces has stated that “. . . the substantial step must ‘unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances.’” *United States v. Hale*, 78

M.J. 268, 271-72 (C.A.A.F. 2019). Interrelated with attempt, is that the specific intent to commit the underlying crime applies to every element.

B. Sex Trafficking of Children

In 2000, Congress passed 18 U.S.C. § 1591 to curtail the trafficking of persons into the sex trade. Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. § 1591 (2000). The statute was focused on those who facilitate, such as third party “pimps” or others who force victims into trafficking. *Id.*

In 2015, Congress amended the statute by adding the words “solicits or patronizes” to make clear that those who purchase sexual acts may be arrested, prosecuted, and convicted. Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 1591 (2015).

In its current form, 18 U.S.C. § 1591 provides in relevant part that whoever knowingly within the special maritime and territorial jurisdiction of the United States patronizes or solicits by any means a person who has not attained the age of 18 years and *will be caused* to engage in a commercial sex act shall be punished.

The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person. 18 U.S.C. § 1591(e)(3).

C. Attempted Sex Trafficking of Children

Some federal cases indicate that attempted sex trafficking – in analogous circumstances of a “john” discussing a trade of something of value for sex – requires the defendant to appear at a predetermined site with the previously discussed form of payment *on their persons*.

For instance, in *United States v. Larive*, the defendant negotiated with an undercover officer to trade a cell phone for sex with a fifteen-year-old girl. 794 F.3d 1016, 1018 (8th Cir. 2015). Within four minutes of leaving the designated location to meet the girl, the defendant was found with said phone and told law enforcement that he was going to meet a girl with whom he had been talking. *Id.* at 1019-20.

In *United States v. Lopez*, the defendant agreed to pay \$80 for a half hour of sex with what he thought was a fifteen-year-old girl. 74 F.4th 915, 917 (8th Cir. 2023). After the defendant arrived at the prearranged meeting place, arresting officers discovered \$100 cash in his wallet. *Id.*

In *United States v. Wright*, the defendant agreed to pay \$100 cash for oral sex from a fifteen-year-old at his auto mechanic shop. 2022 U.S. App. LEXIS 16157, *2 (7th Cir. 2022). Law enforcement officers arrested the defendant and found \$100 cash on his person. *Id.*

D. Legal Age of Consent

According to the UCMJ and similarly in Hawaii, the age of consent is sixteen years old. Article 120b, UCMJ; Hawaii Revised Statute § 707-730.

Argument

Contrary to the government's argument, appellant's arrival at Watts Field did not unequivocally demonstrate that he was willing to *pay* for sex with [REDACTED]

Setting aside the transactional element, it was legal for appellant to meet [REDACTED] for sex. She could legally consent to sex.

Appellant's meeting [REDACTED] did not strongly corroborate the firmness of his criminal intent vis-à-vis paying for sex. Appellant clearly wanted to have sex with [REDACTED] But he neither proposed paying [REDACTED] for sex nor brought up the idea on his own during their conversation. If appellant sincerely planned on paying for sex, it does not make sense that he would invite [REDACTED] to "come take a seat" and to "go on a little drive" with him. (Pros. Ex. 7, 8). There was no need to entice or arouse [REDACTED] if her only interest is in getting paid, however, Appellant did that with the photos and videos he sent her indicating he believed she would be interested even without payment.

Unlike the defendants in *Larive*, *Lopez*, and *Wright*, appellant did not arrive to meet [REDACTED] with the previously discussed form of payment. Appellant's empty

wallet at the time of his arrest best demonstrates that his representations that he withdrew money from an ATM were lies, that he had no intent to pay her, and that he hoped to seduce her.

If law enforcement agents had not arrested him, it is unlikely that appellant meeting ██████ would have in the ordinary and likely course of events led to the commission of the offense. Despite ██████ constant queries and his representations, appellant never withdrew money to pay for sex.

There is no attempted sex trafficking without some form of payment or something of value to be exchanged. Without a trade of something of value, there is no commercial sex act which the statute requires. This is why the government desperately attempted on re-direct to try and expand potential forms of payments – an argument that was shut down by the judge and the agent admitted was not in line with their conversations.

In this case, appellant and ██████ only contemplated the exchange of cash for sex. By her own admission, ██████ did not entertain appellant paying her by some other means. Not only did appellant not appear with cash, but the government did not produce any evidence that he withdrew cash as he had represented.

II. THE GOVERNMENT ENTRAPPED APPELLANT BY INTRODUCING THE CRIMINAL SCHEME WHEN HE WAS NOT PREDISPOSED TO ENGAGE IN ATTEMPTED SEX TRAFFICKING OF A CHILD

Standard of Review

Appellant directs the court to the standard of review for the first Assignment of Error.

Law

While the government may investigate criminal activity through the use of undercover agents who merely provide an offender with an opportunity to commit an offense, it may not originate a criminal design and then induce commission of the crime. *Jacobson v. United States*, 503 U.S. 540, 548 (1992).

“[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in criminal conduct.” *Mathews v. United States*, 485 U.S. 58, 63 (1988); *See* R.C.M. 916(g).

The defense has the initial burden to show some evidence that a government agent originated the suggestion to commit the crime. *United States v. Whittle*, 34 M.J. 206, 208 (C.M.A. 1992); *United States v. Howell*, 36 M.J. 354, 359 (C.A.A.F. 1993); Dep’t of the Army Pamphlet 27-9, para. 5-6, note 1. Once met, the burden shifts to the government to prove beyond a reasonable doubt that the criminal

design did not originate with the government or that the accused had a predisposition to commit the offense “prior to first being approached by government agents.” *Jacobson v. United States*, 503 U.S. 540, 549 (1992); *United States v. Vandzandt*, 14 M.J. 332, 342-34 (C.M.A. 1982).

Predisposition is an accused’s inclination or willingness to engage in criminal activity. Whether an accused is predisposed to commit a crime is determined by the totality of the circumstances. *United States v. Kemp*, 42 M.J. 839, 845-46 (N.M. Ct. Crim. App. 1995).

Argument

The government entrapped appellant to solicit or patronize [REDACTED] for a commercial sex act. On two occasions, [REDACTED] introduced the criminal design. First, [REDACTED] proposed that appellant pay for sex. Second, [REDACTED] represented to appellant that she was sixteen years old. The government did not present any evidence to show that appellant was predisposed to pay for sex with a sixteen-year-old. She also initiated and re-initiated after breaks in all the communication.

1. The government originated the criminal design and induced appellant to commit the crime of commercial sex trafficking

While both appellant and [REDACTED] initially alluded to sex, it was [REDACTED] who explicitly introduced sex by asking “Ru ok with \$50 for BJ or like \$200 for

normal sex[?]" Even if appellant was alluding to sex, he had not mentioned paying for sex prior to ██████ entreaty.

Appellant did not immediately accept ██████ offer of sex for cash. He requested a "snap" and video to confirm she was a real person. Even when ██████ seemingly addressed appellant's concerns by sending pictures of her lounging about the CID office, appellant only stated "[I]et's link then," hardly an overt expression that he wanted to pay ██████ for sex.

Once she continued to reengage about appellant's potential willingness to pay for sex, then approximately thirty minutes later, ██████ revealed the critical fact that she was just under seventeen years old. After the revelation, ██████ again initiated the criminal design by asking appellant whether he "want[ed] to have sex or bj?"

2. Appellant was not predisposed to pay for sex with someone under eighteen years old

At no point prior to ██████ grand reveal did appellant indicate that he had paid or wanted to pay to have sex with someone under eighteen years old. During their conversation, appellant disclosed that he had never paid someone for sex, was on an adult dating cite limited to those "18" and older, and her profile listed her as "18". The photos associated were of a twenty-eight year old special agent with no age regression used.

Likewise, the government offered no independent evidence of any previous predisposition. Like *Jacobsen*, the fact that appellant was looking for casual, non-paid, sex “may indicate a predisposition to [engage in consensual sex with those of a legal age]; but evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition.” 503 U.S. at 540, 550.

Here, the government is required to show he was *predisposed* to pay for sex *with* an underage female. The evolution of the conversation and the instigation/reaching out by the agent against policy⁷ belie that proposition especially where the appellant did not even bring cash. It is not the sex, but the payment that must be shown.

⁷ The third assignment of error discusses the breach of regulation, policy, and protocol and applies equally as strong to this assignment of error.


III. WHETHER THE MILITARY JUDGE IMPROPERLY TOOK JUDICIAL NOTICE OF AN ESSENTIAL ELEMENT WHEN SHE DID SO AFTER CLOSING THE COURT FOR DELIBERATIONS AND SHE ERRONEOUSLY INDICATED THE GOVERNMENT HAD REQUESTED HER TO DO SO DURING REBUTTAL ARGUMENT⁸

⁸ This pleading is limited to the above headnote and this footnote. In closing, appellant noted that the government failed to establish that Schofield Barracks fell within the special maritime or territorial jurisdiction of the United States. (R. 285). During government rebuttal, the judge noted she had no evidence regarding this element and stated that the government could ask the court to take judicial notice. (R. at 293). The government did not do so. (R. at 293). At the end of argument, the judge indicated she would begin her deliberations overnight. (R. 297). But the next day, and citing no case law, the judge indicated that she would give the government an opportunity to ask for judicial notice. (R. at 301). She remarked that if this were before a panel, she would rule otherwise. (R. at 300-01). The government cited *United States v. Evans-Martinez*, as support for Schofield Barracks meeting the jurisdictional element. (R. 302). The judge took judicial notice and immediately found appellant guilty with no further deliberation. (R. 307).

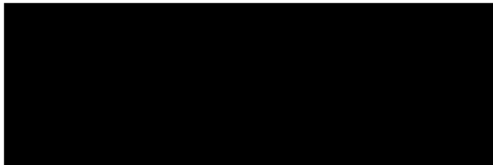
Conclusion

Appellant asks this court to set aside and dismiss the Specification of Charge


I. First, appellant did not attempt to engage in the sex trafficking of a child as he showed up to meet the purported child without money. But even if he committed the offense, the government entrapped him by introducing the criminal scheme and he displayed no predisposition to engaging in such misconduct.




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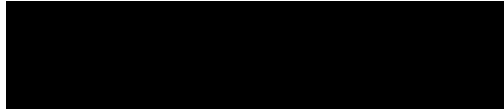
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on June 27, 2024.



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