UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLOR, POND, and STEELE
Appellant Military Judges

UNITED STATES, Appellee
v.
Sergeant First Class BRENT A. KERNS
United States Army, Appellant

ARMY 20250019

Headquarters, 1st Armored Division and Fort Bliss
Joseph K. Vengaus and Rick B. Mathew, Military Judges
Colonel Kristy L. Radio, Staff Judge Advocate

For Appellant: Bradley J. Sauer, Esquire (argued); Captain Andrew W. Moore, JA; Bradley J. Sauer, Esquire (on brief and reply brief).

For Appellee: Captain Teri'El M. Dixon, JA (argued); Major Vy T. Nguyen, JA; Captain Teri'El M. Dixon, JA (on brief).

3 November 2026

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

STEELE, Judge:

An enlisted panel, sitting as a general court-martial, found appellant guilty, contrary to his pleas, of one specification of attempted sexual abuse of a child involving indecent communication and one specification of wrongful solicitation of another to distribute child pornography, in violation of Articles 80 and 82, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 882 [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, forty-eight months of confinement,[1] and to be reduced to the grade of E-1.

[1] The military judge sentenced appellant to forty-two months confinement for the attempted sexual abuse of a child in The Specification of Charge I and forty-eight months confinement for wrongfully solicitating another to produce and distribute child pornography in The Specification of Charge III, to be served concurrently.

On appeal, appellant raises six assignments of error, two of which merit discussion and one of which warrants relief. Specifically, appellant argues: (1) his conviction for soliciting another to produce child pornography in The Specification of Charge III is legally and factually insufficient, and (2) the military judge erred in his instruction to the members concerning appellant's acquittal of an obstruction of justice specification. For the reasons set forth below, we find no error in the military judge's instructions but agree appellant's conviction for solicitation is neither factually nor legally sufficient and grant relief in our decretal paragraph.

BACKGROUND

On 6 October 2023, the U.S. Army Criminal Investigation Division (CID) conducted a child enticement operation via the dating application "MeetMe" to intercept individuals attempting to entice children online to commit sexual acts or exchange child sexual abuse material. Special Agent (SA) [redacted] created a fake profile on the application that included a profile picture of a Bratz doll. The age requirement for the application was eighteen years old and SA [redacted] was thirty-two years old when she first contacted appellant on the application by "liking" and "matching" with appellant's profile. The age listed on SA [redacted] profile was thirty-one. When SA [redacted] began texting appellant, appellant asked how old she was and SA [redacted] told appellant she was fourteen. Appellant told SA [redacted] that she should not be on a dating app and that "looking for friends on here was not a good way to meet people." After messaging back and forth – including appellant telling SA [redacted] that she had a good heart and would "find the one" – the conversation turned to sex. Appellant asked for a photo. SA [redacted] asked, "like of my face?" Appellant replied, "Whatever," and SA [redacted] sent a clothed picture of her in a mirror. Appellant sent a photo of his face in return. Appellant asked for another photo showing skin. After SA [redacted] told appellant she was scared to send "naked pics,"[2] appellant responded that he would delete them. SA [redacted] replied, "you don't need a pic of my p***y to know who ur [sic] talking to" and appellant replied, "I didn't ask for that." Appellant later asked SA [redacted] to "take a naked picture of [herself] with [her] back turned showing nothing but [her] back." SA [redacted] replied, "im [sic] not putting my butt in it" and appellant agreed, "no butt."

Appellant then sent SA [redacted] a photograph of himself unclothed, but with his leg turned so that his genitalia was concealed. SA [redacted] asked appellant what he was hiding, and appellant replied, "I'll show you mine if you show me your's [sic]." Appellant reinforced, "I'll send you a picture if you send a frontal one first . . . I'll show proof that I delete it." Appellant and SA [redacted] later resumed talking about sex and appellant asked SA [redacted] if she had any "sexy lingerie underwear." SA [redacted] said she did not, and appellant asked her to take a picture in the underwear she did have. Later, when asked what he would like to do with her in person, appellant stated, "I'll

[2] Special Agent BH, not appellant, used the word "naked."

go down on you . . . [y]ou'll go down on me . . . I'm 8 inches." Throughout the conversation, appellant repeatedly referenced SA [redacted] stated age, making statements such as "[t]his is dangerous" and "[y]ou have to understand I'm in a bad position. . . . Your [sic] 14." At trial, defense argued that appellant was just a "drunken idiot" when messaging SA [redacted], noting appellant subsequently blocked her number and reported her account to MeetMe, but that his conduct did not rise to the level of solicitation.

LAW AND DISCUSSION

A. Whether The Specification of Charge III is Legally and Factually Sufficient

On appeal, appellant argues that the evidence is legally and factually insufficient to sustain the finding of guilty for The Specification of Charge III, which alleged appellant wrongfully solicited SA [redacted] to produce and distribute child pornography "to wit: a digital image of a minor or what appears to be a minor engaging in sexually explicit conduct, and said conduct was of a nature to bring discredit upon the armed forces." We agree.

This court reviews issues of legal sufficiency de novo. *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018) (citation omitted). Evidence is legally sufficient if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Robinson*, 77 M.J. at 297-98 (internal quotation marks omitted) (citation omitted). Because we must draw "'every reasonable inference from the evidence of record in favor of the prosecution' . . . 'the standard for legal sufficiency involves a very low threshold to sustain a conviction.'" *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (first quoting *Robinson*, 77 M.J. at 298; then quoting *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

We review questions of factual sufficiency "upon request of the [appellant]" and if appellant "makes a specific showing of a deficiency in proof." UCMJ art. 66(d)(1)(B)(i). Once these conditions are met, this court "may weigh the evidence and determine controverted questions of fact" subject to "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and . . . appropriate deference to findings of fact entered into the record by the military judge." UCMJ art. 66(d)(1)(B)(ii), (I)-(II). If this court is "clearly convinced that the finding of guilty was against the weight of the evidence, the [c]ourt may dismiss, set aside, or modify the finding, or affirm a lesser finding." UCMJ art. 66(d)(1)(B)(iii). For this court to be "clearly convinced that the finding of guilty was against the weight of the evidence," this court first "must decide that the evidence, *as the* [*court*] *has weighed it*, does not prove that appellant is guilty beyond a reasonable doubt. Second, the [court] must be clearly convinced of the correctness of this decision." *United States v. Harvey*, 85 M.J. 127, 132 (C.A.A.F.

2024) (cleaned up). Further, this court's assessment for both legal and factual sufficiency "is limited to the evidence presented at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

To prove the solicitation of another to commit the production and distribution of child pornography, the government had to prove beyond a reasonable doubt: (1) appellant solicited or advised a certain person or persons to commit a certain offense under the UCMJ, and (2) appellant did so with the intent that the offense actually be committed. Article 82, UCMJ. The underlying offense for the solicitation here required appellant to solicit another person to knowingly and wrongfully produce and distribute child pornography in violation of Article 134, UCMJ.

The President has defined "child pornography" under Article 134, UCMJ as "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." *Manual for Courts-Martial, United States* (2024 ed.), Part IV, ¶ 95.c.(4). "Sexually explicit conduct" is further defined in relevant part as "lascivious exhibition of the genitals or pubic area of any person." *Id.* at 95.c.(10)(e). The UCMJ does not define "lascivious," but, as the military judge instructed the panel, "'Lascivious' means exciting sexual desires or marked by lust. Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. Consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition." *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3-68B-1 (29 July 2025).

Our analysis is guided by the framework established in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), which delineates six non-exhaustive factors for our consideration of whether material constitutes a lascivious exhibition of the genitals or pubic area:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and,

> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006) (citing *Dost*, 636 F. Supp. at 832).

Appellant asserts that his messages to SA [redacted] fail to demonstrate a specific intent for SA [redacted] to produce and distribute pictures meeting the definition of "child pornography" in the Manual for Courts-Martial rather than simply inappropriate pictures of a minor. We agree.

When examining whether the evidence sufficiently demonstrates a specific intent, we turn to our superior court's holding in *United States v. Ozbirn*, 81 M.J. 38 (C.A.A.F. 2021). In *Ozbirn*, a case analogous to the present facts, appellant challenged the legal sufficiency of his conviction for attempted receipt of child pornography, arguing his requests for "naked pictures" from undercover agents posing as minors did not prove specific intent to receive child pornography. In upholding appellant's conviction, the CAAF held "the specific intent required for an offense 'may be inferred from the totality of the circumstances' including 'the nature, time, or place of' appellant's 'acts before and during' the crime alleged." *Id.* at 42-43 (quoting *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F. 2008)). The court found the evidence legally sufficient where appellant's requests for "naked pictures" occurred within a broader context that included graphic descriptions of very specific sexual acts, requests to engage in sexual relations, and "words evincing a specific focus on genitalia." *Id.* at 43.

Here, in contrast, appellant's messages lacked a focus on genitalia. When appellant asked for pictures showing "skin" and SA [redacted] replied, "u don't need a pic of my p***y to know who ur talking to," appellant specifically rejected the notion, replying, "I didn't ask for that." When appellant asked SA [redacted] to take "a naked picture," the request was for a "naked picture of you with your back turned *showing nothing bit [sic] your back*." Moreover, when SA said, "ok, but I'm not putting my butt in it," appellant agreed, stating, "no butt." These exchanges demonstrate not merely a lack of focus on the genitalia but an affirmative, repeated rejection of any such focus – first by explicitly rejecting an image of genitalia and later by rejecting imagery of the immediate, surrounding anatomy. The government's strongest pieces of evidence are the exchanges after appellant sent a picture of himself unclothed but concealing his penis from view. When asked what he was hiding, appellant replied, "I'll show you mine, if you show me your's [sic]." SA [redacted] then asked if he was excited, and appellant responded, "I'll send you a picture if you send a frontal one first." These messages infer that appellant would send a picture of his "excitement"

and what he was "hiding" – in other words, his erect penis – if SA [redacted] would send a "frontal" picture.[3]

In *Ozbirn*, the CAAF noted that where an appellant offers to send "explicit pictures of genitalia in exchange for naked photos . . . a rational trier of fact could reasonably infer that Appellant intended the other half of the proposed bargain to include sexual images of genitalia." *Id.* at 43. Here, however, appellant did not explicitly request a "naked photo," but a "frontal" picture. And when viewed in the context of the entire exchange between appellant and SA [redacted], the inference becomes tenuous where the message is cabined by appellant's prior, explicit rejection of a picture of SA [redacted] genitalia – "I didn't ask for [a picture of your p***y]" – his agreement to a picture of just her back with "no butt," and his later requests for pictures of SA [redacted] in lingerie or underwear. Within this context, appellant's request for a "frontal" picture is not clearly a request for a lascivious exhibition of the genitalia but rather is entirely consistent with a request for a picture of her breasts. Breasts are not part of the genitalia or pubic area. *See, e.g., United States v. Cuccaro*, 2015 CCA LEXIS 400 (Army Ct. Crim. App. 2015) (finding a picture of exposed breasts did not meet the definition of "a lascivious display of a minor's genitalia"); *see also United States v. Johnson*, 639 F.3d 433, 439 (8th Cir. 2011) (stating images or exhibitions of female breasts and the buttocks of either gender are not within the purview of 18 U.S.C. § 2251(a)). Thus, a picture solely of breasts would fail to meet the definition of a lascivious exhibition of genitalia.[4]

While our assessment of legal and factual sufficiency is limited to the evidence presented at trial, our confidence in the verdict is further undermined by the government's misstatement of the law to the panel. During closing, the trial counsel argued the government met its burden because appellant requested "a naked photo of a young girl . . . exposing her breasts" and a photo of the same girl in "sexy lingerie" or, alternatively, "underwear." However, as discussed above, a photograph of only exposed breasts would not constitute a lascivious exhibition of genitalia. Similarly, a photo of a minor in underwear or lingerie would be legally insufficient to support a conviction unless the pubic area or genitalia were at least discernible. *United States v. Blouin*, 74 M.J. 247 (C.A.A.F. 2015) (rejecting the adoption of the proposition that nudity or discernibility of the genitalia or pubic area are not required under 18 U.S.C. § 2256). Because appellant's request for pictures of SA

[3] At trial, SA [redacted] testified inaccurately that appellant had asked for a "full frontal" picture.

[4] Our conclusion should not be interpreted that a request for a "frontal" picture can never reflect an intent for another to produce and distribute material constituting child pornography but rather that it is insufficient within the context of this conversation and the facts presented here.

[redacted] in her underwear omitted any additional requests or direction indicating an intent to view genitalia, those requests were legally insufficient.

Accordingly, for the aforementioned reasons, we find appellant's conviction as to The Specification of Charge III and Charge III legally and factually insufficient.

B. Whether the Military Judge Erred in His Instruction to the Members Concerning Appellant's Acquittal of Obstruction of Justice

1. Additional Background

In addition to the offenses described *supra*, appellant was also charged with obstruction of justice for later deleting the messages with SA [redacted] in violation of Article 131b, UCMJ, in The Specification of Charge II. Upon the conclusion of the government's case, defense counsel made a motion for a finding of not guilty under Rule for Courts-Martial [R.C.M.] 917 for Charge II, which the military judge granted.[5] The military judge proposed that he would have the members take out their flyer and line through the charge and he would instruct them that the charge and its specification were no longer in front of them. When the military judge asked the parties whether they requested additional instructions, defense counsel requested that the military judge instruct the panel specifically that appellant was found not guilty of the stricken charge. After hearing argument, the military judge proposed instructing the panel to not speculate as to what happened to that specification, which defense declined. When the panel returned, the military judge instructed the panel to line through the charge on their flyer and instructed them that the "specification [was] no longer in front of [them]."

2. Discussion

On appeal, appellant argues the military judge erred in denying defense's requested instruction. We disagree.

A military judge's decision to deny a defense-requested instruction is reviewed for abuse of discretion. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993). "While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give." *Id.* (citing *United States v. Smith*, 34 M.J. 200, 203 (C.M.A. 1992)). We test to determine whether denial of a requested instruction constitutes error by evaluating whether (1) the [requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in

[5] The military judge subsequently instructed counsel to redact previously admitted evidence in relation to the acquitted charge.

the case that failure to give it deprived [appellant] of a defense or seriously impaired its effective presentation." *United States v. Carruthers*, 64 M.J. 340, 345-46 (C.A.A.F. 2007) (citations omitted).

Even if this court agreed that appellant's requested instruction would have been correct for the military judge to issue, we find that this instruction was substantially covered by the military judge's issued instruction. Pursuant to R.C.M. 917(e), in cases before enlisted members, the military judge is only required to specifically instruct the members that he entered a finding of not guilty if the motion is made as to a greater offense but a lesser-included offense is still before them, so that the announcement of findings is not inconsistent with the granting of the motion in accordance with R.C.M. 917(a).

Here, the motion was made outside the presence of the members and was granted as to the offense in its entirety, with no lesser-included offense remaining. The military judge then instructed the panel that the specification was no longer in front of them. Thus, we find that the military judge did not abuse his discretion in denying defense's requested instruction. The instruction given—that the charge and specification were no longer in front of the panel—along with the redaction of any evidence relating solely to the acquitted charge had the same effect as and substantially covered defense's desired instruction. Furthermore, this court is unaware of, and appellant did not provide in either briefs or oral argument, any binding precedent holding an acquittal on one charge legally compels or supports an acquittal on distinct charges under different articles of the UCMJ. Each offense charged under the UCMJ is separate and must be evaluated on its own merits.

Indeed, both the instruction given by the military judge and the alternative instruction he offered to give, which defense ultimately rejected, closely mirror pattern jury instructions in multiple federal circuits. *See, e.g.,* 3d Cir. Model Crim. Jury Instr. § 2.31 (2018); 8th Cir. Model Crim. Jury Instr. § 2.11 (2025);[6] 9th Cir. Jury Instructions Comm., *Manual of Model Criminal Jury Instructions for the*

[6] Providing: "At the beginning of the trial I told you that the defendant was accused of (insert number) different crimes: (Briefly describe the offenses mentioned at the commencement of trial.) Since the trial started, however, [one] [two, etc.] of these charges [has] [have] been disposed of, the one(s) having to do with (describe offenses disposed of). [That charge is] [Those charges are] no longer before you, and the only crime[s] that the defendant is charged with now [is] [are] (describe remaining offenses). You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the [government]. . . has proved, beyond a reasonable doubt, the count[s] which remain, which are (list remaining count[s])." 8th Cir. Model Crim. Jury Instr. § 2.11 (2025).

District Courts of the Ninth Circuit § 2.13 (2010).[7] These federal circuit pattern instructions are not binding, and military judges possess broad discretion to tailor instructions at trial. However, this federal practice further supports the military judge's instructions in this case, consistent with the principle that the military courts should follow federal court practice to the extent practicable and not inconsistent with the UCMJ. *See* Art. 36(a), UCMJ; see also *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) (noting that the implication of Article 36(a), UCMJ is that "Congress intended that, to the extent 'practicable', trial by court-martial should resemble a criminal trial in a federal district court.").

CONCLUSION

The findings of guilty to The Specification of Charge III and Charge III are SET ASIDE, and that specification and charge are DISMISSED.[8] The remaining findings of guilty to The Specification of Charge I and Charge I are AFFIRMED.

Having considered the entire record and reassessing the sentence in accordance with the principles articulated by our superior court in *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we AFFIRM only so much of the sentence as provides for a dishonorable discharge, forty-two months of confinement, and reduction to E-1.

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[7] Providing: "At the beginning of the trial, I described the charge[s] against the defendant. For reasons that do not concern you, [specify count[s] or charge[s]] [is] [are] no longer before you. Do not speculate about why the charge[s] [is] [are] no longer part of this trial. The defendant is on trial only for the charge[s] of [remaining count[s]]. You may consider the evidence presented only as it relates to the remaining count[s]." 9th Cir. Jury Instructions Comm., *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* § 2.13 (2010).

[8] We order four corrections to the Statement of Trial Results, incorporated by reference in the Entry of Judgment. First, "Charge III" should be renumbered to reflect "III, renumbered to II." Second, "Charge IV" should be renumbered to reflect "IV, renumbered to III." Third, under "Sentencing," Charge "IV" should be updated to reflect "III" and the language in the "Concurrent With" block for Charge I should be changed from "Charge IV THE Spec" to "Charge III THE Spec." This accurately reflects the updated numbering on the charge sheet after arraignment.

Chief Judge FLOR and Senior Judge POND concur.

FOR THE COURT:



JAMES W. HERRING, JR.
Clerk of Court