UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist CHRISTIAN Z. DOW
United States Army, Appellant

ARMY 20200462

Headquarters, 7th Infantry Division
Jennifer B. Green, J. Harper Cook, and Larry Babin, Military Judges
Colonel Rebecca K. Connally, Staff Judge Advocate

For Appellant: Captain Carol K. Rim, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief); Jonathan F. Potter, Esquire; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (brief on specified issue); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Jonathan F. Potter, Esquire; Captain Carol K. Rim, JA (on reply brief of specified issue).

For Appellee: Major Christopher H. Kim, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Major Christopher H. Kim, JA (on brief and brief on specified issue).

14 June 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

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[1] Judge Arguelles decided this case while on active duty.

A general court-martial composed of officer members found appellant guilty, contrary to his pleas, of two specifications of possessing child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2012) [UCMJ]. The military judge sentenced appellant to 14 months of confinement for Specification 1 of Charge IV and 8 months of confinement for Specification 3 of Charge IV, with the confinement terms to be served concurrently. The military judge also sentenced appellant to a dishonorable discharge and reduction to E-1.

For Specification 1 of Charge IV, we do not know which of the charged images formed the basis for the panel's variant guilty finding, and we grant relief. For Specification 3 of Charge IV, we do know which charged image formed the basis for the panel's variant guilty finding, yet based on the impermissible scope of matters that the military judge considered in reaching a sentence, we grant relief.

Based on our decision regarding Specification 1 of Charge IV, we need not decide whether the military judge correctly ruled that evidence from appellant's Samsung phone was the result of inevitable discovery.[2]

BACKGROUND

In Specification 1 of Charge IV, appellant was charged with possessing "at least nine" images of child pornography on his Samsung phone. In Specification 3 of Charge IV, he was charged with possessing "at least seven" images on his ZTE phone. The government's digital forensic examination (DFE) expert testified at trial that eight of the nine charged images from the Samsung phone were accessible to appellant, but one of the images was not.[3] Though each image was uniquely numbered on Prosecution Exhibit 14, the expert did not specify which of them were accessible.

The expert testified that one of seven charged images from the ZTE device was in a downloads folder, where appellant could have saved it from an internet search; however, he was unable to determine whether the remaining six images were accessible. As with Prosecution Exhibit 14, each image was uniquely numbered on Prosecution Exhibit 16. While the expert did not refer to its file number in describing its accessibility, he did testify that the downloaded image was a "collage

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[2] We have given full and fair consideration to the matters submitted personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find they lack merit and warrant neither discussion nor relief.

[3] The government's expert witness in digital forensics testified that images stored on an electronic device are "accessible" when they "can be viewed by the user."

file" from that exhibit. There was only one collage file among the images charged in Specification 3 of Charge IV.

The court-martial found appellant guilty by exceptions and substitutions. Of Specification 1 of Charge IV, the panel found him guilty of possessing at least eight images instead of nine. Of Specification 3 of Charge IV, the panel found him guilty of possessing at least one image instead of seven.

We specified for briefing and argument whether this Court could affirm the variant guilty findings without knowing which images formed the basis of that result. Appellant asserts that we cannot determine which of the images resulted in the guilty findings and, therefore, cannot perform our Article 66 review, while appellee argues that we need not know which particular images resulted in the guilty findings.

We partly agree with appellant. In order to conduct our review, we must know which images formed the basis for the panel's variant findings, and we are unable to do this for Specification 1 of Charge IV. However, we part ways with appellant regarding Specification 3 of Charge IV, because we are convinced beyond a reasonable doubt of the image that resulted in the guilty finding.

LAW AND ANALYSIS

A. Law

The factual controversy in this case is not whether the images themselves are unlawful; each file on Prosecution Exhibits 14 and 16 inarguably contain child pornography. The fundamental question was—and remains—whether appellant knowingly and consciously possessed them. Must we only be certain beyond a reasonable doubt that appellant unlawfully possessed child pornography? Or, in this case involving variant findings,[4] must we also be certain of which specific images the court-martial convicted him of possessing?

We have carefully studied our superior court's decisions regarding ambiguous findings and our sister court's decision in *United States v. Saxman*, 69 M.J. 540 (N.M. Ct. Crim. App. 2010). *See United States v. Ross*, 68 M.J. 415 (C.A.A.F. 2010), *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009), *United States v. Scheurer*, 62 M.J. 100, (C.A.A.F. 2005), and *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). The majority of reported ambiguous findings cases involve variant findings that acquit appellants of misconduct on "divers occasions," without

[4] This is not a general verdict case, for the panel found appellant *not guilty* in part.

specifying on which dates they did commit it. Such findings have caused disputes over the service courts' ability to reliably determine whether they are factually sufficient. In *Walters*, our superior court concluded that ambiguous findings thwart our ability to perform this appellate function. 58 M.J. at 396-97. The Court of Appeals for the Armed Forces (CAAF) further elaborated this point more recently in *Wilson*: "If there is no indication on the record which of the alleged incidents forms the basis of the conviction, then the findings of guilt are ambiguous and the Court of Criminal Appeals cannot perform a factual sufficiency review." 67 M.J. at 428 (citing *Walters*, 58 M.J. at 396-97).

In *Ross*, our superior court addressed the "divers occasions" problem in the context of child pornography possession:

> Although excepting those words here without explanation created ambiguous findings, the Government could nevertheless prevail were we to conclude that the evidence was legally insufficient to show that Appellant was guilty of possession with respect to two of the three media. *Cf. Scheurer*, 62 M.J. at 111-12. Under those circumstances, as a matter of law the military judge could have found Appellant guilty of possession with respect to only one of the media—in other words, the verdict would be unambiguous.

68 M.J. at 418.

But, the analysis did not end there, as our superior court in *Ross* continued:

> Given that the evidence is legally sufficient with respect to at least two of the electronic media, the fact remains that we cannot know, nor could the CCA know, what the military judge found Appellant guilty and not guilty of, or indeed whether he found Appellant not guilty of anything at all. The CCA therefore cannot conduct its review under Article 66(c), UCMJ, 10 U.S.C. § 866 (2006).

Id.

We interpret *Ross* to mean that, in order to reliably review appellant's case for factual sufficiency, we must know, beyond a reasonable doubt, which images formed the basis for the variant guilty finding in Specification 1, and which image formed the basis for the variant guilty finding in Specification 3.

We are far from certain which images appellant possessed in Specification 1. The government's evidence revealed only that appellant possessed at least eight images in his phone's photo gallery application, a readily accessible area of his phone (the other image in question was inaccessible). However, the evidence at trial did not disclose which ones were accessible. With its finding of guilty by exceptions and substitutions, the panel acquitted appellant of unlawfully possessing one of the images, but we do not know which one. If we were to affirm the guilty finding as to eight of the images, we would run the unacceptable risk of unlawfully affirming a conviction for conduct that had formed the basis for the acquittal. Such a risk would obviously violate appellant's constitutional protection against double jeopardy, and, for this reason the guilty finding cannot survive.

On the other hand, we are convinced beyond a reasonable doubt of the image that formed the basis for the guilty finding regarding Specification 3 of Charge IV. The government's evidence here established that Prosecution Exhibit 16, derived from appellant's ZTE phone, contained multiple images of child pornography. However, only one of them was accessible to appellant; the other six were not. Were this the only evidence, the guilty finding would have exactly the same infirmity as Specification 1. However, the evidence did not stop there. Instead, the evidence established that the one image accessible to appellant was actually a "collage photo" that "appeared to contain four separate images." The DFE expert discovered this collage file in the ZTE's downloads folder, which is where a user could save an image found on the internet.

There was only one collage file on Prosecution Exhibit 16; the collage depicts four images, at least two of which are child pornography. Based on the testimony and the other evidence associated with Specification 3, we are certain beyond a reasonable doubt that this collage file is the one that the DFE expert described, and that it formed the basis for the panel's guilty finding.

In reaching a sentence of eight months of confinement for Specification 3 of Charge IV, the military judge considered, over defense objection, all seven of the images from Prosecution Exhibit 16. He should have only considered one of them—the collage file that appellant unlawfully possessed. Faced with the decision whether to reassess his sentence or authorize a sentence rehearing, we choose the former. Based on our experience in reviewing child pornography cases, we are confident of the minimum sentence the military judge would have adjudged based on the collage file. *See United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013).

CONCLUSION

The finding of guilty of Specification 1 of Charge IV is SET ASIDE, and the specification is DISMISSED. The finding of guilty of Specification 3 of Charge IV

is AFFIRMED. Only so much of the sentence as provides for a dishonorable discharge, six months of confinement, and reduction to E-1 is approved.

Senior Judge BROOKHART concurs.

ARGUELLES, Judge, dissenting:

I concur with the majority's ruling as to Specification 3 of Charge IV, but I respectfully disagree with my learned colleagues' determination to set aside and dismiss Specification 1 of Charge IV (Specification 1). Not only are there sufficient facts in the record for us to determine what conduct served as the basis for the guilty finding in Specification 1, but appellant has in any event waived any ambiguity or double jeopardy challenge to both Specification 1 and Specification 3.[5]

A. Ambiguity and Double Jeopardy

With respect to Specification 1, after the government's digital forensic examination expert testified that only eight of the nine charged images of child pornography were accessible to appellant, the panel not surprisingly found appellant guilty of possessing eight of the nine images.

In *United States v. Walters*, the Court of Appeals for the Armed Forces (CAAF) held that when the "divers occasions" language is excepted out of a specification, there must be a "relevant date *or other facts in evidence* that will clearly put the accused and the reviewing courts on notice of what conduct served as

[5] It is worth noting at the outset that when faced with this issue in the future, military judges should simply ask the members to indicate which specific images form the basis for their findings. *Cf. United States v. Augspurger*, 61 M.J. 189, 192 (C.A.A.F. 2005) ("The military judge had two opportunities to ensure that the members' findings, as announced, were clear as to the factual basis for the offense. First, she should have properly instructed the members that if they excepted the 'divers occasion' language they would need to make clear which allegation was the basis for their guilty finding. Second, after she examined the findings worksheet but prior to announcement, the military judge should have asked the members to clarify their findings."); Dep't of Army Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 7-25 (10 Sep. 2014) [Benchbook] ("Because you have substituted (one) (_____) for the language ('divers occasions,') ('__ occasions,'), your findings must clearly reflect the specific instance(s) of conduct upon which your findings are based. That may be reflected on the Findings Worksheet by filling in (a) relevant date(s), or other facts clearly indicating which conduct served as the basis for your findings.").

the basis for the findings." 58 M.J. 391, 396 (C.A.A.F. 2003) (emphasis added). The CAAF further explained that where there was not sufficient evidence to determine which of the alleged incidents formed the basis for the guilty finding, the verdict was ambiguous. Because a Court of Criminal Appeals (CCA) cannot properly conduct its Article 66, UCMJ, factual sufficiency review on an ambiguous verdict, double jeopardy bars a rehearing on any of the alleged incidents. *Id.* at 397. *See also United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009) ("If there is no indication on the record which of the alleged incidents forms the basis of the conviction, then the findings of guilt are ambiguous and the Court of Criminal Appeals cannot perform a factual sufficiency review.") (citing *Walters*, 58 M.J. at 396-97).

In *United States v. Scheurer*, appellant was charged with using LSD on divers occasions near Tokyo and Mount Fuji, and the evidence at trial showed that he used one time near Tokyo and one time near Mount Fuji. 62 M.J. 100, 111-12 (C.A.A.F. 2005). As such, when the military judge excepted both the words "on divers occasions" *and* Mt. Fuji, the CAAF held that because there was evidence of only one remaining LSD use, the guilty finding for that specification was not ambiguous. *Id.*

In *Wilson*, by way of contrast, where there was evidence that the rapes occurred in both the bathroom and the bedroom, the CAAF held that the military judge's failure to clarify which incident formed the basis for the conviction resulted in an ambiguous verdict. 67 M.J. at 428. In *United States v. Trew*, the CAAF cited *Wilson* for the proposition that while a CCA may not perform an independent review to determine which of several possible incidents "most likely formed the basis for the conviction," it could still "review the record to determine if there was only a single possible incident that met 'all the details of the specification' for which an appellant was convicted." 68 M.J. 364, 368 (C.A.A.F. 2010) (citing *Wilson*, 67 M.J. at 428).

In *United States v. Ross*, appellant was charged with possessing child pornography on three separate media, and the military judge excepted the words "on divers occasions" without further explanation. 68 M.J. 415, 417 (C.A.A.F. 2010). After noting that excepting those words without explanation created ambiguous findings, the CAAF held that the "Government could nevertheless prevail were we to conclude that the evidence was legally insufficient to show that Appellant was guilty of possession with respect to two of the three media." *Id.* at 418. The CAAF did not hold, however, that as a matter of law a CCA must be able to determine which specific media formed the basis for the guilty finding. Rather, after applying its holding to the facts before it, the CAAF ruled that because two of the three media were legally sufficient, the findings were ambiguous because the CCA could not determine which one formed the basis for the guilty verdict. *Id.* Put another way, because the findings of guilt in *Ross* did *not* match up with the number of media that were factually and legally sufficient, there was a fatal ambiguity in the verdict.

Applying the holding of *Ross* to the facts in this case, because appellant could not access one of the nine images charged in Specification 1, that specific inaccessible image was both factually and legally insufficient to support a finding that he knowingly possessed child pornography. Furthermore, because appellant had access to the remaining eight images, all of which constitute child pornography, those eight images were factually and legally sufficient to support a conviction. As such, because there were facts in evidence in this case that clearly put the accused and the reviewing courts on notice of what conduct served as the basis for the panel's finding, we are not required to guess or speculate as to which images "most likely formed the basis for the conviction." *Trew*, 68 M.J. at 368. *See Walters,* 58 M.J. at 396; *Cf. United States v. Piolunek*, 74 M.J. 107, 111 (C.A.A.F. 2015) (members "are presumed to be competent to make factual determinations as to guilt" and to possess the "intelligence and expertise" to make correct determinations as to which evidence is "factually inadequate") (citations omitted); *Griffin v. United States*, 502 U.S. 46, 59-60 (1991) ("It is one thing to negate a verdict that, while supported by the evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote as it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.") (citing *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)).

It follows that because the panel found appellant guilty of possessing eight images of child pornography, which again equals the number of images that are factually and legally sufficient, the finding for Specification 1 is not ambiguous, and we can perform our Article 66, UCMJ, factual sufficiency determination without raising any double jeopardy concerns.

B. Waiver

1. Additional Facts

As originally drafted, the proposed findings worksheet only provided the panel with the option to select "guilty" or "not guilty" for each of the charged specifications. During the Article 39(a) instruction discussion, defense counsel initially objected to the worksheet on the ground that "[t]here is no way for the appellate court to be able to ascertain which, if any, separate images the members determined to be child pornography." In response the military judge indicated that his plan was to give the panel this "simplified worksheet," and tell them that if variance comes into issue, "I will provide a more detailed, alternate findings worksheet." With that explanation, defense counsel stated that she had no objection to the findings worksheet. During the same Article 39(a) session, defense counsel also objected to the military judge's proposed variance instruction on the ground that because the government charged possession of nine images, if the panel found possession of anything less than nine images, not guilty was the only possible

verdict. The military judge overruled this objection and instructed the panel with the standard variance instruction.[6]

After indicating they had verdicts, the panel members provided the military judge with: (1) the "simplified worksheet" indicating, *inter alia,* guilty verdicts for Specifications 1 and 3 of Charge IV; and (2) a copy of the Flyer in which the word "nine" was lined through and the word "eight" written in the margin for Specification 1, and the word "seven" was lined through and the word "one" written in the margin for Specification 3. After receiving the initial worksheet and marked-up Flyer, the military judge announced to the members that he needed to provide them with an "alternate" worksheet, and asked them to return to the deliberations room while he took up the matter with counsel. In the subsequent Article 39(a) session, the military judge provided counsel with a copy of his proposed "alternate" worksheet, which in pertinent part for each specification at issue read:

> Guilty, except the word(s) and figures(s): ____
> substituting therefor the word(s) and figures ____. Of the
> excepted word(s) and figures(s): Not guilty. Of the
> substituted word(s) and figure(s): Guilty.

Although the military judge's "alternate" worksheet allowed the members to indicate how many images they found appellant to be guilty of possessing for Specifications 1 and 3 of Charge IV, it did *not* provide them with the option or the means to indicate which *specific* images formed the basis for their guilty verdicts. When asked if there was any objection to the "alternate" worksheet, defense counsel responded "No, your honor." After the members subsequently filled out the alternative worksheet substituting the word "eight" for "nine" for Specification 1, and "one" for "seven" for Specification 3, appellant elected sentencing by the military judge, and the panel was dismissed.

During trial counsel's sentencing argument, defense counsel objected to the government's reference to a specific image on the grounds that "the record is not

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[6] Specifically, the military judge instructed the panel that "[i]f you have doubt about the number of the number [sic] of digital images and/or videos knowingly and wrongfully possessed, but you are satisfied beyond a reasonable doubt that the offense was committed in a particular manner that differs slightly from the exact number of digital images and/or videos knowingly and wrongfully possessed as charged in the specification, you may make minor modifications in reaching your findings by changing the number of digital images and/or videos knowingly and wrongfully possessed as described in the specification, provided that you do not change the nature or identity of the offense." *See* Benchbook, para. 7-15.

clear which images he was convicted of and counsel is arguing facts he does not know." Likewise, at the conclusion of trial counsel's argument, the military judge had another discussion in which defense counsel expressed concern about the court reviewing evidence for sentencing given that "[we] don't know that the court has a clear picture for what they determined and what they didn't determine." Although the interchange was somewhat confusing, it appears that the military judge ultimately ruled that because it was a general verdict he could review all of the images (which the majority correctly notes was an erroneous ruling), to which defense counsel responded that she was maintaining her "objection to any variance at all."

2. Law

In *United States v. Gladue*, the CAAF held that an accused "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," to include double jeopardy. 67 M.J. 311, 314 (C.A.A.F. 2009) (citing *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (internal quotation marks omitted). *See also United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997) ("Double-jeopardy claims are waived if not raised at trial.") (citations omitted) (overruled on other grounds by *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009)); *Cf. United States v. Lloyd*, 46 M.J. 19, 21 (C.A.A.F. 1997) (finding "constitutional and statutory protections against double jeopardy may be waived passively, i.e., forfeited by failure to make a timely objection") (citations omitted).

With respect to the waiver analysis, in *United States v. Davis*, 79 M.J. 329, 330-31 (C.A.A.F. 2020), defense counsel responded in the negative to the military judge's questions about whether there were any objections to the proposed findings instructions and/or whether there were any other further requested instructions. Rejecting an R.C.M. 920(f) forfeiture argument, the CAAF held that the appellant "did not just fail to object" when his counsel affirmatively declined to object to the military judge's instructions and offered no additional instructions. *Id.* at 331. To the contrary, the CAAF held that "by 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of the offense." *Id. See also United States v. Rich*, 79 M.J. 472, 476-77 (C.A.A.F. 2020) (same).

Finally, counsel must make trial objections with specificity. *See* Military Rule of Evidence [Mil. R. Evid.] 103(a)(1) (stating a party may only claim error in a ruling to admit evidence if the party timely objects and states the specific ground); *United States v. Knapp,* 73 M.J. 33, 36 (C.A.A.F. 2014) ("A timely and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal.") (cleaned up); *United States v. Eggen,* 51 M.J. 159, 163 (C.A.A.F. 1999) ("[I]t seems clear that

trial defense counsel did not object to the testimony of [an expert witness] on the basis that he had exceeded the area of his expertise. As such, that issue was waived for appeal.").

3. Analysis

In this case, when defense counsel indicated that she had no objection to the military judge's "alternate" sentencing worksheet, she "expressly and unequivocally" acquiesced to the military judge's proposed manner of addressing the variance in the panel's findings. Because that "alternate" worksheet did not provide the panel members with the option to indicate which images formed the basis for the panel's findings, appellant has affirmatively waived any ambiguity or double jeopardy challenge to the guilty verdicts returned in Specifications 1 and 3 of Charge IV. *Cf. Rich*, 79 M.J. at 477; *Davis*, 79 M.J. at 332.

Moreover, the "variance" objections that defense counsel did raise were not specific enough to preserve any ambiguity or double jeopardy claims.[7] Although defense counsel used the word "variance" in her first objection, the basis of that objection was that the government should be held to an "all or nothing" standard wherein if the panel failed to prove every image alleged, they would be required to return not guilty verdicts. As this objection did not explicitly or implicitly refer to factual sufficiency, ambiguity, or double jeopardy, it was insufficient to preserve those issues for appeal. *See Knapp,* 73 M.J. at 36 ("A timely and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal.").

Likewise, although early in the Article 39(a) instruction discussion, defense counsel expressed some concern about the appellate court not being able to discern which images formed the basis for any guilty verdicts, she withdrew that objection when the military judge said he would take it up later with a more detailed worksheet if "variance comes into issue." And, again, when the military judge did in fact "take it up later," defense counsel affirmatively stated that she had no objection to his proposed "alternate" worksheet.

After the panel was dismissed and during trial counsel's sentencing argument, defense counsel objected to the government's reference to a specific image on the grounds that "the record is not clear which images he was convicted of and counsel is arguing facts he does not know." But again, since this objection focused on trial

[7] Indeed, it is also worth noting that appellate counsel also did not raise any such challenge to the findings. Rather, it was this court that identified and requested further supplemental briefing on this issue.

counsel's argument and the images the military judge could review during his deliberations, it failed to preserve any objection to the panel's findings based on ambiguity or double jeopardy. *Cf. United States v. Lloyd*, 69 M.J. 95, 100 (C.A.A.F. 2010) ("We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level."). Likewise, given that there was no prior objection on double jeopardy or ambiguity grounds, defense counsel's subsequent comment that she maintained her "objection to any variance at all" was too vague to sufficiently preserve any ambiguity or double jeopardy claims for appellate review.

Finally, and in any event, even if defense counsel's last two objections somehow put the military judge on notice that there was a potential double jeopardy or ambiguity issue with the panel's findings, since the military judge already dismissed the panel, both objections were untimely. *Knapp,* 73 M.J. at 36 ("A *timely* and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal.") (emphasis added).

In sum, because appellant affirmatively waived any ambiguity or double jeopardy challenge to the findings on Specifications 1 and 3 of Charge IV, both should be affirmed.[8]

C. Motion to Suppress

Having voted to affirm Specification 1 of Charge IV, I briefly address the search warrant that formed the basis for the images charged in that specification. In sum, I would affirm the denial of the motion to suppress, although for different reasons than those found by the military judge. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) ("[W]e affirm a military judge's ruling when 'the military judge reached the correct result, albeit for the wrong reason.'") (quoting *United States v. Bess*, 80 M.J. 1, 12 (C.A.A.F. 2020) (citation omitted)).

First, the military judge failed to give the required deference to the military magistrate's findings in support of the warrant. When reviewing a military magistrate's finding of probable cause to issue a warrant, we inquire whether the

[8] Under the version of Article 66 of the UCMJ in effect at the time of trial, this court retains discretion to "treat a waived or forfeited claim as if it had been preserved at trial" in order to determine if the findings 'should be approved.'" *United States v. Conley*, 78 M.J. 747, 750 (Army Ct. Crim. App. 2017) (citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)); Article 66(d), UCMJ. For all of the reasons set forth above, such relief is not appropriate in this case.

magistrate had a "substantial basis for concluding that probable cause existed." *United States v. Hernandez*, 81 M.J. 432, 437 (C.A.A.F. 2021) (citing *United States v. Rodgers*, 67 M.J. 162, 164-65 (C.A.A.F. 2009)). Given the totality of the affidavit, and after giving the required "great deference" to his findings, the military magistrate in this case did not err in making a "practical, common-sense decision" that there was a "fair probability" that appellant's phone *might* contain images of child pornography. *Id.* at 438 (cleaned up).

Alternatively, under the "good faith" exception codified in M.R.E. 311(c) and interpreted by the CAAF, even if the images that formed the basis for Specification 1 were obtained pursuant to an invalid search warrant, suppression is not warranted because the law enforcement officials who conducted the search acted "in reasonable reliance on a warrant issued by a neutral and detached magistrate." *Id.* at 440, (citing *United States v. Leon*, 468 U.S. 897, 918 (1984)). *See also United States v. White*, 80 M.J. 322, 329 (C.A.A.F. 2020); *United States v. Smith*, 77 M.J. 631, 637 (Army Ct. Crim. App. 2018).

D. Conclusion

For all of the reasons set forth above, I respectfully disagree with my colleagues and would also affirm the finding of guilty to Specification 1 of Charge IV.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court