UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 CAMERON M. MAYS
United States Army, Appellant

ARMY 20200623

Headquarters, Fort Drum
Theresa L. Raymond and William C. Ramsey, Military Judges
Colonel Robert C. Insani, Staff Judge Advocate

For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Rachel P. Gordienko, JA; Captain Joseph A. Seaton, Jr., JA (on brief); Major Christian E. DeLuke, JA; Major Rachel P. Gordienko, JA; Captain Joseph A. Seaton, Jr., JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Brett A. Cramer, JA; Lieutenant Colonel Matthew T. Grady, JA (on brief).

7 September 2022

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

FLEMING, Senior Judge:

Appellant argues his convictions for attempted indecent viewing are legally and factually insufficient because the government only presented evidence that he used his cellphone to attempt to view naked people. For the reasons below, we disagree.[1]

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[1] We have given full and fair consideration to the issues personally raised by appellant before this Court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and determine they warrant neither discussion nor relief.

Appellant was convicted, consistent with his pleas, of one specification of false official statement, one specification of wrongful use of a controlled substance, one specification of wrongful possession of a controlled substance, one specification of wrongful introduction of a controlled substance, one specification of larceny, and one specification of assault upon a person in the execution of law enforcement duties, in violation of Articles 107, 112a, 121, 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, 921, 928 [UCMJ].

Contrary to his pleas, appellant was also convicted by a military judge of two specifications of attempted indecent viewing, one specification of insubordinate conduct toward a non-commissioned officer, one specification of sexual assault, one specification of assault upon a commissioned officer, and one specification of assault upon a non-commissioned officer, in violation of Articles 80, 91, 120, 128 UCMJ, 10 U.S.C. §§ 880, 891, 920, 928.

The military judge sentenced appellant to a dishonorable discharge, confinement for forty-eight months, and reduction to the grade of E-1 which the convening authority approved.

BACKGROUND

In November 2018, appellant deployed with his unit to Kandahar Airfield, Afghanistan. While deployed, appellant and other soldiers lived in housing known as "mods," which included bathroom units. These bathrooms were rectangular in shape and included four sinks and three shower stalls, each approximately six feet tall, in a straight row along a single wall.

On 8 November 2018, a soldier brushing his teeth at the sink in one of the bathroom units observed appellant standing between the last sink and first shower stall. The first shower stall was occupied. The soldier brushing his teeth saw appellant holding his cellphone in the air. The soldier testified he initially thought appellant was attempting to get a better cellphone signal but then recalled there was no cellphone signal available in their deployed location. Upon a closer look, the soldier saw appellant had the camera application open on his cellphone, was standing on his tiptoes, and holding his cellphone at a downward angle oriented over the shower stall divider into the occupied shower stall. The soldier brushing his teeth then confronted appellant regarding the situation. Appellant quickly washed his hands and departed the bathroom. The soldier showering did not observe appellant or his cellphone, but testified at trial that he was showering naked and heard the other soldier confront appellant, heard water run in the sink, and the bathroom door open and close.

On 9 November 2018, a different soldier was showering and observed a cellphone extend over his shower stall divider. The soldier immediately shouted

"'what the [expletive]' and other curse words." The soldier grabbed his towel, stepped out of his stall, and saw appellant standing in the adjacent shower with the curtain partially open. The soldier then left to report the incident, asking another soldier to keep appellant from leaving the bathroom. Appellant, however, immediately departed the bathroom.

The next day, appellant's commander seized appellant's cellphone. A subsequent search of the cellphone revealed water damage. The government did not find any digital images or videos of the showering soldiers on appellant's cellphone. Either he never made such images or videos, or in the alternative, he made such images or videos but the water damage prevented a thorough search of his cellphone.

LAW AND DISCUSSION

This court reviews questions of legal and factual sufficiency de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*" *United States v. Rosario,* 76 M.J. 114, 117 (C.A.A.F. 2017) (citations and internal quotation marks omitted) (emphasis in original). This court applies "neither a presumption of innocence nor a presumption of guilt" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington,* 57 M.J. at 399. "The test for legal sufficiency is whether, 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." *Rosario*, 76 M.J.at 117 (quoting *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014)).

The elements of attempted indecent viewing are: (1) the accused did a certain act; (2) the act was done with the specific intent to commit indecent viewing; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of indecent viewing. UCMJ art. 80, 120c. The elements of indecent viewing are: (1) that the accused knowingly and wrongfully viewed the private area of another person; (2) that said viewing was without the other person's consent; and (3) that said viewing took place under circumstances in which the other person had a reasonable expectation of privacy. UCMJ art. 120c(a)(1).

Appellant argues the evidence does not show he attempted to "view" the private areas of either victim with his own eyes. Appellant contends the evidence only shows, at most, that he attempted to view or make a visual image or digital recording; an act not proscribed by Article 120c(a)(1), UCMJ. In support of his argument appellant cites *United States v. Quick,* arguing that just as the specification in *Quick* failed to state an offense for indecent viewing where the viewing was of a

visual recording, the specifications of which appellant was convicted are similarly legally insufficient because the evidence did not show appellant attempting to directly view the private area of either victim. *Quick,* 74 M.J. 517 (N.M. Ct. Crim. App 2014). Appellant also cites *United States v. Williams*, drawing a parallel between the attempted indecent viewing in the instant case and the legally insufficient conviction for indecent exposure in *Williams* based on a mere display of a digital image of genitalia. *Williams*, 75 M.J. 663 (Army Ct. Crim. App. 2016).

Williams and *Quick* are both distinguishable from appellant's case, however, as each case discusses the display or viewing of a previously created photograph or recording. Here, there is no evidence that appellant ever captured a photograph or created a recording, as neither were found when his cellphone was searched. Instead, appellant was twice observed holding his cellphone in a manner that the camera was oriented towards other soldiers who were naked in a private shower stall. Rather than a subsequent viewing of a photograph or recording, the evidence indicates appellant attempted a contemporaneous viewing of his victims through the camera of his cellphone.

Appellant concedes that the use of a device, such as a mirror or binoculars, to "indirectly" view a person's private area would constitute an indecent viewing, but argues that if the viewing is accomplished by a digital device, such as a cellphone camera, the viewing is not of a person's private area, as defined in Article 120c(d)(2), UCMJ, but instead is a viewing of pixels on the cellphone screen created by the digital device that resemble the person's private area. This is a distinction without a difference.

Nothing in the language of Article 120c(1) requires the direct viewing of the private area of another with the unassisted eyes of an accused. Article 120c(1) proscribes contemporaneous viewing of the private area of another, both direct and indirect, under circumstances in which that individual has a reasonable expectation of privacy. *See United States v. Shea*, ACM S32220, 2015 CCA LEXIS 235 (A.F. Ct. Crim. App. 4 Jun. 2015) (Op. Ct. Unpub.). By appellant's argument, an individual attempting to use the assistance of a cellphone camera to wrongfully view (but not photograph or record) the private area of another could not be convicted of attempted indecent viewing. We see this as a plainly absurd result and contrary to the statute's intent.

On two separate occasions appellant positioned his cellphone in a manner that the camera was oriented towards an individual showering naked in a closed private bathroom stall. Appellant's acts facilitated the viewing of the naked individual in the shower stall through the camera lens of the cellphone, regardless of whether he was also capturing a photograph or recording, or merely using the camera and screen as a technologically advanced mirror. His acts amounted to more than mere preparation.

As appellant was convicted of two *attempted* indecent viewings, it is immaterial whether he ever actually observed the private area of either soldier before being stopped on both occasions. Positioning a cellphone camera in a manner to facilitate the viewing of a naked soldier, otherwise concealed by a divider, is an overt act amounting to more than mere preparation that tends to effectuate an indecent viewing of that naked soldier's private area. We find appellant's convictions for attempted indecent viewing both legally and factually sufficient.

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Judge HAYES and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court