

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAIRNS, BROWN, and VOWELL
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant JOSEPH R. PASADAVA, JR.
United States Army, Appellant

ARMY 9801741

United States Army Intelligence Center and Fort Huachuca
F. D. Clervi, Military Judge

For Appellant: Captain Arun J. Thomas, JA (argued); Colonel Adele H. Odegard, JA; Major Jonathan F. Potter, JA; Captain Donald P. Chisholm, JA (on brief); Lieutenant Colonel David A. Mayfield, JA; Major Mary M. McCord, JA.

For Appellee: Captain Arthur L. Rabin, JA (argued); Lieutenant Colonel Edith M. Rob, JA; Major Anthony P. Nicastro, JA (on brief).

23 May 2001

MEMORANDUM OPINION ON RECONSIDERATION

BROWN, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of committing indecent acts upon the body of a female under sixteen years of age¹ (four specifications) in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 [hereinafter UCMJ], and of unlawfully and knowingly receiving visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a), as incorporated under Article 134,

¹ Pursuant to his pleas, the appellant was provident to violations of the lesser included offense, indecent acts with another, with respect to three specifications involving the same victim, in violation of Article 134, UCMJ. After the providence inquiry, the government successfully proved the charged, greater offenses with that victim.

UCMJ. The military judge sentenced the appellant to a bad-conduct discharge, forfeiture of all pay and allowances, reduction to Private E1, and confinement for four years. In otherwise approving the adjudged sentence, the convening authority disapproved the adjudged forfeitures and waived statutory forfeitures for a period of six months.² See UCMJ art. 58b(b).

Pursuant to our review under Article 66, UCMJ, we have considered the record of trial, the briefs submitted by the parties, the matters personally raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and oral argument on the appellant's three assignments of error.

In his first and second assignments of error, the appellant alleges that the evidence adduced at trial is legally and factually insufficient to sustain his conviction as to the knowing receipt of visual depictions of minors engaging in sexually explicit conduct (Specification 5 of the Charge). The appellant contends that the government failed to prove: (1) that he *knowingly* received the visual depictions, and (2) that the visual depictions on his computer files "involve[d] the use of a minor," as required by 18 U.S.C. § 2252(a). In his third assignment of error, the appellant alleges that the military judge applied the wrong statute in convicting the appellant of Specification 5 of the Charge. We find no merit in the three assigned errors or in the *Grostefon* matters.

BACKGROUND

Three indecent act offenses involved MC, a then twelve-year-old friend of the appellant's younger daughter. The appellant's older, fourteen-year-old daughter, DP, was the victim of one indecent act offense.

The appellant's penchant for sexually explicit material, including material involving minors, came to light during the investigation of MC's molestation complaint by the Army Criminal Investigation Command [hereinafter CID]. In two sworn statements, each obtained after a proper rights advisement and waiver, the appellant provided many details of his visits to sexually oriented chat rooms on the Internet. Both statements were admitted into evidence without objection.

² To the extent that the action purports to waive automatic forfeitures beyond the six-month limitation imposed by Article 58b, UCMJ (i.e., from 1 July 1999 until 2 January 2000—a period of six months, two days), we presume that the Defense Finance and Accounting Service will adhere to the authorized maximum waiver.

In his sworn statements, the appellant revealed that he participated in sex chat rooms on the Internet and received adult and child pornography³ from individuals with whom he chatted: “I started out getting adult pornographic pictures, then people started sending me pictures of kids having sex with adults.” He admitted that he “like[d] to look at the pictures” of children having sex with adults. He found the pictures to be “interesting . . . so [he] continued to receive them.” The appellant indicated that one method he used to obtain child pornography was to indicate to others in these chat rooms that he was “a girl and they sen[t] me pictures of other little girls.” As an active participant in the sex chat rooms, the appellant received child pornography from persons “all over the United States and around the world.” He admitted that “[s]ome of the pictures came from [DP],” but she did not “sen[d] them to [him].” The appellant found the pictures on DP’s computer disks. He stated that his pictures included “young girls and guys,” “[f]rom babies all the way to adults.” The appellant acknowledged that they were all nude or in sexually explicit positions.

The appellant stated that he forwarded, via the Internet, some child pornography to others outside the state of Arizona. In providing more detail, he described pictures of “a 5 year old sucking the penis of, say a man about 20 to 40 years old” and of “little girls having vaginal intercourse with other kids and men.”

Elsewhere in his sworn statements, the appellant stated that he began “masturbating [him]self while on the [I]nternet and looking at these pictures.” The appellant answered affirmatively when CID asked whether he sexually touched his daughter and MC after being on the Internet and looking at child pornography.⁴ Lastly, he revealed to CID that he saved all of these pictures onto zip disks.

³ As a convenience to the reader, we will use the shorter, less artful term “child pornography” in place of the statutory language: “visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct.” 18 U.S.C. § 2252(a)(2)(A). We are mindful that a conviction under 18 U.S.C. § 2252(a) requires proof of every element of the offense beyond a reasonable doubt. Nevertheless, in the appellant’s sworn statements and at trial, the appellant, CID, and others often used the shorthand term, child pornography, in place of the statutory terminology.

⁴ At one point in these statements, the appellant stated that when looking at pictures of children in sexually explicit positions, he felt “terrible” because “[he would] have thoughts of sex.” At other points, while admitting to entertaining ideations of sex with a child, he denied that child pornography sexually stimulated him, and he characterized his interest as “just curious as to what it would feel like.”

Regarding the child pornography offense, beyond the admission of the appellant's two sworn statements, the presentation of the government's case was careless and disjointed, at best.

At trial, CID Special Agent (SA) Griffin testified about the appellant's sworn statements and the subsequent consensual search of the appellant's home and seizure of computer equipment therefrom. Special Agent Griffin also described his technical efforts to preserve the integrity of the contents of the computer hard drive, floppy disks, and zip disks.⁵ No child pornography was found on the appellant's computer hard drive. The zip disks yielded well over 2,000 pornographic pictures. It is unclear from SA Griffin's testimony how many of them were child pornographic images. According to SA Griffin, however, the pictures were sorted into directories on the disks based on "whatever activity was in the picture." For example, SA Griffin testified: "[T]here might have been one section that was nothing but anal. There might have been one section that was nothing but infants. There might have been one section that was nothing but middle-aged teens." Special Agent Griffin testified that he and other agents used the Tanner⁶ scale to identify the ages of the children—between approximately eighteen months and twelve years old—portrayed in the sexually explicit pictures.

On cross-examination, the trial defense counsel questioned SA Griffin on the various ways one can "receive" a picture file via the Internet. At the conclusion of the cross-examination, SA Griffin conceded that he did not know when or how the pictures were received or how the pictures were originally saved. He only knew what was on the zip disks at the time he viewed the images.

⁵ Special Agent Griffin testified that he used several other agents to help collect and preserve the evidence. First, SA Griffin wanted to ensure that the computer was not "booby trapped," presumably to ensure that any attempt to disconnect or access the computer would not cause deletion or other corruption of the files. Another agent "cloned" each floppy and zip disk in order to make an exact replica of the complete binary code of each disk, including "deleted" files. The defense did not question or challenge SA Griffin's technical efforts in any manner.

⁶ The Tanner scale or Tanner staging is the common term for Sexual Maturity Rating or SMR, which was developed by Doctor James M. Tanner, M.D., Ph.D. Pediatricians and others use the Tanner scale to gauge human sexual development.

On redirect and recross-examination, SA Griffin testified that all the pictures he viewed from the zip disks were manually saved by the computer user. None were saved automatically as temporary Internet files with a ".tif" file extension. Oddly, the government never asked SA Griffin to identify hard copy reproductions of any of the images that he viewed from the appellant's zip disks.

The government next called Doctor (Dr.) Knowles whom the defense stipulated to be an expert in the field of pediatrics. He initially testified about his prior training in the "Turner [sic] Classification," which enables one to distinguish adults from children and infants. Through the testimony of Dr. Knowles, the government first introduced Prosecution Exhibit 5 for identification, which contained twenty-one photographic images. Doctor Knowles testified that he received this set of pictures from government counsel early that same morning and that he reviewed them prior to trial. At that point, the defense stipulated that Prosecution Exhibit 5 for identification contained "pictures of minors engaging in sexually explicit acts, as defined by the statute." Despite this stipulation, the government prompted Dr. Knowles to render his opinion as to the ages of the individuals in selected pictures. In each case, Dr. Knowles identified the children in the pictures as being between approximately two and fourteen years old. In some instances, he described the sexual acts in which the children were engaged.

The defense declined to cross-examine Dr. Knowles. The trial counsel then moved the admission of Prosecution Exhibit 5 for identification into evidence. The military judge asked defense counsel if they had any objection. Defense counsel, after conferring with the appellant, stated, "No objection, Your Honor." Thereafter, the military judge admitted the exhibit into evidence as Prosecution Exhibit 5.

The government rested. After the appellant conferred with his counsel, the defense also rested without presenting any evidence.

In closing argument, the government attempted to tie together the evidence relating to the child pornography specification. While arguing many inferences, the government relied heavily on the appellant's two sworn confessions. In its closing argument, the defense argued that the government presented no evidence to link Prosecution Exhibit 5 to the files stored on the appellant's zip disks. Additionally, the defense urged that the government had not established *knowing* receipt of child pornography because there was no evidence that the appellant knew the contents of any file or e-mail attachment before he opened it. In so doing, the defense distinguished *possession* of child pornography from the charged offense of *knowing receipt* of child pornography. In its rebuttal argument, the government realized—perhaps for the first time—that they had failed to tie the pictures in Prosecution Exhibit 5 directly to the appellant. The government chose to reemphasize in rebuttal

the significance of the appellant's two sworn confessions to prove the child pornography specification.

LAW

Under our Article 66(c), UCMJ, mandate, this court “may affirm only such findings of guilty . . . as [we find] correct in law and fact and detemine[], on the basis of the entire record, should be approved.”

The test for legal sufficiency of the evidence 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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, “this [c]ourt is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991) (citations omitted). 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,” this court is itself convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

To convict the appellant of the child pornography specification, the government was required to prove, beyond a reasonable doubt, the following elements: (1) that the appellant knowingly received⁷ a visual depiction; (2) that such visual depiction had been transported in interstate or foreign commerce, by any means including by computer; (3) that the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct; and (4) that such visual depiction is of such conduct. *See* 18 U.S.C. § 2252(a)(2) (1994).⁸ The term

⁷ Although 18 U.S.C. § 2252(a)(2) prohibits both the knowing receipt and distribution of child pornography, the appellant was charged solely with the knowing receipt of such materials.

⁸ The appellant's charge sheet erroneously cited to a 1998 version of 18 U.S.C. § 2252(a); however, the 1998 amendments were not yet in effect at the time the appellant committed the offense. The appellant should have been charged with violating the 1996 version of § 2252(a). This error was harmless in that no changes were made to 18 U.S.C. § 2252(a)(2) in the 1998 amendments to the statute. *See* 18 U.S.C.A. § 2252, Historical and Statutory Notes (West. Supp. 2000).

“knowingly,” as used in Section 2252(a)(2) not only applies to the term “received,” but also extends to “the sexually explicit nature of the material and to the age of the performers.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Thus, the government had to prove that the appellant knew he was receiving visual depictions of minors engaged in sexually explicit conduct.

Additionally, the statute under which the appellant was charged required the use of *actual* minors in the production of the visual depictions, and not images that had been computer-created or photographically manipulated to look like minors. *See generally United States v. Nolan*, 818 F.2d 1015 (1st Cir. 1987).

DISCUSSION

Legal and Factual Sufficiency

Fortunately for the government, the law does not require us to assess how well or how poorly the government tried its case against the appellant. Whether the government painstakingly and methodically tried to meet its burden or did so only through a series of stumbling missteps, our standards for determining legal and factual sufficiency are the same.

1. Admissibility of Prosecution Exhibit 5

At the outset, we agree with the appellant that the government presented no evidence at trial to link the twenty-one images in Prosecution Exhibit 5 to any files contained on the zip disks seized from the appellant or to any images viewed by SA Griffin. However, the trial defense counsel’s failure to object to the relevance of Prosecution Exhibit 5 waives the issue absent plain error. *See* Military Rules of Evidence 402, 103(d) [hereinafter Mil. R. Evid.]. We are mindful of why the defense would choose not to object to the introduction of Prosecution Exhibit 5 on relevance grounds when such relevance objection would alert the otherwise oblivious trial counsel to his failure to lay a proper foundation for admission of the evidence. Nevertheless, this issue is somewhat of a “red herring” because the introduction of the images contained in Prosecution Exhibit 5 was not essential for the government to meet its burden of proof on the child pornography specification. As we will explain in more detail below, SA Griffin’s testimony, coupled with the appellant’s confessions, provided overwhelming evidence to support the child pornography conviction. Therefore, the admission of Prosecution Exhibit 5 did not materially prejudice a substantial right of the accused and did not rise to the level of plain error. *See* UCMJ art 59(a); *United States v. Powell*, 49 M.J. 460, 463-65 (1998). The admission and consideration of Prosecution Exhibit 5 by the military judge was harmless error. Because the government never established the relevance

of Prosecution Exhibit 5, we will not consider that exhibit in conducting our legal and factual sufficiency determination.

2. Corroboration of the Appellant's Confessions

In considering the appellant's legal and factual sufficiency challenge, we apply a two-step approach. First, we must determine whether, based on the evidence properly admitted at trial, the appellant's admissions or confessions were adequately corroborated. *See* Mil. R. Evid. 304(g). Second, we must determine whether the evidence properly admitted at trial, as a whole, is legally and factually sufficient to sustain the conviction.

The purpose of the rule requiring corroboration of confessions by independent evidence is to establish the trustworthiness or reliability of the confession so as to prevent convictions based on false confessions. *See United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987). By its own terms, the rule requires that the independent evidence merely raise "an inference of the truth of some but not all of the essential facts admitted." Mil. R. Evid. 304(g). Hence, the corroborative evidence need not prove the charged offense beyond a reasonable doubt, "as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that the defendant is guilty." *Smith v. United States*, 348 U.S. 147, 156 (1954); *see also United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988). The quantum of evidence required has been described as "not great," and even "very slight." *Melvin*, 26 M.J. at 146 (citations omitted); *see also Yeoman*, 25 M.J. at 4.

The testimony of SA Griffin adequately corroborated the appellant's admission that he categorized and saved to zip disks pornographic images, including child pornography. Special Agent Griffin explained, consistent with the appellant's admission, how the appellant likely received these images as computer files via the Internet. This is consistent with the appellant's admission that he tacitly solicited some of these images over the Internet by identifying himself as a little girl to others in the sex chat rooms. Special Agent Griffin also testified that he viewed the images, some of which depicted minors engaging in sexually explicit conduct. These images were consistent with the descriptions offered by the appellant in his statements. Finally, SA Griffin testified that he and other agents used the Tanner aging scale to identify sexually explicit pictures involving children between approximately eighteen months and twelve years old. As such, SA Griffin adequately corroborated both the sexually explicit nature of the material and the age of the performers, as required by *X-Citement Video*. Although not raised as an assignment of error, we hold that the appellant's two sworn statements were properly admitted and can be considered in analyzing legal and factual sufficiency.

3. Knowing Receipt of Child Pornography

Returning to the first assigned error, the appellant argues that the government failed to prove *knowing* receipt of child pornography over the Internet for two essential reasons. First, the government introduced no evidence that the appellant solicited the child pornography that he received and subsequently possessed. Second, the evidence only showed that the appellant received the child pornography in the form of computer files that were nondescript—the electronic equivalent of mail received in a plain brown wrapper. The appellant argues that he learned of the pornographic nature of the images only after he opened the files and, by then, the receipt was already complete—one cannot *knowingly* receive what one has already *unknowingly* received.

The appellant's argument has a certain appeal because, in effect, he underscores the government's failure to introduce any of the appellant's e-mail or other Internet communications, the names of any Internet sites featuring child pornography that the appellant may have visited, or the sexually explicit file names that originally may have been attached to any child pornography file.

Contrary to the appellant's assertions, however, we find as fact that the appellant knew *before he opened his e-mail and viewed the images*, that some of the e-mails he received contained pictures of child pornography. He may not have known specifically what children were in the pictures or what sexual acts they were performing, but he knew the general nature of the contents of the e-mail attachments⁹ due to a pattern or course of conduct between him and the persons with whom he chatted in the sex chat rooms. The evidence clearly indicates that the appellant was interested in and wanted to receive child pornography; that he used a method to obtain child pornography over the Internet by indicating to others in the sex chat rooms that he was a "girl"; and that he knowingly received and continued to receive child pornography from those with whom he chatted. *See generally United States v. Fabiano*, 169 F.3d 1299, 1305 (10th Cir. 1999), *cert. denied*, 528 U.S. 852

⁹ *See United States v. Brown*, 862 F.2d 1033, 1037-38 (3d Cir. 1988) (holding that proof that appellant "knew the *specific contents* of an item of child pornography" is not required by the statute; appellant knowingly received child pornography even though the child pornography tape he requested was different from the child pornography tape he received).

(1999).¹⁰ This is not the case of a person who, having never solicited or expected to receive child pornography in his lifetime, opened an e-mail one day and was completely shocked that the e-mail contained child pornography. While it is conceivable (but highly unlikely) that the appellant may not have known what he was receiving the first time he opened a file attachment containing child pornography in response to a sex chat room visit, he certainly knew what he was receiving during the second and subsequent visits. We also note that the appellant admitted—and SA Griffin confirmed—that the appellant used directories to save and categorize the child pornography according to the subject matter or theme of the pictures.¹¹

4. Depictions Involving Use of Actual Minors

In the second assigned error, the appellant asserts that the government failed to prove beyond a reasonable doubt that any images on the appellant's zip disks were visual depictions that involved the use of an actual minor. The appellant first argues, and we have already agreed, that the government failed to show that the pictures in Prosecution Exhibit 5 were the same pictures obtained from the appellant's computer zip disks. Second, the appellant argues that the government failed to prove that the persons in the pictures were real children.

At trial, the appellant did not assert, or even suggest, that the images saved to his zip disks did not depict real children. As such, the appellant bears a difficult burden to challenge, for the first time on appeal, any reasonable inference drawn from the admissible evidence. *See generally United States v. Anderson*, No. 97-

¹⁰ In *Fabiano*, 169 F.3d at 1305, the court held that the appellant had “prior knowledge of the content of the visual depictions he received” because: (1) he had been “a regular visitor to the Preteen chat room for several months before he received [the child pornography]”; (2) he was “present in the Preteen chat room when graphic discussion took place regarding the content of material sent and traded in the Preteen chat room”; and (3) he “offered to trade in the Preteen chat room and asked to be included in mailings sent by other participants.”

¹¹ *See United States v. Murray*, 52 M.J. 423, 425 (2000) (the “conscious segregation of the downloaded files [containing pictures of minors engaging in sexually explicit conduct] into a separate directory . . . is sufficient to demonstrate his knowing receipt of the material”; the evidence at trial indicated that appellant downloaded files “with names strongly suggestive of their explicit child-sex content”).

10498, 1999 U.S. App. LEXIS 15132, at *17 (9th Cir. July 6, 1999) (declining to consider the appellant's assertion that "there was no evidence that the images . . . portrayed real children" where such argument was not raised at trial). Notwithstanding the appellant's right to challenge legal and factual sufficiency in this contested case, he is not entitled to try his case differently, de novo, before this court. Nothing in the appellant's two sworn statements or in SA Griffin's testimony indicated that the e-mail attachments that the appellant received via the Internet depicted anything other than actual children engaged in sexually explicit acts. The military judge was permitted to make reasonable inferences from the evidence properly admitted at trial. Absent any evidence to the contrary, the military judge could reasonably infer that actual children were used in the production of the pictures found on the appellant's zip disks. *See Nolan*, 818 F.2d at 1017-18.

Considering all of the admissible evidence in the light most favorable to the government, the military judge could have found beyond a reasonable doubt that the appellant *knowingly* received visual depictions involving the use of *actual* minors engaging in sexually explicit conduct. Likewise, after weighing the admissible evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant *knowingly* received visual depictions involving the use of *actual* minors engaging in sexually explicit conduct.

Application of Correct Statute

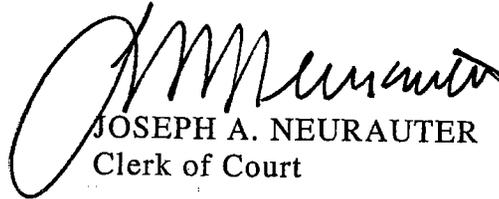
We dispose of the appellant's final assignment of error—that the military judge applied the wrong statute in convicting the appellant of the child pornography specification—in summary fashion. The charge sheet clearly reflects that the appellant was charged with violating 18 U.S.C. § 2252(a) (emphasis added). The appellant now alleges that the military judge convicted the appellant under a closely related statute—18 U.S.C. § 2252A (emphasis added)—which makes criminal the knowing receipt of pornographic images, even images that are *computer generated* or that have been *modified or altered to appear to be minors*. Simply put, we presume that the military judge followed the law relevant to the charged offense. *See United States v. Robbins*, 52 M.J. 455, 457 (2000) (a military judge "is presumed to know the law and apply it correctly") (citing *United States v. Raya*, 45 M.J. 251, 253 (1996)), *cert. denied*, 121 S. Ct. 177 (2000). Nothing in the record of trial evidences that the military judge in this case did otherwise.

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The findings of guilty and the sentence are affirmed.

Senior Judge CAIRNS and Judge VOWELL concur.

FOR THE COURT:



JOSEPH A. NEURAUTER
Clerk of Court