IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.D. HARTY **R.G. KELLY** **W.M. FREDERICK**

UNITED STATES

v.

Shawn A. BOGGS
Sergeant (E-5), U.S. Marine Corps

NMCCA 200600984 Decided 20 June 2007

Sentence adjudged 16 November 2005. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, New River Air Station, Jacksonville, NC.

LT BRIAN MIZER, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

In a case involving mixed pleas, the appellant was convicted by a military judge sitting as a general court-martial, of attempted communication of indecent language to a minor, attempted carnal knowledge, attempt to persuade or entice a minor to engage in sexual activity contrary to 18 U.S.C. § 2422(b), and knowing possession of child pornography contrary to 18 U.S.C. § 2252A(a)(5)(B), in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. His sentence included a dishonorable discharge, confinement for 8 years, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged but suspended all confinement in excess of 5 years for a period of 2 years from the date of the CA's action.

We have reviewed the record of trial, the appellant's three assignments of error,[1] the Government's response, and the

[1] I. WHETHER APPELLANT VOLUNTARILY ABANDONED HIS ATTEMPT TO COMMIT CARNAL KNOWLEDGE WITH A CHILD UNDER THE AGE OF SIXTEEN?

appellant's reply. We conclude that the sentence to 8 years confinement,[2] dishonorable discharge and reduction to pay grade E-1 is inappropriately severe for this appellant and his offenses. We will take corrective action in our decretal paragraph, limiting confinement to 3 years. Otherwise, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c) UCMJ.

Background

On 26 February 2005, the appellant was stationed at Marine Corps Air Station (MCAS), New River, North Carolina. He was living in Maysville, North Carolina, with his active duty wife (deployed to Iraq at the time of the offenses) and stepson. On that date, the appellant logged onto a Yahoo! chat room and initiated a conversation with "Lacie_Luvs_Chris92" (hereinafter Lacie).[3] During the conversation, the appellant viewed "Lacie's" profile.[4] It depicted a young girl, her hair in two long braids who, according to the appellant, looked approximately 10 or 11 years old. Prosecution Exhibit 6 at 2. Lacie told the appellant she was 13 years old. Despite being told Lacie's age, the appellant continued the computer dialogue with her, and the conversation evolved into discussions about sex. The appellant also learned that Lacie was alone in Raleigh, North Carolina, and he offered to travel there to meet her. The appellant gave Lacie his telephone number and the two talked for the first time on the telephone at approximately 2031 on 26 February 2005. The call lasted 14 minutes. The appellant arranged to meet Lacie in Raleigh the next day.

Lacie called the appellant at approximately 1057 on 27 February 2005, and confirmed she wanted to meet him in Raleigh

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II. WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO PROVE APPELLANT KNOWINGLY POSSESSED CHILD PORNOGRAPHY IN VIOLATION OF 18 U.S.C. § 2252A(a)(2)(A)?

III. WHETHER APPELLANT'S SENTENCE TO CONFINEMENT FOR FIVE [SIC] YEARS AND A DISHONORABLE DISHCARGE IS INAPPROPRIATELY SEVERE FOR APPELLANT'S OFFENSES?

[2] The appellant's counsel incorrectly states the appellant received a sentence including confinement for five years. The military judge sentenced the appellant, *inter alia*, to confinement for eight years. The CA, in an act of clemency, suspended all confinement in excess of five years from the date of his action. General Court-Martial Convening Authority Action of 1 Jun 2006.

[3] Chat rooms are online meeting places for Internet users, typically accessible either in an open forum where other users can read the messages as they are typed, or in a private exchange with an individual user. *United States v. Johnson*, 376 F.3d 689, 691 (7th Cir. 2004).

[4] "Lacie" was actually Virginia Delany (a.k.a. Nikki), owner and director of U.S. Cyberwatch, a nonprofit organization focused on eliminating child predators' internet access to children. The organization works with state and federal law enforcement agencies across the United States on child predator cases, and works to raise public awareness about the dangers that children face online. Record at 55, 59.

that day. This call lasted 3 minutes. Lacie placed another call to the appellant that afternoon at approximately 1430 and reached the appellant's answering machine. Lacie called and reached the appellant at 1500. During the call, the appellant indicated he was on his way to meet her and was only one hour away from Raleigh. The telephone call lasted approximately 8 minutes.

Lacie called the appellant for the fifth time at 1600. The appellant told Lacie he was 20 minutes away from their designated rendezvous point in a Raleigh public park. The call ended at 1604 when the parties' connection failed. Lacie called the appellant back at 1613, and he informed her he was 5 to 6 miles away from the park. The telephone call was terminated at 1615. At 1624, the appellant made hotel reservations at the Raleigh-Holiday Inn North in Raleigh, North Carolina. Afterward, the appellant was unable to locate the non-existent rendezvous point and returned to his home in Maysville, North Carolina. The appellant cancelled his hotel reservation at 2030 that evening.

When he arrived home, the appellant found he had received a Yahoo! Message from Ms. Delaney informing him that she was acting as "Lacy_Luvs_Chris92" and that all of his actions with Lacie were recorded as evidence. The appellant initially responded to Ms. Delaney via e-mail, stating he had never been "out of [his] county today" and his communications with Lacie were a "bad joke" on his part because he knew "from the very beginning . . . this was not a legit [sic] call." PE 4 at 1. The appellant also requested that Nikki call him back. Ms. Delaney called the appellant that night, 27 February 2005. The appellant asked Ms. Delaney what he could say or do to keep U.S. Cyberwatch from reporting him to his command. PE 3 call seven at 2. The appellant's communications with Ms. Delany resulted in detailed statements outlining his activities with Lacie. The most incriminating statement was entitled "Child Predator Alert," in which the appellant wrote:

> Over the last two days i [sic] pursued, chatted, and spoke on the phone with who i [sic] believed to be a 13 year [old] girl. I then drove a round trip of 225 miles to meet and attempt to take her virginity. I talked with her about all types of things to include her sexuality and other various personal info. Once i [sic] realized she was home alone . . . I convinced her to meet me in a location near her home so that i [sic] could take her to a near by [sic] hotel and perform sexual acts with her. PE 4 at 2.[5]

The Naval Criminal Investigative Service (NCIS) was alerted to the appellant's activities by U.S. Cyberwatch and launched a criminal investigation. The appellant provided a statement to NCIS wherein he admitted looking at images of naked minors on the internet. He admitted that he sometimes accessed computer links

[5] We note that both pages of PE 4 are marked Page 1 of 2.

to access pictures of minors, specifically teenagers. He admitted accessing the links 15 times, and specifically looking for images of girls aged 14 through 20 years-old. He stated he did not like looking at prepubescent teenagers. The appellant stated, "I don't believe I ever purposely saved these pictures to my computer. I normally just clicked on the link, viewed the picture and then closed it." PE 6 at 4-5.

NCIS searched the appellant's residence, confiscating, among other things, a computer. Forensic analysis of the computer's hard drive by a Government expert revealed 31 images and 12 movies containing suspected child pornography. These images were located in a storage area of the computer retrievable only by forensic analysis, and could not be accessed by the operating system (Windows XL) loaded on the appellant's computer. The expert could not determine how or when the images were downloaded on the computer. He also indicated that images could be downloaded to a computer without being viewed. There was no other evidence of pornography retrieved from the residence. The appellant testified at trial that he had never seen the images found on his computer.[6]

A pediatrician examined the images contained on the computer's hard drive and testified that a total of 69 persons were depicted in the media. Of those, 14 were children who hadn't reached puberty. Fifteen were images of children less than 18 years-old and three of the 12 videos were duplicative in that they were identical to another saved video.

I. Factual and Legal Sufficiency

The appellant attacks his convictions of attempted carnal knowledge and knowing possession of child pornography on the basis that the facts are legally and factually insufficient to support a conviction of either of the charges. Appellant's Brief of 20 Sep 2006 at 5, 9. We will address each offense separately.[7]

A. Attempted Carnal Knowledge

In his first assignment of error, the appellant argues he voluntarily abandoned his plan to meet and have sexual intercourse with Lacie prior to their planned meeting; therefore, the facts are legally and factually insufficient to support the charge of attempted carnal knowledge. We find the appellant's argument unpersuasive and decline relief.

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[6] The appellant had his computer's operating system "wiped" in February 2006 to eliminate performance problems resulting from viruses and "pop-ups." Record at 226-27; Defense Exhibit A.

[7] The appellant pled not guilty to each of these offenses.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; s*ee also* Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562. Furthermore, this court, in its factfinding role, "may believe one part of the witness' testimony and disbelieve another." *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979)).

To obtain a conviction for a violation of attempt under Article 80, UCMJ, there must be proof that: (1) the accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and, (4) that the act apparently tended to effect the commission of the intended offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 4b. As charged here, carnal knowledge was the intended offense. To be found guilty of carnal knowledge under Article 120, UCMJ, there must be proof that: (1) the accused committed an act of sexual intercourse with a certain person; (2) the person was not the accused's spouse; and, (3) that at the time of the sexual intercourse, the person was under the age of 16. *Id*. at ¶ 45b(2).

The appellant concedes that he "had taken significant steps towards the commission of the crime of carnal knowledge." Appellant's Brief at 8. He argues, however, that he abandoned his attempt to meet Lacie and engage in carnal knowledge prior to determining that the designated rendezvous location was fictitious. Voluntary abandonment is a viable defense to attempt offenses if the accused voluntarily and completely abandons the crime solely because of the individual's sense that it was wrong, prior to completion of the crime. MCM, Part IV, ¶ 4c(4). The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. *Id. See also United States v. Rios*, 33 M.J. 436 (C.M.A. 1991); *United States v. Haney,* 39 M.J. 917 (N.M.C.M.R. 1994).

The appellant was in contact with Lacie until minutes before their planned rendezvous near an eagle statue in a Raleigh park. Lacie called the appellant at approximately 1600 on 27 February 2004, and he indicated he was 20 minutes from the park. PE 3 at call five. He told Lacie to be at the location at approximately 1620. *Id*. at 1-2.

The next call occurred at 1613. *Id*. at call six. The appellant told Lacie, "I should be getting off [interstate] 540 here in just a second." He had previously mentioned that once he exited I-540 he would be "only about 2 miles from [Lacie's] house".[8] *Id*.; PE 3 call five at 1. He indicated he should be at their designated rendezvous point in five minutes.

After hanging up with Lacie, at 1622 the appellant called directory assistance. DE C at 1. At 1623, he called the Holiday Inn North in Raleigh, North Carolina, and reserved a room with one king-sized bed. *Id*.; PE 12 at 1.

In his statement to NCIS, the appellant explained that when he was in the immediate area of the designated rendezvous point, he drove around for a few minutes looking for the park. When he couldn't find the park, he stopped at a gas station to ask for directions. When he was told that there was no park meeting the description Lacie provided, the appellant stated, "at that point I figured that some guy had played a joke on me and was laughing his ass of [sic] because he tricked me it [sic] into driving to Raleigh." PE 6 at 3.

At trial, the appellant's version of events changed. He testified he encountered heavy traffic in Raleigh and, unable to find the designated rendezvous point in the park, pulled into a gas station to ask directions. After receiving directions to another park in Raleigh, he returned to his car. He then received a telephone call from a friend, CT, who asked him what he was doing. Record at 202-04. Telephone records indicate the appellant received CT's telephone call at 1655. DE C at 1. The appellant wants us to believe it was this telephone call, received by the appellant 40 minutes after he told Lacie he was only minutes from their designated rendezvous point, 31 minutes after he made the hotel reservation, and only after he stopped at a gas station and asked for directions, that caused him to do some soul searching and abandon his plan to meet Lacie and return home. We find the appellant's version of the events as related at trial to be self-serving and wholly unconvincing.

The military judge considered the defense of voluntary abandonment as argued by civilian defense counsel and rejected that defense. We concur with the military judge. We have no doubt the appellant feels remorse for his actions. We do not,

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[8] The fictitious park was supposedly located one block from Lacie's house. Lacie and the appellant agreed to the meeting point during an e-mail exchange on 26 February 2005. PE 2 at 11.

however, believe the appellant's decision to abort his plan to meet Lacie was brought about by his soul-searching or any sudden onset of decency. Instead, the appellant was prevented from completing his plan to meet with, and have sex with, a 13-year-old girl only because both Lacie and the designated rendezvous point were fictitious. It was these factors, unanticipated when he set out on his 2-hour journey to Raleigh, that caused the appellant to change course and be unable to complete his intended crime, not the righting of his moral compass.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of attempted carnal knowledge beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

B. Knowing Possession of Child Pornography

The appellant next argues that the facts in this case are factually and legally insufficient to support a finding beyond a reasonable doubt that he knowingly possessed child pornography. In support of his argument, the appellant suggests that the "Kazaa" file sharing program, loaded on the appellant's home computer, was responsible for downloading and storing the files containing child pornography found on appellant's hard drive. The evidence supports a different conclusion.

The appellant was charged with violating Clause 3, Article 134, UCMJ, by knowingly possessing child pornography in violation of the Child Pornography Prevention Act of 1996 (CPPA). The CPPA penalizes individuals who knowingly possess "any book magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . . ." 18 U.S.C. § 2252A(a)(5)(B).

The appellant admitted to NCIS that he is "attracted to young girls" and actively searched the internet for pictures of girls aged 14 through 20 years-old. PE 6 at 4. He admitted that he purposely entered chat rooms containing links to pictures of minors, specifically teenagers, and that "[you] don't know what they look like until you **download the picture**." *Id*.(emphasis added). Further, the appellant admitted that some of the pictures he viewed were of prepubescent teenagers, post-pubescent teenagers, and other young girls who could have been over 18 years old who were in various states of undress. *Id*. Some

images were of girls with their breasts exposed, in others their vaginas were exposed and in some the girls were completely nude. *Id*.

The appellant's statements are corroborated by evidence found on his computer's hard drive. A computer forensics examiner from the Defense Computer Forensics Laboratory testified that he examined the computer retrieved from the appellant's residence. On the computer's hard drive, he discovered 31 images and 12 movies containing, what he believed to be child pornography. The forensic examiner's belief was confirmed by the Director, Armed Forces Center for Child Protection, a pediatrician qualified as an expert who examined all the suspect images discovered on the hard drive. She determined that, of the 69 people depicted in the photos or films, 14 individuals were prepubescent children, and 15 were less than 18 years-old. Record at 178. During her testimony, the images found on the appellant's computer were displayed in the courtroom. Record at 157-78.

Given the appellant's detailed description of his internet activities involving his proclivity for fetish sites catering to child pornography, we are not persuaded by his "Kazaa defense." The record reveals that the appellant actively sought out child pornography and downloaded it for his personal viewing.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of knowing possession of child pornography beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt.[9] *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Sentence Appropriateness

The appellant claims his sentence is inappropriately severe in light of the fact the appellant's "principal" conviction was for attempted carnal knowledge, a victimless crime that punishes a criminal state of mind. Appellant's Brief at 13. While we disagree with the appellant's characterization of his crimes, we nonetheless find that a sentence that includes confinement for

[9] The appellant asserts that the military judge's finding of not guilty of Specification 1 of the Additional Charge (receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) is inconsistent with his finding the appellant guilty of Specification 2 of the Additional Charge (knowing possession of child pornography in violation of title 18 U.S.C. § 2252A(a)(5)(B)). The Government's closing argument reveals that Specification 1 and Specification 2 of the Additional Charge were charged in the alternative. Record at 316. Contrary to the appellant's assertions, the military judge's findings were not inconsistent.

eight years to be inappropriately severe for this appellant and his offenses. We will take corrective action in our decretal paragraph.

Congress has vested Courts of Criminal Appeals the power to review a case for sentence appropriateness, including relative uniformity. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *see also* Art. 66(c) UCMJ. This sentence appropriateness provision is a "sweeping Congressional mandate to ensure a 'fair and just punishment for every [appellant].'" *United States v. Baier* 60 M.J. 382, 384 (C.A.A.F. 2005). Deciding sentence appropriateness is distinguishable from granting clemency, which "involves bestowing mercy – treating an [appellant] with less rigor than he deserves," and which has been placed "by Congress in other hands." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *Id.* This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The facts surrounding the appellant's offenses establish his criminal intent to victimize a young, prepubescent girl. The appellant's viewing the image of Lacie appearing, as admitted by the appellant, to be 10 or 11 years old, driving over 100 miles to meet her, reserving a hotel room and planning to engage in a sexual encounter with her with the ultimate goal of taking away her virginity, are not indicia of benign lust. Instead, it is evidence of a criminal mind at work to sexually victimize a young girl. It is the exact type of criminal activity our statutes are designed to penalize.

Further, the appellant ignores the fact he was also convicted of, among other offenses, the knowing possession of child pornography, a crime that involves very real victims. The images of pornography found on his computer capture, in graphic detail, the victimization of children. As an individual who sought out these images, he played a role in supporting and promoting the sexual exploitation and oppression of children. For that he deserves harsh punishment.

We must balance the appellant's serious criminal conduct with his extremely strong military record. The appellant served in Iraq and was awarded a Navy Achievement Medal for being a member of the aircrew completing the longest combat flight in Marine Expeditionary Unit history. He also earned the Combat Action Ribbon for ground combat and Combat Air Crew Wings for hours flown in combat flight in Iraq. Although members from his "school house" command at the time of trial offered their opinion

that he was less than trustworthy, those Marines who served closely with him in combat in Iraq spoke highly of his performance and military character.

After reviewing the entire record, we find that the sentence is inappropriately severe for this offender and his offenses.

Conclusion

Accordingly, the findings are affirmed. We affirm only so much of the sentence as provides for a dishonorable discharge, confinement for three years, and reduction to pay grade E-1.

Senior Judge HARTY and Judge Kelly concur.

For the Court

R.H. TROIDL
Clerk of Court