

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, R.E. BEAL, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DONAVON R. LEWIS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000431
GENERAL COURT-MARTIAL**

Sentence Adjudged: 22 April 2010.

Military Judge: Maj S.F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol H.D. Russell,
USMC.

For Appellant: LT Ryan Santicola, JAGC, USN; LT Toren
Muschovic, JAGC, USN.

For Appellee: LT Kevin Shea, JAGC, USN.

29 July 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

BEAL, Judge:

A general court-martial, consisting of members with enlisted representation, convicted the appellant, contrary to his plea, of wrongful possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), as punishable under Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to two years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed.

The appellant assigns three errors: (1) the trial counsel committed plain error by making an improper closing argument; (2) the evidence is legally and factually insufficient to sustain the appellant's conviction; and (3) that the military judge erred by instructing the members on the affirmative defense under 18 U.S.C. § 2252A(d) over defense objection.¹ After considering the pleadings of the parties and the entire record of trial, we conclude there were no errors materially prejudicial to the appellant's substantial rights and affirm the findings and sentence. Arts. 59(a) and 66(c), UCMJ.

Background

The case against the appellant began in late October 2008 after he spent two nights at the home of Lance Corporal (LCpl) H and his wife. The appellant and LCpl H were classmates at the Motor Transport School, Camp Lejeune, North Carolina, and both were checking in to 11th Marines at Camp Pendleton, California. Upon learning the appellant had not yet arranged for quarters, LCpl H invited him to stay at his apartment. On the appellant's second night at LCpl H's apartment, Mrs. H observed a pop-up message on the appellant's computer screen which indicated a "limewire" download was completed. Mrs. H thought the filename associated with the downloaded file was suspicious, which prompted her to later look at the appellant's "limewire" download history while the appellant was out of the apartment. During this inspection, Mrs. H saw file names suggestive of child pornography and she took a digital photograph of them with her cellular telephone.

The next day, after the appellant and LCpl H had left for the day, Mrs. H called her husband, and told him that she did not want the appellant to return to the apartment. The appellant did not return to the apartment after that. The day after, on 30 October 2008, Mrs. H reported her discovery to a chaplain and ultimately met with representatives of the Naval Criminal Investigative Service (NCIS) and described what she observed on the appellant's computer and showed them the digital photograph she had taken of the appellant's computer screen. Later that evening, LCpl H met the appellant at a local McDonald's and returned the appellant's possessions which he had left at the apartment.

On 14 November 2008, two special agents from NCIS interrogated the appellant. He waived his rights and made the following hand-written statement:

I got here about 2 week [sic] ago. I got line wire start to down load all kind of por just bee typein in porn [sic]. I am be acused of possession of child pornographe [sic]. As soon as

¹ Both the second and third assigned errors were submitted pursuant to *United States v. Grostefon*, 12 M.J. 431, (C.M.A. 1982).

I found out I had it, I deleted it [sic]. I saw it once or twice on thier and every tine I just delete it did think nothing of it just got read of it [sic].

Beneath the cursive portion of the above statement, the NCIS agent hand printed several questions to which the appellant provided hand printed responses; two of these questions and responses are:

Q: What were the age/gender of the children you were looking at?

A: Fema 14 [sic].

Q: Estimate how many images of child pornography are on your computer?

A: 18.

Prosecution Exhibit 1.

Following the interview, the NCIS agents accompanied the appellant to his residence and conducted a consensual search of the residence and, also with the appellant's consent, seized the appellant's laptop computer for analysis. An analyst from the Defense Computer Forensics Laboratory (DCFL) testified for the prosecution that twenty two images of suspected child pornography, identified as Prosecution Exhibits 9-30, were found on the appellant's laptop computer. The analyst testified that he was able to determine the images first appeared on the computer in his LimeWire "shared folder" between 28 October 2008 and 30 October 2008. The analyst also testified that DCFL did not have the ability to determine how many times any files were accessed by a user before deletion.

The analyst also testified that the Google search engine on the appellant's laptop computer had certain search terms saved which were suggestive of child pornographic material. E.g., "14 pussy", and "underage hardcore sex". According to the operating system, one search was conducted on Tuesday, 28 October 2008, which was entered at "7:17 and 14 seconds" Greenwich Mean Time (GMT). Record at 555-56. Another search term used was entered at "1:50 and 38 seconds" GMT on 31 October 2008. *Id.* at 555.

Improper Argument

The appellant's first assigned error seeks reversal of his conviction based upon comments made by trial counsel during his rebuttal argument on findings. Specifically, the defense claims the trial counsel personally vouched for the credibility of two Government witnesses and expressed personal opinions on both the sufficiency of the Government's evidence, and the improbability of the defense's theory of the case. The Government argues that the comments did not amount to improper vouching but even if they did, the error was not so severe as to warrant reversal of the

conviction. As both parties acknowledge, the defense did not object to the trial counsel's closing argument, accordingly we review the argument for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009). Plain error is found when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. We find that certain portions of the trial counsel's rebuttal argument were improper, but in the context of the entire record of trial, did not amount to plain error.

The trial counsel offered his personal opinion as to the strength of the Government's evidence by stating, "[T]his has actually been a very good and very well conducted investigation. Some investigations aren't good enough for anybody, right? But this investigation was very good." Record at 696-97. Following this statement the trial counsel highlighted some of the testimony elicited during his case-in-chief and the prosecution exhibits that had been admitted and characterized each as being "pretty good" or "very good." *Id.* at 697.

The trial counsel also characterized the defense theory that perhaps LCpl H or his wife downloaded the child pornography onto the appellant's computer as "outrageously bizarre." *Id.* at 697. He further opined, "That doesn't make any sense. It's ridiculous." *Id.* Furthermore, the trial counsel also commented on the defense theory that the NCIS agents lied when they testified that their interrogation of the accused was not recorded. Specifically he characterized the theory as a "fabrication" and that it was "made-up by the defense." *Id.* at 698-99.

Finally, the trial counsel made the following comments regarding the credibility of the two NCIS agents who were primarily involved in this case, "Special Agent [S] has unimpeachable integrity. Special Agent [B] is a Naval Criminal Investigative Services special agent. He's had to work very hard to get to that position and he has good integrity as well." *Id.* at 698.

It is improper for trial counsel to interject themselves into the trial proceedings by expressing a "personal belief or opinion as to the truth or falsity of any testimony or evidence." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citations and internal quotation marks omitted). Likewise, it is improper for a prosecutor to characterize a defense as fabricated. *Id.* at 182 (citations omitted). However, prosecutorial comment must be examined in context of the full record and what may otherwise be deemed improper argument may be justified in light of the defense's trial tactics. *United States v. Haney*, 64 M.J. 101, 104 (C.A.A.F. 2006). In this case, the trial counsel's comments were made following the civilian defense counsel's lengthy and caustic closing argument in which he

repeatedly attacked the trial counsel's integrity, and repeatedly accused the trial counsel of attempting to deceive the members.

Notwithstanding our view of the highly provocative nature of the defense counsel's argument, we cannot say the trial counsel's comments were proper; but we do not go so far as to call the error plain or obvious. The improper comments noted above were all confined to three pages of a nearly 800 page record, and they were made without drawing an objection from the defense. Moreover, the members were admonished by the military judge immediately before the trial counsel began his argument, and again shortly after he finished his rebuttal argument, that the argument of counsel did not constitute evidence, and that they alone must determine the issues of the case based upon the evidence as they remembered it. Record at 667, 701. The members were also clearly instructed by the military judge that it was their duty alone to determine the credibility of the witnesses. *Id.* at 708.

Legal and Factual Sufficiency

For his second assigned error, the appellant argues that the evidence is factually and legally insufficient to support his conviction for possession of child pornography. We disagree. The test for legal sufficiency 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, 325 (C.M.A. 1987). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Id.* The Government submitted evidence sufficient to sustain convictions for the offense of which the appellant was convicted. After reviewing the evidence, we find that a "rational trier of fact could have found the essential elements of the crime[s] of which the appellant was found guilty] beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). We, too, are convinced of his guilt beyond a reasonable doubt. Therefore, the evidence is sufficient to sustain the convictions on the specifications challenged by the appellant.

Instructional Error

In regard to the appellant's third assigned error, we find the military judge properly gave the statutory affirmative defense, notwithstanding the defense's objection to the instruction. As the Government notes in its brief, the defense elicited testimony from the DCFL forensic analyst that although certain images discovered on the appellant's hard drive were registered with the National Center for Missing and Exploited Children Center's database of images depicting known children,

the registration of those images was not conclusive evidence the images were of child pornography. Record at 585; Government's Brief of 22 Feb 2011 at 6. Testimony was also elicited that all the images of suspected child pornography were deleted before the computer was seized by NCIS. Record at 577. Because the members themselves would have to determine which images constituted child pornography, it was possible they could find the appellant possessed less than three images of child pornography. If they were to reach that finding, the members would need to know that the statute provided a basis for acquitting the appellant of the charge. We agree with the Government, that under the circumstances of this case, the military judge properly instructed, over defense objection, on a defense reasonably raised by the evidence. *United States v. Dipaola*, 67 M.J. 98, 101 (C.A.A.F. 2008); *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995).

Conclusion

The findings and the approved sentence are affirmed.

Senior Judge MAKSYM and Judge WARD concur

For the Court

R.H. TROIDL
Clerk of Court