

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DUSTIN J. BARBIER
SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100326
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 March 2011.

Military Judge: LtCol Gregory Simmons, USMC.

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

Staff Judge Advocate's Recommendation: Col D.K. Margolin,
USMC.

For Appellant: CDR Edward Hartman, JAGC, USN.

For Appellee: Maj William Kirby, USMC.

12 April 2012

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.**

PAYTON-O'BRIEN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of an indecent act, indecent exposure, and possession and distribution of child pornography, violations of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for seven years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable

discharge. The convening authority approved the sentence as adjudged but, pursuant to the terms of a pretrial agreement, suspended confinement in excess of 48 months.¹

The appellant advances three assignments of error: (1) that Specification 1 of Charge I fails to state an offense where the indecent act alleged was the appellant's oral request during a web-chat internet conversation that a child under the age of 16 years transmit sexually explicit pictures; (2) that his plea to an indecent act was improvident because the military judge failed to elicit a factual basis to support the finding that his conduct was indecent, and (3) the military judge erred in his calculation of the maximum punishment and, therefore, the sentence should be set aside.

After careful consideration of the record of trial and the pleadings submitted by the parties, we resolve these assignments adversely to the appellant and conclude that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

Between 27 November 2009 and 1 December 2009, while stationed at Camp Pendleton, the appellant engaged in a series of sexually provocative communications with SH, a 14-year-old girl he had met in a teenage internet chat room. During their contacts, SH was living in the State of Texas and never met with the appellant in person. The appellant and SH commenced their communications with each other via their computers while in an internet chat room, then continued their contacts via text messaging and on the telephone. Sometimes, in the chat room, the appellant and SH utilized web cameras to communicate via a live video feed, which enabled them to see each other during the course of their conversations.

During their communications, the appellant and SH discussed topics of a sexual nature, including masturbation and the appellant's desire to have sexual intercourse and oral sex with SH. Additionally, while they were communicating in the chat room and on the webcam, the appellant either requested verbally or through typewritten words that SH take off her clothes, expose her breasts and buttocks to him, and send him images of

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543. (N.M.Ct.Crim.App. 2011).

her in her bra and underwear. On 10 occasions over the webcam, SH complied with the appellant's requests, exposing herself to him while clothed merely in her undergarments. On four occasions, the appellant intentionally exposed his penis to SH via the webcam, and on one of these occasions, he masturbated while SH watched. The appellant was aware that SH was only 14 years of age during all his contacts with her.

Specification 1 of Charge I alleges that the appellant, while on active duty, engaged in wrongful indecent conduct on divers occasions between on or about 27 November 2009 and on or about 1 December 2009, when he:

"(1) Engaged[] in sexually explicit conversation with [SH], a 14 year-old child; (2) Urged and induced . . . [SH] to transmit electronically to [him] sexually explicit pictures of her body for his viewing and sexual gratification; and (3) Made initial plans to rape [SH], a child unable to consent, by requesting she meet [him] in person to engage in sexual intercourse." ²

In a separate course of misconduct unrelated to the appellant's actions with SH, the appellant possessed and distributed child pornography, which the Government charged under Article 134, as conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

**Indecent Act:
Failure to State an Offense,
Providence of the Plea, and
Factual and Legal Sufficiency**

In his first assignment of error, the appellant avers that Specification 1 under Charge 1, indecent act, fails to state an offense because the conduct alleged was his oral request that the victim transmit to him via an internet webcam sexual pictures of herself for his viewing and sexual gratification.³

² The appellant was also charged under Specification 2 of Charge 1 under Article 120(n), to wit: "on divers occasions . . . intentionally expose in an indecent manner his genitalia while engaging in webcam chat conversations over the Internet with [SH], a 14 year-old female child." Pertaining to this particular specification, the appellant does not challenge the sufficiency of his pleas or the manner in which he was charged.

³ We note that the appellant pleaded by exceptions to this specification, by excepting the language "sexually explicit" from part (2) of the specification, and all of the language in part (3) of the specification. The

Appellant's Brief of 25 Aug 2011 at 7. In the appellant's second assignment of error, the appellant avers that the military judge failed to elicit a factual basis to support that the appellant's conduct was indecent as to the same specification. *Id.* at 16. Because these two concepts in this case are related, we will address them together.

The appellant's argument concerning his first assignment of error is two-fold. First, he argues that the specification fails to allege that the conduct occurred without the victim's consent and fails to allege that it violated her reasonable expectation of privacy. *Id.* at 7-11. Second, he argues that the specification merely alleges language which is not conduct. *Id.* at 11-14. The appellant's argument concerning his second assignment of error is that the military judge failed to elicit sufficient facts that he urged or induced the minor victim to transmit pictures of her body without her consent and contrary to her reasonable expectation of privacy. *Id.* at 16.

A. Failure to State an Offense

Whether a specification states an offense is a question of law that is reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the offense, either expressly or by necessary implication, so as to give the accused notice and protection against double jeopardy. *Id.* at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). However, we follow the same rule adopted by most federal circuit courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975)); see also *United States v. Lonsford*, No. 201100022, 2012 CCA LEXIS 72, at *6 n.3 (N.M.Ct.Crim.App. 29 Feb 2012).

We find that the indecent act specification in this case properly states an offense. First, as the quoted language from the specification in the "Background" section above demonstrates, the specification tracked the model specification language of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(11). Second, the specification notified the appellant of the time, place, victim, and means by which the offense was committed. Third, if the appellant had been found not guilty, the specificity of the pleading would have protected

military judge found the appellant guilty by exceptions in accordance with his pleas.

the appellant from being tried again for those same offenses at those times against that victim, thereby providing a bar against retrial for this same crime. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).

Our inquiry does not end there. As the Court of Appeals for the Armed Forces (CAAF) recently stated, whether a specification alleges a violation of Article 120(k) depends on the scope of the statutory term "indecent conduct," as defined by Article 120(t)(12). *United States v. King*, __ M.J. __, No. 11-0583, 2012 CAAF LEXIS 276 (C.A.A.F. Mar. 13, 2012). Article 120(k), UCMJ, provides that:

Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

The term "indecent conduct" is defined in Article 120(t)(12), in part, as follows:

[T]hat form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

The elements of indecent acts are as follows:

- (1) that the accused engage in certain conduct; and
- (2) that the conduct was indecent conduct.

MCM, Part IV, ¶ 45b(11).

As the CAAF has held, "'language' can be, or be part of, 'conduct' in a particular case." *King*, 2012 CAAF LEXIS 276 at *6 (footnote omitted). See also *United States v. Brinson*, 49 M.J. 360, 364-65 (C.A.A.F. 1998) (language constituted disorderly conduct); *United States v. Lofton*, 69 M.J. 386, 390 (C.A.A.F. 2011) (comments of a sexual nature made by an officer to a female enlisted service member constituted conduct unbecoming an officer). In examining the specification at issue in this case, we have no trouble concluding that the specification stated an offense.

First, although on appeal the appellant frames the charged conduct as a mere request to a minor child to reveal her body to him via electronic images, in actuality the specification charges additional acts. There were three distinct acts named within the specification, namely that the appellant (1) engaged

in sexually explicit conversations with the minor child, (2) urged and induced the minor child to transmit to him sexually explicit pictures of her body, and (3) made plans to rape the minor by requesting that she meet him to engage in sexual intercourse. While ultimately the appellant, during his pleas, excepted out the third section in its entirety and the "sexually explicit" language in the second section, it is clear from the face of the specification as *charged* that the appellant's crimes were more than mere language to a minor. The appellant's offenses not only included language (sexually explicit conversations and urging), but conduct (inducement to transmit electronic images of herself to the appellant).

Turning next to the question of whether the appellant's conduct meets the definition of "indecent conduct" as required by Article 120(k), we apply the traditional canons of statutory construction. *Id.* at *7. Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result. *Id.* (citing *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007)). As noted, indecent conduct is defined as "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations."⁴ Under the circumstances of this case, the appellant's charged conduct constitutes an indecent act.

We reject the appellant's assertion that indecent conduct is limited to situations involving the violation of a person's reasonable expectation of privacy and without the person's consent. While the statute sets forth examples of indecent conduct under Article 120(t)(12), the list is not exhaustive. Nor is the list exclusive. Furthermore, the list of examples set forth in the definition under Article 120(t)(12) as to what acts can constitute indecent conduct does not create additional elements to the offense.

B. Providence of the Pleas

In his second assignment of error, the appellant avers that his plea to Specification 1 of Charge 1, indecent act, was improvident because the military judge failed to elicit a factual basis that his conduct was indecent. Appellant's Brief at 16.

We review a military judge's decision to accept or reject an accused's guilty plea for an abuse of discretion. *United States*

⁴ Art. 120(t)(12), UCMJ.

v. Eberle, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The appellant asserts that since the military judge failed to establish that he urged or induced the minor victim to transmit pictures of her body without her consent and contrary to her reasonable expectation of privacy, there was an insufficient factual basis for the military judge to accept his plea of guilty. We disagree.

In this case, following an explanation of the elements, including a definition of the term "indecent conduct," and following an examination of the appellant in accordance with RULE FOR COURTS-MARTIAL 910, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), and *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), the military judge entered a finding of guilty consistent with the appellant's plea.

As the CAAF stated in *King*, language can be conduct. Although the CAAF did not decide the ultimate issue in *King* as to whether the language used by the appellant in that case was conduct and instead affirmed the lesser included offense of an attempted indecent act, *King* is distinguishable from the case at issue. Here, the appellant used sexually explicit language with a teenage girl he had met over the internet, speaking to her about masturbation and sexual intercourse. He then requested she send him images of her breasts and buttocks. The minor victim did as the appellant requested, although left her undergarments in place in the images of the pictures she sent.

When examining the entirety of this record, we find a significant and lengthy conversation over a five-day period between the appellant and this minor child that covered topics of a sexual nature. The record reveals that the appellant repeatedly discussed sexual acts with the victim, who he knew was a 14-year-old girl, asked her to have intercourse with him, and requested repeatedly that she take off her clothes. Prosecution Exhibits 2-4. The victim complied by sending him images of her partially undressed. These conversations occurred during the same time frame that the appellant exposed his genitalia to the victim and masturbated while she could view him via the webcam. Again, we are not persuaded by the appellant's argument that indecent conduct is limited to situations involving the violation of a person's reasonable expectation of

privacy and without the person's consent, particularly when one party is legally incompetent to consent to the sexual activity discussed. We hold, therefore, that there is no substantial basis in law or fact to question the providence of the appellant's guilty plea to Specification 1 of Charge I.

Maximum Punishment

In his final assignment of error, the appellant avers the military judge erred in his calculation of the maximum punishment, in light of *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011), and therefore his sentence must be set aside. We disagree.

The maximum punishment authorized for an offense is a question of law reviewed *de novo*.

The two specifications at issue allege that the appellant:

Charge II, Specification:

Between on or about 1 October 2009 and on or 31 March 2010 knowingly and wrongfully possess images of child pornography or that appeared to be child pornography, which conduct was to the prejudice to the good order and discipline in the armed forces and/or was of a nature to bring discredit upon the armed forces.

Additional Charge, Specification:

On or about 7 February 2010. knowingly and wrongfully distribute images of child pornography or that appeared to be child pornography, which conduct was to the prejudice to the good order and discipline in the armed forces and/or was of a nature to bring discredit upon the armed forces.

Pursuant to a pretrial agreement, the appellant entered a plea of guilty to both of the above specifications, entered into a stipulation of fact (Prosecution Exhibit 1), for possession of child pornography,⁵ and following an explanation of the elements, was examined by the military judge in accordance with *Care*.

⁵ The stipulation did not contain any facts pertaining to the additional charge of distribution of child pornography. The military judge discussed the stipulation with counsel in an R.C.M. 802 conference prior to taking the appellant's pleas, and was advised by the trial defense counsel that the appellant would "be ready to speak to the facts of that additional charge and specification." Record at 13. Further, defense counsel advised the military judge that his client would be able to testify that the images were child pornography. *Id.*

In reviewing the record in its entirety, it is clear that the appellant's offenses are receipt and distribution of images of child pornography, not receipt and distribution of images that "appeared to be child pornography." See Record at 37, 44. Thus, the military judge did not err in his assessment of the maximum punishment. Thus, *Beaty* has no applicability to this case since there were actual images of child pornography. The military judge was aware prior to taking the appellant's pleas, based on his review of the pretrial agreement, the stipulation of fact, and his R.C.M. 802 conferences with the trial and defense counsel, that the appellant was pleading guilty to the offenses of possession and distribution of child pornography. Our review of the evidence, Appellate Exhibit IV, confirms that the images were actual child pornography, not images that "appear to be" child pornography. It would have been, therefore, appropriate for the military judge to except the language "or that appeared to be child pornography" upon announcement of findings. We will take action in our decretal paragraph.

Conclusion

The findings are affirmed, except for the words "or that appeared to be child pornography" in the specification under Charge II and the specification under the Additional Charge. The sentence, as approved by the convening authority, is affirmed.

Senior Judge MAKSYM and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court