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

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

UNITED STATES OF AMERICA

v.

JOSHUA G. ANDERSON
HOSPITALMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 201200499
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 July 2012.
Military Judge: Col G.W. Riggs, USMC.
Convening Authority: Commanding General, Marine Corps Installations East, Marine Corps Base, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol D.M. McConnell, USMC.
For Appellant: CDR Edward Hartman, JAGC, USN.
For Appellee: Maj David Roberts, USMC; LT Lindsay Geiselman, JAGC, USN.

27 June 2013

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.

MCFARLANE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy to rape a child, one specification of fraudulent enlistment, one specification of rape of a child, one specification of taking indecent liberties with a child, two specifications of possession of child pornography, one specification of distribution of child pornography, two

specifications of using indecent language, one specification of communicating a threat, and one specification of wearing unauthorized medals or badges, in violation of Articles 81, 83, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 883, 920 and 934. The appellant was sentenced to confinement for 30 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.[1]

The appellant submits the following assignments of error:

1. The appellant's plea to conspiracy to rape a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;

2. The appellant's plea to rape of a child was improvident because the military judge failed to elicit facts sufficient to prove each element of the offense;

3. The military judge erred when he did not *sua sponte* find that separate specifications for the possession of the same child pornography on different media represented an unreasonable multiplication of charges;[2] and

4. The appellant's plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the presence of an "aware" child.

After carefully considering the record of trial and the submissions of the parties, we find merit in the fourth assigned error listed above. After taking corrective action in our

[1] To the extent that the convening authority's action purported to execute the punitive discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

[2] The appellant's brief initially framed this assignment of error as a failure of the military judge to find the two specifications "facially identical," and therefore multiplicious. Appellant's Brief of 13 Feb 2013 at 2, 9. However, in the argument portion of his brief the appellant focuses entirely on whether the two specifications represent an unreasonable multiplication of charges. *Id*. at 20-24. Given the focus of the appellant's argument, and the fact that the specifications are not facially duplicative, we address the assignment of error as one of unreasonable multiplication of charges.

decretal paragraph and reassessing the sentence, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The charges relevant to the first, second, and fourth allegations of error in this case arose out of an incident wherein the appellant and his wife sexually assaulted the wife's niece. The charges relevant to the third assignment of error arose out of the appellant's possession of child pornography.

In January of 2011, the appellant was planning on leaving his wife. Wanting to save their marriage and aware of the appellant's sexual interest in minors, the appellant's wife came to him and proposed a plan to sexually assault AU, her five-year-old niece. Pursuant to that plan, they arranged to babysit AU overnight at their home. At bedtime, they fed AU hot chocolate laced with sleeping medication. Once AU was unconscious, both the appellant and his wife raped the child by penetrating her genital opening with their tongues. After the assault, the couple engaged in sexual intercourse in the bed right next to AU. AU remained unconscious throughout the sexual assault and sexual intercourse between the appellant and his wife.

Between December of 2009 and April of 2011, the appellant downloaded 580 distinct and different digital images of child pornography to his personal computer. Between May of 2010 and April of 2011, the appellant copied a number of those images from his personal computer to the flash drive on his Blackberry cellular phone.

Additional relevant facts are further developed below.

Factual Basis to Support the Guilty Pleas

The appellant asserts that the military judge failed to obtain an adequate factual basis for the appellant's pleas regarding rape of a child, and conspiracy to rape a child. Specifically, the appellant avers that, for both offenses, the facts fail to show an "intent to abuse, humiliate, harass or degrade, or arouse or gratify the sexual desire of any person . . . ." Appellant's Brief of 13 Feb 2013 at 7-8 (citing to Article 120(t)(1), UCMJ). Additionally, with respect to the conspiracy charge, the appellant argues that the providence

inquiry failed to show that he was more than a mere bystander, and that the military judge's failure to reconcile his answers during the inquiry with the more incriminating statements in the stipulation of fact create a substantial basis to question the plea. We disagree.

We review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Once a military judge accepts an accused's plea as provident and enters findings based on the plea, we will not reject the plea unless there is a substantial basis in law or fact for questioning the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). When making this determination, we are permitted to look to the record as a whole in evaluating the factual basis for the plea and are not limited to considering only the appellant's statements. *See United States v. Jordan,* 57 M.J. 236, 239 (C.A.A.F. 2002).

A. Rape of a Child

As applied to the facts of this case, the statutory definition of sexual act requires that the penetration of the genital opening be made "with an intent to abuse, humiliate, harass, or degrade, any person or to arouse or gratify the sexual desire of any person." Art. 120(t)(1), UCMJ. In this case, the military judge read the applicable definition of sexual act to the appellant, and the appellant agreed that his acts comported with that definition. However, the military judge did not ask any specific questions regarding intent during the portions of the providence inquiry regarding the charges of rape of a child, and conspiracy to commit rape of a child. Nonetheless, when reviewing the record as a whole, we find ample evidence to show that the acts were committed to gratify the appellant's sexual desires.

First, after having been read the aforementioned definition, the appellant specifically referred to what happened to the victim as a "sexual act." Record at 41. The appellant also agreed with the military judge's suggestion that his wife came up with the idea of assaulting AU because of the appellant's "proclivity to be interested sexually in minors." *Id*. Later during the proceeding, evidence was introduced that the appellant had referred to the five-year-old victim as a "hottie," that he had sexual fantasies about her, and that he masturbated to a photograph of AU in her Christmas dress. *Id*.

at 107-09. Given these facts, we do not find a substantial basis in law or fact for questioning the appellant's guilty plea to rape of a child. *See Inabinette*, 66 M.J. at 322.

B. Conspiracy to Commit Rape of a Child

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the Code and, while the agreement continues to exist, either conspirator performs an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 5(b). The agreement "need not be in any particular form or manifested in any formal words." *Id.* at ¶ 5(c)(2). A conspiracy is "generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves." *United States v. Barnes,* 38 M.J. 72, 75 (C.M.A. 1993) (citations omitted). The evidence must show that the accused possessed "deliberate, knowing, and specific intent to join the conspiracy, not merely that he was associated with persons who were part of the conspiracy or that he was merely present when the crime was committed." *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984) (citing *United States v. Glen-Archila,* 677 F.2d 809 (11th Cir. 1982)). *See also United States v. Knowles*, 66 F.3d 1146, 1157 (11th Cir. 1995) (mere presence and association with conspirators insufficient to support conspiracy conviction).

The appellant's argument with respect to this charge is two-fold. First, the appellant argues that the record fails to show that the agreement between he and his wife encompassed the requisite intent, by either party, to assault AU in order to abuse, humiliate, harass or degrade, or arouse or gratify the sexual desire of any person. Rather, he argues, the record shows that his wife's intent was to "salvage her marriage." Appellant's Brief at 13. This argument confuses intent with motive. The appellant's wife may have been motivated by a desire to save her marriage, but the record shows that her intent was to satisfy the appellant's sexual desires. Second, for the reasons detailed above, it is clear that the appellant's intent was to gratify his sexual desires, thus providing the required *mens rea*.

Second, the appellant argues that the providence inquiry "makes clear that the plan, furtherance, and execution were committed solely by Appellant's wife" and that, to the extent that the inquiry conflicts with the stipulation of fact, this court should find that inconsistency a basis for questioning the

plea. *Id*. at 12. This argument mischaracterizes the record. Although the appellant's answers to the military judge's questions during the providence inquiry do suggest that the plan was conceived by the appellant's wife, and that she was the one who largely carried it out, the appellant ignores the fact that he said "my wife came to me – and she knew that I was attracted to her niece – and she came to me and *asked* if I wanted to do sexual acts with her and her niece and I told her I did." Record at 33 (emphasis added). This statement, along with the portion of the stipulation of fact wherein the appellant states "*we* discussed and agreed to drug AU while she was in our bed, remove her underwear, and commit rape of a child on her while she was unconscious," shows that he was not some mere bystander at this crime. Prosecution Exhibit 1 at 2 (emphasis added). Rather, this shows that he helped plan the crime, and that it was executed both on his behalf and with his active participation. Given these facts, we do not find a substantial basis in law or fact for questioning the appellant's guilty plea to conspiracy to rape a child. *See Inabinette*, 66 M.J. at 322.

Unreasonable Multiplication of Charges

In the third assignment of error, the appellant asserts that the military judge committed plain error by not finding that the two specifications of possession of child pornography constituted an unreasonable multiplication of charges. The appellant argues that the military judge should have found that Specification 1 of Charge IV and the sole specification under Additional Charge IV were an unreasonable multiplication of charges because the images contained on the flash memory card referenced in Additional Charge IV were copied from, and therefore a subset of, the images referenced in Specification 1 of Charge IV. We disagree.

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges (UMC). RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), DISCUSSION. In determining whether there is UMC, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and, (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition).

In this case, the first *Quiroz* factor weighs against the appellant, since no motion was made at trial to treat the two specifications as an unreasonable multiplication of charges. The second and third factors also weigh against the appellant. He used a separate and distinct form of media when he transferred the images and videos from his laptop computer to the flash drive on his Blackberry, which made each possession a separate and distinct criminal action. *See United States v. Campbell,* 66 M.J. 578, 583 (N.M.Ct.Crim.App. 2008) ("[E]ach possession on different media was a separate crime, and, therefore, a proper basis for a separate specification alleging possession, regardless of the similarity of the images and videos in each instance"), *aff'd in part and rev'd in part on other grounds*, 68 M.J. 217 (C.A.A.F. 2009); *see also United States v. Planck*, 493 F.3d 501, 504-05 (5th Cir. 2007) ("[T]he *actus reus* is the possession of child pornography; the Government need only prove the defendant possessed the contraband at a single place and time to establish a single act of possession . . . . [Here, the appellant] possessed child pornography in three separate places -- a laptop and desktop computer and diskettes -- and, therefore, committed three separate crimes."). Though the images were identical to the originals when viewed, the duplicates on the flash drive are separate electronic files, created by the appellant, and embedded in different media. Therefore, we conclude that the number of specifications under the charge did not misrepresent or exaggerate the appellant's criminality.

As to the fourth factor, the appellant faced life without the possibility of parole as a result of the rape charge, therefore the separate possession offenses did not increase the appellant's punitive exposure. Finally, we find that the Government's charging strategy in this case reflected a reasoned approach and was not overreaching. In sum, all of the *Quiroz* factors weigh against the appellant. Accordingly, we hold that it was not an abuse of discretion for the military judge to accept the appellant's guilty pleas to two different specifications of possession of child pornography.

Indecent Liberty with a Child

The appellant asserts that his plea to taking indecent liberty with a child was improvident because the military judge failed to elicit facts sufficient to support a finding that the appellant's conduct was committed in the physical presence of a child, in that the term "presence" requires a level of awareness

by the child that did not exist in this case. Appellant's Brief at 19-20. We agree.

This area of the law has been evolving in recent years, and has been the subject of two recent changes to the UCMJ. Prior to 1 October 2007, "Indecent acts or liberties with a child" was an enumerated offense under Article 134, UCMJ. From 1 October 2007 to 27 June 2012, "Indecent liberty with a child" was made punishable under Article 120(j), UCMJ. Acts that would have been prosecuted under those provisions committed on or after 28 June 2012, are now punishable under Article 120b(c), UCMJ, "Sexual Abuse of a Child."

At the time of the appellant's offense, the crime of indecent liberty with a child was defined by statute as: "engag[ing] in indecent liberty in the physical presence of a child . . . with the intent to arouse, appeal to, or gratify the sexual desire of any person . . . ." Art. 120(j), UCMJ. The phrase "indecent liberty" was further defined as "indecent conduct, but physical contact is not required. . . . An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. . . ." Art. 120(t)(11), UCMJ. In addition, "indecent conduct" was defined as: "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. . . ." Art. 120(t)(12), UCMJ.

No statutory definition was provided for the term "physical presence" set forth in Article 120(j), UCMJ. However, the word "presence" had been the subject of judicial interpretation when indecent liberty with a child was an Article 134 offense. In *United States v. Miller*, the Court of Appeals for the Armed Forces (CAAF) noted that "[t]he definition and common understanding of 'presence' is: '[t]he state or fact of being in a particular place and time' and '[c]lose physical proximity *coupled with awareness*.'" 67 M.J. 87, 90 (C.A.A.F. 2008) (quoting *Black's Law Dictionary* 1221 (8th ed. 2004)) (emphasis added).

Although the CAAF has not yet applied that definition as the word is used in Article 120(j), UCMJ, the Air Force Court of Criminal Appeals (AFCCA) has. In a recent published opinion, the AFCCA held that "in order to sustain a charge of indecent liberty under Article 120(j), UCMJ, the child must have at least some awareness the accused is in her physical presence." *United*

States v. Burkhart, 72 M.J. 590, (A.F.Ct.Crim.App. 2013). The AFCCA based this decision on the "intent behind the criminalization of the conduct, the statutory definition of the offense, and the case law interpreting the requirement of 'presence' for the offense of indecent liberty." *Id*. Specifically, the court noted the fact that the statute focused on "protection of the child's morals, prevention of premature exposure to sexual matters, prevention of injury to the child." *Id*.

We agree with the AFCCA's reasoning, and for the reasons set forth in their opinion, come to the same conclusion: that in order to sustain a charge of indecent liberty under Article 120(j), UCMJ, the child must have at least some awareness the accused is in her physical presence. Because the providence inquiry in this case indicated that AU was unconscious, and therefore not aware that the appellant and his wife engaged in sexual intercourse in the bed next to her, we find a substantial basis to question the appellant's plea to indecent liberty with a child. *See Inabinette*, 66 M.J. at 322.

Indecent Act as a Lesser Included Offense

Our determination that the appellant's plea is improvident as to a violation of Article 120(j), UCMJ, does not end our inquiry. The CAAF has recognized that an improvident plea may be upheld as a provident plea to a lesser included offense. *See, e.g., United States v. Pillow*, 28 M.J. 1008, 1011 (C.G.C.M.R. 1989); *United States v. Anderson*, 27 M.J. 653, 655 (A.C.M.R. 1988). We must determine whether the record supports our affirming a lesser included offense.

As this court recently noted in *United States v. Morris*, an indecent act in violation of Article 120(k), UCMJ, is a lesser included offense of indecent liberty with a child in violation of Article 120(j). *United States v. Morris*, No. 201100569, 2012 CCA LEXIS 455, unpublished op. (N.M.Ct.Crim.App. 30 Nov 2012) (citing *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)).

The five elements of "Indecent liberty with a child" are:

(a) That the accused committed a certain act or communication;
(b) That the act or communication was indecent;

(c) That the accused committed the act or communication in the physical presence of a certain child;
(d) That the child was under 16 years of age; and
(e) That the accused committed the act or communication with the intent to: arouse, appeal to, or gratify the sexual desires of any person.

MCM, Part IV, ¶ 45b(10).

The elements of "indecent act" are:

(a) That the accused engaged in certain conduct; and
(b) That the conduct was indecent conduct.

MCM, Part IV, ¶ 45b(11).

Application of the statutory elements test discussed in *Jones* reveals that the "elements of [indecent act] are also elements of [indecent liberty with a child] and [indecent liberty with a child is] the greater offense because it contains all of the elements of [indecent act] along with one or more additional elements." *Jones*, 68 M.J. at 470. It is impossible to prove indecent liberty with a child without also proving an indecent act. Moreover, while not dispositive, the Manual for Courts-Martial also listed "Article 120 – Indecent act" as a lesser included offense of indecent liberty with a child. MCM, Part IV, ¶ 45d(10)(a). Accordingly, we find that the appellant received the constitutionally-required notice that he had to defend against both the greater and lesser offense, and that we can decide whether the appellant's plea was provident to the lesser offense of indecent act in violation of Article 120(k), UCMJ.

The problematic part of the appellant's plea to indecent liberty with a child – awareness by the child - is not an issue under the LIO of indecent act. All that is required for a conviction under Article 120(k) is conduct signifying "that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and depraved the morals with respect to sexual relations." Art. 120(t)(12), UCMJ. Here, the appellant had sexual intercourse with his wife right next to a sleeping five-year-old to whom he was sexually attracted, and who they had just raped. Moreover, the appellant's wife told the Naval Criminal Investigative Service that the appellant was

"rubbing [AU's] vagina" during the intercourse. Record at 109. Under these circumstances the appellant's sexual acts were "grossly vulgar, obscene, and repugnant to common propriety." Art. 120(t)(12), UCMJ. Consequently, we set aside the guilty finding to Specification 6 of Charge II and affirm a guilty finding to the lesser included offense of indecent act, in violation of Article 120(k), UCMJ.

Sentence Reassessment

Because of our above action on findings, we must determine whether we are able to reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006), and carefully considering the entire record, we conclude that there has not been a "dramatic change in the 'penalty landscape.'" *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Moreover, we are satisfied beyond a reasonable doubt that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. Accordingly, no further action is deemed necessary.

Conclusion

We affirm the findings, as modified, and the sentence approved by the convening authority and reassessed by this court.

Senior Judge WARD and Senior Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court