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

Before
J.R. PERLAK, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WILLIAM G. MCKINLEY III
AEROGRAPHER'S MATE SECOND CLASS (E-5), U.S. NAVY

NMCCA 201000120
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 January 2012.
Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.
Convening Authority: Commander, Navy-Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.D. Hutchison, JAGC, USN.
For Appellant: LT Ryan Mattina, JAGC, USN; Maj Kirk Sripinyo, USMC.
For Appellee: LCDR Gregory R. Dimler, JAGC, USN; Maj David Roberts, USMC; LT Lindsay Geiselman, JAGC, USN.

28 February 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.

PER CURIAM:

This case is before us for a second time. On initial review before this court, we concluded that the military judge abused his discretion in denying the appellant's request for production of a defense expert witness and that this error materially prejudiced the appellant's substantial rights. We then set aside the findings and sentence and authorized a

rehearing. *United States v. McKinley*, No. 201000120, 2011 CCA LEXIS 119 (N.M.Ct.Crim.App. 30 Jun 2011).

At a rehearing, a general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of knowingly receiving images of child pornography in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to reduction to pay grade E-3 and to 60 days restriction. The convening authority (CA) approved the reduction to pay grade E-3, but disapproved the restriction. We have continuing jurisdiction for purposes of this appeal, as the initial sentence included 90 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. *See United States v. Johnson*, 45 M.J. 88, 89-90 (C.A.A.F. 1996).

The appellant now argues that the evidence is both legally and factually insufficient to sustain his conviction of knowing receipt of child pornography.

After careful consideration of the record and the briefs of the parties, we conclude that the findings and the 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

In a pretrial statement to criminal investigators, the appellant admitted downloading "Limewire," a file sharing program, onto a co-worker's home computer while house-sitting from 21-23 March 2008. He also used "Limewire" to download music and pornographic videos from the Internet. Prosecution Exhibit 5. He searched "Limewire" for pornographic videos "using the search terms porn and lesbian." *Id*. He "noticed videos with 'pthc' in the filename, and used that term to search for videos." *Id*.

The appellant also admitted downloading "between four (4) and eight (8)" videos that depicted "obviously underage" young females engaged in sexual activity. He asserted that he "at no time intentionally downloaded child pornography" and that he downloaded the subject child pornography "without knowing what I was downloading, and realized it was child pornography only after it was downloaded and I was able to view it. At this point, I deleted each video once I realized what I was viewing." *Id*.

He stated that he viewed each video for "only a few seconds, [and after realizing] what [he] was looking at . . . immediately deleted the video[s]." *Id*. The appellant described the content of those videos as including "females [who] seemed to be under the age of 15 years old," the sexual acts depicted therein, the participants' relative positions and size, and his recollection of their state of dress. *Id*. He stated that each video "had a different female," that he had not noticed any "underage males," and specifically recalled the hair color, estimated age, state of undress and sexual acts depicted in one of the videos.

At trial, the principal issue in controversy was whether the appellant "knowingly received child pornography" and knew that the material was child pornography. The primary evidence of knowledge presented by the Government was the appellant's pretrial statement, video data files and metadata extracted from the subject computer, and expert testimony. PE 1, 5, 6, and 7.

Mr. Gray, a Government witness and expert in computer forensics and child pornography investigations, testified that, by default, "Limewire" creates two folders, an "incomplete folder" and a "saved folder." Verbatim Transcript at 107. The "incomplete folder" is a temporary repository for partially downloaded files that are automatically transferred to the "saved folder" when fully downloaded. *Id.* at 108.

With respect to the computer used by the appellant, Mr. Gray testified that the "incomplete folder" included a number of files with titles suggestive of child pornography and files which contained child pornography. Mr. Gray also testified that the "saved folder" contained no pornography but included country and western music downloaded on 22 March 2008. He prepared a spreadsheet of the "incomplete folder's" contents, and testified that the modified date contained therein "should be a copy of the actual file download times." *Id.* at 116.

Turning to the file names of the files he believed contained child pornography, Mr. Gray explained that "pthc" stands for "preteen hardcore" which is "probably the most common [search] term" associated with child pornography. *Id.* at 117. He also testified that other terms present in the incomplete folder's file names were well-recognized as child pornography including "Vicky," "r@ygold," "pedo," "hussyfan," and "Lolita." *Id.* at 117-18, 132. He acknowledged that he was not an expert in the use of "Limewire," that "Limewire" does not retain search

terms, and that he found no search terms in "Limewire" indicative of child pornography. *Id.* at 133-34, 155.

He then testified that in his experience you have to "type in some type of search term . . . to get this sort of result." *Id.* at 155. He opined that child pornography specific search terms were used "because I don't see that there is any other way that the specific type of things that were downloaded could have been downloaded, whether it was just suspected child pornography or the country and western music." *Id.* at 156-57. During recross examination Mr. Gray acknowledged that he had no proof that a search term was used and could not tell the members what was searched. *Id.* at 157.

The Government also introduced evidence developed from the subject computer including: a CD of files extracted from the "incomplete folder" containing child pornography and suspected child pornography, a Computer Forensic Worksheet, and URL History. PE 1, 6, and 7. The video file titles in the "incomplete folder" include numerous terms and graphic descriptions clearly suggestive of child pornography. *Id*. A number of those graphically titled files also contain child pornography while several do not. Most of the graphically titled files include the term "pthc" in their file name.

Additional facts necessary to resolve the assigned error are included herein.

Legal and Factual Sufficiency of the Evidence

We conduct a review for both legal and factual sufficiency. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. When reviewing for legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id*. at 325.

The appellant asserts that evidence is both legally and factually insufficient to prove that the appellant knowingly received child pornography. He argues that his uncontroverted statement to criminal investigators demonstrates that he did not

intentionally download child pornography. He also asserts that his account is corroborated by the Government expert's testimony that the videos were found in the "incomplete folder" rather than the "saved folder." Finally, he argues that the Government expert could not identify, with certainty, the search terms the appellant used to locate and download the child pornography. We disagree.

First, the appellant's admissions, Mr. Gray's testimony, and the prosecution exhibits all establish the appellant's knowledge of the nature and character of the material being received and knowledge that he received child pornography over the Internet. It is essentially undisputed that in the privacy of a co-worker's residence, the appellant downloaded "Limewire" onto that co-worker's personal computer, and then used "Limewire" to download videos including "between four (4) and eight (8)" videos of child pornography over the course of three days.

Second, the appellant's use of "pthc," a common child pornography search term, further evidences his knowledge of the nature and character of the material being received and that he knew he received child pornography over the internet. Independent of the search term "pthc," filenames including that term also include other terms unambiguously suggestive of child pornography. These graphically titled file names, clearly suggestive of child pornography, include at least one-file previewed by the appellant. This provides additional evidence of his knowledge.

Third, the graphically titled files containing child pornography which do not include in their titles any of the search terms the appellant admitted using provide further evidence that he was searching for, and knew that he received, child pornography. Those file titles include other common child pornography search terms or graphic language clearly indicative of child pornography, and corroborate Mr. Gray's expert opinion that the appellant used child pornography specific search terms to obtain those files.

Finally, we are not persuaded by the appellant's claims that he did not know that he was downloading child pornography until after he downloaded and viewed the videos or that he immediately deleted those videos files "a few seconds" after discovering their true content. The plausibility of these claims is significantly reduced by evidence that the appellant downloaded files containing child pornography and/or titles

indicative of child pornography on each day of a three day period. PE 6. Moreover, the validity of his claim that he received and viewed four to eight videos of child pornography stands opposed by the approximately 20 video files with titles clearly indicative of child pornography and/or video files containing child pornography found in the "incomplete folder." The credibility of his claims that he viewed each video for "only a few seconds" before deleting them is also challenged by his recollection of key details of the child pornography in those videos.

On the basis of the record before us, and considering the evidence in the light most favorable to the Government, a reasonable fact finder could have found all the essential elements of the charged offense beyond a reasonable doubt. *Turner*, 25 M.J. at 324. After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt of knowingly receiving images of child pornography. *Id.* at 325.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court