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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BROOKS A. PARIS
SEAMAN (E-3), U.S. NAVY

NMCCA 201200301
SPECIAL COURT-MARTIAL

Sentence Adjudged: 12 April 2012.
Military Judge: CDR Donald C. King, JAGC, USN.
Convening Authority: Commanding Officer, Center for Explosive Ordnance Disposal and Diving, Panama City, FL.
Staff Judge Advocate's Recommendation: LT Jesse D. Adams, JAGC, USN.
For Appellant: LT Gabriel K. Bradley, JAGC, USN.
For Appellee: LCDR Keith B. Lofland, JAGC, USN; Capt Samuel C. Moore, USMC.

30 July 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.

PRICE, Judge:

A panel of officer members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of attempting to access, with intent to view, "Internet web sites containing images of child pornography, as defined by 18 U.S.C. § 2256 (8)," which conduct was of a nature to bring discredit upon the armed forces in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The convening authority

approved the adjudged sentence of reduction to pay grade E-1 and a bad-conduct discharge.

The appellant raises four assignments of error: (1) the evidence is legally insufficient to sustain a conviction of attempted access to websites containing child pornography where his "Google" searches were "mere preparation" and did not constitute a "substantial step" toward completion of the predicate offense; (2) the evidence is factually insufficient to prove that he "specifically intended to access websites containing [child pornography];" (3) he was convicted of conduct in violation of the First Amendment; and, (4) the military judge erred by denying a challenge for cause against a court-martial panel member.

After considering the record of proceedings, the parties' pleadings, and the oral argument of counsel, we conclude that the evidence is factually insufficient to prove that the appellant specifically intended to access websites containing child pornography as defined by 18 U.S.C. § 2256(8). We will set aside the findings and sentence in our decretal paragraph. Our action moots the remaining assignments of error. Arts. 59(a) and 66(c), UCMJ.

Background

In 2010, the appellant's roommate at a Navy Dive School reported seeing three photographic images of naked children on the appellant's computer. He described the photos as depicting young naked boys and girls standing in outdoor settings, including a beach, a camp sporting event setting, and near a swimming pool. Record at 225-28; Prosecution Exhibit 5. Pursuant to a command authorization, criminal investigators searched the appellant's quarters and seized his electronic storage media. Record at 215-18. Shortly thereafter, the appellant waived his rights under Article 31(b), UCMJ, and provided a statement to investigators. In that statement he acknowledged:

> [A]ccess[ing] the Internet . . . search[ing] in Google through a nude beach website . . . click[ing] on the website and . . . s[eeing] several [photographs] of women on the beach and kids. . . . standing there, not posed. Most of the people in the pictures, including the children were naked. There was no sexual activity in the photos. There w[ere] no words or captions in the photos.

PE 4 at 1.

The appellant then acknowledged highlighting and saving pictures in his pictures folder, but claimed that there was no child pornography on his phone, iPod, or PlayStation 3. *Id.* He admitted to looking at pornography of young women of his age, 18, and usually searching for nude beach or porn or XXX. *Id.* After stating that "[t]here should not be any search terms related to children on my computer history," he concluded by stating:

> Child pornography to me is naked children. The pictures I have, I can't tell if it is or isn't. I had no idea it was wrong, or if it is wrong. I believe these websites were overseas things and they call it "naturism."

Id.

At trial, a Government expert in computer forensics (Mr. B) testified that the appellant's Internet search history revealed that on various dates during the charged time frame various search terms were entered into Google including: "nude kids," "kids nudist," "naked kids," "naked boy," "boys naked," "boy's penis," "boy/kid nudist," or "boy nudist kids." Record at 272. On 13 October 2010, the search term "child pornagraphy" [sic] was entered into "Google" web search and within minutes the same search term was entered into "Google Images." *Id*. at 274-76. Within minutes of those searches, the term "naked kids" was entered into "Google" – the record is not clear as to whether this search was a "Google" web search or "Google Images" search. *Id*.

Mr. B also testified that investigators recovered approximately 290,000 images from the appellant's computer including at least 1,500 images of adult pornography, other types of photographs, and videos. *Id*. at 282. He acknowledged that only 10 of the recovered images were relevant to the offense charged. *Id*.; PE 5 and 6. Mr. B testified that the three images in Prosecution Exhibit 5 were recovered from the appellant's "My Pictures" folder and were downloaded from three different internet websites." *Id*. at 265-68. The Government presented no testimony or argument that the three photos of nude children depicted in Prosecution Exhibit 5 constituted child pornography as defined by 18 U.S.C. § 2256(8).

The Government also introduced seven sexually explicit photographic images of young women and men of indeterminate ages recovered from the appellant's computer.[1] PE 6. The defense called as a witness Naval Criminal Investigative Service (NCIS) Special Agent T, who was then serving as the Department of Defense representative to the National Center for Missing and Exploited Children (NCMEC). He testified that none of the seven images depicted in Prosecution Exhibit 6 were present on the NCMEC or military child pornography data bases. He also testified that none of the images met the criteria for referral to the "doctors at the Armed Forces Center for Child Protection" for determination as to whether they depicted children. Record at 365. Specifically, he testified that several of the photos were not amenable to a sexual maturity rating as they did not depict breast or genital development, and that the other images were likely to be rated as "unknown/can't determine as opposed to rated as a child." Record at 371-76. The Government presented no testimony or argument that these seven images constituted "child pornography" as defined by 18 U.S.C. § 2256(8), but did argue that review of those images in conjunction with the search terms the appellant used evidenced the appellant's "specific intent to try and find images of child pornography." *Id.* at 441.

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

Factual Sufficiency of the Evidence

The appellant asserts that the evidence is factually insufficient to prove beyond a reasonable doubt that he specifically intended to access websites containing child pornography as defined by 18 U.S.C. 2256(8). We agree.

We have a duty to review the factual sufficiency of the evidence. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. 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. *Turner*, 25 M.J. at 325.

[1] Mr. B testified that these images were recovered from "volume shadow copy," where data is automatically stored through a "snapshot of the system at a point in time" in case the computer operator wants to "restore" the system "back to another point in time." Record at 269.

The specification alleged that the appellant:

> on divers occasions from . . . August to . . . October 2010 [did] knowingly and wrongfully attempt to access with intent to view Internet web sites containing images of child pornography, as defined by 18 U.S.C. § 2256(8), which conduct was . . . of a nature to bring discredit upon the armed forces.

In order to prove the offense alleged, the Government was required to prove beyond a reasonable doubt, *inter alia*, that the appellant specifically intended to access websites containing child pornography as defined by 18 U.S.C. 2256(8). Record at 424-25. The military judge defined child pornography in accordance with 18 U.S.C. § 2256(8) as "material that contains a visual depiction of an actual minor engaging in sexually explicit conduct," and properly defined "sexually explicit conduct" as "actual or simulated sexual intercourse or sodomy including genital/genital, oral/genital, and anal/genital or oral/anal whether between persons of the same or opposite sex, masturbation or lascivious exhibition of the genitals or pubic area of any person." *Id*. at 426-27. At trial, whether the evidence supported a finding that the appellant specifically intended to access websites containing child pornography was a key factual issue in controversy.

The primary evidence of the appellant's specific intent was his use of specific terms to search the Internet, digital images extracted from his computer, expert testimony, and his pretrial statement to investigators. PE 4-6. The appellant argues that the Internet search terms he used and other circumstantial evidence presented at trial demonstrate his intent to access images of nudity, but not images of minors engaging in sexually explicit conduct. He also avers that evidence of his subjective, albeit erroneous, belief that images of naked children were child pornography is not sufficient to sustain the findings of guilty. We agree that the evidence is factually insufficient to prove his specific intent to access websites containing child pornography for the following reasons.

First, the record includes no evidence that the appellant actually accessed a website containing images of child pornography, as defined by 18 U.S.C. § 2256(8). Likewise, the evidence presented does not support a finding that the appellant's Internet search activity actually identified any website containing child pornography, or that he "clicked on" or otherwise attempted to access any links returned in response to

search terms he entered into "Google." In fact, the Government presented no evidence that the source websites for images of nude children found on the appellant's computer contained child pornography or links thereto, while a defense computer forensics expert testified that the websites that the appellant visited "do not contain child pornography." Record at 412; PE 5.

It is essentially undisputed that the three images presented as Prosecution Exhibit 5 depicting young naked boys and girls standing in outdoor settings contain no visual depictions of "sexually explicit conduct," and do not constitute child pornography as defined by 18 U.S.C. § 2256(8). *See United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(adopting *Dost* factors with consideration of the totality of the circumstances to determine whether a photograph contains a "lascivious exhibition") (citing *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom*, *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)); *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); *see also United States v. Campbell*, 81 F. App'x 532, 536 (6th Cir. 2003); *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994). Nor, in our view, do these three images depict young children as sexual objects or in a sexually suggestive way so as to constitute "child erotica." *See United States v. Rapp*, 2013 CCA LEXIS 355 at n.15 (N.M.Ct.Crim.App. 30 Apr 2013) ("'Child erotica' has been defined by Federal courts as 'material that depicts "young girls [or boys] as sexual objects or in a sexually suggestive way," but is not "sufficiently lascivious to meet the legal definition of sexually explicit conduct" under 18 U.S.C. § 2256.'") (quoting *United States v. Vosburgh*, 602 F.3d 512, 520 (3d Cir. 2010) (additional citations omitted)).

Although images in Prosecution Exhibit 6 clearly depict "sexually explicit conduct," there is no direct testimony or argument that any of the persons depicted therein are minors. Based upon our review of the record and pleadings of the parties, we are unconvinced that these images depict minors or constitute child pornography as defined by 18 U.S.C. § 2256(8). We note with agreement the assessment of the Department of Defense liaison to NCMEC that the photos were not amenable to a sexual maturity rating or were likely to be rated as "unknown/can't determine as opposed to rated as a child." Record at 371-76.

Second, we are not persuaded by the Government's argument that the appellant's Internet search terms in conjunction with his obvious interest in images of nude children is sufficient to

prove that he specifically intended to access websites containing child pornography. On the contrary, we conclude that his Internet search activities, assessed in the context of the entire record, falls short of proof beyond a reasonable doubt of the requisite specific intent.

The appellant's apparent entry of "child porn[a]graphy" into "Google" web search and then, a short time later, into a "Google Images" search, is undoubtedly the most compelling and probative evidence of an intent to access a website and/or images of child pornography. However, during the approximately two months of the appellant's alleged attempts to access websites containing child pornography, the record reflects that "child pornagraphy" [sic] was entered only twice as a search term, within minutes, on 13 October 2010. The search term "naked children" was then entered into Google and a particular website was then accessed for the second time in 10 days. Further, one or all of the source websites for the images depicted in Prosecution Exhibit 5 were also accessed 10 days earlier, and again three and six days after the two "child porn[a]graphy" searches. Again, the Government put on no evidence that those websites contained child pornography or links thereto, while the defense computer forensics expert opined that the websites that the appellant visited "do not contain child pornography." Record at 412; PE 5.

Similarly, the probative value of the "child pornagraphy" search actions must be assessed in the context of the appellant's claim that "[c]hild pornography to me is naked children," and his subsequent actions. PE 4. If at the time of the Internet search activity, the appellant intended to access websites including "child pornography" which he erroneously believed to be images of "naked children" nothing done in an effort to accomplish his purpose of accessing websites containing images of naked children can be an attempt to commit a crime. *See* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 621-22 (3d ed. 1982)("It is the well settled rule that there cannot be a conviction for an attempt to commit a crime unless the attempt, if completed, would have constituted a crime.") (citations and internal quotation marks omitted).

Notably, and with the exception of evidence of the two internet searches on 13 October 2010 for "child pornagraphy," the remaining search terms including "nude kids," "kids nudist," "naked kids," "naked boy," "boys naked," "boy's penis," "boy/kid nudist," or "boy nudist kids" provide, at best, minimal evidence of the requisite specific intent. We do find this internet

search activity highly probative of the appellant's acknowledged interest in images of naked children, but not of a specific intent to access websites containing child pornography.

Moreover, the search terms used, the websites accessed, and the images downloaded do not include common search terms or graphic language often indicative of child pornography. Instead the images and the websites they are taken from appear more suggestive of nudist or naturist imagery. Though such imagery and interest in such imagery may be distasteful to many, the appellant's interest in images of naked children was neither alleged as misconduct, nor otherwise pursued or instructed upon as a theory of criminal liability at trial.[2]

Third, we find the appellant's statement to investigators credible. PE 4. His statement, provided shortly after his electronic storage media were seized and he was advised that he was suspected of "possession of child pornography" by investigators, is largely corroborated by the evidence.[3] Record at 215-18; PE 3.

His admissions that he searched in "'Google' through a nude beach website" "click[ed] on the website and . . . saw several [photographs] of women on the beach and [naked] kids," that "[t]here was no sexual activity in the photos," and that he "saved [the pictures] in [his] pictures folder" were corroborated by his roommate, and by computer forensics experts for the Government and defense. Record at 225-28, 267, 274-75, 282, 410-412; PE 4-5. His admission that he "look[ed] at pornography of young women, of [his] age, 18," is consistent

[2] We decline the Government's invitation extended during oral argument to affirm a general disorder in violation of clause 2 of Article 134, UCMJ, as a lesser included offense as we "may not affirm an included offense on 'a theory not presented to the' trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)). We leave for another day determination of the legal efficacy of such a general disorder allegation as well as the significant Constitutional questions implicated by any such allegation. *Cf. United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009) (setting aside simple disorder under Article 134, UCMJ, affirmed by lower Court as a lesser included offense of violation of Article 95 and overruled previous decisions "[t]o the extent those cases support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense . . . .").

[3] Arguably the only portion of his statement not clearly corroborated by other evidence of record was his claim that "[t]here should not be any search terms related to children on my computer history." PE 4. However, we find the absence of corroboration inconsequential considering the qualified nature of this statement and the appellant's acknowledgement that he saved images of nude children in his "pictures folder." *Id*.

with the images admitted at trial. PE 4 and 6; Defense Exhibit D. Perhaps most significantly, the appellant's stated beliefs that "[c]hild pornography [to him] is naked children," and that he believed the websites that he accessed and downloaded images from "were overseas things [called] `naturism'" are also corroborated by his Internet search activities, the images depicted in Prosecution Exhibit 5 as well as the website names from which he downloaded those three images, the testimony of the Government and defense computer forensics experts and NCIS SA T, as well as Defense Exhibit D. On balance, the appellant's statement weighs heavily against finding that he specifically intended to access websites that contained child pornography.

Conclusion

For these reasons, we have an honest and actual doubt suggested by both the material evidence, and lack of it – as to the appellant's specific intent to access websites containing child pornography as defined by 18 U.S.C. § 2256(8). *See generally United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994) (approving a similar instruction on "reasonable doubt"). We shall, therefore, give the appellant the benefit of the reasonable doubt to which he is entitled. After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are not convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Accordingly, the findings and the sentence are set aside and the Charge and its specification dismissed. Arts. 59(a) and 66(c), UCMJ.[4]

[4] By reaching this conclusion, we leave for another day resolution of whether entry of such search terms into "Google" or another Internet search engine may constitute a "substantial step" toward completion of an attempted offense. The parties assert, and our research suggests that this may be an issue of first impression in American jurisprudence. *See United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011)(noting that an "elusive" line separates mere preparation from the substantial step necessary to prove a criminal attempt - evidence just too preliminary to constitute a substantial step toward enticement where there was no travel, no "concrete conversation," such as a plan to meet, and no course of conduct equating to grooming behavior); *Compare United States v. Heiberg*, 2011 CCA LEXIS 319, at *10-11 (N.M.Ct.Crim.App. 22 Nov 2011) ("appellant's intentional efforts to obtain commercial subscriber-level access to (application to join) a child pornography website is clearly the overt act required to prove attempted receipt of child pornography"), and *United States v. Russo*, 2009 U.S. Dist. LEXIS 106598 (E.D. Va., Nov. 16, 2009) (viewing introductory page of a website that contained child pornography and making debit card payment to that website was a substantial step toward receiving child pornography), *aff'd*, 408 Fed. Appx. 753 (4th Cir. 2011).

Chief Judge MODEZELEWSKI and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court