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

Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL D. KING, JR.
BUILDER THIRD CLASS (E-4), U.S. NAVY

NMCCA 201000406
GENERAL COURT-MARTIAL

Sentence Adjudged: 16 April 2010.
Military Judge: CDR Mario de Oliveira, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR M.A. Larrea, JAGC, USN.
For Appellant: Capt Bow Bottomly, USMC.
For Appellee: Maj Elizabeth Harvey, USMC.

5 May 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARBERRY, Senior Judge:

A panel of members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of indecent conduct and one specification of aggravated sexual assault both in violation of Article 120, UCMJ, 10 U.S.C. § 920. The members sentenced the appellant to three years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant asserts on appeal that the military judge erred in admitting Prosecution Exhibit 10 into evidence and Specification 5 of Charge I fails to state an offense.[1]

After careful examination of the record of trial and the parties' pleadings, 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 February 2009, GF, the 13-year-old stepdaughter of the appellant, confided to her mother that the appellant was sexually abusing her. The appellant's wife reported the allegations to the Naval Criminal Investigative Service (NCIS) and the matter was investigated. As part of the investigation, an oral intercept of the appellant's Skype conversation with GF was conducted.[2] The intercept was successful in obtaining an audio recording of the conversation between the appellant and GF, but was unable to retrieve any text messages exchanged between the appellant and GF, due to his deleting the text messages.

Prior to trial, the appellant's counsel moved to exclude the audio recording, PE 10, because: (1) The absence of the video and typed text took the conversation out of context and would thus be unfairly prejudicial and confusing; (2) The recording was incomplete; and, (3) The recording could not be authenticated. (Appellate Exhibit XI).

Evidentiary Ruling

Prior to denying the appellant's motion to exclude the audio recording of the Skype conversation, PE 10, the military judge made detailed findings to support his decision. Specifically, he found that the appellant's claim that the omission of the texted portion of the conversation would cause contextual confusion was not supported by the facts; that a majority of the missing text was read aloud by or commented on by GF as she was receiving the text messages; that GF's reading of or commenting on the text put the communications in context; that the appellant never refuted or disputed GF's recitation of the text comments or complained that her reading of his text was out of context; and that the recording was sufficiently complete to allow it to come before the fact-finder.

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[1] The appellant raises both errors pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Skype is a popular voice communication service which uses the internet and provides a variety of features including two-way audio and video communication. *See* http://www.skype.com; http://voip.about.com/od/voipsoftware/a/whatisskype.htm

The military judge found that the recording was accurate and that the defense had failed to demonstrate how the evidence would mislead or confuse the members. The military judge also found that the recording could be authenticated, and finally, determined that the missing text was a matter that went to the weight the fact-finder might give the evidence, and not to its admissibility. The military judge then conducted a MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) balancing test and found that the probative value of the recording was not substantially outweighed by the danger of unfair prejudice and ruled the evidence was admissible. Record at 64-67.

At trial, the appellant's defense counsel *voir dired* the NCIS agent who was called to authenticate the audio recording and renewed his motion to exclude the recording. The military judge reiterated his earlier findings and also found that the absence of the text portion of the conversation was due to the appellant's deleting of the text. The military judge conducted another balancing test under MIL. R. EVID. 403 and once again denied the motion. (*Id.* at 432-34.).

We review a military judge's evidentiary rulings for an abuse of discretion. *E.g., United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994). When a military judge balances the competing interests in admitting or excluding evidence, we will give great deference to a clearly articulated basis for his decision. *See, e.g., United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Conversely, when there is no such clearly articulated basis, we will be less deferential in our review. In this instance, we hold that the military judge did not abuse his discretion in denying the appellant's motion to exclude the audio recording of his Skype conversation with GF.

MIL. R. EVID. 401 and 403

The appellant's recorded conversation with the victim was relevant evidence in determining whether he had sexual intercourse with GF, as she alleged, and whether he engaged in an indecent act by requesting that GF remove her shirt. In the latter instance, the recorded communication was the basis for Specification 5 of Charge I. Under these circumstances, the relevance of the audio recording is clear. MIL. R. EVID. 401.

Notwithstanding its relevance, the military judge conducted the requisite balancing test, on two occasions, and found that probative value was not substantially outweighed by its tendency to mislead due to the missing text. MIL. R. EVID. 403. We agree.

Completeness

Notwithstanding the absence of the text communications, the military judge ruled that the recording was admissible, subject to authentication, and that the absence of the text

communications went to the weight afforded the evidence, not its admissibility. Record at 66-67. In support of his ruling, the military judge cited to *United States v Blanchard,* 48 M.J. 306 (C.A.A.F. 1998), in which the court held that the existence of deletions or suspected deletions from a tape does not *per se* bar admission of the audio tapes. Our review of the military judge's decision indicates that he did not abuse his discretion in finding that "although the conversation was not absolutely complete it is more than sufficient to come before the fact finders for their own determination." Record at 65.

Having listened to the recording and reviewed the record of trial, we are satisfied that the audio recording was sufficiently complete and that the missing text, most of which was read aloud by GF, was not so substantial as to render the recording as a whole untrustworthy. *See United States v. Craig*, 60 M.J. 156, 160 (C.A.A.F. 2004). Accordingly, we are satisfied that the military judge's findings of fact are not clearly erroneous and his conclusions of law are correct, and conclude he did not abuse his discretion in admitting PE 10.

Authentication

Finally, we conclude that the military judge did not abuse his discretion in finding that the audio recording was properly authenticated under MIL. R. EVID. 901(b)(5). The testimony of the victim who participated in the Skype conversation and the NCIS agent who conducted the oral intercept was sufficient to authenticate the recording. *See Blanchard*, 48 M.J. at 310. Accordingly, the appellant's first assignment of error is without merit.

Failure to State an Offense

In his second assignment of error, the appellant alleges that Specification 5 of Charge I, Indecent Act under Article 120 (k), UCMJ, fails to state an offense because his request that GF expose her breasts was a communication that does not meet the definition of an indecent act. We disagree.

"A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)(citations omitted). Whether a specification states an offense is a question that we review *de novo*. *Id*.

Specification 5 of Charge I alleged that the appellant committed indecent conduct "by requesting Ms. [GF], a female under 16 years of age, to expose her breasts during a SKYPE internet conversation so that he could view them utilizing the web camera." Charge Sheet.

Article 120(k), UCMJ, specifies that any person who engages in indecent conduct is guilty of an indecent act. "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. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of --
>
> (A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or
>
> (B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125 of this chapter), or sexual contact.[3]

Art. 120(t)(12), UCMJ.

In *United States v Rollins*, 61 M.J. 338 (C.A.A.F. 2005), the court affirmed the appellant's conviction for indecent acts with another under Article 134, UCMJ, where the appellant was convicted of engaging in an indecent act by giving an 18-year-old male a pornographic magazine and *by requesting* that they masturbate together.[4] In denying the appellant's claim that his actions were constitutionally protected by the First Amendment, the Court noted that the offense did not involve the simple exchange of constitutionally protected material, but instead a course of conduct designed to facilitate a sexual act in a public place. *Id.*

Similarly, the appellant in this case engaged in a course of conduct designed to result in his 13-year-old stepdaughter's exposure of her breasts. The evidence at trial demonstrates that from a deployed environment, the appellant contacted GF via a Skype internet connection, engaged in a video chat, and then

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[3] We note that this is not an all inclusive list of the conduct that might punishable under Article 120(k) as the word "includes" means "includes but is not limited to". *See* 10 U.S.C. § 101(f)(4), Rules of Construction. We note further that had the appellant actually viewed GF's breast via the internet transmission, his action would have been punishable under Article 120(k), UCMJ.

[4] Article 134, UCMJ, indecent acts with another was replaced by Article 120(k), UCMJ which omitted the requirement that the act be performed with a certain person and that the conduct be of a nature to be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

requested that his 13-year-old stepdaughter stand up, lift her shirt, exposing her breasts to him. AE XXXVII at 34 (Transcript of PE 10).

After examining all the circumstances, including the age of the victim, the nature of the request, and the relationship of the parties, we find that the appellant's behavior was indecent in that it constituted "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." Art. 120(t)(12), UCMJ. We conclude that the appellant's indecent conduct satisfies the statutory definition of an indecent act.

Accordingly, we conclude that Specification 5 of Charge I states an offense as "it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Crafter*, 64 M.J. at 211.[5]

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Judge PRICE concurs.

BOOKER, Senior Judge (dissenting in part and concurring in part):

I respectfully part company with regard to the legal efficacy of Specification 5 of Charge II. I otherwise concur in the disposition of the case of this service member who committed unspeakable crimes with and against his stepdaughter.

Any dispassionate reading of the record shows that the appellant communicated indecent language to GF during the course of the conversations alleged in this specification. I will note that the particular means of communication used here – a Skype device, which I understand to be a type of contemporaneous two-way audio and video communication – may represent that "technological advance" which tends to "bring about physical presence as it is commonly understood." *United States v. Miller*, 67 M.J. 87, 90 (C.A.A.F. 2008). As I read the record, the appellant and GF were able to view one another and react immediately to one another's voices and actions, and if that is

[5] Assuming without deciding that the appellant's unfulfilled request that GF expose her breasts to him does not constitute an indecent act, in the context of this case his request does constitute an attempt to engage in an indecent act, a lesser included offense of Article 120(k), UCMJ. In that event, we would affirm a finding of guilty for attempted indecent act, and without any change to the sentencing landscape, affirm the approved sentence. *See United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(citation omitted); *see also United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006).

the evil that the offense of indecent liberties is designed to address, then it may well be prudent to redefine "physical presence" to encompass such a case as this. The appellant was not charged with communicating indecent language, however, nor was he charged with indecent liberties. He was charged with committing an indecent act.

Whether a specification states an offense is a question that we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). We consider the essential elements of the offense, notice of the charge, and protection against double jeopardy in performing our analysis. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

Congress has the authority to delineate the elements of a federal criminal offense. *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Jones*, 68 M.J. 465, 2010 CAAF LEXIS 393 at 16-17 (C.A.A.F. 2010). It holds similar authority with respect to the land and naval forces. U.S. CONST. art. I, § 8, cl. 13 In the case of the appellant, it has defined an offense of "indecent act" to mean "indecent conduct," which it further defines 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." If that were all there were to the statutory definition, I could agree that the specification states an offense, and I could certainly find a legally and factually sufficient basis for affirming the guilty finding to the specification.

The problem is that the statutory definition continues with examples of acts that constitute indecent conduct. I recognize that the examples are not limited to those provided; *see* 10 U.S.C. § 101(f)(4). I note, however, that the examples provided all involve some sort of surreptitious activity with regard to the victim, and applying the statutory construction device of *eiusdem generis* I would have trouble including the allegation here in that category.

I also have some question about the legal and factual sufficiency of the proof to the members. *See United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The statute contains what appear to be two additional elements that were not proven to the members: that the activity occur without the consent of the other person and that the activity violate the other person's reasonable expectation of privacy. Granted, GF was under 16 at the time of the video teleconference, and persons under the age of 16 are legally incapable of consenting to "sexual activity". Art. 120(t)(14)(a). I am not certain, however, whether the term "sexual activity" encompasses what is alleged in the specification. I will note that a female's baring her breasts could be considered an indecent exposure, Article 120(n), but I note by the same token that the definition of child pornography does not include exhibition of breasts as part of "sexually

explicit conduct". *See* 18 U.S.C. § 2256(2)(A) and (B). I think as a general proposition that a child's expectation of privacy in her appearance is greater than an adult's expectation of privacy in her appearance, but there was no evidence presented on that element, either. In any case, the military judge never instructed the members on definitions to use during their deliberations.

In the final analysis, though, while I would find that Specification 5 of Charge II fails to state an offense, I join the majority's resolution of the assignment of error regarding the Skype conversation transcription and, on reassessment, I would comfortably conclude that the sentencing authority would impose, and the convening authority would approve, a sentence at least as great as that adjudged originally. *E.g., United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006).

For the Court

R.H. TROIDL
Clerk of Court