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

Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

HEATHER D. LUBICH
ELECTRONICS TECHNICIAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201100378
SPECIAL COURT-MARTIAL

Sentence Adjudged: 7 April 2011.
Military Judge: CAPT Carole J. Gaasch, JAGC, USN.
Convening Authority: Commander, Naval Strike and Air Warfare Center, Fallon, NV.
Staff Judge Advocate's Recommendation: LT J.M. Riches, JAGC, USN.
For Appellant: LCDR Michael R. Torrisi, JAGC, USN.
For Appellee: Maj William C. Kirby, USMC.

19 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.

PER CURIAM:

A panel of members with enlisted representation sitting as a special court-martial convicted the appellant, contrary to her pleas, of one specification of attempted larceny, one specification of wrongfully and knowingly transferring, possessing, or using a means of identification of another person, and one specification of impersonating a commissioned

officer with the intent to defraud, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934, respectively. The members sentenced her to forty-five days confinement, forfeiture of $1,300.00 pay per month for two months, reduction to pay grade E-3, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered the approved sentence executed.

In her sole assignment of error, the appellant asserts that the military judge erred in admitting into evidence, over defense objection, computer-generated printouts marked as Prosecution Exhibits 19 and 23. The appellant argues: (1) that PE 19 and PE 23 contain testimonial hearsay admitted in violation of the confrontation clause; (2) that, in the alternative, the exhibits were inadmissible hearsay; and, (3) that the Government failed to properly authenticate the exhibits.

After careful examination of the record of trial and the parties' pleadings, we disagree and 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.

Facts

The appellant was charged with impersonating her supervisor, a commissioned officer, and submitting fraudulent documents while applying for a $10,000 loan in his name. At trial, the Government sought to introduce documents that detailed her internet history, showing websites she visited and passwords she used to access accounts. Mr. Schmidt, a cyber forensics examiner from the Naval Criminal Investigative Service (NCIS), testified that he conducted a forensic examination of the appellant's user data from her Navy-Marine Corps Intranet (NMCI) account. He described a process in which the case agent submitted a request to the NMCI Information Assurance Department, which then remotely collected all data associated with the appellant's navy.mil user account by an automated process that searched NMCI servers for information on the account and then retrieved her user account data from servers and from all workstations that she had logged onto. Record at 428, 430-32, 434-39. That data, which included all her documents, folders, and internet history, was downloaded by NMCI to six CD ROMs and forwarded to the NCIS case agent. From that raw data, Mr. Schmidt generated two reports, using computer

forensic tools. The first report was the appellant's Internet Explorer Cookie Index (PE 19), a 179-page-document that tracked the appellant's visits to websites, using the text files that are automatically created by the website on the user's profile. Mr. Schmitt also created PE 23 from the appellant's NMCI account data; PE 23 details the various user names and passwords that the appellant used to log into particular websites from her navy.mil account.

Trial defense counsel objected to the introduction of both PE 19 and PE 23, arguing that Mr. Schmitt could not properly authenticate the two exhibits as he had not collected the underlying data from the appellant's navy.mil account, and that the data contained testimonial hearsay. After considering testimony and argument at an Article 39(a) session, the military judge overruled the defense counsel's objections and admitted the exhibits stating:

> I believe that argument goes more to the weight of the evidence, and you certainly can explore that in cross-examination. The objection is overruled. I find that both Prosecution Exhibits 19 and 23 for identification have been sufficiently authenticated and that the Confrontation Clause is not implicated because we are dealing with an automated process, no conclusions in these documents themselves and, again, it's an automated process with very little discretion involved on the part of the person that was obtaining the data.

Record at 444.

We review a military judge's ruling admitting evidence for an abuse of discretion. *United States v. Hursey,* 55 M.J. 34, 36 (C.A.A.F. 2001). The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). The challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997) (internal quotation marks and citations omitted)). We turn now to the appellant's three arguments regarding these two exhibits.

Confrontation Clause

The confrontation clause provides the appellant the right to confront witnesses against him. U.S. CONST. amend. VI. Testimonial hearsay is an out-of-court statement made by witnesses and introduced at trial in violation of the confrontation clause. *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). "[M]achine-generated data and printouts are not statements and thus not hearsay – machines are not declarants – and such data is therefore not 'testimonial.'" *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (internal quotation marks and citations omitted).

In the instant case, PE 19 and PE 23 are computer-generated reports from the appellant's NMCI account. Record at 429, 438-39. The reports contain lists of files created automatically on her user profile that reveal internet history, user names, and passwords. *Id.* at 429-31, 441, 453. The data was not manipulated, merely compiled. *Id.* at 429-30, 442. Therefore, the exhibits do not contain testimonial hearsay and do not implicate the confrontation clause.

Hearsay

The appellant also argues that PE 19 and PE 23 contain hearsay evidence and that a sufficient foundation was not laid to support their admission.

Hearsay is an out-of-court statement, made by a declarant, offered for the truth of the matter asserted. MILITARY RULE OF EVIDENCE 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In the case at bar, the exhibits were logs of the appellant's online activities created automatically on her user profile. A printout of a computer record showing processed keystrokes is not hearsay. *United States v. Duncan*, 30 M.J. 1284, 1289 (N.M.C.M.R. 1990). The printouts detailing internet history and access to various websites contain no statement, were not made by a declarant, and are therefore not hearsay.

Authenticity

Although the computer generated reports were not hearsay, and therefore no hearsay exception needed to be established, the Government was nevertheless required to authenticate PE 19 and PE 23 prior to admission. The appellant argues that Mr. Schmidt could not properly authenticate PE 19 and PE 23, because he did

not have the requisite knowledge of the process used by NMCI to gather the original data.

The general rule requiring authentication of real and documentary evidence is designed to ensure that only reliable information reaches the trier of fact. Authentication as a condition precedent to admissibility "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MIL. R. EVID. 901(a). When seeking to admit computer-generated reports, the proponent must authenticate the exhibit as the print-out it purports to be, as well as authenticate the process by which it was prepared to show that the print-out produced accurately reflects the input data. *United States v. Fisher*, No. 2010000287, 2011 CCA LEXIS 122, at *8, unpublished op. (N.M.Ct.Crim.App. 30 June 2011).

The requirement for authentication may be satisfied by a variety of methods, including testimony from a witness with knowledge that "a matter is what it is claimed to be," MIL. R. EVID. 901(b)(1), or by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result, MIL. R. EVID. 901(b)(9).

Taking into account this record as a whole, the testimony of Mr. Schmidt was sufficient to authenticate PE 19 and PE 23. He described the process by which the raw data from the appellant's NMCI account was downloaded onto CD-ROMs, and the process by which he generated PE 19 and PE 23 from that raw data. Mr. Schmidt described clearly what a user's internet cookie history would contain (PE 19), and what data would be captured in the NTUSER.DAT index (PE 23). A review of PE 19 and PE 23 unequivocally establishes that those two exhibits are exactly what the trial counsel claimed them to be: an exhaustive, detailed history of the appellant's online activities from her NMCI account.

Conclusion

We conclude that the military judge's rulings were not clearly erroneous; her conclusions were correct and she did not abuse her discretion in finding that PE 19 and PE 23 did not violate the confrontation clause and were properly authenticated under MIL. R. EVID. 901. Accordingly, the appellant's

assignment of error must fail. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court