IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 201000406
Michael D. KING JR. Builder Third Class (E-4) U.S. Navy, Appellant	)	USCA Dkt. No. 11-0583/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issue Presented

WHETHER SPECIFICATION 5 OF CHARGE I ALLEGING AN INDECENT ACT UNDER ARTICLE 120(k), UCMJ, FAILED TO STATE AN OFFENSE WHERE THE INDECENT ACT ALLEGED WAS APPELLANT ORALLY REQUESTING DURING A SKYPE INTERNET CONVERSATION THAT A CHILD UNDER THE AGE OF 16 YEARS EXPOSE HER BREASTS SO THAT HE COULD VIEW THEM UTILIZING THE WEB CAMERA.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006), because Appellant's approved sentence included a bad-conduct discharge and three years of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial, convicted Appellant, contrary to his pleas, of one specification of indecent conduct and one specification of engaging in a sexual act, on divers occasions, with a child between the age of twelve and sixteen, both in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2007). The Members sentenced 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 Record of Trial was docketed with the lower court on July 22, 2010. After Appellant and the Government submitted briefs, the lower court affirmed the findings and sentence. *United States v. King*, No. 201000406, 2011 CCA LEXIS 83 (N-M. Ct. Crim. App. May 5, 2011). On June 28, 2011, Appellant filed a petition for grant of review with this Court. On July 21, 2011, this Court granted review of the issue presented.

Statement of Facts

A. Appellant's wife discovered his misconduct.

On February 14, 2009, Appellant left his wife, AK, and stepchildren and deployed to Kuwait with his unit. (J.A. 57.) While he was gone, Appellant communicated with his family by SKYPE internet chat. (J.A. 57.) One day, AK came home and wished to look through the text of previous SKYPE conversations with Appellant because she missed him. (J.A. 81.) She discovered a conversation between Appellant and her fourteen-year-old daughter, GF, which was sexually explicit. (J.A. 81-82.) After AK asked GF about these messages, GF showed her mother a sex toy that Appellant had bought for her which she had hidden in the box springs of GF's bed, and related that Appellant had sexually abused her. (J.A. 86.)

B. NCIS recorded Appellant's SKYPE conversation with GF.

AK reported these facts, and NCIS began an investigation, which included recording a SKYPE conversation between Appellant and GF. (J.A. 149, 183.) During the conversation, Appellant discussed the sex toy he had purchased for GF, and admitted having sex with her. (J.A. 219, 221.) Appellant also asked GF to expose her breasts so he could view them utilizing a web camera. (J.A. 151, 215-217.)

C. Appellant was convicted of committing an indecent act.

Specification 5 of Charge I alleges a violation of Article 120, UCMJ, in that 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." (J.A. 11.) During the Government's case-in-chief, Trial Defense Counsel moved to dismiss the specification as failing to state an offense, claiming Appellant's request to view his stepdaughter's breasts did not fall under the definition of indecent conduct. (J.A. 76-77.)

Trial Defense Counsel argued that unlike the definition of "indecent liberties," the definition of "indecent conduct" did not include the term "communication" and therefore Appellant's request was not included within the definition of "indecent conduct." (J.A. 77.) The Military Judge noted that the

specific examples of indecent conduct included in the definition were not exclusive, and denied the Defense motion. (J.A. 78.)

Summary of Argument

The specification alleged indecent "conduct" because the plain meaning of the word "conduct" includes an oral request such as Appellant's. "Conduct" means how a person behaves, and Appellant's request to GF to expose her breasts was part of his behavior. His request went beyond merely communicating indecent language. It was part of a course of conduct designed to facilitate Appellant viewing his stepdaughter's breasts via a web camera. Indecent conduct does not need to be without a victim's consent and contrary to that victim's reasonable expectation of privacy, because those factors are examples of one type of indecent conduct, not elements of the offense.

Argument

SPECIFICATION 5 OF CHARGE I ALLEGED AN INDECENT ACT BECAUSE APPELLANT'S REQUEST TO HIS FOURTEEN-YEAR-OLD STEPDAUGHTER TO EXPOSE HER BREASTS SO HE COULD VIEW THEM WITH A WEB CAMERA CONSTITUTED INDECENT "CONDUCT" UNDER THE PLAIN MEANING OF THE WORD.

A. The specification alleged every element.

The standard for determining whether a specification states an offense is whether the specification alleges every element of the offense either expressly or implicitly, so as to give the accused notice and to protect him against Double Jeopardy.

United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). The question of whether a specification states an offense is reviewed *de novo*. *Id.* Specifications challenged at trial are judged more strictly than those challenged for the first time on appeal. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

Specification 5 alleged a violation of Article 120(k), Indecent Acts. The elements of this offense are: "(a) That the accused engaged in certain conduct; and (b) That the conduct was indecent conduct." Manual for Courts-Martial (MCM), United States (2008 ed.), Part IV, ¶45b(11).

The specification states an offense because it alleges each element of the offense expressly. The specification alleges the conduct Appellant committed——"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"——and that this conduct was indecent conduct. (J.A. 11.) Therefore, the specification stated an offense.

B. Orally requesting a minor to expose her breasts is indecent "conduct" under the word's plain meaning.

Article 120, UCMJ defines "indecent conduct" 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. 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 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. . . or sexual contact

Article 120(t) (12), UCMJ, 10 U.S.C. § 920 (2007). However, since the statute does not define the word "conduct" by itself, statutory construction must begin with the word's common and approved usage. *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003)(citations omitted).

Black's Law Dictionary defines "conduct" as "Personal behavior, whether by action or inaction; the manner in which a person behaves." Black's Law Dictionary 315 (8th ed. 2004). The manner in which Appellant behaved was by asking his fourteen-year-old stepdaughter to stand up, lift up her shirt, and expose her breasts to him. (J.A. 216-17.) These actions went far beyond merely communicating indecent language. Rather, they were part of a course of conduct designed to facilitate Appellant viewing his stepdaughter's breasts via a web camera. *See United States v. Rollins*, 61 M.J. 338, 345 (C.A.A.F. 2005) (giving minor a pornographic magazine and requesting that they masturbate together constituted indecent act with another).

This Court has routinely held in other settings that the word "conduct" includes language. *United States v. Brinson*, 49

M.J. 360, 365 (C.A.A.F. 1998) (language constituted disorderly *conduct*); *United States v. Lofton*, 69 M.J. 386, (C.A.A.F. 2011) (comments of a sexual nature were *conduct* unbecoming an officer). In *Brinson*, this Court held that the uttering of numerous curse words was disorderly conduct. 49 M.J. at 365.[1] Just like the definition of indecent conduct under Article 120, UCMJ, the definition of disorderly conduct under Article 134, UCMJ, does not expressly state that the "conduct" may consist of language only. MCM, Part IV, ¶73c(2). Such clarification is not necessary based on the plain meaning of the word. *See e.g. Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22 (1993) (describing unwanted sexual innuendos as "conduct" which may be actionable as hostile work environment sexual harassment).

C. The definition of an indecent liberty does not change the plain meaning of the word "conduct".

An indecent liberty "may consist of communication of indecent language as long as the communication is committed in the physical presence of a child." Article 120(t)(11), UCMJ. By contrast, the definition of "indecent conduct" does not expressly state that the conduct may consist of communication of indecent language. Article 120(t)(12), UCMJ. However, the difference in the definitions was caused by historical reasons,

[1] The conviction for disorderly conduct was affirmed as a lesser-included offense of indecent language. *Brinson* is only cited for the proposition that language may be disorderly conduct.

and does not support the conclusion that Congress intended to exclude requests to a minor to engage in sexually explicit behavior from the definition of indecent conduct.

The current definition of indecent liberty under Article 120, UCMJ, is based on the previous definition of indecent liberties with a child under Article 134, UCMJ. MCM, App. 23, A23-15. The sentence which explains that an "indecent liberty may consist of the communication of indecent language" first appeared in an explanation paragraph in the 1984 revision to the Manual. MCM, (1984 ed.), Part IV, ¶ 87c(2). The explanation was not distinguishing between "conduct" and the communication of indecent language, but rather between offenses committed "in the physical presence of the child" and those that were not.

The Court of Military Appeals previously held that communications to a minor over the telephone did not support a conviction for taking indecent liberties with a minor. *United States v. Knowles,* 15 C.M.A. 404 (C.M.A. 1965). The explanation which first appeared in the older version of Article 134, indecent liberty, and has since been incorporated into the current definition under Article 120, reaffirms the physical presence requirement. But for the fact that Appellant was communicating with GF via a web camera, instead of in person, he would have been guilty of indecent liberty with a child, and

facing a maximum of fifteen years confinement, instead of five. MCM, pt. IV, ¶ 45f(4)-(5).

In addition, when the clarification that an indecent liberty may consist of the communication of indecent language was first added, the offense of indecent liberty required "that the accused committed a certain act." MCM, (1984 ed.), Part IV, ¶ 87b(2)(a). Committing an "act" is a more narrow term which might not naturally include the uttering of indecent language, so the clarification was necessary. By contrast, the elements of Appellant's offense only require that he "engaged in certain conduct." MCM, Part IV, ¶45b(11). There is no need to clarify that the conduct can be communicating indecent language, because that is already apparent from the word "conduct."

D. <u>The rule of lenity does not apply because the statute is not grievously ambiguous</u>.

Appellant asks this Court to invoke the rule of lenity. (Appellant's Br. at 4.) However, it is not appropriate to invoke the rule of lenity unless "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello v. United States,* 524 U.S. 125, 138 (1998)(quotations omitted). The simple existence of some ambiguity "is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree." *Id.* The rule of lenity does not permit a defendant to "automatically win

in these cases" unless there is "grievous ambiguity or uncertainty in the statute". *Id.* at 138-39.

The Government acknowledges that in the past, this Court has used the rule of lenity in a slightly different manner. *See United States v. Thomas,* 65 M.J. 132, 135 (C.A.A.F. 2007). But regardless of whether the rule is invoked upon ambiguity, or only upon grievous ambiguity, as articulated by the Supreme Court, it should not be invoked in this case because the statute is not ambiguous. The plain meaning of indecent conduct includes Appellant's request to his fourteen-year-old stepdaughter to expose her breasts.

E. Appellant's request to GF did not need to be without GF's consent and contrary to her reasonable expectation of privacy. These factors are not elements of the offense.

The definition of indecent conduct *includes* observing or recording in some manner the genitalia, anus, buttocks, areola, or nipple of another person contrary to that person's reasonable expectation of privacy, and without that person's consent. Article 120(t)(12), UCMJ. "Includes" means "includes but not limited to." 10 U.S.C. § 101(f)(4) (2006). Thus, Appellant's argument that indecent conduct is limited to situations in which the conduct occurs in violation of a person's reasonable expectation of privacy, and without the person's consent, is contrary to the plain meaning of the statute.

1. The definition includes voyeuristic conduct which might not otherwise be included.

The history of the statute indicates that Congress was intending to specifically include actions which might not otherwise be included in the definition, not to restrict indecent conduct to actions committed without the victim's consent and contrary to the victim's right of privacy. Prior to 2007, secretly recording a nude person in violation of that person's reasonable expectation of privacy and without that person's consent would not have been sufficient to constitute indecent acts *with another* in violation of Article 134, UCMJ. *See United States v. Ederle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *see also United States v. McDaniel,* 39 M.J. 173, 175 (C.M.A. 1994). Rather, such conduct done without any participation by the victim, would have been considered "mere voyeurism" that was not committed *with another. Id.*

In 2007, 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. Lest there be any confusion, Congress explicitly included what would have previously been "mere voyeurism" within the new definition of indecent conduct. Article 120(t)(12), UCMJ. Therefore, making a recording of a nude person in violation of that person's

expectation of privacy and without that person's consent is one type of behavior that might constitute indecent conduct.

But that does not mean that every type of indecent conduct must be committed in a similar manner as acts of voyeurism. Appellant asks this Court to use the rule of *ejusdem generis* to restrict indecent conduct solely to "surreptitious, voyeuristic acts." (Appellant's Br. at 9-10.)

2. The rule of *ejusdem generis* does not limit indecent conduct solely to surreptitious or voyeuristic acts.

The rule of *ejusdem generis* is never applied to give a statute an operation different from that intended by the body enacting it. *Danciger v. Cooley*, 248 U.S. 319, 326 (1919). The rule of *ejusdem generis* "may not be used to defeat the obvious purpose of legistation." *United States v. Powell*, 423 U.S. 87, 91 (1975). Here, the obvious purpose was to expand the definition of indecent conduct to specifically include voyeuristic acts, a type of behavior that had not previously been included.

The rule of *ejusdem generis* is also not appropriate because the definition of indecent conduct is grammatically different than definitions in other statutes in which the rule applies. *Ejusdem generis* was used in *United States v. Begay*, 553 U.S. 137 (2008) because the statute defined a "violent felony" as, *inter alia*, any crime that is "burglary, arson, or extortion, involves

use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 139-40. The Court used the rule of *ejusdem generis* to conclude that driving under the influence was "too unlike the provision's listed examples for us to believe that Congress intended the provision to cover it." *Id.* at 142; *But cf. Sykes v. United States,* 131 S. Ct. 2267 (2011)(finding that conviction for using a vehicle to flee police after being ordered to stop was a violent felony under the statute).

But suppose that after *Begay* was decided, a statute defining a violent felony did not list burglary, arson, extortion, or the use of explosives, as examples of crimes that presented as serious risk of potential injury or personal injury to another, but that instead the statute read as follows: "A violent felony is a crime that presents a serious risk of potential injury or personal injury to another. A violent felony includes driving under the influence." Suppose that the statute further stated that "includes" means "includes but not limited to." In that case, a defendant would be hard pressed to argue that committing murder with a firearm was not a violent felony, because his crime did not involve alcohol or a vehicle. It would be clear that the statute was specifically including a crime that might not otherwise be included, and using *ejusdem generis* to limit the plain words of the statute solely to crimes

such as driving under the influence would not be appropriate. Such is also the case with indecent conduct. Specification 5 of Charge I did not need to allege that Appellant's indecent conduct occurred in violation of GF's reasonable expectation of privacy, and without her consent, because those factors are not elements of the offense.

F. The President lists communicating indecent language as one way in which the general article might be violated. This does not mean that such conduct is outside the statutory definition of indecent conduct.

The preemption doctrine may in some circumstances prohibit application of Article 134, UCMJ, to conduct covered by Articles 80 through 132, UCMJ. MCM, pt. IV, ¶ 16c(5)(a); *United States v. Anderson,* 68 M.J. 378 (C.A.A.F. 2010). Here, Appellant seeks to create a new "reverse preemption doctrine" by arguing that because the President has listed indecent language as one of the ways in which Article 134, UCMJ, could be violated, it follows that indecent oral communications are therefore excluded from the statutory definition of indecent conduct. (Appellant's Br. at 6.) The fact that Appellant could have also been charged with violating the general article is irrelevant towards whether his actions meet the statutory definition of indecent conduct. Congress establishes the elements of offenses. *United States v. Jones,* 68 M.J. 465, 471 (C.A.A.F. 2010). Here, Congress specifically changed one of the elements of the offense. The

old indecent acts with another required that the accused "committed a certain wrongful act with another person" MCM (2005 ed.), Part IV, ¶90b(1). By contrast, the element of indecent acts under Article 120, UCMJ, only requires that the accused "engaged in certain conduct." MCM (2008 ed.), Part IV, ¶45b(11). Because the plain language of this element includes Appellant's conduct, Specification 5 of Charge I stated an offense.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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I certify that the foregoing was electronically filed with the Court and a copy electronically served on opposing counsel on September 21, 2011.

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