22 July 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
Robert M. Payne
USAF,
Appellant.

USCA Dkt. No. 13-0345/AF

Crim. App. No. 37594

BRIEF IN SUPPORT OF PETITION GRANTED

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STAFF SERGEANT (E-5) **ROBERT PAYNE,** USAF, *Appellant.*	)	Crim. App. No. 37594

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

Issue Granted

WHETHER THE MILITARY JUDGE IMPROPERLY INSTRUCTED THE MEMBERS OF THE ELEMENTS FOR CREATION OF CHILD PORNOGRAPHY.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 8-11 September 2009, Appellant was convicted, contrary to his pleas, of one specification of attempting to communicate indecent language; one specification of attempting to transfer obscene material to a minor; and one specification of attempting to persuade, induce, entice, or coerce a minor to create child pornography, each in violation of Article 80, UCMJ, 10 U.S.C. § 880; and of two specifications of failure to obey a lawful

general regulation, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The members sentenced Appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. J.A. at 379. On 19 January 2010, the convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 3 years, and reduction to E-1. J.A. at 30.

On 17 January 2013, in an unpublished opinion, AFCCA affirmed the findings and sentence. J.A. at 17. The Military Justice Division reported that a copy of AFFCA's opinion was mailed to Appellant by first class mail on 23 January 2013.

On 18 March 2013, Appellant petitioned this Court for a grant of review. On 8 April 2013, Appellant filed a Supplement to Petition for Grant of Review. The government waived their right to reply on 11 April 2013. On 20 June 2013, this Court granted review on the issue presented.

Statement of Facts

Staff Sergeant (SSgt) Payne was an Air Force recruiter and excelled at his job. J.A. at 436-54. But, after he received an award for his role in assisting a car crash victim in August 2007, his mental state began to noticeably change. J.A. at 262-63. He became depressed and stopped communicating with the outside world. J.A. at 263. His mental state progressively deteriorated and he became moody and anti-social. J.A. at 264-

65. In April 2008, for no apparent reason, Appellant announced he wanted a divorce and left his wife and two kids. J.A. at 265-66.

Between June and July 2008, Appellant and a person claiming to be a 14-year-old girl named “Marley” began a relationship. J.A. at 87. Appellant and “Marley” conversed by posting on a message board, through instant messaging, and on the telephone. J.A. at 87, 114, 117. "Marley" was, in fact, a part-time undercover deputy sheriff working for the Sheriff’s Department of Ulster County, New York. J.A. at 68-69, 85. Ultimately, Appellant was arrested by Ulster County Sheriff’s Department deputies on l August 2008. J.A. at 228.

A. Conversations with “Marley.”

Under the screen name “Cheergrrl13” and using the identity “Marley Riley,” Deputy Lillian Vedder would access an America Online chat room entitled “Friends and Flirts.” J.A. at 77, 85. A chat room enables individuals to “chat” via the internet with each other. *Id*. She entered the age of fourteen years old when she accessed the chat room. J.A. at 80. The text of these “chats” were copied from the chat room and saved to a word document by Deputy Vedder if the conversation became sexually explicit. J.A. at 81-82. The saved chats did not include a date stamp. J.A. at 81.

The first contact between Deputy Vedder and the Appellant was on 20 June 2008. J.A. at 87. Appellant used the screen name "flyingsolo799." J.A. at 88. Deputy Vedder was having computer issues and was unable to preserve the initial chat. *Id*.

The first chat Deputy Vedder saved was from 20 June 2008. J.A. at 380-85. The recorded chats between Appellant and Deputy Vedder became sexually explicit. J.A. at 380. Deputy Vedder initiated discussion about "seeing" "flyingsolo799" "jacking off and cumming." *Id*. "Flyingsolo799" responded, indicating he had a "cam," meaning camera. *Id*. Deputy Vedder responded, "I don't htough [sic]." *Id*. The conversations escalated with chats involving sexual fantasies. J.A. at 381. In one chat, the following colloquy occurred:

> Flyingsolo799@yahoo.com: do u have any nude pics
> Cheergrrl13: no
> Flyingsolo799@yahoo.com: can u take some
> Cheergrrl13: u there
> Flyingsolo799@yahoo.com: yea
> Cheergrrl13: ok
> Flyingsolo799@yahoo.com: so can u take some nude pics
> Cheergrrl13: i cant
> Cheergrrl13: i don't have a cam
> Flyingsolo799@yahoo.com: ok
> Cheergrrl13: the bathing suit is the closet
> Cheergrrl13: nud eoic [sic] I have

J.A. at 381-82.

While on the stand, Deputy Vedder initially could not even remember what "flyingsolo799" asked her. J.A. at 90. After trial counsel refreshed her memory, she stated "to take some nude picture." J.A. at 91. There was no further discussion about pictures during that chat session. *Id*. Another chat occurred on 30 June 2008. J.A. at 386. During that chat, "flyingsolo799" asked "cheergrrl13" if she was able to get "pics." *Id*. "Cheergrrl13" responded, "not yet." *Id*. On the stand, Deputy Vedder did not recall anything significant occurring in that conversation. J.A. at 92.

Another conversation occurred on 16 July 2008. J.A. at 386-92. This conversation started with a discussion of "flyingsolo799's" background, which included "flyingsolo799" sending pictures of himself to "cheergrrl13's" email address. J.A. at 387. "Flyingsolo799" then asked, "can u send me more pics[?]" *Id*. "Cheergrrl13" responded she didn't have any and also stated she did not have a camera phone. J.A. at 387-88. Later in the chat, "flyingsolo799" requested pictures of "cheergrrl13" in her cheer uniform, to which the response was no. J.A. at 389. In an 18 July 2008 conversation, "flyingsolo799" stated he "wished you had more pics." J.A. at 394. "Cheergrrl13" responded that she was sorry she doesn't have anymore. *Id*. Later in the 18 July chat, "cheergrrl13" asked to see "flyingsolo799's" penis. J.A. at 396.

On 21 July 2008, their chat included talk about Marley swimming and “flyingsolo799” stated, “mmmm I bet u looked good.” J.A. at 400. “Flyingsolo799” followed up by asking, “have u been able to get more pics,” however, “cheergrrl13” responded, “not yet.” *Id*. “Flyingsolo799” responded he had a picture of his penis, to which “cheergrrl13” requested to see it. *Id*. “Flyingsolo799” complied and sent it to “cheergrrl13’s” email. *Id*. Upon receipt, “cheergrrl13” commented, “nice.” J.A. at 401.

On 22 July 2008, Appellant, again using screen name “flyingsolo799,” started another chat with “cheergrrl13.” J.A. at 410. In this chat, Appellant explained his reasoning for wanting more pictures of “cheergrrl13.” He stated: “that’s why i want more pics of u that why i no ur not just a cop poseing [sic] as a girl.” *Id.* “Cheergrrl13” replied, “i have to find the disk they are on ... i can post more to myspace.” *Id*. To which “flyingsolo799” said, “cool that would work.” *Id*.

On direct examination, the trial counsel asked Deputy Vedder whether the Appellant asked “you to send him anything in order to know that you were not a cop during that conversation?” J.A. at 102. Deputy Vedder could not recall. *Id.* Trial counsel refreshed her memory and Deputy Vedder stated that the Appellant had asked for “[p]ictures . . . [m]ore pictures.” J.A. at 103.

During a recorded telephone conversation from 22 July 2008, the Appellant reiterated his request for pictures: “See if you can find me some pictures.” J.A. at 139. Later in the conversation, “flyingsolo799” stated, “i wish i could see a pic of u nude.” J.A. 412. “Cheergrrl13” again responded by saying, “my parents would kill me if i sent that on the computer.” *Id*. The interactions continued with “flyingsolo799” sending additional pictures. J.A. at 416-17.

Appellant continued to request pictures from “cheergrrl13”: “yea but i still would like pics”; “i’ll make u a deal u send me a nude pic of u and u will get one of me”; and “so send me one with you nude.” J.A. at 417. “Cheergrrl13” continued to protest that her parents would be upset at her. *Id*. This caused “flyingsolo799” to respond: “if we can get away with fucking u u can get away with a nude pic.” *Id.*

In a recorded 23 July 2008 telephone conversation between Appellant and Deputy Vedder, the pictures were again mentioned. J.A. at 155-56. Once again, Deputy Vedder, acting as if she was “Marley”, stated that she would have her mother find the disc of the pictures. *Id*.

On 25 July 2008, another chat occurred where “flyingsolo799” asked about pictures. J.A. at 424. “Cheergrrl13” responded that her mom had found the disk and she would put more up on Sunday. *Id*. During testimony, once again,

Deputy Vedder could not recall if there was any discussion about pictures, however, after her memory was refreshed she stated that she communicated that her mom found the disk. J.A. at 107.

B. Jury Instructions.

During an Article 39a session, the military judge marked her draft findings instructions. J.A. at 268. Civilian defense counsel made the following objection:

> Regarding your instructions for all four specifications under Charge I, we object to your instructions because we do not believe that the government in its pleadings identified the offenses to which you are listing elements. We believe that based on what trial counsel stated when she read the identity of the elements to us and later to the members in their initial discussion about these findings instructions as you've memorialized on the record, and even at present, we believe that these elements are not necessarily a fair parsing of what was pled in each of the four specifications in Charge I.

The military judge noted the objection and read the following instruction for Specification 4 of Charge I:

> (1) that . . . the accused attempted to persuade, induce, entice, or coerce "Marley," someone he believed was a female 14 years of age, to commit the offense of creating child pornography, by requesting that she send nude photos of herself to the accused;
>
> (2) that the accused intended that the person he thought was "Marley" actually produce one or more visual depictions of her nude body to send him electronically or through the mail; and
>
> (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and

discipline in the armed forces or was a nature to bring discredit upon the armed forces.

J.A. at 283.

She then read the following definitions:

"Child pornography" means any visual depiction of a minor engaging in sexually explicit conduct.

. . .

"Sexually explicit conduct" includes masturbation or lascivious exhibition of the genital or pubic area of any person.

"Lascivious" means exciting sexual desires or marked by lust. Not every exposure of genitals or pubic area constitutes a lascivious exhibition. Consideration of the overall content of the visual depictions should be made to determine if it constitutes a lascivious exhibition. In making this determination, considered are such factors as whether the focal point of the depiction is on the genitals or public area, whether the setting is sexually suggestive, whether the child is depicted in an unnatural pose or in inappropriate attire considering the child's age, whether the child is partially clothed or nude, whether the depiction suggests sexual coyness or willingness to engage in sexual activity and whether the depiction is intended to elicit a sexual response in the viewer, whether the depiction portrays the child as a sexual object, and any captions that may appear on the depiction or materials accompanying the depiction. A visual depiction, however, need not involve all of these factors to be a lascivious exhibition.

J.A. at 283-94.

She further instructed:

Proof that the accused actually persuaded "Marley" to send nude photographs of her to him is not required. However, it must be proved beyond a reasonable doubt that, at the time of the acts, the accused intended to persuade, or attempted to persuade, "Marley," whom he

> thought was a 14-year-old female, to send nude photographs of herself to him.

J.A. at 284.

C. Closing Argument

During closing argument, the trial counsel made no mention of "sexually explicit conduct," "lascivious exhibition," or any factors listed by the military judge. J.A. at 321-23. Civilian defense counsel solely addressed the entrapment issue of the operation during his closing argument. J.A. at 339-56.

D. Air Force Court of Criminal Appeals' decision.

AFCCA found the following elements required for the offense:

> [E]lements of an attempt offense under Article 80, UCMJ, were: (1) that the accused did a certain overt act, (2) that the act was done with the specific intent to commit a certain offense under the code, (3) that the act amounted to more than mere preparation, and (4) that the act apparently tended to effect the commission of the intended offense. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 4.b (2008 ed.).
>
> . . .
>
> [E]lements of a Clause 1 or Clause 2 Article 134, UCMJ, offense are: (1) that the accused did or failed to do certain acts, and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or was a nature to bring discredit upon the armed forces. *MCM*, Part IV, ¶ 60.b.
>
> [T]wo federal circuits have stated the elements (of 18 U.S.C. § 2251(a)) as follows: "(1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and

> (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce." *United States v. Broxmeyer*, 616 F.3d 120, 124 (2d Cir. 2010) (quoting *United States v. Malloy*, 568 F.3d 166, 169 (4th Cir. 2009) (internal quotations omitted)).

J.A. at 9-10.

Despite the military judge's failure to include these elements in the instructions, AFCCA found "although the military judge's instructions on attempts lacked some specificity, they included all the required elements and adequately instructed the members to find the necessary predicate facts beyond a reasonable doubt." J.A. at 10.

Summary of Argument

The military judge erred by omitting required elements in her instructions to the members, failed to adequately define "create" or "creation of child pornography," in her instructions and by instructing that a nude photo itself rises to the level of child pornography.

Argument

THE MILITARY JUDGE IMPROPERLY INSTRUCTED THE MEMBERS OF THE ELEMENTS FOR CREATION OF CHILD PORNOGRAPHY.

Standard of Review

"The question of whether a jury was properly instructed is a question of law, and thus . . . review is de novo." *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007).

Law and Analysis

A military judge must instruct the members of the panel on the elements of each offense charged. Rule for Courts-Martial (R.C.M.) 920(e)(l). "It is a 'basic rule that instructions must be sufficient to provide necessary guideposts for an informed deliberation on the guilt or innocence of the accused.'" *United States v. Dearing*, 63 M.J. 478, 479 (C.A.A.F. 2006) (citing *United States v. Anderson*, 13 C.M.A. 258, 259 (C.M.A. 1962)) (further internal citations omitted).

The military judge improperly instructed the panel members in three different ways: (1) the military judge entirely omitted the elements of attempt, as well as the elements required under 18 U.S.C. § 2251(a); (2) the military judge did not adequately define "create" or "creation of child pornography"; (3) the military judge instructed that a nude picture is enough to constitute creation of child pornography.

1. The military judge omitted required elements in her instructions to the members.

If the military judge entirely omits an element, the error is per se prejudicial. *United States v. Mance*, 26 M.J. 244, 255 (C.M.A. 1988).

Specification 4 of Charge I alleges Appellant violated Article 80, UCMJ, Attempt. The elements of attempt are: (1) the accused did a certain overt act; (2) that the act was done with

the specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; and (4) that the act apparently tended to effect the commission of the intended offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM), Part IV, ¶ 4(b) (2008 ed.).

The military judge erroneously instructed the members on Specification 4 of Charge I when she failed to instruct the members of these elements of attempt. *See* J.A. at 282-85. Instead, the military judge erroneously announced to the members that Appellant was charged with solicitation in violation of Article 134, UCMJ, and proceeded to instruct them on the elements of solicitation. *Id*. In doing so, the military judge entirely omitted not just the elements of the charged offense, but the offense itself. This error is per se prejudicial.

AFCCA erred in attempting to stretch the three elements the judge instructed on into the different elements of both Article 80 and Article 134. Though AFCCA held that the nonspecific instructions were adequate to cover all required elements, the military judge's instructions failed to include critical, required items.

One obvious missing element was the substantial step element and requirement of Article 80, UCMJ. If the military

judge had properly instructed the members on attempt, it would have read similar to:

> Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense.
>
> MCM, Part IV, ¶ 4.c.(2) (2008 ed.)

Although AFCCA found that a "serious request to commit the requested act," was a substantial step, the members at trial needed to find that requests for a nude picture to prove that "Marley" was not a cop, was a substantial step to creating child pornography. J.A. at 10, 410. This Court recently found error in a guilty plea context where, while defining the elements of an Article 80 attempt to commit an Article 134 offense, the military judge failed to instruct on the requirement of a substantial step toward committing the underlying offense. *United States v. Schell*, 72 M.J. 339 (C.A.A.F. 2013).

Under 18 U.S.C. § 2251(a), it is a crime to "persuade, induce, entice, or coerce any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of

transmitting a live visual depiction of such conduct." AFCCA cited two federal circuits as establishing the elements for violating § 2251(a) as follows: "(1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce." *United States v. Broxmeyer*, 616 F.3d 120, 124 (2d Cir. 2010) (quoting *United States v. Malloy*, 568 F.3d 166, 169 (4th Cir. 2009) (internal quotations omitted)). J.A. at 9-10.

AFCCA found that the third interstate commerce element, which the members of this court-martial were never instructed on, was established by the word "send." J.A. at 11. This is incorrect. The members were not instructed that, in order to find Appellant guilty, they had to find that the materials used to produce the images had been transported in interstate or foreign commerce. No evidence was admitted as to how such "child pornography" would be produced, let alone how it would be produced with materials from interstate or foreign commerce.

AFCCA erred when it found that the omission of crucial definitions and required elements from the instructions was harmless. Because an element of the charged offense was entirely omitted, "this error may not be tested for harmlessness

because, thereby, the court members are prevented from considering that element at all." *Mance,* 26 M.J. at 255.

2. The military judge failed to adequately define "create" or "creation of child pornography."

The military judge improperly chose to instruct on the elements of solicitation. While doing this, she attempted to define "child pornography." However, she failed to instruct the members on the elements of creation of child pornography. Due to the military judge's error in properly instructing on the elements and definitions of "creating child pornography," the members were unable to make an informed deliberation regarding whether Appellant attempted to create child pornography. It was not possible for the members to decide beyond a reasonable doubt that Appellant was guilty of attempting to create child pornography without an instruction of what constitutes creation of child pornography.

The term "create" is not defined in § 2251(a). In the absence of a statutory definition, this Court considers three sources: (1) the plain meaning of the term; (2) the manner in which Article III courts have interpreted the term; and (3) guidance, if any, the UCMJ may provide through reference to parallel provisions of law. *See Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (in the absence of a statutory definition of a particular term, courts look "to regular usage to see what

Congress probably meant."); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (internal citation omitted); *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) ("words should be given their common and approved usage") (citation and quotation marks omitted).

"Create" is defined as "to bring into existence" or "to make out of nothing and for the first time." *Webster's Third New International Dictionary* 532 (1966). Creation of child pornography under the statute, however, cannot simply mean "to bring into existence." An individual can "bring into existence" an image that may meet the requirements of child pornography; however, if that image was "created" using a computer and is a virtual image rather than an actual image, that image is not child pornography and would not fall under Section 2251. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)[1]. The Government must prove that an image depicts an actual child in order to sustain a conviction under the Child Pornography Prevention Act. *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003).

[1] *See also New York v. Ferber,* 458 U.S. 747, 764 (1982) (discussing the origin exclusion from first amendment protection due to the welfare of the children engaged in its production); Lara N. Strayer, *Ambiguous Laws Do Little to Erase "Kiddie Porn,"* 5 Temp. Pol. & C.R. L. Rev. 169, 178 (1996) (stating that "producers force children to visually reproduce prohibited sexual acts with or without the assistance of adults").

In order to be convicted of creating child pornography, there must be more than simply bringing an image into existence. The military judge failed to instruct the members on the definition of "creating child pornography."

Instead, the military judge stated that the accused had to merely intend "Marley" simply "send nude photographs of herself to him." J.A. at 526. However, § 2251(a) applies only to the production of child pornography, and distribution is proscribed by another uncharged section. *See Broxmeyer*, 616 F.3d at 126-27. Therefore, Appellant's act cannot be what is meant by "creating" under the statute.

3. The military judge instructed that a nude photo itself rises to the level of child pornography.

The military judge instructed the members that Appellant needed to think that "Marley" actually produced one or more visual depictions of her nude body to send to him electronically or through the mail. J.A. at 283. However, that is not the mens rea requirement for creating child pornography.

First, a nude picture alone is not child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (expressly stated that "depictions of nudity, without more, constitutes protected expression"). Instead, "sexually explicit conduct" is required. As defined by 18 U.S.C. § 2256(2), "sexually explicit conduct" includes five different categories of conduct: sexual

intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person." *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006).

While the military judge did define child pornography as "lascivious," and listed the factors under *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), these definitions were not framed appropriately. The military judge stated on two occasions that Appellant only had to intend that he get sent a visual depiction of her nude body. J.A. at 283-84. Again, this is erroneous. Further, this misunderstanding of what is child pornography and what constitutes creation of child pornography was exploited during trial counsel's closing argument. Trial counsel argued that the chats between "Marley" and Appellant about nude pictures and potentially being caught by "her" parents constituted the attempted creation of child pornography. Additionally, trial counsel did not mention sexually explicit conduct, lascivious exhibition, or anything else that would meet the requirements of child pornography.

Regarding lascivious exhibition, courts look to the intent of the producer or editor of the video. *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999).

For the instructions in this case to be adequate, the military judge must tell the members what the accused intended

to do was to persuade, entice, or coerce "Marley" into taking a photo of herself that included her engaging in "sexually explicit conduct" of either masturbation or lascivious exhibition of the genitals, in accordance with the *Dost* factors. However, the military judge did not do that, and the members were left ill-informed about the crime of attempted creation of child pornography.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding for Specification 4 of Charge I and the sentence, and return the case to the Judge Advocate General of the Air Force to remand to the appropriate convening authority for a sentencing rehearing.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on July 22, 2013.

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