21 August 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 13-0345/AF
Staff Sergeant (E-5), ROBERT M. PAYNE, USAF, *Appellant.*	)	Crim. App. No. 37594

FINAL BRIEF ON BEHALF OF THE UNITED STATES

THOMAS J. ALFORD, Captain, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4813
Court Bar No. 34441

GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 27428

DON CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 35093

INDEX

TABLE OF AUTHORITIES

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL CASES

MISCELLANEOUS

21 August 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 13-0345/AF
Staff Sergeant (E-5), ROBERT M. PAYNE, USAF, *Appellant.*	)	Crim. App. No. 37594

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

ISSUE PRESENTED

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, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

In June and July of 2008, Appellant engaged in graphic internet chats with "Marley"--an individual Appellant believed to be a 14-year-old girl, but who was actually a part-time Ulster County, New York, Sheriff's deputy (Deputy Vedder). (JA at 68-69, 85, 87, 90.) During the chats, Appellant inquired about Marley's age, her sexual history, discussed sexual intercourse with her, and described what he wanted to do with

her sexually. (JA at 91, 94-99, 380-435.) Appellant also sent "Marley" photos of his erect penis and requested on multiple occasions that she send him graphic photographs in return.[1] (*See, e.g.*, JA at 387, 389, 394, 396, 400-02, 405-06, 410-12, 416-18, 422, 431.) Appellant also told "Marley," "[I] could go to prison for haveing [sic] sex with you." (JA at 410.) On 23 July 2008, in a recorded telephone conversation between Appellant and "Marley," Appellant once again mentioned pictures, but "Marley" put off following through with the request as she had before. (JA 155-56.)

After assurances from "Marley" that they would not get in trouble, Appellant proposed that the two meet for a "camping trip" so the they could engage in sexual activity. (JA at 120-21, 176-77, 222, 414-15.) When Appellant drove to meet "Marley" in Saugerties, New York, he was apprehended by the local authorities at a Citgo gas station. (JA at 227-28.)

At trial, Appellant was charged with four separate attempt offenses under Article 80, UCMJ for his online interactions with an individual he thought was a 14-year-old girl. (JA 21, 23.) In particular, specification 4 of Charge I stated:

[1] "Marley" originally sent Appellant a picture of a young girl in a bathing suit, but this was insufficient for Appellant's purposes, as he repeatedly asked her for more pictures during their sexually explicit chats, saying things such as "so can u take some nude pics," "i wish I could see a pic of u nude," "i'll make u a deal u send me a nude pic of u and u will get one of me," "if we can get away with fucking u u can get away with a nude pic," and "can I video us haveing sex." (JA at 381-82, 412, 417, 422.).

> In that STAFF SERGEANT ROBERT M. PAYNE, United States Air Force, 360th Recruiting Group, McGuire Air Force Base, New Jersey, did, within the continental United States, on divers occasions, from on or about 1 June 2008 to on or about 1 August 2008, wrongfully and knowingly attempt to persuade, induce, entice or coerce "Marley," someone he believed was a female 14 years of age, who was in fact, Lillian Vedder, an Ulster County New York Sheriff's Office undercover detective, to create child pornography by requesting that "Marley" send nude photos of herself to the said STAFF SERGEANT ROBERT M. PAYNE, which conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

(JA at 23.) Each of the four specifications of Charge I were charged as an attempt, instead of a completed act, based in part on the fact that the underage girl Appellant thought he was speaking with was actually an undercover Sheriff's deputy, making it impossible to complete these offenses. (JA at 68-69.)

At the beginning of trial, the panel members were provided a flyer with the exact charges and the trial counsel summarized the "general nature" of specifications 1 and 4 of Charge I as "two specifications of attempted solicitation of another to commit an offense." (JA at 32, 37.) Trial defense counsel did not file a motion to dismiss any of the attempt specifications on grounds of failure to state an offense. Trial defense counsel also did not file a motion for a bill of particulars or other request for specificity on the attempt specifications.

When preparing the findings instructions, the military judge stated that specification 4 of Charge I was an attempted "solicit[ation] of a minor to create child pornography." (JA at 21, 23, 282, 457-73.) The language of the specification substantially mirrors the language of 18 U.S.C. § 2251(a), a federal law that can be applicable to servicemembers by way of Article 134, UCMJ. *See generally* Manual for Courts-Martial, United States (MCM) (2008 ed.) part IV, para. 60. The military judge thereafter provided counsel for both sides a draft of her findings instructions for review and asked if either side objected to the instructions as written. (JA at 267-68, 457-73.)

Appellant's trial defense counsel objected to the instructions on all four of the attempt specifications in Charge I by claiming the following:

> [W]e 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 these elements are not necessarily a fair parsing of what was pled in each of the four specifications in Charge I.

(JA 268-69.)

Appellant's trial defense counsel never clearly stated that any of the specifications failed to state an offense; that any instruction was missing elements; that the elements failed to properly define "child pornography," "create," or "creation;" that "nudity" was constitutionally insufficient to establish a child pornography offense; or that the instructed upon offenses so differed from trial defense counsel's view of the case that it had affected their defense. (Id.) Moreover, Appellant's trial defense counsel declined to even tell the judge which specification or what elements were "not a . . . fair parsing of what was pled" because they apparently felt it was not their duty "to assist the government or even the bench in perfecting elements" against Appellant. (JA at 268.)

In response to this objection, trial counsel stated that the announcement of the "general nature of the charges" before the members is simply a generalized summary and that the military judge properly determined which offenses Appellant attempted to commit. (JA at 270-71.) Thereafter, the military judge instructed the members on the attempt specifications as drafted in her written findings instructions. (JA at 274-85, 457-73.) Concerning specification 4 of Charge I, the military judge stated that Appellant was charged with "soliciting a minor to create child pornography." (JA 282.) She then instructed the members that the elements of that offense were:

> (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.

(JA at 283, 462.) (emphasis added.)

The military judge further defined the offense by stating that an enticement required a "serious request to commit the requested act" and that proof Appellant actually persuaded "Marley" to send a picture was not required for an attempt offense. (JA at 284-85, 463.) She also stated that Appellant must have "specifically intended that 'Marley' produce visual depictions of a minor engaged in sexually explicit conduct." (Id.) Additionally, the military judge discussed the issue of impossibility of completing the crime by discussing the fact that Deputy Vedder was not actually an underage girl, and that this fact does not affect an attempt offense, so long as Appellant believed she was an underage girl when he was enticing her. (JA at 285, 463.)

Following the reading of the instructions, neither counsel objected to the instructions as given. (JA 363.) The military judge also provided a copy of her written instructions to the members for use during their deliberations. (JA at 274, 364, 457-73.)

The members thereafter convicted Appellant of specification 4 of Charge I, along with four of the other six specifications within Charge I and II. (JA 372-73.) When discussing a maximum punishment, the trial counsel specifically stated specification 4 of Charge I was based on 18 U.S.C. § 2251 and calculated the maximum for that offense as 15 years confinement. (JA at 376.) After the military judge asked trial defense counsel for their position on maximum punishment, trial defense counsel declined to provide a maximum punishment and simply reiterated their generic statement that "because of the way the charges were pled . . . we don't know what the offenses are." (Id.) The military judge agreed with the trial counsel that specification 4 of Charge I was an attempt to violate 18 U.S.C. § 2251 and instructed on the maximum sentence accordingly. (JA at 376-78.)

SUMMARY OF THE ARGUMENT

The military judge did not err in instructing on the elements of specification 4 of Charge I. A comparison of the specification in question and the language of 18 U.S.C. § 2251(a) demonstrates that the specification was an attempted

violation of the federal law applied to the military through the general article. Both the specification in question and 2251(a) state it is a crime to "persuade, induce, entice or coerce" a minor to produce a visual depiction of child pornography. Accordingly, this Court should be reviewing the instructions by the military judge as instructing on an attempted violation of 18 U.S.C. § 2251(a) and not merely under the statutory language of Article 80 taken out of context. The unique factors involved in Appellant's offense meant that the military judge had to craft unique instructions, which she was permitted to do. Her instructions on the attempted offense, which were only generally objected to along with the other specifications in the charge, contained all of the necessary elements and adequately instructed the members to find the necessary predicate facts beyond a reasonable doubt.

Appellant's claim that the military judge committed reversible error by not defining the commonly understood term "create" or "creating" is meritless. The terms "create" or "creating" are well understood, and there is nothing in the record to indicate that the terms were used in a way other than their normal definitions. Further, this Court has declined to find error in cases where the military judge did not define well-understood terms.

Appellant bootstraps a legal sufficiency challenge onto his allegation of instructional error. While Appellant is correct that a nude picture alone is not sufficient for the members to find child pornography, the military judge properly instructed the members that Appellant had to have specifically intended that "Marley" produce visual depictions of a minor engaged in sexually explicit conduct. Further, any error in the instructions was harmless based on the overwhelming evidence of Appellant's guilt on specification 4 of Charge I.

ARGUMENT

THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS OF THE ELEMENTS FOR ATTEMPED ENTICEMENT OF A MINOR TO CREATE CHILD PORNOGRAPHY.

Standard of Review

This Court reviews the substance of an instruction *de novo*. United States v. Maynulet, 68 M.J 374 (C.A.A.F. 2010). "Failure to object to an instruction or the omission of an instruction before the members close to deliberate constitutes waiver absent plain error." R.C.M. 920(f); *see also* United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). If an instruction includes all required elements but merely lacks further specificity, that instruction may be tested to see if it was harmless. United States v. Glover, 50 M.J. 476, 478 (C.A.A.F. 1999).[2]

[2] However, if this Court finds that the military judge did not inform the members of a required element of the offense, then the principle of waiver

Law and Analysis

The elements of an attempt offense under Article 80, UCMJ are: (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. *See* MCM, part IV, para. 4.b. "To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which tends to accomplish the unlawful purpose." MCM, part IV, para. 4.c.(1).

Until recently, the UCMJ did not contain an enumerated offense for child pornography itself, but prosecutions for child pornography prior to the new amendment had been consistently upheld in the military under Article 134, UCMJ. *See, e.g*, United States v. Irvin, 60 M.J. 23 (C.A.A.F. 2004); United States v. Brisbane, 63 M.J. 106 (C.A.A.F. 2006); United States v. Wolford, 62 M.J. 418 (C.A.A.F. 2006); United States v. Leonard, 64 M.J. 381 (C.A.A.F. 2007); United States v. Ober, 66 M.J. 393 (C.A.A.F. 2008); United States v. Kuemmerle, 67 M.J. 141 (C.A.A.F. 2009). Article 134 is commonly referred to as the "general article" because it can be adapted to any disorder or neglect that prejudices good order and discipline or that is

---

will not apply and the error cannot be tested for harmlessness. United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000); Glover, 50 M.J. at 478.

service discrediting under clause 1 or 2 of that Article. *See* MCM, part IV, para. 60.a. and c. The only elements of a clause 1 or 2 Article 134 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, para. 60.b.

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."[3] 18 U.S.C. § 2251(a) (emphasis added). While 18 U.S.C. § 2251(a) does not list out separate elements similar to UCMJ offenses, at least two federal circuits have listed the elements as requiring proof beyond a reasonable doubt that: "(1) [T]he 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

[3] 18 U.S.C. § 2251(a) is one law within the larger "Child Pornography Prevention Act of 1996" (CPPA), an act passed by Congress that created and revised several laws specifically targeted at preventing sexual abuse of minors and the production of child pornography. *See* Child Pornography Prevention Act, Pub. L. No. 104-208, § 121 (1996).

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).

In his brief, Appellant states that the military judge committed reversible error when she instructed on the elements of specification 4 of Charge I. (App. Br. at 11-12.) The basis for this alleged error is his claim that the military judge "failed to instruct the members of the[] elements of attempt" in violation of Article 80. Instead, Appellant argues, the military judge instructed the members "on the elements of solicitation" in violation of Article 134, UCMJ. (App. Br. at 13.) Appellant also argues the instruction is deficient because the military judge failed to adequately define "create" or "creation of child pornography." (App. Br. at 16.) Last, Appellant argues that the military judge erred in instructing the members that a nude photo by itself rises to the level of child pornography. (App. Br. at 18.) The United States will answer each of these allegations in turn, in addition to addressing whether prejudice existed if there was error.

A. The military judge's instructions covered all necessary elements of specification 4 of Charge I.

Appellant's argument that the military judge did not include the required elements of Article 80 in her instructions is misplaced. Appellant seems to argue that because the

military judge did not read the statutory elements of Article 80, she did not include the requirements of Article 80 in her instructions. However, under this unique charge of attempting to entice a minor to create child pornography, the military judge was permitted to, and appropriately did, tailor her instructions to cover not only the required elements of Article 80, but also of Article 134 and 18 U.S.C. § 2251(a). As all elements from these offenses were addressed, the military judge's instructions were not erroroneous.

The combination of an attempt offense, a federal crime, and the UCMJ article applying that federal crime to the military simply cannot be overlooked when determining what instructions the military judge needed to provide to the members. This Court has stated a military judge may tailor instructions to the evidence and the law. *See, e.g.*, United States v. Hopkins, 56 M.J. 393 (C.A.A.F. 2002) (citing United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997)). That is precisely what the military judge did in this case when she covered both the factual and legal issues involved in an attempted violation of 18 U.S.C. § 2251(a) that was further complicated by the recipient of Appellant's enticement being made to an undercover police officer posing as a 14-year-old girl. A failure to tailor the instructions would have led to a redundant, duplicative and confusing recitation of nine elements from three

different laws as listed in the law section above. *See* Leonard, 64 M.J. at 383 ("[N]either clause 1 nor clause 2 requires that a specification exactly match the elements of conduct proscribed by federal law.").

Moreover, it is clear from the record that all of the attempt offenses in Charge I were attempts, and not completed acts, due to the fact Appellant was interacting with an undercover deputy and not a 14-year-old girl as he thought. And concerning specification 4 of Charge I in particular, that crime was charged as an attempt for the additional reason that despite Appellant's attempts to persuade, induce, entice, or coerce "Marley" into taking a child pornographic picture in violation of 2251(a), no such image was ever produced, nor could it ever be created by an adult such as Deputy Vedder. Simply put, this is not a case where the charge was an attempt offense because the accused tried to commit the offense and failed of his own regard, but, rather, because Appellant tried to commit the offense and it was impossible to complete due to the recipient of his actions being an undercover detective.

Ultimately, the unique factors involved in Appellant's offense meant the military judge had to craft unique instructions. Appellant's actions clearly met the purpose and elements of 2251(a) and would have resulted in a completed offense but for the fact that the minor he was speaking with was

an undercover deputy unable to take a child pornographic image of herself. However, Article 80 specifically takes such "factual impossibility" issues into account to ensure a criminal such as Appellant is not excused for his conduct based solely on law enforcement preventing the completion of the crime. *See* MCM, part IV, para. 4.c.(3).

With the proper background of the reason behind the unique instructions, it is clear that the military judge's instructions on specification 4 met all four of the required elements for Article 80, UCMJ. First, the instructions described with specificity what overt act Appellant committed, that is, "requesting the sending of nude photos" by "Marley," a person Appellant "believed to be a female 14 years of age." (JA at 283.) Second, the instructions stated that the overt act was done with the intent that "Marley" "actually produce one or more visual depictions of her nude body to send to him electronically" and that Appellant "must have specifically intended that the offense of creating child pornography be committed" to be found guilty of specification 4.[4] (JA at 283-84.) Third, the instructions stated that the actions of

[4] As stated above, the military judge also instructed the members that Appellant must have "specifically intended that 'Marley' produce visual depictions of a minor engaged in sexually explicit conduct . . . ." (JA at 285.) The military judge also instructed the members what constituted "sexually explicit conduct," and specifically mentioned that not "every exposure of genitals or pubic area constitutes a lascivious exhibition." (JA at 284.)

Appellant must have amounted to "a serious request to commit the requested act," thereby meeting the element that Appellant's overt act constituted a "substantial step" and amounted to more than mere preparation.[5] Finally, Appellant's act would tend to effect the commission of the intended offense as 2251(a) criminalizes such a request, and Appellant's request would have affected the commission of the offense if "Marley" had actually been a 14-year-old female and not an adult (Deputy Vedder), who is unable to take a photo of himself that constitutes child pornography.

Appellant cites this Court's recent decision in United States v. Schnell, 72 M.J. 339 (C.A.A.F. 2013), to support his proposition that the military judge's "substantial step" instruction was insufficient or missing. Yet, Schnell was (1) a guilty plea case, (2) where 18 U.S.C. § 2422(b) was at issue by way of clause 3 of Article 134, UCMJ, (3) "the military judge erred because she failed to instruct [the appellant] that he had to take a substantial step toward persuading, inducing, enticing or coercing a minor in order to plead guilty," and (4) "neither the specification nor the stipulation of fact mentioned that a 'substantial step' was an element of the offense." Schnell, 72 M.J. at 346.

[5] As Appellant's overt act in this attempt offense was the actual request transmitted to the recipient, the nature of the overt act already met the requirement that is was more than mere preparation.

Here, the military judge specifically instructed the members of the following:

> You must also be convinced beyond a reasonable doubt that the accused's statements constituted a serious request that the offense be committed. Unless you are satisfied beyond a reasonable doubt that the accused was not communicating in jest when the statements were made . . . you may not convict the accused of this offense.
>
> ...
>
> For this offense to be completed, it is sufficient for the accused to have tried to persuade what he thought was a 14 year old girl to create child pornography.

(JA at 285.) Based on this language, it is clear that the military judge sufficiently instructed the members with regard to both the overt act and "substantial step" requirements under this attempted clause 1 and 2 Article 134 offense.

The military judge's instructions also met the elements of Article 134 and 18 U.S.C. § 2251(a). Under Article 134's requirements, the instructions clearly stated an act done by Appellant and that the act was prejudicial to good order and discipline or service discrediting. Additionally, the instructions included that: (1) The subject of Appellant's solicitation was someone Appellant believed to be a minor; (2) that he attempted to persuade, induce, entice, or coerce her to take a pornographic picture of herself and send it to him; and (3) that such child pornographic image would have been sent

electronically or through the mail, meeting the (in this case, unnecessary)[6] interstate commerce element. Instructing on each of the elements of the principal, greater offense--2251(a)--must necessarily include the (lesser) attempted offense. *See* United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). And while the person enticed was not actually a minor and no images of child pornography were created, that is why this charge was an attempt under Article 80 and not a completed crime under Article 134.

Finally, trial defense counsel's failure to adequately object to the instructions of the military judge means this issue should be reviewed under a plain error analysis. Trial defense counsel waited until after pleas and after all the evidence was admitted to suddenly claim the specifications were ambiguous. Under R.C.M. 905(b)(2) and 906(b)(6), any motion to dismiss for failure to state an offense or for a bill of particulars on an ambiguous specification should have been filed prior to entry of pleas. Perhaps recognizing that the defense could not meet their burden under either of these motions, trial defense counsel chose instead to object to any instructions on the four attempt specifications. Trial defense counsel also chose not to adequately explain the basis for their objection to the military judge and thereby denied the military the military

[6] The "interstate commerce" language was not included in the specification and is not technically an element if the crime is charged as an attempted clause 1 or 2 offense under Article 134. *See generally* United States v. Leonard, 64 M.J. 381 (C.A.A.F. 2007).

judge the ability to rule in their favor. Simply put, trial defense counsel's intentional withholding of their reasoning in their objection made it function as no objection at all. However, even if this Court does review the instructions under an undeserved *de novo* standard, the government contends that the instructions on specification 4 of Charge I meet that standard as well for the reasons already explained.

B. The failure to define the term "creation" in respect to the already defined term "child pornography" was not error.

Appellant's claim that not providing a definition of the colloquial words "create" or "creating" in reference to the defined term "child pornography" led to prejudicial, reversible error is simply inconsistent with logic and the law. (App. Br. at 16.) First, there is no indication in the record, in the instructions, or by the parties that the words "create" or "creating" were used in anything other than their normally understood definitions. Just as the members of the panel are not instructed to ignore their common understandings of the ways of the world when they are seated, they are also not expected to forget common definitions of everyday words.

Moreover, this Court in Glover and Ober has already addressed similar situations where an appellant claims error on appeal for not defining a well-understood term at trial. Glover, 50 M.J. at 478; Ober, 66 M.J. at 406-07. In both cases,

the Court found it was not plain error and not prejudicial for the Court to have failed to provide more specific definitions for the words "wrongful" and "uploading," respectively. Id. In both of those cases, the Court also looked with disfavor on the fact that a definition of those words was not requested at trial and declined to find the military judge erred by not *sua sponte* providing one. Id. Accordingly, if something as specific as "uploading" does not require a specific definition, Appellant is hard-pressed to explain how an even more common word like "create" requires a specific definition especially absent any request for one by his counsel at trial.

C. The military judge properly instructed that a nude photo can rise to the level of child pornography by also instructing the members regarding "lascivious exhibition" and the specific intent for the offense.

As a last resort, Appellant alleges that the military judge erred when she 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" because "a nude picture alone is not child pornography." (App. Br. at 18.) This argument is a rehash of Appellant's original assignment of error, filed with this Court on 8 April 2013, where he alleged that specification 4 of Charge I was insufficient because "there was no evidence that the Appellant was requesting visual depictions of a minor engaged in 'sexually explicit conduct.'"

(Appellant's Supplement to Petition for Grant of Review, dated 8 April 2013.) This Court specifically declined to review that assignment of error, and, thus, the issue is not properly before the Court.

That said, even if this bootstrapped legal sufficiency issue constitutes instructional error, AFCCA properly found that "the evidence supports the findings of the members that the appellant requested a 'lascivious exhibition of the genitals or pubic area' of 'Marley,' as contemplated under" United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986.). (JA at 5.) Also, as stated repeatedly above, the military judge specifically instructed the members that Appellant must have "specifically intended that 'Marley' produce visual depictions of a minor engaged in sexually explicit conduct." (JA at 284-85, 463.) She also clarified what "sexually explicit conduct" meant under the law. (JA at 284.)

Further, at the time Appellant requested the nude photographs of "Marley," he was engaged in sexually explicit conversations with her, which, as AFCCA properly noted, "at least provided some context to the nature and purpose of the photographs requested." (JA at 6.) Moreover, Appellant spoke about sex and sexual acts with "Marley" contemporaneous with his requests for pictures, and he also provided "Marley" with photographs of his erect penis, as well as a video of himself

masturbating. Because Appellant specifically intended to obtain a photograph of "Marley" engaged in sexually explicit conduct, and because the military judge properly instructed the members on the specific intent requirement, this argument fails. Last, and most important, because this issue is not properly before this Court, the Court should reject this argument outright.

D. Any error in the military judge's instructions were harmless.

When a military judge provides pertinent instructions on the elements and the issue is whether the military judge simply failed to provide greater specificity and there was no objection to the instructions at trial, that issue is waived absent plain error. United States v. Simpson, 58 M.J. 368, 378 (C.A.A.F. 2003). In Simpson, for example, the military judge did not commit plain error when she did not literally follow the non-binding sample instructions from the Military Judges' Benchbook, DA PAM 27-9. Id. Furthermore, the Air Force Court of Criminal Appeals held in United States v. Staton, 68 M.J. 569 (A.F. Ct. Crim. App. 2009) that "[i]n the military justice system, military judges are 'required to tailor the instructions to the particular facts and issues in a case.'" Staton, 68 M.J. at 572 (quoting United States v. Baker, 57 M.J. 330, 333 (C.A.A.F.2002)(internal citations and quotations omitted)).

To establish plain error, an appellant must show that there was error, that the error was plain or obvious, and that the error materially prejudiced his substantial rights. *See* United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998). Where a military judge entirely omits an instruction on an element of an offense, that error may not be tested for harmlessness. Glover, 50 M.J. at 478; United States v. Mance, 26 M.J. 244, 255 (C.M.A. 1988). But, where the military judge adequately identifies the elements and simply fails to give a more specific instruction that error can be tested for harmlessness. Glover, 50 M.J. at 478; Mance, 26 M.J. at 255.

In Glover, where the defense counsel did not request a specific instruction on what "wrongful" meant in a wrongful inhalation case, the Court found no plain or obvious error and no prejudice. Glover, 50 M.J. at 478. Additionally, in Ober, where the defense counsel did not request a specific instruction on what "uploading" meant in a charge for transporting child pornography in interstate commerce, the Court found no plain error. Ober, 66 M.J. at 402, 406-07.

If an instructional error is indeed found, it "must be tested for prejudice under the standard of harmless beyond a reasonable doubt." Wolford, 62 M.J. at 420 (citations and quotations omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is

whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." Id.

Even if there was error in the instruction on specification 4 of Charge I, any error was harmless beyond a reasonable doubt. In the case at hand, there was overwhelming evidence of Appellant's guilt on specification 4 of Charge I. (JA at 38-256, 380-435.) The government introduced both the instant messenger chat logs where Appellant made his repeated requests for "Marley" to take nude pictures of herself and send them to him and discussed sexually explicit matters including his desire to have sexual intercourse with who he thought was a 14-year-old girl and to videotape said intercourse. (Id.) The government also put the recipient of Appellant's requests on the stand as Deputy Vedder testified to how she held herself out as an underaged girl and how Appellant initiated all matters of a sexual nature with her including the request for nude photos. (Id.) Finally, the government put Appellant's audio taped confession into evidence where he largely corroborated the offenses and evidence against him. (Id.)

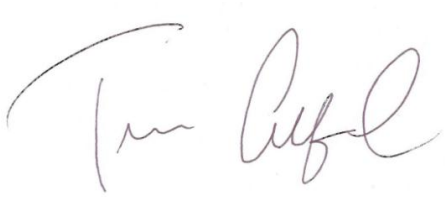
Based upon the overwhelming evidence of Appellant's guilt, it is clear that any deficiency in more specific instructions was harmless beyond a reasonable doubt. So long as the instructions included all required elements of the offense, any failure to provide more detail simply "did not contribute to the

defendant's conviction." Wolford, 62 M.J. at 420. And the principle that substantial evidence of guilt can make an error harmless is clearly a concept this Court continues to apply as it was present in the conclusion of two fairly recent decisions. *See* United States v. Medina, 69 M.J. 462 (C.A.A.F. 2011); United States v. Clark, 69 M.J. 438 (C.A.A.F. 2011). Finally, there was no confusion before the members whether specification 4 of Charge I was an allegation of an attempt offense or of a completed offense, since by that time the members had already heard three other times that these offenses were charged as attempts due to Deputy Vedder being an adult and not a 14-year-old girl. (JA at 274-85.) Therefore, it was clear what the specification alleged and that there was overwhelming proof of Appellant's guilt.

Accordingly, this Court should find there was no plain error in the military judge's instructions on specification 4 of Charge I or that such error was harmless.

CONCLUSION

WHEREFORE the government respectfully requests that this Honorable Court should affirm the findings and sentence in this case.



THOMAS J. ALFORD, Captain, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4813
Court Bar No. 34441

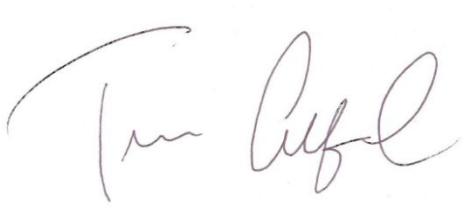
GERALD R. BRUCE
Senior Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4800
Court Bar No. 27428

For 

DON CHRISTENSEN, Colonel, USAF
Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews MD 20762
(240) 612-4800
Court Bar No. 35093

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 21 August 2013.



THOMAS J. ALFORD, Captain, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 Perimeter Road, Suite 1190
Joint Base Andrews NAF, MD 20762
(240) 612-4813
Court Bar No. 34441