

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee,

v.

JACOB M. OZBIRN,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. 39556

USCA Dkt. No. 20-0286/AF

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

WHETHER THE EVIDENCE THAT APPELLANT ASKED FOR “NAKED PICTURES” FROM ADULTS PRETENDING TO BE MINORS IS LEGALLY SUFFICIENT TO SUSTAIN A CONVICTION FOR ATTEMPTED RECEIPT OF CHILD PORNOGRAPHY.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter, the Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2016). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2016).

Statement of the Case

On May 2-3, 2018, and May 8-11, 2018, Appellant, Airman First Class (A1C) Jacob M. Ozbirn (hereinafter, A1C Ozbirn), was tried by a panel of officer members sitting as a general court-martial at Royal Air Force (RAF) Mildenhall, United Kingdom (UK). Contrary to his pleas, A1C Ozbirn was found guilty of one charge and two specifications of attempted sexual abuse of a child, one specification of attempted sexual assault of a child, and one specification of attempted receipt of child pornography, all in

violation of Article 80, UCMJ, 10 U.S.C. § 880 (2016). (JA at 284.) The court-martial sentenced A1C Ozbirn to reduction to the grade of E-1, three years confinement, and a dishonorable discharge. (JA at 298.) The convening authority approved the adjudged sentence. (JA at 43.) On May 1, 2020, the Air Force Court modified Specification 1 and 2 of the Charge, which alleged attempted lewd acts on divers occasions, by excepting the words “on divers occasions,” and set aside and dismissed the excepted words with prejudice. (JA at 35.) A majority of the Air Force Court affirmed the remaining findings and, after reassessment, also affirmed the sentence. (*Id.*) Judge Key dissented from the majority’s holding that the conviction for attempted receipt of child pornography was legally and factually sufficient. (JA at 35-39.) A1C Ozbirn timely filed a petition for review, invoking this Court’s jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on October 1, 2020. *United States v. Ozbirn*, 2020 CAAF LEXIS 550 (C.A.A.F. Oct. 1, 2020).

Statement of Facts

General Background

A1C Ozbirn’s conviction for attempted receipt of child pornography on divers occasions was based on messages he exchanged with three individuals purporting to be minor girls. Unbeknownst to A1C Ozbirn, however, these minors were actually a group of decoys from the UK-based vigilante groups, Keeping Kids Safe (KKS) and Silent Justice. (JA at 201, 248-249.) Over the course of a 48-hour period in August 2017, A1C Ozbirn exchanged messages with three different decoys, identified as “Febes,” “Jodie Walsh” and “Jessica Saunders.” (JA at 46-125; 129-141; 141-171.) A1C Ozbirn engaged in sexual conversations with each of the three decoys and requested that they each send him naked pictures of themselves. (*Id.*)

Communications with the Decoys

On August 17, 2017, A1C Ozbirn contacted “Febes,” a decoy pretending to be a 12-year-old girl, played by an adult member of KKS, through the Nearby application.¹ (JA at 231-233.) A1C

¹ They eventually moved the conversation to the WhatsApp application.

Ozbirn's relevant communications with "Febes" about "naked pictures" included the following messages:

A1C Ozbirn: have you seen naked guys or ever sent naked pictures? I would have sex with you carefully

"Febes": never seen no

A1C Ozbirn: Oh I could show you if you want and I would like to see you too.

"Febes": I don't have a camera

...

A1C Ozbirn: what do you look like?
[A1C Ozbirn sent a picture of his face and shoulders, clothed, in an outdoor setting]

...

A1C Ozbirn: Do you have any more pictures of you?

"Febes": I will try not to be scared [tomorrow]

A1C Ozbirn: Okay. There is nothing to be afraid of I will take care of you! And please can I have on [sic] more picture

"Febes": U can take [tomorrow]
With ur phone
We can do selfy [sic]

A1C Ozbirn: Can I take naked ones?

"Febes": I'm very shy

A1C Ozbirn: We are having sex tomorrow and only I will see them

“Febes”: Kk [*sic*]

(JA 46-58; 66-71.)

On August 16, 2017, A1C Ozbirn contacted “Jodie Walsh,” a decoy pretending to be a 13-year-old girl, played by an adult member of Silent Justice. (JA at 248-250.) A1C Ozbirn also requested “naked pictures” from “Jodie”:

A1C Ozbirn: Have you ever sent a naked picture to anyone or seen a guys part?

“Jodie”: No

...

A1C Ozbirn: ...Can you send me a naked picture?

Jodie: No I can't do that

A1C Ozbirn: Why?

It will help

How about holding up a regular picture with you holding a peace sign up?

...

“Jodie”: I'm not sending naked pictures of me

A1C Ozbirn: I mean any pictures

“Jodie”: Oh ok

[“Jodie” sent a clothed picture of herself showing

her face and shoulders]

A1C Ozbirn: Yeah. I was hoping the naked one would help but any will do.

(JA 88-90.)

A1C Ozbirn also requested “naked pictures” of “Jessica Saunders,” a decoy pretending to be a 12-year-old girl, played by an adult member of KKS. (JA at 129-141.) He asked the decoy, “have you every [sic] trade naked pictures before?” (JA at 120.) A1C Ozbirn later told “Jessica,” “So you have to send a picture of you naked then you get to see a dick[.]” (JA at 121.) The decoy responded, “I haven’t got any naked photos.” (*Id.*) A1C Ozbirn replied, “you have to take one.”² (*Id.*)

The KKS “Hunters” Trap A1C Ozbirn

A1C Ozbirn arranged to meet “Febes” on August 18, 2017, near a road next to a hotel in Burton-on-Trent. (JA at 129-141.) That

²The members acquitted A1C Ozbirn of Specification 3, which alleged he sexual abused “Jessica Saunders.” The panel members found A1C Ozbirn guilty of Specification 5, which alleged attempted receipt of child pornography on divers occasions. However, in their findings, the panel members found A1C Ozbirn guilty “*except the words ‘Jessica Saunders,’*” despite these words not being listed in the specification, indicating they sought to acquit A1C Ozbirn of the offense as it related to this particular decoy. (JA at 284.)

evening, a group of members from KKS—self-proclaimed “hunters”—drove to the area of the hotel. (JA at 203, 212.) A1C Ozbirn arrived at 7:30 p.m. and the “hunters” met him in an area of roadway that was secluded, where they trapped him so he could not leave. (JA at 213-214.) While the “hunters” waited for the police to arrive, the group live-streamed their encounter with A1C Ozbirn over Facebook for thousands of people to watch the sting operation unfold. (JA at 216.) As the sting operation was being streamed to the Facebook audience, the “hunters” told A1C Ozbirn that he would be raped in prison and attempted to elicit admissions from him about his offenses. (JA at 216-217.)

Air Force Court Majority Opinion

In affirming the conviction for attempted receipt of child pornography, the Air Force Court focused their analysis on the issue of whether A1C Ozbirn had the specific intent to commit the offense. (JA at 14.) The Air Force Court reasoned that the Government was not required to introduce a specific statement by A1C Ozbirn indicating he desired a lascivious display of the “girls” genitals or pubic areas. (*Id.*) According to the Air Force Court’s opinion, the “[c]ircumstantial evidence demonstrating his intent beyond a

reasonable doubt could be sufficient.” (*Id.*) The Air Force Court contended that the Government had introduced “strong” circumstantial evidence of A1C Ozbirn’s intent, given that A1C Ozbirn encouraged the decoys to engage in sexual activity with him, and it was in this context that he requested “naked” pictures. (*Id.*) Furthermore, the Air Force Court noted that A1C Ozbirn requested to take naked pictures of “Febes” when they were to engage in sexual intercourse. (*Id.*) The Air Force Court found it “more than reasonable to conclude that any naked photographs of ‘Febes’ under those circumstances” would include sexually explicit conduct. (*Id.*) Finally, the Air Force Court found it “revealing” of A1C Ozbirn’s intent when he encouraged “Jessica” to take a “naked picture” of herself in exchange for a picture of a penis. (*Id.*) However, even without the messages to “Jessica,” the Air Force Court held that a reasonable finder of fact could find proof beyond a reasonable doubt that A1C Ozbirn intended to receive child pornography.

Judge Key’s Dissent

While the majority of the Air Force Court concluded circumstantial evidence permitted the inference that A1C Ozbirn wanted naked pictures containing a lascivious exhibition of the

genitals or pubic area, Judge Key was “unable to make that leap.” (JA at 38.) Judge Key found that A1C Ozbirn’s request for “naked” pictures was insufficient to prove he specifically intended to receive material that met the legal definition of child pornography. (*Id.*) Judge Key noted that nudity, without more, is constitutionally protected, and therefore, prohibited conduct must be “adequately defined” and “suitably limited and described.” (JA at 36, citing *New York v. Ferber*, 458 U.S. 747, 764 (1982).)

Applying the relevant definition of child pornography, Judge Key noted that A1C Ozbirn requested “‘naked’ pictures without further elaboration,” which differed from cases where an appellant specifically sought photographs of a child’s genitals or the child exhibiting sexual acts. (JA at 38, citing *United States v. Johnston*, No. ACM 39075, 2017 CCA LEXIS 715, at *2 (A.F. Ct. Crim. App. 16 Nov. 2017) (unpub. op.), rev. denied, 77 M.J. 312 (C.A.A.F. 2018) (Appellant requested “sexy” pictures and a photograph of the vagina of a person he believed to be 14-years old) (other citations omitted).) Judge Key also highlighted the fact that A1C Ozbirn did not request any particular pose or vantage point or insist that the pictures

include any of the girls' genital areas. (JA at 37.) Judge Key concluded:

Without evidence Appellant specifically intended to obtain not just a picture of a nude child, but one that included both the lascivious exhibition of the genitals or pubic area and which was obscene, Appellant cannot be convicted of attempted receipt of child pornography. (JA at 39.)

Judge Key stated he would have set aside A1C Ozbirn's conviction for attempted receipt of child pornography as being both legally and factually insufficient. (*Id.*)

Summary of Argument

Child pornography is a specifically defined offense, as naked photographs of children, without more, fall within constitutionally protected speech. A1C Ozbirn requested "naked pictures" from individuals he believed were minors but made no specific requests demonstrating his intent to receive photographs that would meet the specific definition of child pornography. Furthermore, there is insufficient circumstantial evidence to support the inference that he expected to receive photographs of the decoys' genitals or pubic area displayed in a lascivious manner. Accordingly, the conviction for

attempted receipt of child pornography is legally insufficient and should be set aside and dismissed with prejudice.

Argument

THE EVIDENCE THAT APPELLANT ASKED FOR “NAKED PICTURES” FROM ADULTS PRETENDING TO BE MINORS IS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR ATTEMPTED RECEIPT OF CHILD PORNOGRAPHY.

Standard of Review

Legal sufficiency of the evidence is reviewed *de novo*. *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014). “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014) (internal quotation marks and citation omitted).

Law

Nudity, without more, is protected expression under the First Amendment to the United States Constitution. *Ferber*, 458 U.S. at 764. The Supreme Court has cautioned that while child pornography may be criminalized, speech may not be prescribed when it is neither

child pornography nor obscene. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002) (holding that the ban on virtual child pornography was unconstitutionally overbroad since it proscribed speech which was neither child pornography nor obscene and thus, abridged the freedom to engage in a substantial amount of lawful speech); *see also United States v. Moon*, 73 M.J. 382, 387 (C.A.A.F. 2014) (holding that if an image of a nude minor is neither obscene nor child pornography, it implicates the protections of the First Amendment).

The military judge in this case correctly instructed the panel members that child pornography is defined as material that is an obscene visual depiction of a minor engaging in sexually explicit conduct; sexually explicit conduct is “actual or simulated lascivious exhibition of the genitals or pubic area[.]” (JA at 185-186, 283.) This Court has adopted the factors articulated in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) in analyzing whether a particular image constitutes a lascivious exhibition of the genitals or pubic area of any person: (1) whether the focal point of the visual depiction was on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction was sexually suggestive, i.e., in a place or pose

generally associated with sexual activity; (3) whether the child was depicted in an unnatural pose or in inappropriate attire, considering the age of child; (4) whether the child was fully or partially clothed, or nude; (5) whether the visual depiction suggested sexual coyness or willingness to engage in sexual activity; and (6) whether the visual depiction was intended or designed to elicit sexual response in the viewer. *United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006) (citing *Dost*, 636 F. Supp. at 832).

This Court has also adopted the approach taken by other federal courts by combining a review of the *Dost* factors with “an overall consideration of the totality of the circumstances.” *Roderick*, 62 M.J. at 430; *see also United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); *United States v. Campbell*, 81 F. App'x 532, 536 (6th Cir. 2003).

The Service Criminal Courts of Appeal Have Resolved Analogous Cases Differently

This Court has not specifically addressed which circumstances surrounding a generic request for “naked” or “nude” photographs would be sufficient to infer an attempt to receive child pornography. However, the service courts of appeal have attempted to resolve

similar issues. In *United States v. Payne*, an Airman (Staff Sergeant (SSgt) Payne), requested “nude pics” from an undercover police officer pretending to be a 14-year-old girl. 2013 CCA LEXIS 18 (A.F. Ct. Crim. App. 17 Jan. 2013) (unpub. op.), *aff’d*, 73 M.J. 19 (C.A.A.F. 2013).³ SSgt Payne also sent the decoy a picture of his erect penis and said, “I wish I could see one of you.” 2013 CCA LEXIS 18 at *5. On another occasion, SSgt Payne told the decoy, “I wish I could see a pic of u nude” and offered to send the decoy a nude picture of himself if she would send one of herself. *Id.* SSgt Payne also asked the decoy, “can I video us having sex” during their planned meeting. *Id.* Finally, SSgt Payne told her, “I can't wait to video u rideing [*sic*] it” during the same chat where he sent a video of himself masturbating. *Id.*

The Air Force Court found that SSgt Payne’s conviction for attempting to persuade, induce, entice, or coerce a minor to create child pornography was legally sufficient. *Id.* at *14. Like in this case, the “nude” photographs SSgt Payne requested were never produced because of a “legal impossibility.” *Id.* at *11. Nonetheless,

³ While Judge Key addressed *Payne* in his dissent, the Air Force Court’s majority chose to not address this case in its opinion.

the Air Force Court reasoned that when placed in context, the evidence supported the findings that SSgt Payne requested a lascivious exhibition of the genitals or pubic area, as contemplated by *Dost*. *Id.* at *11-12. Among such evidence was the fact that SSgt Payne had sent the decoy pictures of his erect penis as well as a video of himself masturbating, which the Air Force Court found, were “examples of the type of images he had in mind.” *Id.* at *12. Furthermore, SSgt Payne had admitted that the photographs were clearly intended to gratify his sexual desire. *Id.* at *13.

In *United States v. Gilbert*, the Army Court of Criminal Appeals (hereinafter, the Army Court) found an appellant’s attempts to persuade a 14-year-old girl to send him nude “selfies” did *not* amount to an attempt to possess child pornography. No. ARMY 20190766, 2020 CCA LEXIS 255 (A. Ct. Crim. App. July 31, 2020) (unpub. op.). The appellant in *Gilbert* made a general request from an actual 14-year-old girl for nude “selfies” and also sent her a picture and video of his penis hoping she would reciprocate. *Gilbert*, 2020 CCA LEXIS 255 at *2. The minor girl eventually agreed to send one in the future but suggested the future photo would not be a nude photo but rather, a picture of her breasts. *Id.* When the minor

girl questioned why the appellant seemed upset by this, he responded “...I mean it's only fair you like seeing me naked so I should be able to see some of you.” *Id.*

The Army Court determined the military judge should not have accepted the appellant’s guilty plea to the attempted possession of child pornography:

It seems the military judge was satisfied that appellant’s request for any selfie, with the goal of *eventually* convincing [the victim] to send him an image of herself containing a lascivious exhibition of her genitals or engaging in masturbation was sufficient. We disagree and find the military judge abused his discretion in accepting appellant’s plea on that basis. By appellant’s own admission, [the victim] hinted she *might* send him a photo of her breasts, which would not meet the prerequisite of genital or pubic area depiction to even begin an analysis of whether the photo would constitute child pornography.

Id. at *9. (Emphasis in original.)

Analysis

There is insufficient direct or circumstantial evidence that A1C Ozbirn intended to receive pictures that would meet the legal definition of child pornography when he requested “naked pictures.”

A1C Ozbirn requested “naked pictures” from individuals purporting to be minors, but there is no evidence that he was specifically seeking images that would meet the legal definition of child pornography. This Court has recognized that a depiction of an

individual's genitals or pubic area is "prerequisite to any analysis under *Dost*." *Roderick*, 62 M.J. at 430. Applied here, there is nothing in the record to support the conclusion that A1C Ozbirn was specifically seeking a picture of the decoy's genitals or pubic area, as opposed to a picture of their breasts or any other form of "naked picture." Furthermore, as Judge Key noted, even when genitals or the pubic area are shown, such an exhibition must be lascivious—"without a lascivious exhibition, the conflation of pictures of nude children with illegal child pornography impermissibly criminalizes legal, if not constitutionally protected, material. (JA at 36-37, citing *United States v. Piolunek*, 72 M.J. 830, 836 (A.F. Ct. Crim. App. 2013) and *Moon*, 73 M.J. at 387.) Because there was no request for the decoys' genitals, it follows that there is insufficient evidence to conclude A1C Ozbirn also had the specific intent to receive a lascivious display of the genitals.

The Air Force Court majority stated that the Government is "free to meet its burden of proof with circumstantial evidence." (JA at 14, citing *United States v. King*, 78 M.J. 218 221 (C.A.A.F. 2019).) While that is an accurate statement of law, the circumstantial evidence in this case, on these facts, does not allow such a leap to

conclude A1C Ozbirn was seeking child pornography. The majority highlighted the fact that A1C Ozbirn requested to take naked pictures of “Febes” when he met her to engage in sexual activity. (JA at 14.) However, an expression of a *future* desire *for him* to take “naked” pictures does not support the inference that A1C Ozbirn wanted “Febes” to send a picture of her genitals or pubic area in a lascivious manner when he asked her on August 17, 2017. Moreover, A1C Ozbirn made this request to take “naked” pictures (“Can I take naked ones?”) after “Febes” said, “we can take selfy [sic].” (JA at 70.) At most, one can speculate that A1C Ozbirn requested to take a naked selfie when he met “Febes.” However, such speculation does not provide sufficient evidence about the type of vantage point or pose A1C Ozbirn was seeking at the time he made his earlier request, “have you ever sent naked pictures...I would like to see you too.” (JA at 52.)

Furthermore, the type of circumstantial evidence surrounding the request for “nude” pictures in *Payne*—and even *Gilbert* where the Army Court found the evidence was *not* legally sufficient to support a conviction—is not present in this case. SSgt Payne supplemented his request for “nude” pictures with actual nude

photos and videos of his own genitals. A1C Ozbirn, on the other hand, did not send any photos of his genitals or a video of him masturbating. The only photos he sent to the decoys were *clothed* pictures of himself, displaying only his face and shoulders. (JA at 58, 86.) The Air Force Court in *Payne* reasoned that requesting nude pictures, while also sending photos of one’s genitals, demonstrates a request for child pornography in return. However, as Judge Key appropriately noted, “[the Air Force Court] decision in *Payne* seems to have pushed the bounds of the concept of inferring specific intent to its outer limits, beyond which lies only speculation.” (JA at 38.) As the circumstantial evidence found in *Payne* is not present in this case, this Court is left with only speculation of A1C Ozbirn’s specific intent.

While the appellant in *Gilbert* provided at least some indication about the type of “nude” photo he expected—he expressed dissatisfaction when the minor victim agreed to only send a picture of her breasts—A1C Ozbirn provided no specificity about what type of photograph he expected from the decoys. The most specific request came when “Jodie” told A1C Ozbirn she could *not* send him a naked picture (“no I can’t do that”). He responded, “How about a

regular picture with you holding a peace sign up?” (JA at 89.) Then, when “Jodie” told A1C Ozbirn she would not send him a naked picture, he said, “I mean *any* pictures” to which “Jodie” answered with a clothed picture of herself. (JA at 89-90 (emphasis added).) This indicates that while A1C Ozbirn requested naked pictures, the main purpose of his request for photos was to verify he was speaking to a real person. *See* JA at 4 (a computer forensic analyst testified that he found internet searches on A1C Ozbirn’s phone in which he seemed to be trying to determine whether the people he was messaging were in fact who they claimed to be). Additionally, in this case, the decoys pretended to have virtually no knowledge of anything sexually related (e.g., “Febes” referred to her vagina as her “wee area.” (JA at 55)); it would therefore be unreasonable to infer that A1C Ozbirn expected to receive a lascivious display of the genitals when he requested “naked pictures” from the decoys. Moreover, while the appellant in *Gilbert* actually sent a picture of his genitals, A1C Ozbirn only made the *offer* to one of the decoys, “Jessica Saunders,” when he told her “[s]o you have to send a picture of you naked then you get to see a dick.” (JA at 121.) However, this still does not provide sufficient evidence of the type of “picture of

[her] naked” he expected, as a picture of her breasts could have sufficed for this hypothetical exchange of photographs.⁴

A1C Ozbirn’s sexually explicit conversations with the decoys formed the basis for the attempted sexual assault and attempted sexual abuse of a child, for which he was convicted. However, the convicted conduct cannot and should not also form the basis for transforming a general request for “naked photographs” into the specific intent for a different offense that Congress has been constitutionally steered to “adequately defin[e]” and “suitably limi[t] and describ[e].” *Ferber*, 458 U.S. at 764.

This Court and others have repeatedly drawn a distinction between mere naked photographs of children and the specific contraband of child pornography. A1C Ozbirn requested “naked pictures” from the decoys but he did not request photographs of their genitals exhibited in a lascivious manner. Furthermore, his other communications and conduct do not form the sufficient


⁴ The Air Force Court majority seemed to recognize the panel members’ attempt to acquit A1C Ozbirn of the offense as it related to “Jessica Saunders,”: “However, even without Appellant’s messages to “Jessica,” we conclude a reasonable finder of fact could find proof beyond a reasonable doubt that Appellant intended to receive child pornography.” (JA at 14.)

circumstantial evidence to support the finding that he was seeking to receive child pornography. Even drawing every reasonable inference from the evidence of record in favor of the Government, the evidence is not legally sufficient to support A1C Ozbirn's conviction of attempted receipt of child pornography beyond a reasonable doubt.

Conclusion

This Honorable Court should set aside the finding of guilt as to Specification 5 of the Charge and dismiss it with prejudice.

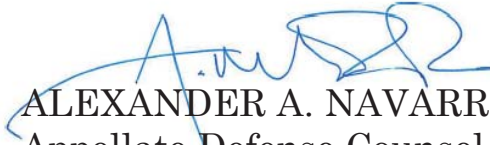
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CERTIFICATE OF FILING AND SERVICE

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 November 2, 2020.



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