2 December 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39556
Airman First Class (E-3), JACOB M. OZBIRN, USAF, *Appellant.*	)	USCA Dkt. No. 20-0286/AF

BRIEF ON BEHALF OF THE UNITED STATES

ALEX B. COBERLY, Capt, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36177

MATTHEW J. NEIL, Lt Col, USAF
Director of Operations
Government Trial and
Appellant Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Col, USAF
Chief
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

INDEX OF BRIEF

TABLE OF AUTHORITIES

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

FEDERAL COURTS

STATUTES

OTHER AUTHORITY

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39556
Airman First Class (E-3), JACOB M. OZBIRN, USAF, *Appellant*	)	USCA Dkt. No. 20-0286/AF

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

ISSUE GRANTED

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 ("the Air Force Court") reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2016).[1] (JA at 35.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[1] All references to the Uniform Code of Military Justice, Military Rules of Evidence, and Rules for Courts-Martial are to the Manual for Courts-Martial, United States (2016 ed.) (MCM).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

Guilty Finding for Attempted Receipt of Child Pornography

Over the course of less than 48 hours between 16 and 18 August 2017, Appellant initiated and directed three separate, sexually charged, text-message conversations with individuals he believed to be minor girls. (JA at 232-34, 249-50, 262-63.) At the time, Appellant believed that he was messaging with girls named "Febes," age 12, "Jodie Walsh," age 13, and "Jessica Saunders," age 12. (Id.) Unbeknownst to Appellant, he was actually messaging adult British citizens who presented themselves as minors online. (Id.) Appellant engaged in each one of the three conversations through the text-messaging applications Nearby and WhatsApp. (Id.) Early on in each conversation, Appellant turned the topic of conversation to sex, and he explicitly described a variety of sexual acts that he wanted to perform on the girls. (Id.) Appellant was ultimately caught on 18 July 2017, after he drove to a hotel near Burton-on-Trent, United Kingdom, expecting to meet "Febes" to have sex. (JA at 243-45.)

At his subsequent trial, Appellant faced one charge and five specifications of attempt under Article 80, UCMJ. (JA at 198-200.) Specification 5 of the Charge alleged the following:

> [Appellant] did, at or near Royal Air Force Mildenhall, United Kingdom, on divers occasions between on or about 16 August 2017 and on or about 18 August 2017, attempt to knowingly and wrongfully receive child pornography, to wit: photographs of what appear to be minors engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(JA at 200.) Contrary to his plea, a panel of officer members found Appellant guilty of all specifications and the charge, to include Specification 5. (JA at 43, 284). The panel attempted to except the words "Jessica Saunders" from their finding of guilty to Specification 5; however, individual names did not appear in the language of the specification itself. (JA at 200, 284). The panel then sentenced Appellant to be reduced to the grade of E-1, to be confined for 3 years, and to be dishonorably discharged from the service. (JA at 298.)

On appeal, the Air Force Court found the evidence against Appellant, particularly the circumstantial evidence, legally and factually sufficient to support his conviction for attempted receipt of child pornography. (JA at 14-15.) The majority of the evidence supporting Appellant's conviction stemmed from the text-messages he sent to "Febes," "Jodie," and "Jessica."

Appellant's Messages to "Febes"

Mr. GW, the adult behind the "Febes" profile, testified at trial, and he discussed the messages Appellant sent him through both Nearby and WhatsApp.

(JA at 231-47.) The Government also introduced images of the messages themselves as prosecution exhibits. (JA at 46-74, 129-41.)[2]

Appellant initiated a conversation with "Febes" via the Nearby application at approximately 1100 on 17 August 2017. (JA at 234.) This initial conversation lasted only briefly, but Appellant re-initiated contact approximately four hours later. (JA at 236.) Within the first seven messages, believing he was speaking to a 12-year-old, Appellant turned the conversation toward sex by first asking whether "Febes" had a boyfriend. (JA at 49.) After "Febes" responded "not allowed," Appellant said "I know many girls that have already had several boyfriends and even had sex too." (Id.) Appellant proceeded to discuss sex in detail, and he propositioned "Febes" with the possibility of having sex with him. (JA at 49-52.)

Following his initial messages about sex, Appellant asked "Febes," "have you seen naked guys or every [sic] sent naked pictures?" (JA at 52) He added, "I would have sex with you carefully" and "I could show you if you want and I would like to see you too." (Id.) Appellant described sex explicitly to "Febes," messaging, "well we both get naked and then my mouth licks you down there until you are wet" and "my part goes into yours." (JA at 54.) Appellant further clarified

[2] Joint Appendix pages 66-74 and 129-141 are two versions of the same WhatsApp conversation between Appellant and "Febes," introduced at trial as Prosecution Exhibits 4 and 10, respectively. For ease of reading, this brief will cite to the latter. There is more information available for these messages because they came from a forensic digital extraction. (JA at 272-78.)

that licking "down there" meant licking the "vagina," which is a different "part" than "the part pee comes out." (JA at 55.) Appellant proceeded to coordinate a plan to meet "Febes" in order to have sex. (JA at 55-63.) During this conversation, Appellant again described the act of sex, including his desire to "lick[]" her "vagina" until she is "wet" and his desire to "stick [his] part," meaning his "d*ck" into her "part." (JA at 61.)

At approximately 1922 on 17 August 2020, Appellant's conversation with "Febes" switched from Nearby to WhatsApp. (JA at 64, 129.) During this conversation, Appellant confirmed his plan to have sex with her, and he sent two messages asking for "Febes" to send him pictures. (JA at 134-35.) When "Febes" declined to send pictures, Appellant asked if they could take "naked" pictures together and noted "we are having sex tomorrow and only I will see them." (JA at 135.) The conversation ended for the day at approximately 2143 on 17 August 2020. (JA at 138.)

The following day, 18 August 2020, Appellant was caught after he acted on his plan and drove to a hotel near Burton-on-Trent, United Kingdom, expecting to meet "Febes" to have sex. (JA at 242-45.)

Appellant's Messages to "Jodie Walsh"

Ms. LM, the adult behind the "Jodie Walsh" ("Jodie") profile, also testified at trial, and she too discussed the messages Appellant sent through both Nearby

and WhatsApp. (JA at 248-60.) The Government also introduced images of these messages as prosecution exhibits. (JA at 75-84, 142-71.)[3]

Similar to his messages to "Febes," Appellant initiated a conversation with "Jodie" via the Nearby application on 16 August 2017. (JA at 259.) Also consistent with his messages to "Febes," Appellant quickly told "Jodie," "I know girls that have had [boyfriends] younger and even had sex." (JA at 78.) Appellant proceeded to make multiple propositions about having sex with "Jodie," an individual he believed to be a 13-year-old girl. (JA 78-83.) Appellant's messages included: "I can help you lose [your virginity] if you want;" "we could have sex if you want too [sic];" and "I would like to have sex with you." (JA at 78, 82.)

Appellant's conversation with "Jodie" switched from Nearby to WhatsApp at approximately 2010 on 17 August 2020. (JA at 85, 142.) Appellant immediately continued the conversation with his ongoing plan to meet "Jodie" to have sex. (JA at 142-44). Appellant told "Jodie," they were going to "[h]ave sex." (JA at 145.) When asked for more details, the following exchange occurred:

> **"Jodie"**: Wat [sic] will you do

[3] Joint Appendix pages 85-107 and 142-71 are two versions of the same WhatsApp conversation between Appellant and "Jodie," introduced at trial as Prosecution Exhibits 6 and 12, respectively. For ease of reading, this brief will cite to the latter. There is more information available for these messages because they came from a forensic digital extraction. (JA at 279-82.)

> **Appellant**: Kiss you take your clothes off lick you down there and when you are wet and ready stick my part into you
>
> **Appellant**: Have you ever sent a naked picture to anyone or seen a guys part?
>
> **"Jodie"**: No
>
> **"Jodie"**: Lick me where
>
> **"Jodie"**: Wat [sic] do u mean wet I don't want a shower
>
> **Appellant**: Your vagina. And it's not a shower you will get wet with natural juices. Can you send me a naked picture?

(JA at 147.) When "Jodie" asked why Appellant wanted naked pictures, Appellant twice responded that sending naked pictures would "help." (Id. at 148.) Later in the conversation, Appellant turned the topic back to their plan to have sex. (JA at 155-57.) Appellant told "Jodie," "I want to take your clothes off. Kiss you. Lick your vagina until you are wet. Then stick my part into you slowly and carefully." (JA at 157.) "Jodie" responded, "Y do u want to lick my fairy I pee from there," and Appellant responded with, "That is where the vagina is" and "that is part of sex." (Id.) The topic of sex persisted throughout the remainder of Appellant's conversation with "Jodie" until it ended for the night at approximately 2319. (JA at 158-69.)

Appellant's Messages to "Jessica Saunders"

Mr. JG, the adult behind the "Jessica Saunders" ("Jessica") profile, also testified at trial, and he too discussed the messages Appellant sent him over Nearby. (JA at 261-72.) As with the other two individuals, the Government introduced images of the messages themselves as a prosecution exhibit. (JA at 108-28, 265).[4]

Consistent with his messages to "Febes" and "Jodie," Appellant initiated and then engaged in the conversation with "Jessica" on 17 August 2017. (JA at 263.) Early on in his conversation with "Jessica," an individual Appellant believed to be a 12-year-old girl, Appellant directed the topic to sex, saying "I know girls your age who have already had a few [boyfriends] and had sex to [sic]." (JA at 109, 263.)

Also similar to "Febes" and "Jodie," Appellant propositioned "Jessica" with the possibility of having sex with him, stating: "have you thought about sex"; "what do you feel about sex"; and "when you have sex for the first time mistakes will be made. At your age that is the best time to learn." (JA at 110, 112, 113.) Appellant also explained sex to "Jessica," messaging: "during sex a guys part enters into a girls part. If he does too deep or she is not ready it can hurt;" "my

[4] Unlike the conversations with "Febes" and "Jodie," Appellant did not engage in conversation with "Jessica" via WhatsApp.

d*ck has to go in your vagina during sex so I will put it in slowly"; and "That is part of learning do you want to see [a penis]?" (JA at 114, 118, 119.) After Appellant offered to share an image of his penis, the following exchange occurred:

> **Appellant**: do you want to try [sex]?
>
> **"Jessica"**: I don't know, I don't like the idea of something I've not seen before hurting me.
>
> **Appellant**: do you want to see One? and it won't hurt you if done properly
>
> **"Jessica"**: ok
>
> **Appellant**: have you every [sic] traded naked pictures before?
>
> **"Jessica"**: no one has seen me naked
>
> **Appellant**: do you want to see a d*ck so that you will now what goes in?
>
> **"Jessica"**: ok
>
> **Appellant**: So you have to send a picture of you naked then you get to see a d*ck
>
> **"Jessica"**: I haven't got any naked photos
>
> **Appellant**: you have to take one

(JA at 120-21.) After this exchange and until their conversation ended, Appellant continued to discuss sex with "Jessica." (JA at 121-24.)

SUMMARY OF THE ARGUMENT

The Air Force Court correctly found the evidence legally sufficient to sustain Appellant's conviction for attempted receipt of child pornography. (JA at 15.) "Specific intent" to receive child pornography does not require exact or technical language – it is evaluated under the totality of the circumstances. In this case, the totality of the evidence is sufficient to support Appellant's guilt beyond a reasonable doubt. Appellants own words, memorialized in Nearby and WhatsApp messages, prove that, when he requested naked pictures from "Febes," "Jodie," and "Jessica," he specifically intended to receive images that contained lascivious exhibitions of the genitalia or pubic area. In fact, there is nothing about Appellant's requests that suggested he meant his requests to be devoid of any sexual context or to include images of only breasts without genitalia. Instead, the circumstances of Appellant's requests proved he specifically intended to receive naked pictures that included images of the genitalia that would excite a sexual response or tend to excite lust. Accordingly, this Court should affirm the Air Force Court's decision and uphold Appellant's conviction for attempted receipt of child pornography.

ARGUMENT

THE TOTALITY OF THE EVIDENCE IN APPELLANT'S CASE IS LEGALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION BECAUSE IT PROVES THAT, WHEN APPELLANT ASKED FOR "NAKED PICTURES," HE SPECIFICALLY INTENDED TO RECEIVE CHILD PORNOGRAPHY.

Standard of Review

The question of legal sufficiency is reviewed de novo. United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019).

Law

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of a crime beyond a reasonable doubt." United States v. Gutierrez, 73 M.J. 172, 175 (C.A.A.F. 2014). Evaluating the legal sufficiency of Appellant's conviction for attempted receipt of child pornography requires consideration of both Article 80 and Article 134, UCMJ.

First, "attempt" under Article 80, UCMJ, included the following four elements: (1) that the accused did a certain overt act; (2) that the act was done with the specific intent to commit the offense; (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. MCM, part IV, para. 4.b..

Second, "receipt of child pornography" under Article 134, UCMJ, and as charged in Appellant's case, included the following two elements: (1) that the accused knowingly and wrongfully received child pornography; and (2) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces. MCM, pt. IV, para. 68b.b.(1). Appellant was charged with attempting to receive pictures of "what appear to be minors," so the term "child pornography" meant "an obscene visual depiction of a minor engaging in sexually explicit conduct."[5] MCM, pt. IV, para. 68b.c.(1). Finally, the term "sexually explicit conduct" included actual or simulated, sexual intercourse, sodomy, bestiality, masturbation, sadistic or masochistic abuse, or a lascivious exhibition of the genitals or pubic area. MCM, pt. IV, para. 68b.c.(7).

Analysis

Appellant specifically intended to receive images of child pornography when he requested pictures from "Febes," "Jodie," and "Jessica." Appellant's conviction is legally sufficient, and it should be upheld. Appellant does not dispute the legal sufficiency of the majority of the underlying elements of his conviction. (App. Br. at 10.) Instead, Appellant's claim focuses exclusively on the "specific intent"

[5] Although the Manual does not define "obscene," the military judge provided a standard definition in the findings instructions at trial. (JA at 186.)

element of attempt. (Id.) In doing so, Appellant endeavors to characterize his attempt to receive child pornography as "a generic request for 'naked' or 'nude' photographs," and he argues that there is insufficient direct or circumstantial evidence to prove "specific intent" beyond a reasonable doubt. (JA at 10, 13, 16.) Appellant's argument fails for two reasons. First, there is no difference between "generic" and "specific" requests – "specific intent" is evaluated under the totality of the circumstances. Second, the totality of the evidence is sufficient to uphold Appellant's conviction beyond a reasonable doubt.

1. "Specific Intent" is Evaluated under the Totality of the Circumstances

The legal sufficiency of an attempt to receive child pornography does not require any exact or technical language. Instead, determining an individual's "specific intent" is a fact based inquiry that encompasses the totality of the circumstances. United States v. Webb, 38 M.J. 62, 69 (C.M.A. 1993) (specific intent "'may be inferred from the totality of circumstances' including 'the nature, time, or place of' appellant's 'acts before and during' the crime alleged") (quoting Goldman v. Anderson, 625 F.2d 135, 137 (6th Cir. 1980)). Therefore, the fundamental question in this case is whether the totality of the evidence is sufficient to show that, when Appellant requested naked pictures, he subjectively intended to receive "obscene visual depictions of minors engaging in sexually explicit conduct." *See* United States v. Pawlowski, 682 F.3d 205, 211 (3d Cir.

2012), *cert. denied*, 133 S. Ct. 894 (2013) (in an attempt case, the focus is "on the subjective intent" of the accused).

In considering Appellant's subjective intent, the Air Force Court correctly determined that "the Government was not required to introduce a specific statement by Appellant that he desired a lascivious display of . . . [the] genitals or pubic areas, or any other specific words." (JA at 14) (citing King, 78 M.J. at 221). In contrast, Appellant seemingly asserts that "specific requests" are indeed a prerequisite to proving "specific intent," arguing "[b]ecause there was no request for the [girls'] genitals, it follows that there is insufficient evidence to conclude [Appellant] also had the specific intent to receive a lascivious display of the genitals." (App. Br. at 10, 17, 21.) The level of exactness and technicality that Appellant suggests is not required by the law. Furthermore, contrary to Appellant's claim, there is no need for this Court to broadly establish "which circumstances surrounding a generic request for 'naked' or 'nude' photographs would be sufficient to infer an attempt to receive child pornography." (Id. at 13.) There is not and should not be bright-line distinctions between "generic" and "specific" requests; instead, it is necessary to look to the "totality of the circumstances" of Appellant's conduct. Webb, 38 M.J. at 69.

The law does not require exact or technical language to establish "specific intent." Instead, the "totality of the circumstances" approach is sufficient. Webb,

38 M.J. at 69. This approach is also consistent with this Court's test for the legal sufficiency of actual images of child pornography, as outlined in United States v. Roderick, 62 M.J. 425, 429-31 (C.A.A.F. 2006). In Roderick, this Court established the test for determining whether an image constitutes a "lascivious exhibition of the genitals or pubic area." 62 M.J. at 429. The test incorporated the six factors outlined in United States v. Dost, with "an overall consideration of the totality of the circumstances." Roderick, 62 M.J. at 431 (citing 636 F. Supp. 828 (S.D. Cal. 1986)). In adopting this approach, this Court noted that Dost provided "workable criteria," but "there may be other factors that are equally if not more important." 62 M.J. at 431.

Here too, in the context of an attempt, the "totality of the circumstances" approach is wholly appropriate. The Dost factors themselves are relevant in that they provide context and a "workable" meaning for the term "lascivious." 62 M.J. at 431. However, the exact language of any one Dost factor is not dispositive of "specific intent," and, in some cases, they may not be relevant at all. The Air Force Court noted as much when it found "the Dost factors to be of limited utility in this case because there are no actual images to evaluate." (JA at 14.) *See also*, United States v. Gilbert, ARMY 20190766, 2020 CCA LEXIS 255, at *9 (A. Ct. Crim. App. 31 July 2020) (unpub. op.) (in an attempt case, "[t]here is no application of the Dost factors or analysis to perform"); United States v. Johnston,

ACM 39075, 2017 CCA LEXIS 715, at *9 (A.F. Ct. Crim. App. 16 November 2017) (unpub. op.), *pet. denied*, 77 M.J. 312 (C.A.A.F. 2018) (finding legal and factual sufficiency, without reference to Dost factors); and United States v. Payne, ACM 37594, 2013 CCA LEXIS 18, at *11 (A.F. Ct. Crim. App. 17 January 2013) (unpub. op.), *aff'd*, 73 M.J. 19 (C.A.A.F. 2013) (describing the trial judge's instruction on "lascivious," which did not enumerate the Dost factors). In short, the fact specific nature of "specific intent" compels a "totality of the circumstances" approach.

In support of his argument, Appellant posits that there is a split amongst the Service Courts, and he asserts that "[t]his 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." (App. Br. at 13.) Appellant proceeds to address his perceived differences in "analogous cases." (Id. at 13-16.) However, despite Appellant's assertion, there is not and should not be bright-line distinctions between "generic" and "specific" requests. Instead, the "totality of the circumstances" approach is appropriate, and it is consistent with this Court's established precedent in Roderick and Webb. Furthermore, this approach is sufficient to reconcile the differences that Appellant perceives amongst the Service Courts. Specifically:

In Johnston, the Air Force Court upheld a conviction for attempted receipt of

child pornography without reference to the Dost factors. unpub. op. at *9. Notably, the Court highlighted the appellant's request for a "photograph of [the] vagina" as evidence of a "substantial step," but it did not isolate this language as a prerequisite to the "specific intent" analysis. Id. Instead, the Court determined that the appellant's "own words in his messages" demonstrated his "specific intent to attempt to receive child pornography." Id. The Johnston Court's focus on "messages," plural, embodied the "totality of the circumstances" approach.

In Payne, the Air Force Court similarly upheld a conviction for attempted creation of child pornography. unpub. op. at *14. Although the Court included Dost in its outline of the law, few, if any, of the Court's considerations fell under an enumerated Dost factor. Id. at *12-13. Instead, the Court ultimately looked to "context" and considered a variety of factors, including: the age of the minor; the "sexually explicit" nature of the conversation; that the appellant "spoke about sex and sexual acts . . . before asking [] for any nude photographs;" that the appellant sent photos of his own genitalia; that appellant requested to exchange naked images; and the fact that appellant drove several hours to meet for sex. Id. The Payne Court's focus on "context" is synonymous with considering the "totality of the circumstances."

Finally, in Gilbert, the Army Court of Criminal Appeals addressed the sufficiency of a guilty plea to attempted possession of child pornography. unpub.

op. at *6. In doing so, the Court noted the "analysis is a highly fact-specific determination" that is made "on a case-by-case" basis. Id. at *8.

In Gilbert, the appellant repeatedly asked a minor to send "selfies" (a picture taken of oneself), including "nude" selfies, and he also "sent her a digital video and photos of his penis in an attempt to persuade her to reciprocate." Id. At *2. In his plea colloquy, the appellant admitted that "his intent was to first get [the minor] to send a 'selfie' and then something more explicit to which he could masturbate." Id. at *5. The appellant further stated, "he was initially only asking [the minor] to send him pictures of herself so he could see what she looked like, though he was 'intending' for their message exchange to escalate to [her] sending him an image of herself masturbating." Id. at *4.

The Gilbert Court found the appellant's "hope and desire" failed to meet the "substantial step" element of an attempt, and it did not substantively address "specific intent." Id. at *11-12. In its analysis, the Court did not stop at the fact that the appellant "never actually asked [the minor] to send him an image of herself engaged in sexually explicit conduct." Id., at *12-13. Instead, the Court noted that the appellant made an "honest admission at his providence inquiry that he had *hoped* [the minor] would *eventually* send him a picture of herself [engaging in sexually explicit conduct]." Id. at *13 (emphasis in original). Thus, the unique and "fact specific determination" of the Gilbert case can be differentiated from

Appellant's case because it included a detailed explanation of that particular appellant's mindset, provided during the guilty plea. Id. at *4. Here, there is no such explanation, but the Court is left with legally sufficient evidence of Appellant's mindset, exhibited through his text-messages. As will be discussed below, the timing and content of Appellant's messages revealed his immediate sexual intent, his focus on the genitalia, and his overarching desire to engage in sexual intercourse with minors – he did not merely show an intent to see what the other individuals "looked like." Id. at *4. *Cf*. United States v. Isabella, 918 F.3d 816, 834-36 (10th Cir. 2019) (finding a "substantial step" in an attempted persuasion case where the appellant requested pictures after confirming the minor's age, engaging in sexually explicit conversations, exchanging nude pictures, and encouraging further explicit pictures).

As with Johnston and Payne, the Gilbert Court's "highly fact-specific determination" made "on a case-by-case basis" embodied the "totality of the circumstances" approach.

Overall, the case law in this area consistently looks to an individualized and fact specific approach to "specific intent" – one that considers the "totality of the circumstances." This is the appropriate course because there is no difference in culpability between an individual who uses obscene or vulgar language and one who uses a more subtle or grooming approach to request child pornography. Both

individuals have the same subjective intent, albeit exhibited in different ways. For this reason, there should be no requirement for an appellant to make "specific requests" or to use technical language because that would amount to a mandate for direct evidence, at the exclusion of circumstantial evidence. *See* R.C.M. 918(c) ("Findings may be based on direct or circumstantial evidence."). Therefore, the analysis for "specific intent" is appropriately considered under fact-based inquiry that encompasses the "totality of the circumstances." Webb, 38 M.J. at 69; Roderick, 62 M.J. at 431. This standard has been consistently used other cases, it is applicable in Appellant's case, and it is suitable across the spectrum of criminal behavior.

2. The Evidence is Legally Sufficient to Prove Appellant's Specific Intent

The totality of the evidence is legally sufficient to establish Appellant's guilt beyond a reasonable doubt. Appellant's own words prove that he specifically intended to receive child pornography when he requested naked photographs from individuals he believed to be minor girls.

"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 a crime beyond a reasonable doubt." Gutierrez, 73 M.J. at 175. "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences

from the evidence presented." King, 78 M.J. at 221. Instead, "[the] legal sufficiency assessment 'draw[s] every reasonable inference from the evidence in the record in favor of the prosecution.'" United States v. Robinson, 77 M.J. 294, 298 (C.A.A.F. 2018) (second alteration in original) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)).

Appellant asserts that "there is nothing in the record to support the conclusion that [he] was specifically seeking a picture of the decoy's genitals or pubic area." (App. Br. at 17.) This statement is irreconcilable with the facts in evidence. Appellant's own words, documented in his Nearby and WhatsApp messages, provided ample evidence of Appellant's subjective intent to receive child pornography, namely lascivious exhibitions of the genitals or pubic area. *See* King, 78 M.J. at 219, 221 ("[T]his Court has long recognized that the government is free to meets its burden of proof with circumstantial evidence.") (citing United States v. Kearns, 73 M.J. 177, 182 (C.A.A.F. 2014)). Appellant's statements in his Nearby and WhatsApp messages established the following two conclusions: (a) Appellant sought out minors, he initiated communication, and he then directed three highly sexual conversations that focused on genitalia; and (b) Appellant acted on his desire to have sex with minors. These two conclusions sufficiently established Appellant's subjective intent, and they proved Appellant specifically intended to receive images that contained lascivious exhibitions of the genitals or

pubic area.

(a) Appellant Initiated Highly Sexual Conversations that Focused on Genitalia

Within less than 48 hours, Appellant initiated three separate conversations with individuals he believe to be girls between the ages of 12 and 13. (JA at 232-34, 249-50, 262-63.) A review of these messages, both individually and collectively, demonstrated that Appellant initiated and then directed highly sexual conversations that focused explicitly on genitalia and the pubic area. Three specific facts are apparent from the substance of Appellant's messages: (i) his requests for naked pictures came only after he directed the conversations to sex; (ii) he described specific sexual acts that focused on the genitalia; and (iii) he made requests for pictures that coincided with his descriptions of genitalia. These facts provided insight into Appellant's mindset, and they supported the conclusion that that, when Appellant requested "naked pictures," his subjective focus was on sex and the genitals or pubic area specifically.

(i) Appellant's requests for naked pictures exclusively occurred within the midst of ongoing sexual conversations. Appellant established his mindset immediately with "Febes," "Jodie," and "Jessica," directing each conversation to "boyfriends" and girls their age having sex within the first few messages. (JA at 49, 78, 109.) Not one of the three individuals reached out to Appellant – he took independent action to find them and then engage in sexual behavior. In each

instance, after directing the topic to sex, Appellant ensured the conversations remained almost entirely about sexual acts, genitalia, and potential meetings to have sex. (*See generally,* JA at 46-74, 75-84, 108-28, 129-41,142-71.) In doing so, Appellant continually redirected any minor deviations in conversation back to the topic of sex. (Id.)

All of Appellant's requests for pictures came within the highly sexual environment that he created. *See*, e.g., Payne, unpub. op. at *12 (noting "appellant spoke about sex and sexual acts . . . even before asking [] for any nude photographs"). For example, Appellant asked "Febes" whether she had "seen naked guys or every [sic] sent naked pictures" and he told her, "I could show you if you want and I would like to see you too." (JA at 52.) Appellant also expressed his desire to take "naked" pictures with "Febes" after they had sex. (JA at 135.) Similarly, Appellant twice told "Jodie" that sending naked pictures would "help" her within the context of the sexual encounter he planned to have with her. (JA at 148.)

Not once did Appellant ask for pictures before he directed the topic of conversation to sex with minor girls. These messages revealed Appellant's subjective intent because they showed his focus was expressly on sex, not mere nakedness or some other benign explanation. Appellant's own words make it impossible to excise his requests for pictures from his singular focus on sex with

minors, to the exclusion of everything else. Thus, it is fair to conclude, as the Air Force Court did, that, under the circumstances, Appellant's requests for pictures were intended to include a "lascivious display" because he meant them to incite lust. (JA at 14) (citing BLACK'S LAW DICTIONARY (6th ed. 1990)). Similarly, the Appellant's unwavering focus on sex leaves little doubt that Appellant intended to receive images "designed to elicit a sexual response in the viewer." Dost, 636 F. Supp. At 832. Finally, Appellant's focus on "sex" is critical because, as is elaborated next, Appellant's subjective understanding of "sex" focused specifically on the genitalia.

(ii) In addition to the overall sexual nature of each conversation, Appellant also described very specific sex acts to "Febes," "Jodie," and "Jessica." These messages provided further insight into Appellant's specific intent because they showed his subjective understanding of "sex" to be particularly focused on "genitalia."

With "Febes," Appellant said they would "both get naked," he would "lick[]" her "vagina," and he would "stick [his] part" into her "part." (JA at 54, 55, 61.) Appellant's focus on genitalia went as far as to describe the vagina, differentiating the part used for sex from "the part pee comes out." (JA at 55.)

In near identical language with "Jodie," Appellant twice told her that he wanted to "take [her] clothes off," "lick [her] vagina until [she was] wet," and

"stick [his] part into [her]." (JA at 147, 157.) Appellant also explained to "Jodie" that there are different parts to a vagina, and the part relating to sex is different that the part used for urination. (JA at 157.)

Appellant told "Jessica," consistent with his statements to "Febes" and "Jodie," that "during sex a guys part enters a girls part," and "my d*ck has to go in your vagina during sex so I will put it in slowly." (JA at 114, 118.)

In his brief, Appellant attempts to argue, that because "the decoys pretended to have virtually no knowledge of anything sexually related," it is "unreasonable to infer [Appellant] expected to receive a lascivious display of the genitals." (App. Br. at 20). However, these messages prove just the opposite. Appellant's language showed not only a general focus on sex with minors, but also a sharp focus on genitalia, including a mental process that thought through the sexual anatomy of young girls' vaginas. These messages demonstrate that Appellant's subjective intent relating to "naked" and "sex" included a particularized focus on the genitalia. *See*, e.g., Payne, unpub. op. at *12 (noting that the sexual nature of messages "provided some context to the nature and purpose of the photographs requested").

Furthermore, Appellant's language about what sexual acts he wanted "to do" to the genitalia of minor girls demonstrated his intent to receive images "designed to elicit a sexual response in the viewer." *See* Dost, 636 F. Supp. at 832. A plain

reading of Appellant's own words reveals that nearly everything Appellant did and said in his conversations with "Febes," "Jodie," and "Jessica" was intended to elicit a sexual response – there was no other discernable purpose to his conversations.

(iii) In addition to Appellant's overarching focus on sex and genitalia, there are at least two instances in which Appellant's express focus on genitalia coincided directly with his request for pictures.

With "Jodie," Appellant said, "[I want to] Kiss you take your clothes off lick you down there and when you are wet and ready stick my part into you." (JA at 147.) Less than a minute later, he followed up with, "Have you ever sent a naked picture to anyone or seen a guys part?" (Id.) Less than ninety-seconds after that, Appellant messaged "Your vagina. And it's not a shower you will get wet with natural juices. Can you send me a naked picture?" (Id.)

With "Jessica" Appellant sent a "quid-pro-quo" request in which he offered to send pictures of his own genitalia in exchange for pictures from her. Specifically, Appellant offered to send an image of his penis, and he asked "Jessica," "do you want to see a d*ck so that you will know what goes in?" (JA at 119, 121.) When "Jessica" responded "ok," Appellant replied, "you have to send a

picture of you naked then you get to see a d*ck."[6] *See also*, e.g., Payne, unpub. op. at *13 (noting that the appellant sent photos of his genitalia and offered to send more, contingent on receipt of pictures in return).

Appellant's messages with "Jodie" and "Jessica" directly tied his requests for naked photos to his mental focus on his own genitalia and the genitals of minor girls. In doing so, Appellant unmistakably confirmed that his subjective intent was to receive pictures that made genitalia the "focal point" of the image. Dost, 636 F.Supp. at 832.

Overall, the express language in Appellant's requests, as well as the context provided by his surrounding statements, showed a mindset that inextricably tied "naked" to "sex," and "sex" to the genitalia of minor girls. Thus, to Appellant, a request for "naked pictures" meant more than mere nudity. It subjectively meant sexual images "intended or designed to elicit a sexual response" and with a "focal point" on the genitalia. *See* Dost, 636 F.Supp. at 832. Despite Appellant's

[6] The panel's apparent attempt to acquit Appellant of the attempt relating to "Jessica" is irrelevant to this analysis. At a minimum, the "Jessica" messages are relevant to Appellant's subjective intent for the "Febes" and "Jodie" messages. *See* United States v. Hyppolite, 79 M.J. 161, 165-67 (C.A.A.F. 2019) (holding that evidence of charged conduct "may be admissible for another purpose," including intent); United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017) (holding that appellants "are generally acquitted of offenses, not specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review"). Additionally, the attempted acquittal could be readily attributed to the evidence of Mr. JG's conviction for "destroying or damaging property in 2009," a basis unrelated to the content of the messages themselves. (JA at 270.)

contrary assertion, this was the only reasonable conclusion that could be drawn from his statements. Appellant never requested images of only the breasts, nor did he specify that the "naked pictures" he was requesting should not contain the genitalia. Instead, Appellant directed each conversation to explicit sexual acts and then made his requests while simultaneously expressing a particular focus the role genitalia play in sexual intercourse. *See*, e.g., Payne, unpub. op. at *12 (appellant's "actions suggested that the photographs were intended for sexual gratification"). There was no other reasonable conclusion because Appellant, continually, and without prompting, directed and redirected each of his conversations to the topics of sex and the genitalia.

(b) Appellant Acted on his Desire to have Sex with Minors

In addition to his sexual messages to "Febes," "Jodie," and "Jessica," Appellant also took several steps to act on his desire to have sex with minors. First, during the afternoon and evening of 17 July 2017, Appellant made plans to have sex with "Febes" the following evening at a hotel near her grandmother's house. (JA at 56-63.) Appellant simultaneously made a near-identical plan to have sex with "Jodie" at her mother's house, later on during the same night he planned to meet "Febes." (JA at 142-45.) On 18 July 2017, Appellant acted on his plan and he travelled to the location he arranged with "Febes." (JA at 243-45.) These acts provided additional context to Appellant's subjective intent at the time he

requested naked pictures, notably his focus on sex with minors. More specifically, Appellant's actions showed that, at the time he requested naked pictures, his mindset was focused on genitalia and his imminent plan to have sex with minors. Appellant made his relentless focus on genitals and sexual intercourse clear to the point that he willingly drove to meet "Febes" for sex. The intent of Appellant's conversations was to satisfy his sexual desires, so it follows that his requests for pictures were similarly "intended or designed to elicit a sexual response in the viewer." *See* Dost, 636 F. Supp. at 832. It is illogical to conclude that Appellant intended to receive anything other than pictures that included a lascivious exhibition of the genitalia. Appellant's plans to have sex with these underage "girls" refutes the notion that he was merely intending to receive innocent, non-sexual, nude pictures that would not rise to the level of child pornography. *See also*, e.g., Payne, unpub. op. at *13 (highlighting that "appellant drove several hours to meet her in order to have sex with her"); Johnston, unpub. op. at *8 ("[a]ppellant was attempting to arrange a meeting").

In summary, Appellant's statements in the Nearby and WhatsApp messages established that he specifically sought pictures that contained lascivious exhibitions of the genitals or pubic area. This conclusion was demonstrated by the following: (a) Appellant sought out minors, he initiated communication, and he then directed three highly sexual conversations that focused on genitalia; and (b) Appellant acted

on his desire to have sex with minors. Furthermore, for each of these reasons, the evidence was sufficient to prove Appellant also intended to receive "obscene" images because he expressed his "prurient interest in sex" with minors and there was no "serious literary, artistic, political or scientific value" in the images he requested. (JA at 186.)

Appellant's struggle to provide the innocent explanation that "his request for photos was to verify he was speaking to a real person" is without merit on appeal. (App. Br. at 20.) "[T]he appellate question is not whether the evidence is better read one way or the other, but whether . . . a reasonable fact finder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt." Gutierrez, 73 M.J. at 175 (quotations and citations omitted). Here, considering Appellant's own words, in light of the "very low threshold" for legal sufficiency, and drawing every reasonable inference in favor of the Government, the evidence is sufficient to prove Appellant specifically intended to receive child pornography when he requested naked pictures from "Febes," "Jodie," and "Jessica." *See* King, 78 M.J. at 219; Robinson, 77 M.J. at 298. *See also* United States v. Isabella, 918 F.3d 816, 834, n.17 (10th Cir. 2019) (finding that, for an attempt to persuade the production of child pornography, the appellant's "requests for 'naughty' and 'naked' photos [were] more than sufficient to infer specific intent" and the appellant's interactions with other minors

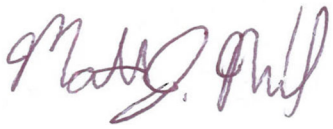
"evince[d] a common scheme").

CONCLUSION

The Air Force Court correctly found the evidence legally sufficient to sustain Appellant's conviction for attempted receipt of child pornography. "Specific intent" does not require exact or technical language – it is considered under the totality of the circumstances. The totality of the evidence in this case shows that, throughout a short timeframe, Appellant requested pictures from individuals he believed to be minors, he did so in the midst of sexually explicit conversations, his requests coincided with his particularized focus on genitalia, and he acted on his desire to have sex with minors. This evidence is sufficient to overcome the "very low threshold" required for legal sufficiency, and it proved Appellant's specific intent to receive images that contained a lascivious exhibition of the genitals or pubic area. *See* King, 78 M.J. at 219.

For these reasons, the United States respectfully requests this Honorable Court should affirm the Air Force Court's decision and uphold Appellant's conviction for attempted receipt of child pornography.

ALEX B. COBERLY, Capt, USAF
Appellate Government Counsel,
Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36475



MATTHEW J. NEIL, Lt Col, USAF
Director of Operations, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34156

MARY ELLEN PAYNE
Associate Chief, Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 34088

SHAUN S. SPERANZA, Colonel, USAF
Chief, Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 33821

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 2 December 2020.

ALEX B. COBERLY, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 36475

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This answer complies with the type-volume limitation of Rule 24(c) because:

☒ This brief contains 7,083 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a monospaced typeface using Microsoft Word Version 2013 with 14 characters per inch using Times New Roman.

/s/_____

ALEX B. COBERLY, Capt, USAF

Attorney for USAF, Government Trial and Appellate Operations Division

Dated: 2 December 2020

APPENDIX

United States v. Gilbert

United States Army Court of Criminal Appeals

July 31, 2020, Decided

ARMY 20190766

Reporter
2020 CCA LEXIS 255 *

UNITED STATES, Appellee v. Sergeant CHRISTOPHER S. GILBERT, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, Eighth Army. Robert L. Shuck, Military Judge. Colonel Dean L. Whitford, Staff Judge Advocate.

Core Terms

military, sexual, nude, child pornography, images, substantial step, guilty plea, messages, depiction, picture, selfies, possess child pornography, sexually explicit, preparation, possession of child pornography, lascivious, genitals, superior court, pubic area, sentence, exhibition, accepting, requests, breasts, factors, hoping, visual, constitutes, abused, vagina

Counsel: For Appellant: Major Benjamin A. Accinelli, JA; Captain Jason X. Hamilton, JA.

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

Judges: Before ALDYKIEWICZ, SALUSSOLIA, and WALKER Appellate Military Judges. Senior Judge ALDYKIEWICZ and Judge SALUSSOLIA concur.

Opinion by: WALKER

Opinion

MEMORANDUM OPINION

WALKER, Judge:

While appellant's attempts to persuade a teenage victim to send him nude "selfies" may have constituted the offense of solicitation, they did not amount to the offense of attempt to possess child pornography.[1] For reasons discussed below, we find a substantial basis in law and fact to question the providence of appellant's plea to The Specification of Charge I. Accordingly, we set aside appellant's conviction of attempted possession of child pornography and reassess his sentence.

BACKGROUND

[1] A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of one specification each of attempt to possess child pornography, sexual abuse of a child, and possession of child pornography, in violation of Articles 80, 120b, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 880*, *920b*, *934* [UCMJ]. The convening authority approved the adjudged sentence to a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1. This case is now before this court pursuant to Article 66, UCMJ.

A. Appellant Requests Nude "Selfies" from MN

Appellant met Miss MN online playing the video game "Fortnite" on 28 May 2018. Using the voice chat feature in the game, MN told appellant she was thirteen years old and appellant told her he was twenty-two. The two traded Instagram account names and began exchanging **[*2]** private messages through the Instagram text messaging feature. MN would borrow her step-mother's cell phone in order to exchange messages with appellant.

In the messages, appellant engaged in inappropriate sexual conversations with MN and repeatedly asked her to send him a "selfie," including a nude "selfie" (pictures taken of oneself) through Instagram. When MN denied appellant's requests for photos, appellant sent her a digital video and photos of his penis in an attempt to persuade her to reciprocate. MN eventually said she would send appellant a picture over the weekend when her parents were gone and she was home alone, but suggested that it may not be a nude photo but rather, a photo of her breasts. When MN inquired as to why appellant would be mad if she did not send him an unclothed photo of herself, appellant replied, ". . . I mean it's only fair you like seeing me naked so I should be able to see some of you."

On 1 June 2018, MN's step-mother intercepted messages that were sexual in nature from appellant to MN. MN's father reported the messages to local law enforcement, who conducted an investigation including a download of the Instagram messages between appellant and MN.[2]

*B. **[*3]** The Military Judge Is Not Convinced Appellant's Requests Constitute Attempts to Possess Child Pornography*

During appellant's guilty plea providency inquiry, the military judge expressed concern over whether appellant's description of his actions toward MN met the definition of attempt to possess child pornography, as charged by the government. Appellant explained, "My request to see her naked was a substantial step and a direct movement toward what I hoped would result in [MN] actually sending me, not only a nude image of herself, but an image where she was actually touching her breast or vagina."

The military judge asked appellant whether he actually asked MN to send him a picture of her touching her breasts or vagina. Appellant replied that he had not, but likely would have, had MN's parents not intervened when they did.

The military judge then defined the categories of "sexually explicit conduct" to appellant. He specifically asked appellant whether he had requested MN send him photos of herself engaged in any of the categories of sexually explicit conduct: (a) sexual intercourse or sodomy; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition **[*4]** of the genitals or pubic area of any person. Appellant provided that he had not specifically asked MN to send him pictures of herself engaged in any of the categories of sexually explicit conduct. Appellant explained he was initially only asking MN to send a picture of herself so he could see what she looked like, though he was "intending" for their message exchange to escalate to MN sending him an image of herself masturbating.

The military judge explained to appellant "not every picture of a nude underage person constitutes child pornography." Before taking an extended break to allow the parties to confer, the military judge concluded, "I'm not convinced based on reading the stipulation of fact that the accused was intending to possess sexually explicit photographs of [MN]. And that he was in fact only wish—desiring to possess nude selfies, and I don't think that meets the definition of child pornography without anything else."

In an attempt to provide further context, the government entered into evidence the complete exchange of Instagram messages between appellant and MN. Appellant then explained each of the messages to the military judge and his intent behind them. Appellant admitted **[*5]** that his intent was to first get MN to send a selfie and then something more explicit to which he could masturbate. Finally, the military judge asked appellant, "What would've been sufficient for you to meet that requirement?" Appellant replied, "Your honor, it would be a nude image of her depicting her breasts without clothes on or her either exposing her vagina or her with her panties on, touching her vagina." The military judge asked appellant why the image he ultimately desired to receive would have been lascivious, based on the factors provided in *United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986)*.

[2] The police department also seized appellant's phone and upon searching it, discovered the material which was the basis for the possession of child pornography specification of which appellant was convicted.

Appellant explained that an image such as that which he desired from MN would have been lascivious "because it would be designed to get [him] sexually excited," and would have suggested "sexual willingness to engage in sexual activity."

Before finally accepting appellant's plea, the military judge asked appellant what prevented him from actually committing the offense of possession of child pornography with regard to MN. Appellant replied that MN never sent him any images of herself and then her parents intervened.

LAW AND DISCUSSION

Asking a minor child to share naked pictures of herself and hoping the images will contain sexually explicit **[*6]** conduct does not satisfy the elements of the offense of attempted possession of child pornography. We conclude the military judge abused his discretion by accepting appellant's guilty plea to the offense of attempted possession of child pornography.

A. Standard of Review

The military judge at a guilty plea is "charged with determining whether there is an adequate basis in law and fact to support the plea before accepting it." *United States v. Inabinette, 66 M.J. 320, 321-322 (C.A.A.F. 2008)* (citations omitted). We review a judge's decision to accept a guilty plea for abuse of discretion. *United States v. Weekes, 71 M.J. 44, 46 (C.A.A.F. 2012)* (citing *Inabinette, 66 M.J. at 321*. A military judge abuses his discretion if he accepts a guilty plea "without an adequate factual basis to support it" or if he accepts a guilty plea based upon "an erroneous view of the law." *Id.* (citation omitted).

In reviewing a military judge's decision to accept a guilty plea, "appellate courts apply a substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea?" *Inabinette, 66 M.J. at 322* (internal quotations and citations omitted). "If an accused's admissions in the plea inquiry do not establish each of the elements of the charged offense, the guilty plea must be set aside." *Weekes, 71 M.J. at 46* (citing *United States v. Gosselin, 62 M.J. 349, 352-53) (C.A.A.F. 2006))*.

*B. The Definition of Child **[*7]** Pornography*

As the military judge aptly explained to appellant, "not every picture of a nude underage person constitutes child pornography." "'Child pornography' means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of a minor engaging in sexually explicit conduct." *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], pt. IV, ¶ 68b.c.(1). "Sexually explicit conduct means actual or simulated: (a) sexual intercourse or sodomy . . .; (b) bestiality; (c) masturbation; (d) sadomasochistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person." *MCM*, pt. IV, ¶ 68b.c.(7).

In *United States v, Roderick*, our superior court adopted the six *"Dost* factors" developed by the Southern District of California for determining when an image constitutes a "lascivious exhibition" of the genitals or pubic area. *62 M.J. 425, 430 (C.A.A.F. 2006)*(citing *United States v. Dost, 636 F. Supp. at 828, 832* (S.D. Cal. 1986(C.A.A.F. 2006). The non-exclusive list of the *"Dost* factors" are:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or **[*8]** pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 429. If an image of a child does not depict the genitals or pubic area, that ends the "lascivious exhibition" analysis as such a depiction is a prerequisite to the application of the *Dost* factors. *Id. at 430*.

Since the military court system adopted the *Dost* factors, courts have analyzed material on a case-by-case basis to determine whether it meets the definition of lascivious exhibition of the genitals or pubic area. Such an analysis is a highly fact-specific determination with legal consequences. *See United States v. Piolunek, 74 M.J. 107, 108* ("Whether any given image does or does not display the genitals or pubic region is a question of fact, albeit one with legal consequences.") We are not prohibited from considering evidence

outside the four corners of the image(s) in question when making a determination as to whether **[*9]** an image constitutes child pornography. *United States v. Updegrove, ARMY 20160166, 2017 CCA LEXIS 36, at *7* (23 Jan. 2017) (mem. op.) (discussing *Roderick, 62 M.J. 425*). The "objective facts surrounding the image's creation may be considered." *Id.*

However, in appellant's case, we have no images to analyze, and instead only the objective facts surrounding appellant's requests for a hypothetical image that was never produced, let alone possessed. There is no application of the *Dost* factors or analysis to perform. While we may consider objective facts surrounding an image's creation, we cannot wholly substitute such facts for an analysis of the material in question. It seems the military judge was satisfied that appellant's request for any selfie, with the goal of *eventually* convincing MN 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, MN 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. As we cannot be sure **[*10]** what type of image MN might have sent appellant had her parents not intervened (or if she would have sent him anything), we turn our analysis toward appellant's actions in attempting to procure photos from MN.

C. Attempt Offenses and the Substantial Step

"[A]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." UCMJ art, 80. The statute specifically requires that an offense of attempt must include the specific intent to commit the offense coupled with "an overt act that directly tends to accomplish the unlawful purpose." *MCM*, pt. IV, ¶ 4c.(1). The overt act must go beyond mere preparation, which may consist of "devising or arranging the means or measures necessary for the commission of the offense." *MCM*, pt. IV, ¶ 4c.(2).

In *United States v. Winckelmann*, our Superior Court drew the "elusive line separating mere preparation from a substantial step." *70 M.J. 403, 407 (C.A.A.F. 2011)* (internal quotation marks and citations omitted). The court relied on federal cases that defined a "substantial step" as "more than mere preparation but less than the last act necessary **[*11]** before actual commission of the crime." *United States v. Hale, 78 M.J. 268, 272 (C.A.A.F. 2019)* (citing *Winckelmann, 70 M.J. 403*). Quoting the 9th Circuit, the *Winckelmann* court stated the substantial step must "unequivocally demonstrate[e] that the crime will take place unless interrupted by independent circumstances." *70 M.J. 407*. (quoting *United States v. Goetzke, 494 F.3d. 1231, 1237 (9th Cir. 2007)*(citations omitted)).

In the context of attempted child enticement cases where an accused has not traveled to meet the target child victim and the interactions occurred over the internet, "courts analyze the factual sufficiency of the requisite substantial step using a case-by-case approach." *Winckelmann, 70 M.J. at 407*. Where an accused has not actually met the child victim or engaged in "concrete conversations" making plans to do so, courts have still found "defendants have taken a substantial step toward enticement of a minor where there is a course of more nebulous conduct, characterized as 'grooming' the victim." *Id. at 408*. We likewise consider appellant's overall grooming actions toward MN in analyzing whether his strictly online message exchanges with her amounted to an attempt to possess child pornography.

D. Hoping is Not a Substantial Step

Appellant's hope and desire that MN would eventually send him a photo of herself that constituted child pornography, despite **[*12]** not having requested such a photograph, was nothing more than mere preparation. As our Superior Court recognized, "preparation consists of devising or arranging the means or measures necessary for the omission of the offense; the attempt is the direct movement toward the commission after preparations are made." *United States v. Schoof, 37 M.J. 96, 103 (C.M.A. 1993)*(internal quotation omitted)). In the context of a guilty plea, our Superior Court further commented:

> Quite simply, where an accused pleads guilty and during the providence inquiry admits that he went beyond mere preparation and points to a particular action that satisfies himself on this point, it is neither legally nor logically well-founded to say that actions that may be ambiguous on this point fall short of the line 'as a matter of law' so as to be substantially inconsistent with the guilty plea.

Schoof, 37 M.J. at 103. We acknowledge that we are bound to accept an appellant's guilty plea explanation of his substantial step toward the commission of his target offense. However, in this case, appellant's actions toward MN simply did not amount to more than mere preparation and hoping.

Though appellant explained his desire to escalate the message exchanges with MN, he never actually asked MN to send **[*13]** him an image of herself engaged in sexually explicit conduct. Appellant's honest admission at his providence inquiry that he had *hoped* MN would *eventually* send him a picture of herself masturbating or touching her breasts or vagina does not constitute a substantial step toward possession of child pornography.

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *United States v, Hartman, 69 M.J. 467, 468 (C.A.A.F. 2011)* (quoting *United States v. O'Connor, 58 M.J. 450, 453 (C.A.A.F. 2003))*. The military judge's initial instinct was correct: appellant asking thirteen-year-old MN for nude "selfies" did not constitute an attempt to possess child pornography. When the military judge tried to discuss with appellant his understanding of the critical distinction between permissible and prohibited behavior, appellant's responses evidenced a belief that his conduct was prohibited because he intended to eventually persuade MN to send him photos that would sexually excite him and satisfy his masturbatory preferences. The military judge accepted this context as a substitute for appellant taking a substantial step toward possession of material that **[*14]** would actually meet the definition of child pornography.

But appellant's hope that MN would eventually send him a photo of herself engaged in sexually explicit conduct (such as masturbation) did not change the nature of his actions toward MN. Appellant had inappropriate sexual conversations with MN, sexually abused her by sharing images and videos of his penis with her, and asked her to send him nude pictures of herself. He admitted that it was all preparatory work toward his ultimate goal of procuring photos that might have met the legal definition of child pornography. But he never actually asked or instructed MN to send him material that would constitute child pornography. Desiring images of MN to aid in his masturbation did not transform his preparation into a substantial step toward commission of the target offense of possession of child pornography.

In *United States v. Moon*, our Superior Court reversed a conviction of "knowingly possess[ing] multiple images of nude minors and persons appearing to be nude minors, which possession was to the prejudice of good order and discipline in the armed forces and was of a nature likely to bring discredit upon the armed forces," charged in **[*15]** violation of Article 134, UCMJ, but not as a possession of child pornography offense. *73 M.J. 382 (C.A.A.F. 2014)*. The military judge in *Moon* attempted to have the accused explain why the images he possessed were prohibited, rather than constitutionally protected such as nude images of children in works of art. *Id. at 388-89*. The appellant admitted he possessed the nude images of minors to satisfy his own sexual gratification and that was the reason the nude images of children, not amounting to actual child pornography, were not protected under the *First Amendment* and their possession was criminal. *Id. at 389*. Reversing the conviction, the court clarified that the military judge's statement of the law was incorrect: "possession of images for one's sexual gratification does not itself remove such images from *First Amendment* protection. If it did, 'a sexual deviant's quirks could turn a Sears catalog into pornography.' *Id.* (quoting *United States v. Amirault, 173 F.3d 28, 34 (1st Cir. 1999))*.

As our Superior Court did in *Moon*, we similarly conclude that notwithstanding appellant's anticipated sexual arousal to the nude "selfies" he wanted MN to send to him, the military judge misapplied the law and failed to clearly distinguish prohibited from protected conduct. The closest appellant came to possessing child pornography of **[*16]** MN was hoping for it. We do not find his general request for nude "selfies" of MN to be a substantial step toward the offense of possession of child pornography, as images of nude minors are not per se child pornography. We therefore set aside appellant's conviction of attempt to possess child pornography.

E. Sentence Reassessment

Having set aside appellant's conviction of the Specification of Charge I we now reassess appellant's sentence in accordance with the principles articulated by our superior court in *United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986)*, and *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)*. Setting aside appellant's conviction of attempt to possess child pornography reduces his maximum confinement exposure from thirty-five years to twenty-five years. *MCM*, pt. IV, ¶¶ 4.e, 45.b.e.(3)(b), 68.b.e.(1).

All other remaining elements of the maximum punishment, such as reduction, forfeitures, discharge, and potential fine, remain unchanged. Appellant's adjudged sentence only included nine months of confinement and it was imposed by a military judge alone. *See* *United States v. Adams, 74 M.J. 589, 593 (Army Ct. Crim. App. 2015)*.

The most important consideration for us is that the gravamen of appellant's criminal conduct remains unchanged without his conviction for attempt to possess child pornography. Appellant preyed on a thirteen-year-old **[*17]** girl online, sexually abused her by sending her digital pictures and videos of his penis, engaged in inappropriate sexual conversations with her, and attempted to guilt her into sending nude images of herself. Though his requests for nude "selfies" did not constitute the offense of attempt to possess child pornography, they are inseparable from his sexual abuse of MN. Appellant's requests for a thirteen-year-old to send him nude photos are admissible aggravation evidence related to appellant's other convictions, and before the trier of fact notwithstanding our set aside of the attempted possession of child pornography conviction. We are confident that the remaining offenses of sexual abuse of a child and possession of child pornography would have yielded a sentence at trial at least equal to that adjudged in appellant's case. We therefore affirm appellant's sentence of a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

CONCLUSION

The Specification of Charge I and Charge I are set aside and DISMISSED. The remaining findings of guilty are AFFIRMED. The sentence is AFFIRMED.

Senior Judge ALDYKIEWICZ and Judge SALUSSOLIA **[*18]** concur.

End of Document

User Name: Alex COBERLY
Date and Time: Monday, November 30, 2020 3:12:00 PM EST
Job Number: 131110054

Document (1)

1. *United States v. Johnston, 2017 CCA LEXIS 715*
   Client/Matter: -None-
   Search Terms: 2017 CCA LEXIS 715
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

United States v. Johnston

United States Air Force Court of Criminal Appeals

November 16, 2017, Decided

No. ACM 39075

Reporter
2017 CCA LEXIS 715 *

UNITED STATES, Appellee v. Zachary J. JOHNSTON, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Johnston, 2018 CAAF LEXIS 13 (C.A.A.F., Jan. 12, 2018)*

Review denied by *United States v. Johnston, 2018 CAAF LEXIS 120 (C.A.A.F., Mar. 5, 2018)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Matthew S. Ward (arraignment); Vance H. Spath. Approved sentence: Dishonorable discharge, confinement for 10 months, and reduction to E-1. Sentence adjudged 20 January 2016 by GCM convened at Moody Air Force Base, Georgia.

Overview

HOLDINGS: [1]-Evidence that a servicemember responded to an online advertisement that was posted by an Air Force Office of Special Investigations special agent, believed that the person who posted the ad was a 14-year-old girl, and sent the agent messages which asked him to send nude pictures and described sexual acts he wanted to perform with the agent, was sufficient to affirm the servicemember's convictions for attempted sexual abuse of a child under the age of 16 years and attempted receipt of child pornography, in violation of UCMJ art. 80, *10 U.S.C.S. § 880*; [2]-There was no merit to the servicemember's claim that his conviction for attempted receipt of child pornography had to be set aside because the specification alleged that he attempted to violate UCMJ art. 134, *10 U.S.C.S. § 934*, when that offense was punishable only under UCMJ art. 120b, *10 U.S.C.S. § 920b*.

Outcome
The court affirmed the findings and sentence.

Core Terms

child pornography, sentence, photograph, sexually, reasonable doubt, doctrine of preemption, Specification, conversation, wrongfully, knowingly, messages

Case Summary

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > General Article > Preemption

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

HN1[] General Article, Preemption

The United States Air Force Court of Criminal Appeals ("AFCCA") reviews questions of preemption de novo. The preemption doctrine prohibits application of Unif. Code Mil. Justice ("UCMJ") art. 134, *10 U.S.C.S. § 934*, to conduct covered by UCMJ arts. 80 through 132, *10 U.S.C.S. §§ 880 through 932*. Manual Courts-Martial pt. IV, para. 60.c.(5)(a) (2016). Both the United States Court of Appeals for the Armed Forces and the United States Court of Military Appeals have long placed an additional requirement on the application of the preemption doctrine that has greatly restricted its applicability: simply because an offense charged under Article 134 embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. It must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. The preemption doctrine applies only when: (1) Congress intended to limit prosecution for a particular area of misconduct to offenses defined in specific articles of the UCMJ; and (2) the offense charged is composed of a residuum of elements of a specific offense.

Military & Veterans Law > Military Offenses > Attempts

HN2[] Military Offenses, Attempts

The elements of Unif. Code Mil. Justice ("UCMJ") art. 80, *10 U.S.C.S. § 880*, require: (1) that an accused did a certain overt act; (2) that the act was done with the specific intent to commit a certain offense under the UCMJ; (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 Courts-Martial pt. IV, para. 4.b.

Military & Veterans Law > Military Offenses > General Article

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

HN3[] Military Offenses, General Article

The elements of receiving child pornography, in violation of Unif. Code Mil. Justice art. 134, *10 U.S.C.S. § 934*, require: (1) that an accused knowingly and wrongfully received child pornography; and (2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. Manual Courts-Martial pt. IV, para. 68b.

Military & Veterans Law > Military Offenses > General Article

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

Military & Veterans Law > Military Offenses > General Article > Preemption

HN4[] Military Offenses, General Article

The changes Congress made to Unif. Code Mil. Justice ("UCMJ") art. 120b, *10 U.S.C.S. § 920b*, have not incorporated the UCMJ art. 134, *10 U.S.C.S. § 934*, offense of child pornography. Therefore, the preemption doctrine does not apply to Article 134 child pornography specifications.

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] Burdens of Proof, Proof Beyond Reasonable Doubt

The United States Air Force Court of Criminal Appeals ("AFCCA") reviews issues of factual and legal sufficiency de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The AFCCA's assessment of legal and factual sufficiency is limited to the evidence produced at trial. The test for legal sufficiency of the evidence is whether, considering the evidence in the

light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The "reasonable doubt" standard does not require that the evidence be free from conflict. In resolving questions of legal sufficiency, the AFCCA is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the AFCCA is convinced of an appellant's guilt beyond a reasonable doubt. In conducting its unique appellate role, the AFCCA takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Offenses > General Article

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

HN6[] **Military Offenses, General Article**

"Child pornography" is defined in the Uniform Code of Military Justice as material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct. Manual Courts-Martial ("MCM") pt. IV, para. 68b.c(1). "Sexually explicit conduct" is further defined as actual or simulated lascivious exhibition of the genitals or pubic area of any person. MCM pt. IV, para. 68b.c(7).

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7[] **Judicial Review, Courts of Criminal Appeals**

The United States Air Force Court of Criminal Appeals reviews sentence appropriateness de novo, and may affirm only such findings of guilty and a sentence, or such part or amount of a sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The AFCCA assesses sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Though the AFCCA has discretion to determine whether a sentence is appropriate, it has no power to grant mercy.

Counsel: For Appellant: Major Virgina M. Bare, USAF; Major Annie W. Morgan, USAF; Brian L. Mizer, Esquire.

For Appellee: Major G. Matt Osborn, USAF; Gerald R. Bruce, Esquire.

Judges: Before MAYBERRY, JOHNSON, and MINK, Appellate Military Judges. Judge MINK delivered the opinion of the court, in which Senior Judges MAYBERRY and JOHNSON joined.

Opinion by: MINK

Opinion

MINK, Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of attempted sexual abuse of a child under the age of 16 years and one specification of attempted receipt of child pornography, all in violation of *Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880*. The adjudged and approved sentence consisted of a dishonorable discharge, 10 months of

confinement, and reduction to E-1.[1]

On appeal, Appellant asserts: (1) the Government was preempted from charging the attempted *Article 134* offense in Specification **[*2]** 3 of the Charge; (2) the conviction for attempted receipt of child pornography is legally and factually insufficient; and (3) Appellant's sentence was inappropriately severe.[2] Finding no error materially prejudicial to a substantial right of Appellant, we affirm the findings and sentence.

I. Background

In March 2015, Appellant, a 22-year-old senior airman, responded to a Craigslist advertisement on the Internet that he believed was posted by a female named "Julia." The advertisement had actually been posted by Air Force Office of Special Investigations (AFOSI) Special Agent CS, a male agent posing as the 14-year-old female "Julia" as part of "Operation Broken Heart," an Internet Crimes Against Children (ICAC) undercover investigation. Appellant then began an extensive conversation with "Julia" by email and text messages that continued for approximately four days. Shortly after responding to the advertisement, in the fourth text message sent by Special Agent CS, Appellant learned that "Julia" was 14 years old. Despite expressing some initial concerns about her age, Appellant continued the conversation and quickly changed the focus to sexual topics. During the course of their conversations, **[*3]** Appellant communicated indecent language to "Julia," stating "by f[**]king u till u c[*]m all over my d[**]k," "making u c[*]m again and again," "Want to see my c[**]k," and "I want to see your pu[**]y." Appellant also sent "Julia" a photograph of his penis and asked "Julia" to send him a photograph of her vagina. Appellant was charged with attempting to commit the underlying offenses because "Julia" was not an underage girl, but rather a fictitious person portrayed by Special Agent CS.

II. Discussion

A. Preemption

In Specification 3 of the Charge, Appellant was charged with attempting to knowingly and wrongfully receive child pornography in violation of *Article 80, UCMJ*. The underlying offense Appellant was alleged to have attempted to commit is listed in *Article 134, UCMJ*. Appellant asserts the Government was preempted from charging the "assimilated *Article 134* offense in this case because Congress intended to limit prosecution for conduct of this nature in a complete way to *Article 120b(c)*."

HN1[] We review questions of preemption de novo. *United States v. Benitez, 65 M.J. 827, 828 (A.F. Ct. Crim. App. 2007)*. The preemption doctrine prohibits application of *Article 134* to conduct covered by *Articles 80 through 132*. **[*4]** *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 60.c.(5)(a).

Our superior court has long placed an additional requirement on the application of the preemption doctrine that has greatly restricted its applicability:

> [S]imply because the offense charged under *Article 134, UCMJ*, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.

United States v. Anderson, 68 M.J. 378, 386-87 (C.A.A.F. 2010) (citing *United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979))* (alteration in original). The preemption doctrine "applies only when (1) Congress intended to limit prosecution for . . . a particular area of misconduct to offenses defined in specific articles of the Code, and (2) the offense charged is composed of a residuum of elements of a specific offense." *United*

---

[1] Pursuant to *Article 58b, Section (b), UCMJ*, the convening authority waived all mandatory forfeitures of pay and allowances for a period of six months, release from confinement, or expiration of term service, whichever occurred sooner, for the benefit of Appellant's dependent spouse and children. In a memorandum dated 5 January 2016, the convening authority denied Appellant's request for deferment of mandatory forfeitures and reduction in rank but failed to articulate the reasons for the denial as required by Rule for Courts-Martial 1101(c)(3). *See United States v. Jalos, No. ACM 39138, 2017 CCA LEXIS 607, at *5-6 (A.F. Ct. Crim. App. 5 Sep. 2017)* (unpub. op.). Our review of the record of trial reveals no colorable showing of possible prejudice as a result of the convening authority's error by failing to articulate the reasons for the denial and we conclude that no relief is warranted.

[2] Raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

States v. Curry, 35 M.J. 359, 360-61 (C.M.A. 1992) (quotation marks and citations omitted).

Appellant was charged with attempting to knowingly and wrongfully receive child pornography under Article 80, UCMJ. HN2[] The elements of Article 80, UCMJ, require: (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; **[*5]** and (4) that the act apparently tended to effect the commission of the intended offense. *MCM*, pt. IV, ¶ 4.b. The "certain offense under the code" Appellant was attempting to commit was not "an assimilated Article 134 offense," as claimed by Appellant, but rather the specifically listed Article 134 offense of receiving child pornography. *MCM*, pt. IV, ¶ 68b. HN3[] The elements of that offense require: (1) that the accused knowingly and wrongfully received child pornography, and (2) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. *Id.*

In a series of recent cases, we have addressed similar preemption arguments related to the production of child pornography under the same listed Article 134 offense. We have held: HN4[] "The changes to Article 120b, UCMJ, have not incorporated the listed Article 134, UCMJ, offense of child pornography. Therefore, the preemption doctrine does not apply to Article 134, UCMJ, child pornography specifications." United States v. Chambers, No. ACM 38975, 2017 CCA LEXIS 318, at *7 (A.F. Ct. Crim. App. 4 May 2017) (unpub. op.) (quoting United States v. Costianes, No. ACM 38868, 2016 CCA LEXIS 391, at *19-20 (A.F. Ct. Crim. App. 30 Jun. 2016) (unpub. op.)). We find no meaningful distinction between Appellant's case involving the attempted receipt **[*6]** of child pornography and our prior decisions addressing production of child pornography, both of which are under the listed Article 134 offense, that would cause us to come to a different conclusion here. We conclude that the challenged Article 134 offense underlying the charged Article 80 offense with which Appellant was charged was not preempted by Article 120b.

B. Legal and Factual Sufficiency

Appellant also challenges the legal and factual sufficiency of the evidence supporting his conviction for attempting to knowingly and wrongfully receive child pornography.

HN5[] We review issues of factual and legal sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 M.J. 324 (C.M.A. 1987); *see also* United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). The "reasonable doubt" standard does not require that the evidence be free from conflict. United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record **[*7]** in favor of the prosecution." United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." Turner, 25 M.J. at 325; *see also* United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." Washington, 57 M.J. at 399.

As discussed above, Appellant was charged with attempting to receive child pornography in violation of Article 80, UCMJ. Appellant asserts that he neither had the specific intent to receive child pornography nor did he take a "substantial step" to do so, as required to prove an attempt under Article 80. We disagree.

Shortly after Appellant began communicating with a person he believed to be a 14-year-old girl, Appellant began asking her for pictures of herself, initially stating, "Send a sexy one lol" and later, "...u got any naked pics?" As Appellant continued his dialogue with "Julia," the topics **[*8]** included where she lived on base, when her mother would be at work, and the possibility of visiting "Julia." The following exchange of text messages then occurred between Appellant and "Julia":

Appellant: "Oh thats cool I cant wait to make u feel

good;)"
Julia: ":)) how u plan om doin thst boy?"
Appellant: "By f[**]king u till u c[*]m all over my d[**]k"
Appellant: "And making u c[*]m again and again"
Julia: "k but im not tryna be on teen mom"
Appellant: "Thats why condoms were made"

Two days after this conversation, during his continuing dialogue with "Julia," Appellant asked her if she wanted to see his "c[**]k" and then asked her for a photograph of her vagina, telling her "I want to see ur pu[**]y." SA CS, responding as "Julia," said "im at school how m I gonna take a pu[**]y pic 4 u?" Appellant then said in response, "In the bathroom or ti[**]ies." Later, as Appellant was attempting to arrange a meeting with "Julia," he sent her a text message stating, "Yeah, just send me some naked pics for motivation." Appellant then sent "Julia" a photograph of his penis and later a photograph of himself in his Air Force uniform. After being apprehended by the AFOSI, Appellant admitted in his written **[*9]** statement that he responded to the Craigslist advertisement and engaged in continuing conversations with "Julia," whom he said he knew was 14 years old.

HN6[] "Child pornography" is defined in the UCMJ as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." *MCM*, pt. IV, ¶ 68b.c(1). "Sexually explicit conduct" is further defined as "actual or simulated: ...(e) lascivious exhibition of the genitals or pubic area of any person." *MCM*, pt. IV, ¶ 68b.c(7).

Relying on Appellant's own words in his messages to "Julia," a reasonable factfinder could conclude that Appellant had the specific intent to attempt to receive child pornography, i.e., the "lascivious exhibition of the genitals or pubic area" of the person he believed to be a 14-year-old girl and took a "substantial step" towards obtaining such by requesting a photograph of her vagina.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence is legally sufficient to support Appellant's conviction beyond a reasonable doubt. *Barner, 56 M.J. at 134*. Moreover, having weighed the evidence **[*10]** in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner, 25 M.J. at 325*. Appellant's conviction is therefore both legally and factually sufficient.

C. Sentence Appropriateness

Lastly, Appellant asserts that his sentence was inappropriately severe and he requests the court reduce the dishonorable discharge to a bad-conduct discharge. We disagree and decline to do so.

HN7[] This court reviews sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)*. We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine, on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*.

"We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (citing *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)*). Though we have great discretion to determine whether a sentence is appropriate, we have no power to "grant mercy." *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)*.

Appellant was convicted of attempting to sexually abuse a child under 16 years of age by intentionally communicating indecent **[*11]** language and by sending a picture of his penis to a person he believed was a 14-year-old child. Appellant was also convicted of attempting to knowingly and wrongfully receive child pornography from the person he believed was a 14-year-old girl by asking her to send him sexually explicit photographs.

We have given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial. Appellant was subject to a maximum sentence of 40 years of confinement, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. His approved sentence of a dishonorable discharge, 10 months of confinement, and reduction to E-1 was significantly less than the maximum that could have been imposed. The sentence properly addressed Appellant's serious misconduct, was legally appropriate based on the facts and circumstances of this particular

case, and was not inappropriately severe.

III. Conclusion

The findings of guilt and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, **[*12]** *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

United States v. Payne

United States Air Force Court of Criminal Appeals

January 17, 2013, Decided

ACM 37594, ACM 37594

Reporter
2013 CCA LEXIS 18 *

UNITED STATES v. Staff Sergeant ROBERT M. PAYNE, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Payne, 72 M.J. 162, 2013 CAAF LEXIS 313 (C.A.A.F., Mar. 19, 2013)*

Review granted by *United States v. Payne, 72 M.J. 407, 2013 CAAF LEXIS 650 (C.A.A.F., June 20, 2013)*

Affirmed by *United States v. Payne, 73 M.J. 19, 2014 CAAF LEXIS 18 (C.A.A.F., Jan. 6, 2014)*

Prior History: **[*1]** Sentence adjudged 11 September 2009 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Katherine E. Oler. Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Core Terms

military, Specification, child pornography, photographs, depiction, instructions, nude, nude photograph, indecent, visual, solicitation, persuade, sanity, sexual, convicted, offenses, sex, beyond a reasonable doubt, sexually explicit, coerce, commit, entice, induce, lascivious, chat, commission of the offense, good order, conversations, medications, proceedings

Case Summary

Overview
Appellant service member communicated with a supposed minor on-line, sent her pornographic photos, asked for nude photos, and went to New York to meet her. He was convicted of two specifications of attempted offenses, and two of misuse of his computer. Although the military judge's instructions on the attempts lacked specificity, they included all the required elements and adequately instructed the members to find the necessary predicate facts beyond a reasonable doubt. The colloquy between the military judge and the appellant was sufficient and was supported by the record.

Outcome
The findings of guilty and the sentence, as approved, were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Attempts

HN1[] Military Offenses, Attempts

A conviction will be upheld when criminal conduct and mens rea set forth in the specification satisfy the requirements of attempt, under Unif. Code Mil. Justice art. 80, 10 U.S.C.S. § 880, where the charge describes the gravamen of the underlying proscribed offense.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] Evidence, Weight & Sufficiency of Evidence

Under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), a criminal court of appeals reviews issues of legal and factual sufficiency de novo. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving legal-sufficiency questions, a court is bound to draw every reasonable inference from the evidence in favor of the prosecution. The assessment of legal sufficiency is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN3[] Evidence, Weight & Sufficiency of Evidence

The test for factual sufficiency under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, a court of criminal appeals is convinced of the accused's guilt beyond a reasonable doubt. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination.

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

HN4[] Employing Minor to Engage in Child Pornography, Elements

In determining whether a particular photograph constitutes a lascivious exhibition, a court will combine a review of the totality of the circumstances with the following factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] Judicial Review, Courts of Criminal Appeals

A court of criminal appeals reviews de novo the instructions given by the military judge. When a judge omits entirely any instruction on an element of the charged offense, that error may not be tested for harmlessness because, thereby, the court members are prevented from considering that element at all and it is not for us to determine what the court members would have found had they been properly advised on the elements. Conversely, when a judge's instruction adequately identifies an element to be resolved by the members and adequately requires the members to find the necessary predicate facts beyond a reasonable doubt, then an erroneous instruction on that element may be tested for harmlessness.

Military & Veterans Law > Military Offenses > Attempts

HN6[] Military Offenses, Attempts

The correct elements of an attempt offense under Unif. Code Mil. Justice art. 80, 10 U.S.C.S. § 880, 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. Manual Courts-Martial pt. IV, para. 4.b (2008). 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. Manual Courts-Martial pt. IV, para. 4.c.(1).

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

HN7 **Categories of Offenses, Prejudicial to Discipline & Good Order**

The elements of an offense under clause 1 or clause 2 of Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, 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. Manual Courts-Martial pt. IV, para. 60.b.

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

HN8 **Employing Minor to Engage in Child Pornography, Elements**

Under 18 U.S.C.S. § 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. 18 U.S.C.S. § 2251(a). Although § 2251(a) does not list out separate elements similar to offenses under the Unif. Code Mil. Justice, the elements thereof are 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.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Trial Procedures, Findings**

Whether a specification is defective is a question of law that is reviewed de novo. A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

HN10 **Military Offenses, Rape & Sexual Assault of a Child**

Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, does not require physical presence. Unlike indecent liberties with a child, child pornography offenses under that section and 18 U.S.C.S. § 2251(a), envision the minor as both a victim and an actor involved in an offense.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN11 **Posttrial Procedure, Commitment & Treatment**

A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b), Manual Courts-Martial. The trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN12 **Posttrial Procedure, Commitment & Treatment**

If it appears to any commander, counsel, or other officers of the court that there is reason to believe that

the accused lacks the capacity to stand trial, that fact and its basis shall be transmitted to the person authorized to order an inquiry into the mental condition of the accused. R.C.M. 706(a), Manual Courts-Martial. Before referral of charges, the convening authority orders the inquiry. R.C.M. 706(b)(1), Manual Courts-Martial. After referral of charges, the military judge orders the inquiry. R.C.M. 706(b)(2), Manual Courts-Martial. The phrase "understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case" means that the accused has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him or her.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN13[] **Posttrial Procedure, Commitment & Treatment**

Mental competence to stand trial is a question of fact, we will overturn the military judge's determination on appeal only if it is clearly erroneous. R.C.M. 909(e)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > General Overview

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN14[] **Courts Martial, Posttrial Procedure**

Where a post-trial delay is facially unreasonable, a court examines that issue under the four factors set forth in Barker v. Wingo: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. When a court assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, it does not need to engage in a separate analysis of each factor.

Counsel: For the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Reggie D. Yager; and Captain Luke D. Wilson.

For the United States: Colonel Don M. Christensen; Major Zachary T. Eytalis; Captain Brian C. Mason; Captain Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Judges: Before ORR, ROAN, and HARNEY, Appellate Military Judges. Chief Judge Orr participated in this decision prior to his retirement.

Opinion by: HARNEY

Opinion

OPINION OF THE COURT

HARNEY, Judge:

The appellant was tried by a general court-martial composed of officer members at Joint Base McGuire-Dix-Lakehurst, New Jersey, between 8 and 11 September 2009. Contrary to his pleas, the appellant was convicted 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*. **[*2]** The appellant was also convicted of two specifications of failure to obey a lawful general regulation by misusing his Government-issued computer in connection with his alleged sex offense, in violation of Article 92, UCMJ, *10 U.S.C. § 892*. The members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. 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.

The appellant initially assigned three errors before this Court: (1) the evidence is legally and factually insufficient to support his conviction, (2) the military

judge violated the appellant's procedural due process rights by conducting an inadequate competency inquiry, and (3) the appellant's due process rights were violated when he was tried and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. The appellant later assigned two supplemental errors: (1) the military judge committed reversible error by omitting required instructions on the elements of Specification 4 of Charge I, and (2) Specification **[*3]** 4 of Charge I fails to state an offense where it alleges a minor herself can commit the underlying offense of creation of child pornography by sending a nude picture of herself. We disagree and, finding no prejudice to a substantial right of the appellant, affirm.

Factual Background

Between 20 June 2008 and 1 August 2008, the appellant engaged in Internet chat sessions and phone conversations with "Cheergrrr113," a person he believed was a 14-year-old girl named "Marley." The appellant identified himself as a 28-year old male in the Air Force by the name of "Rob" and used "Flyingsolo799" as his screen name. In fact, the person the appellant spoke with was an undercover officer from the Ulster County Sheriff's Department named LV, who was investigating individuals who solicit sex from minors over the Internet.

During their Internet and phone conversations, the appellant told "Marley" he wanted to have sex with her, asked her to send him nude photos of herself, and asked her to meet him in New York for sex. During their first conversation on 20 June 2008, the appellant told "Marley" that he liked her bikini photo on her MySpace profile and asked if she wanted to "talk dirty," to which she **[*4]** responded that she did. When she asked if the appellant minded that she was only 14 years old, he stated he did not. Several chat log entries later, the appellant told "Marley" he was thinking about ejaculating on her. He continued to engage in sexually explicit dialogue and stated "so baby make me cum" and "Plz I am so hard," followed by a request for nude photos:

> Flyingsolo799: do u have any nude pics?
> Cheergrrr113: no
> Flyingsolo799: can u take some
> (conversation nonresponsive)
> Flyingsolo799: so can u take some nude pics
> Cheergrrr113: I can't
> Cheergrrr113: I don't have a cam

Although "Marley" declined to provide or take any nude photographs during their initial online chat sessions, the appellant continued to engage in sexual discourse with her that day.

The appellant continued to speak with "Marley" on future occasions and repeated his request for nude photographs. On 30 June 2008, he asked "Marley" for some nude photographs and also asked when the two of them could "do some phone," meaning phone sex. On 16 July 2008, the appellant told "Marley" "I love looking at this pic of u on myspace in ur bathing sute and think about how bad I want to f*** ur young hot body." On 21 July 2008, the appellant **[*5]** sent "Marley" a photograph of his nude and erect penis and stated that he was "hard" and "now I wish I could see one of u." On 22 July 2008, the appellant stated "I wish I could see a pic of u nude" and offered to send "Marley" a nude picture of himself if she would send one of herself. On 23 July 2008, the appellant asked "Marley" "can I video us having sex" during their planned meeting. On 31 July 2008, during a sexually explicit chat, the appellant stated, "I can't wait to video u rideing it." During the same chat, the appellant sent "Marley" a video of himself masturbating.

On 31 July 2008, the appellant drove from his home in Philadelphia to rural New York State to meet Marley the following morning for a pre-planned camping trip. On 1 August 2008, while parked at a grocery store waiting for "Marley," the appellant was arrested by local law enforcement authorities. At the time of his arrest, the appellant had with him a sleeping bag and four condoms. He admitted to the arresting officer that he had traveled to New York to have sex with a 14-year-old girl.

The appellant was charged with four separate attempt offenses under *Article 80, UCMJ*, for his online interactions with "Marley." **[*6]** He was convicted, in part, of attempting to persuade, induce, entice, or coerce a minor to create child pornography in violation of *Article 80, UCMJ*, as set forth in Specification 4 of Charge I:

> 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, [LV], 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.

Specification 4 of Charge I: Creation of Child Pornography

At the outset, we note that the parties differ as to the underlying offense set forth in Specification 4 of Charge I. The appellant asserts that the specification alleges a solicitation offense under *Article 134, UCMJ*. The Government **[*7]** disagrees and asserts that it alleges an *Article 80, UCMJ*, offense for an attempt to commit conduct analogous to that proscribed by *18 U.S.C. § 2251(a)*, which is prejudicial to good order and discipline or service discrediting under *Article 134, UCMJ*.

After reviewing the record of trial and the language of Specification 4 of Charge I, we agree with the Government. ***HN1***[↑] Our superior court has previously upheld convictions when "[t]he criminal conduct and mens rea set forth in the specification satisfy the requirements of [an *Article 80, UCMJ*, attempt,] clauses 1 and 2 of *Article 134, UCMJ*, and describes the gravamen of the offense proscribed by [*18 U.S.C. § 2251(a)*]." *United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007)*. "[N]either clause 1 nor clause 2 requires that a specification exactly match the elements of conduct proscribed by federal law." *United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985)* ("Federal [crimes] may be properly tried as offenses under clause (3) of *Article 134*, but . . . if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one **[*8]** of those [clauses]." (quoting *United States v. Long, 2 C.M.A. 60, 6 C.M.R. 60, 65 (C.M.A. 1952)* (internal quotations omitted)). Under this analysis, we conclude that Specification 4 of Charge I describes the attempt at the gravamen of conduct analogous to that proscribed by *18 U.S.C. 2251(a)* that, if completed, would have been a violation of Clause 1 or 2 of *Article 134, UCMJ*, as charged under *Article 80, UCMJ*.

We now turn to the three errors the appellant has raised with respect to Specification 4 of Charge I: (1) whether the evidence was legally and factually sufficient to support his conviction thereon; (2) whether the military judge properly instructed the members on the elements of attempt; and (3) whether the specification states an offense.

1. Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support Specification 4 of Charge I. He asserts that his conviction cannot stand because: (1) his request for nude photographs from "Marley" did not equate to a request for photographs of a lascivious nature, and (2) more than mere nudity is required to transform an image of a minor into child pornography. He also asserts that evidence of a request **[*9]** that a picture *be sent* does not satisfy the specification's allegation that a picture *be created*. We disagree.

HN2[↑] Under Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)*). In resolving legal-sufficiency questions, "[we] [are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993)* (quoting *United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)*; *see also United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007)*. Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.***HN3***[↑] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial **[*10]** and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. *Article 66(c), UCMJ*; *United States v. Bethea, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973)*.

HN4[↑] In determining whether a particular photograph constitutes a "lascivious exhibition," we will combine a review of the totality of the circumstances with the factors articulated in *United States v. Dost, 636 F. Supp 828, 832 (S.D. Cal. 1986)*. Those factors are as follows: (1) whether the focal point of the visual depiction is on

the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed **[*11]** to elicit a sexual response in the viewer. *United States v. Roderick, 62 M.J. 425, 430 (C.A.A.F. 2006)*. *See, e.g., United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)* (holding that four electronic images depicting accused's stepdaughter in various stages of undress were not child pornography within the meaning of the Child Pornography Prevention Act because they did not contain an exhibition of the child's genitals or pubic area).

In this case, the military judge instructed the members that "child pornography" means any visual depiction of a minor engaging in sexually explicit conduct. She further instructed that "sexually explicit conduct" includes masturbation or lascivious exhibition of the genitals or pubic area of any person. The military judge also instructed that "lascivious" means exciting sexual desires or marked by lust, that not every exposure of genitals constitutes a lascivious exhibition, and that consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition.

The nude photographs the appellant requested from "Marley" were never produced because of a legal impossibility. When placed in context, however, **[*12]** 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 *Dost*. The evidence presented at trial showed that the appellant asked "Marley" for photographs that made her genitals the focal area in order to elicit a sexual response from him. First, the appellant believed that "Marley" was a 14-year-old minor. Second, at the time the appellant requested the nude photographs from "Marley," he was engaged in sexually explicit conversations with her, which at least provided some context to the nature and purpose of the photographs requested. In the chat logs, the appellant spoke about sex and sexual acts with "Marley" even before asking her for any nude photographs. Third, the appellant provided "Marley" with photographs of his erect penis, as well as a video depiction of himself masturbating, which provided her with examples of the type of images he had in mind. Fourth, his actions suggested that the photographs were intended for sexual gratification. After not receiving nude photographs despite multiple requests, the appellant began to send the graphic photographs of his penis **[*13]** and the video of himself masturbating, and then told "Marley" that he would send more nude photographs of himself if she would send some nude photographs of herself. Finally, after multiple sexual chats with "Marley," the appellant drove several hours to meet her in order to have sex with her.

Nonetheless, the appellant argues that the specification is "nonsensical" because the act of *sending* a photograph does not *create* a type of photograph. The appellant's argument fails when placed in context with his requests for the photographs. We read the specification to allege that when the appellant asked "Marley" to send him nude photographs of herself, he was asking that she create or produce those photographs, if none existed at the time of the request. Indeed, the facts presented at trial establish that when the appellant requested the photographs, "Marley" stated she did not have any to send. When the appellant asked if "Marley" could take some photographs, she stated she did not have a camera to take any such photographs. In this context, the evidence shows that the appellant was aware that "Marley" did not have any photographs to send him. Thus, his request that she take some photographs **[*14]** contemplated that she create child pornography.

After considering the evidence in a light most favorable to the prosecution, drawing every reasonable inference from the evidence in the Government's favor, we find that the evidence is legally sufficient to support the appellant's conviction under Specification 4 of Charge I. Additionally, upon a de novo review of the facts in this case, making allowances for not personally observing the witnesses, we find the evidence is also factually sufficient to support said conviction.

2. Instructions on the Elements

The appellant next argues that the military judge erroneously instructed the members on Specification 4 of Charge I when she failed to instruct on the elements of attempt set forth in *Article 80, UCMJ*. We disagree.

HN5[↑] We review de novo the instructions given by the military judge. *United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006)*; *United States v. Quintanilla, 56 M.J. 37, 83 (C.A.A.F. 2001)*; *United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996)*. "When a judge *omits entirely* any instruction on an element of the

charged offense, this error may not be tested for harmlessness because, thereby, the court members are prevented from **[*15]** considering that element at all" and "[i]t is not for us to determine what the court members would have found had they been properly advised on the elements." *United States v. Mance, 26 M.J. 244, 254-55 (C.M.A 1988)* (italics in original) (citations omitted). *See also United States v. Gilbertson, 1 C.M.A. 465, 4 C.M.R. 57, 61 (C.M.A. 1952)* (inadequacy of instructions on an element requires reversal). Conversely, "when a judge's instruction adequately identifies an element to be resolved by the members and adequately requires the members to find the necessary predicate facts beyond a reasonable doubt, then an *erroneous* instruction on that element may be tested for harmlessness." *Mance, 26 M.J. at 256* (italics in original). *See also United States v. Glover, 50 M.J. 476, 478 (C.A.A.F. 1999)*; *United States v. Goddard, 1 C.M.A. 475, 4 C.M.R. 67, 68 (C.M.A. 1952)* ("[U]nder certain circumstances," an instructional error on an offense "might be an unimportant error.").

The military judge provided both sides a draft of her findings instructions for review and asked if either side objected to the instructions as written. Defense counsel objected to the instructions on the attempt specifications on the grounds that the Government **[*16]** failed to identify with enough specificity what offenses the appellant was charged with attempting to commit, either when summarizing the general nature of the charges or in the flyer provided to the members.[1] After acknowledging the defense objection, the military judge then instructed the members on the attempt specifications, as drafted in her written findings instructions.

The military judge first instructed on the elements as follows:

> (1) that . . . the accused attempted to persuade, induce, entice, or coerce "Marley," **[*17]** 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.

She then instructed the members on the burden of proof and intent, as follows:

> MJ: 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.
>
> To be guilty of this offense, the accused must have specifically intended that the offense of creating child pornography be committed. You must also be convinced beyond a reasonable doubt that the accused's statements constituted **[*18]** 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, and that the accused specifically intended that "Marley" produce visual depictions of a minor engaged in sexually explicit conduct, as I have defined that term for you, you may not convict the accused of this offense.

The military judge continued with an instruction on the issue of impossibility:

> MJ: The evidence has raised the issue that it was impossible for the accused to have committed the offense of soliciting a minor to create child pornography because the person that the accused thought was a 14-year-old girl named "Marley" was actually an undercover detective from the Ulster County Sherriff's Office named [LV]. If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of attempting to persuade, induce, entice, or coerce a minor to create child pornography, the accused may be found guilty of

---

[1] At trial, the civilian defense counsel phrased the objection as follows:

> CDC: 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.

attempting to solicit a minor to create child pornography, even though under the facts as they actually existed it was impossible for the accused **[*19]** to complete the offense of persuading a minor to create child pornography. 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 to create child pornography. The burden of proof to establish the accused's guilt beyond a reasonable doubt is upon the [G]overnment. If you are satisfied beyond a reasonable doubt of all the elements of the offense as I have explained them to you, you may find the accused guilty of attempting to solicit a minor to create child pornography.

HN6[] The correct elements 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.). "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, ¶ 4.c.(1).

HN7[] The elements of a Clause 1 or Clause 2 Article 134, UCMJ **[*20]** , 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. At the time of trial, prosecutions concerning child pornography were consistently charged and upheld in the military under Article 134, UCMJ. *See* 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).

Notably, HN8[] 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." 18 U.S.C. § 2251(a). Although 18 U.S.C. § 2251(a) does not list out separate elements similar to UCMJ offenses, two federal circuits have stated the elements **[*21]** 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)).

We find that, 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. We further find the lack of specificity in her instructions was harmless beyond a reasonable doubt and met all four of the required elements of Article 80, UCMJ. Mance, 26 M.J. at 256.

First, the instructions described the overt act requirement, such as the appellant allegedly "requesting" that "Marley" "send of nude photos of herself to the appellant" when "Marley" was a person the appellant "believed to be a female 14 years of age." **[*22]** Second, the military judge instructed that the members must find that the appellant committed the overt act with the intent that "Marley" "actually produce one or more visual depictions of her nude body to send to him electronically" and that the appellant "must have specifically intended that the offense of creating child pornography be committed." Third, she instructed the members that they "must also be convinced" the appellant's actions were "a serious request to commit the requested act," thereby finding that the appellant's overt act was a substantial step amounting to more than mere preparation. Finally, she instructed that the members could find that the appellant's act would tend to effect the commission of the intended offense if they found that the act was prejudicial to good order and discipline or service discrediting, because Article 134, UMCJ, criminalizes such conduct. Additionally, such a request would have affected the commission of the offense if "Marley" had actually been a 14-year-old female and not an adult. Ultimately, the military judge's instructions did not relieve the Government of its burden to prove the elements beyond a reasonable doubt and did not remove **[*23]** the issues from the members' consideration. The members were instructed they had to find that the appellant would have completed the underlying offense but for the fact that "Marley" was not

an actual minor.[2]

Moreover, the military judge's instructions included conduct analogous to 18 U.S.C. § 2251(a). While the instructions clearly stated an act done by the appellant that was prejudicial to good order and discipline or service discrediting, they specifically required the members to find: (1) that the subject of the appellant's actions was someone the 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 interstate commerce requirement.

Finally, the appellant argues that the military judge erred by not defining for the members the term "create" or "creating" in the context of child pornography. We disagree. These terms are well understood, and there is nothing in the record to indicate that these terms were used in a way other than their normal definitions. Our superior court has declined to find error in cases where the military judge did not define well-understood **[*25]** terms. Ober, 66 M.J. at 406-07 (finding no error when the military judge failed to define the term "uploading" for the members); Glover, 50 M.J. at 478 (finding no error when the military judge failed to define the term "wrongful" for the members). In light of these cases, we decline to find that the military judge erred in not providing a specific definition for the term "create."

3. Failure to State an Offense

The appellant argues that Specification 4 of Charge I fails to state an offense because it alleges that a minor can commit the offense of creating child pornography by sending a photograph of herself, an act he claims is a legal impossibility. HN9[↑] Whether a specification is defective is a question of law that we review de novo. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." Id. at 211 (citing United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial (R.C.M.) 307(c)(3).

The appellant relies, in part, on United States v. Sutton, 68 M.J. 455 (C.A.A.F. 2010).[3] **[*26]** The appellant in *Sutton* was charged under Article 134, UCMJ, for asking his stepdaughter to lift up her shirt and offering her money to do so. The specification stated that the appellant "wrongfully solict[ed] his dependant step-daughter . . . to engage in indecent liberties by asking her to lift up her shirt and show him her breasts for $20.00 . . . with intent to gratify [his] lust." Id. at 458. During the trial, the military judge asked the trial counsel whether the appellant was charged with indecent liberties with a minor, or with solicitation to commit indecent liberties with a minor, both offenses under Article 134, UCMJ. After considerable discussion, trial counsel finally stated that the offense charged was for solicitation to commit indecent liberties with a minor. Id. at 457. The military judge instructed the members accordingly and the members convicted the appellant of the solicitation offense.

On appeal, our superior court addressed whether a minor child could be solicited to commit the offense of indecent liberties when she would be both the victim and perpetrator of the crime. The Court answered "no," holding that the elements of an indecent liberty with a child contemplate two actors, the accused and the victim. As such, a minor "cannot commit the offense of indecent liberties with a child on herself" because of the separate "with a child" element of indecent liberties. Id.

---

[2] In United States v. Winckelmann, 70 M.J. 403 (C.A.A.F. 2011), our superior court held that the evidence was legally insufficient to establish a substantial step toward enticement to support a conviction for attempted enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). Although the focus in *Winckelmann* was whether the evidence was legally sufficient to establish a substantial step, the Court noted that the military judge had improperly instructed the members on what constitutes a substantial step. In dicta, the Court stated that the "better practice" would be for the military judge to "craft an instruction that provides definitional guidance to the members." Id. at 407, n. 5. The Court also noted that the judge must provide instructions that "sufficiently cover the issues in the case and focus on the facts presented by the evidence." Id. In this case, we find that the military judge did craft instructions that sufficiently covered the issues **[*24]** in the case, focused on the facts presented by the evidence, and provided definitional guidance for the members.

[3] The appellant also argues that Specification 4 of Charge I fails to state an offense because "it is questionable" whether the UCMJ prohibits a service member from soliciting a civilian to commit a crime; a civilian who is a minor cannot be solicited to commit a crime; and a minor **[*27]** cannot be prosecuted for creating child pornography, because to do so would violate the minor's constitutional rights to privacy and free speech. We have considered the appellant's arguments and find them to be without merit. United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

at 459. The Court stated that the appropriate way to charge the appellant's conduct would have been as an indecent liberty with a child, not as a solicitation. *Id.* See also United States v. Miller, 67 M.J. 87, 90-91 (C.A.A.F. 2008) (a live Internet feed of the appellant masturbating his penis to a person he thought was a minor was not an attempted indecent liberty with a child, based on a lack of physical presence that is **[*28]** required for that offense);[4] United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006).

We find the case before us distinguishable from Sutton. Here, the appellant was charged with an Article 80, UCMJ, attempt to solicit the creation of child pornography, **[*29]** in violation of Article 134, UCMJ. Specification 4 of Charge I does not allege attempted solicitation to commit indecent liberties with a minor. He was not in the physical presence of the undercover detective, but ***HN10***[↑] Article 134, UMCJ, does not require physical presence. Unlike indecent liberties with a child, child pornography offenses under Article 134, UMCJ—and 18 U.S.C. § 2251(a) for that matter—envisions the minor as both a victim and an actor involved in the offense. Thus, we find that Specification 4 of Charge I states an offense.

Mental Competency

The appellant next argues that his due process rights were violated when: (1) the military judge conducted an inadequate competency inquiry at trial, and (2) he was tried and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. We disagree.

1. Colloquy with the Military Judge

[4] In United States v. Miller, 67 M.J. 87 (C.A.A.F. 2008), the Court reasoned that indecent liberties with a child require that the liberties be taken in the "physical presence" of the child. Thus, the Court refused to find that the appellant's "constructive presence" via the web camera was enough to satisfy a physical presence requirement "without completely disregarding the plain meaning of 'physical presence' as used in the *Manual for Courts-Martial, United States (MCM)* explanation of the offense." The Court noted that the *Manual* does not define "presence." The Court also noted, however, that the *Manual* explanation states that "the liberties must be taken in the physical presence of the child, but physical contact is not required." *See MCM*, Part IV, ¶ 87.c.(2) (2008 ed.). The Court further noted that "[a]lthough MCM explanations are not binding on this Court, they are generally treated as persuasive authority." Miller, 67 M.J. at 89.

HN11[↑] A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b). The trial may proceed unless it is established by a preponderance of the evidence that the accused "is presently suffering from a mental disease or defect rendering him or her mentally incompetent" to the extent **[*30]** that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(e). ***HN12***[↑] If it appears to any commander, counsel, or other officers of the court that there is reason to believe that the accused lacks the capacity to stand trial, that fact and its basis shall be transmitted to the person authorized to order an inquiry into the mental condition of the accused. R.C.M. 706(a). Before referral of charges, the convening authority orders the inquiry. R.C.M. 706(b)(1). After referral of charges, the military judge orders the inquiry. R.C.M. 706(b)(2). "The phrase . . . 'understand the nature of the proceedings . . . or to conduct or cooperate intelligently in the defense of the case' [] means that the accused 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and . . . a rational as well as factual understanding of the proceedings against him.'" United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993) (quoting Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)).

Prior to trial, the appellant's trial defense counsel requested a sanity board, arguing **[*31]** that the appellant had been treated for depression and bipolar disorder during the period of the charged offenses. The request for a sanity board was granted and the sanity board took place between 31 March 2009 and 8 April 2009. The board involved psychological testing, interviews with the appellant, and review of his available mental health records. The sanity board concluded that the appellant did not suffer from a mental disease or defect at the time of the offenses, was able to appreciate the wrongfulness of his actions, was not suffering from a severe disease or defect at the time of prosecution, and had the mental capacity to cooperate intelligently in his defense.

At one point during trial, the trial counsel played the audio-taped confession of the appellant for the members. Immediately thereafter, the appellant's civilian defense counsel (CDC) asked for a break, because his client appeared "dazed," "out of it," and "kind of sleepy." The military judge granted the request. After the break, the CDC told the military judge that his client was ready to proceed:

CDC: My client, Staff Sergeant Payne, has consulted with the psychologist and has gotten some assistance from his family **[*32]** member and from the consulting forensic psychologist for the defense and I believe he is prepared to assist in the defense for the remainder of today. I just ask leave of the court if it appears that he is again getting drowsy or woozy as he appeared during the playing of the interrogation tape that he be allowed a brief recess to take care of it. As the court is aware from information provided prior, he is under mental health treatment. We have had a sanity board in this case and we are doing our best to ensure that he is alert and able to fully participate in his defense.
MJ: Understood. So there was a sanity board that concluded that at the time of the alleged offenses he was?
CDC: He was responsible for his conduct and that he was competent to assist in the defense of his case.
MJ: And prior to taking the last recess, I mean, have you had concerns that as we have gone through today that he has not been able to participate in his own defense?
CDC: During — I noticed him getting woozy and looking asleep during portions of the interrogation tape which is why I asked for the recess in order to take care of that.

The military judge then turned her attention to the appellant, and engaged **[*33]** in the following colloquy:

MJ: Understood. Sergeant Payne?
ACC: Yes, ma'am.
MJ: It's obviously very important for your case that you be able to articulately and intelligently help your counsel in your defense. You understand that, right?
ACC: Yes, ma'am.
MJ: If at any point you feel too tired to go on, if you get dizzy — I mean, I don't know what meds you are taking right now so I don't know what the side effects are and I recognize that the whole court-martial is a very stressful event in your life. If at any point you need a break for any reason, you just indicate that to your counsel and he will take care of asking for it and we won't let the members know that anything is going on. Okay?
ACC: Yes, ma'am.
MJ: Were you able to listen to the tape? I mean, were you —
ACC: Absolutely.
MJ: Okay. So you were mentally present while that tape was playing?
ACC: Yes, ma'am, I was.
MJ: All right. Anything else — and are you prepared to proceed now?
ACC: Absolutely. Yes, ma'am.

In his post-trial declaration, the appellant avers the following:

During the trial I found it very difficult to keep attention on what was going on. I couldn't stay focused. I also was extremely drowsy. I can remember my attorneys **[*34]** admonishing me, but there was nothing I could do to change my action. At one time in the trial, [the CDC] asked for a break so that I could collect myself, the judge directed me to call my doctor on the base. I called and was told there was nothing that could be done; I just had to deal with it. Just side effects.

HN13[↑] Because mental competence to stand trial is a question of fact, we will overturn the military judge's determination on appeal only if it is clearly erroneous. R.C.M. 909(e)(1); *United States v. Barreto, 57 M.J. 127, 130 (C.A.A.F. 2002)*; *Proctor, 37 M.J. at 336*. We conclude that the colloquy between the military judge and the appellant was sufficient and is supported by the record. The appellant seems to suggest that his competency was at issue because he was drowsy and woozy, was under mental health treatment, and was on medications. These particular facts did not raise a preponderance of the evidence sufficient to overcome the presumption that the appellant was competent to stand trial. Rather, the colloquy with the military judge suggests that the appellant was fully aware of what was happening around him. He answered "yes, ma'am" to the questions the military judge asked, **[*35]** with the exception of the questions "[w]ere you able to listen to the tape" and "are you prepared to proceed now," to which the appellant answered "Absolutely."

Additionally, the appellant's defense counsel assured the military judge that the sanity board found the appellant competent to assist in his defense, that the appellant was prepared to assist in his defense for the remainder of that day's proceedings, and that the appellant had access to the services of a forensic psychologist on base and at trial. Given all these facts, we cannot say that the military judge was required to conduct a more detailed inquiry with the appellant. The appellant cogently answered the military judge's questions, he affirmed that he was "absolutely" able to proceed with his defense, his counsel agreed that he

was able to proceed and participate in his defense, and the sanity board report stated that he was able to participate in his defense. *See* United States v. Riddle, 67 M.J. 335, 338-40 (C.A.A.F. 2009); *see also* Proctor, 37 M.J. at 336. After reviewing the record using the "clearly erroneous" standard, we find that the military judge did not err.

2. Competence to Stand Trial

In his post-trial declaration, **[*36]** the appellant asserts that his diagnosis of bipolar disorder was incorrect. He states that, during his initial hospitalization at Baylor, his provider diagnosed him as bipolar and prescribed numerous psychotropic drugs. He further states that another provider confirmed the bipolar diagnosis and prescribed him stronger psychotropic drugs and increased the dosages. As previously noted, the appellant asserts that the medications affected him physically and mentally and that during the trial, he was inattentive, lacked focus, and was extremely drowsy. During his confinement, the appellant states that his doctor concluded that his bipolar diagnosis was incorrect, took him off all medications, and he has retained his normal faculties. He claims that it was fundamentally unfair for him to be tried and convicted while rendered incompetent by a "concoction" of psychotropic medications.

We have reviewed this assignment of error in light of the record of trial and find it to be without merit. United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987). The facts in the record undermine the appellant's argument that the drugs made him incompetent. Prior to trial, the appellant was taking the same or **[*37]** similar drugs as those he took during his court-martial. The sanity board found that the appellant reported only mild sedation and weight gain as side effects from these drugs. Additionally, the sanity board found that the appellant understood the legal proceedings, charges, and potential punishments associated with those charges and understood the role of the judge, members, defense, prosecution, and witnesses. The sanity board also found that the appellant did not suffer from a mental disease or defect, was able to appreciate the wrongfulness of his actions, was not then suffering from a severe disease or defect, and had the mental capacity to cooperate intelligently in his defense. Finally, the colloquy between the military judge and the appellant showed that he was aware of the proceedings and able to participate in his defense.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with and the date of completion of review by this Court is facially unreasonable. **HN14**[↑] Because the delay is facially unreasonable, we examine the four factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1) the length of the delay, (2) the reasons for **[*38]** the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. United States v. Moreno, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See* United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

Chief Judge Orr participated in this decision prior to **[*39]** his retirement.

End of Document

United States v. Payne

United States Air Force Court of Criminal Appeals

January 17, 2013, Decided

ACM 37594, ACM 37594

Reporter
2013 CCA LEXIS 18 *

UNITED STATES v. Staff Sergeant ROBERT M. PAYNE, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Payne, 72 M.J. 162, 2013 CAAF LEXIS 313 (C.A.A.F., Mar. 19, 2013)*

Review granted by *United States v. Payne, 72 M.J. 407, 2013 CAAF LEXIS 650 (C.A.A.F., June 20, 2013)*

Affirmed by *United States v. Payne, 73 M.J. 19, 2014 CAAF LEXIS 18 (C.A.A.F., Jan. 6, 2014)*

Prior History: **[*1]** Sentence adjudged 11 September 2009 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Military Judge: Katherine E. Oler. Approved sentence: Dishonorable discharge, confinement for 3 years, and reduction to E-1.

Core Terms

military, Specification, child pornography, photographs, depiction, instructions, nude, nude photograph, indecent, visual, solicitation, persuade, sanity, sexual, convicted, offenses, sex, beyond a reasonable doubt, sexually explicit, coerce, commit, entice, induce, lascivious, chat, commission of the offense, good order, conversations, medications, proceedings

Case Summary

Overview
Appellant service member communicated with a supposed minor on-line, sent her pornographic photos, asked for nude photos, and went to New York to meet her. He was convicted of two specifications of attempted offenses, and two of misuse of his computer. Although the military judge's instructions on the attempts lacked specificity, they included all the required elements and adequately instructed the members to find the necessary predicate facts beyond a reasonable doubt. The colloquy between the military judge and the appellant was sufficient and was supported by the record.

Outcome
The findings of guilty and the sentence, as approved, were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Attempts

HN1[] Military Offenses, Attempts

A conviction will be upheld when criminal conduct and mens rea set forth in the specification satisfy the requirements of attempt, under Unif. Code Mil. Justice art. 80, 10 U.S.C.S. § 880, where the charge describes the gravamen of the underlying proscribed offense.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] Evidence, Weight & Sufficiency of Evidence

Under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), a criminal court of appeals reviews issues of legal and factual sufficiency de novo. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving legal-sufficiency questions, a court is bound to draw every reasonable inference from the evidence in favor of the prosecution. The assessment of legal sufficiency is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN3[] Evidence, Weight & Sufficiency of Evidence

The test for factual sufficiency under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, a court of criminal appeals is convinced of the accused's guilt beyond a reasonable doubt. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination.

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

HN4[] Employing Minor to Engage in Child Pornography, Elements

In determining whether a particular photograph constitutes a lascivious exhibition, a court will combine a review of the totality of the circumstances with the following factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN5[] Judicial Review, Courts of Criminal Appeals

A court of criminal appeals reviews de novo the instructions given by the military judge. When a judge omits entirely any instruction on an element of the charged offense, that error may not be tested for harmlessness because, thereby, the court members are prevented from considering that element at all and it is not for us to determine what the court members would have found had they been properly advised on the elements. Conversely, when a judge's instruction adequately identifies an element to be resolved by the members and adequately requires the members to find the necessary predicate facts beyond a reasonable doubt, then an erroneous instruction on that element may be tested for harmlessness.

Military & Veterans Law > Military Offenses > Attempts

HN6[] Military Offenses, Attempts

The correct elements of an attempt offense under Unif. Code Mil. Justice art. 80, 10 U.S.C.S. § 880, 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. Manual Courts-Martial pt. IV, para. 4.b (2008). 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. Manual Courts-Martial pt. IV, para. 4.c.(1).

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

HN7 **Categories of Offenses, Prejudicial to Discipline & Good Order**

The elements of an offense under clause 1 or clause 2 of Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, 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. Manual Courts-Martial pt. IV, para. 60.b.

Criminal Law & Procedure > ... > Child Pornography > Employing Minor to Engage in Child Pornography > Elements

HN8 **Employing Minor to Engage in Child Pornography, Elements**

Under 18 U.S.C.S. § 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. 18 U.S.C.S. § 2251(a). Although § 2251(a) does not list out separate elements similar to offenses under the Unif. Code Mil. Justice, the elements thereof are 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.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Trial Procedures, Findings**

Whether a specification is defective is a question of law that is reviewed de novo. A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

HN10 **Military Offenses, Rape & Sexual Assault of a Child**

Unif. Code Mil. Justice art. 134, 10 U.S.C.S. § 934, does not require physical presence. Unlike indecent liberties with a child, child pornography offenses under that section and 18 U.S.C.S. § 2251(a), envision the minor as both a victim and an actor involved in an offense.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN11 **Posttrial Procedure, Commitment & Treatment**

A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b), Manual Courts-Martial. The trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN12 **Posttrial Procedure, Commitment & Treatment**

If it appears to any commander, counsel, or other officers of the court that there is reason to believe that

the accused lacks the capacity to stand trial, that fact and its basis shall be transmitted to the person authorized to order an inquiry into the mental condition of the accused. R.C.M. 706(a), Manual Courts-Martial. Before referral of charges, the convening authority orders the inquiry. R.C.M. 706(b)(1), Manual Courts-Martial. After referral of charges, the military judge orders the inquiry. R.C.M. 706(b)(2), Manual Courts-Martial. The phrase "understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case" means that the accused has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him or her.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Commitment & Treatment

HN13[] **Posttrial Procedure, Commitment & Treatment**

Mental competence to stand trial is a question of fact, we will overturn the military judge's determination on appeal only if it is clearly erroneous. R.C.M. 909(e)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > General Overview

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN14[] **Courts Martial, Posttrial Procedure**

Where a post-trial delay is facially unreasonable, a court examines that issue under the four factors set forth in Barker v. Wingo: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. When a court assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, it does not need to engage in a separate analysis of each factor.

Counsel: For the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Reggie D. Yager; and Captain Luke D. Wilson.

For the United States: Colonel Don M. Christensen; Major Zachary T. Eytalis; Captain Brian C. Mason; Captain Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Judges: Before ORR, ROAN, and HARNEY, Appellate Military Judges. Chief Judge Orr participated in this decision prior to his retirement.

Opinion by: HARNEY

Opinion

OPINION OF THE COURT

HARNEY, Judge:

The appellant was tried by a general court-martial composed of officer members at Joint Base McGuire-Dix-Lakehurst, New Jersey, between 8 and 11 September 2009. Contrary to his pleas, the appellant was convicted 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*. **[*2]** The appellant was also convicted of two specifications of failure to obey a lawful general regulation by misusing his Government-issued computer in connection with his alleged sex offense, in violation of Article 92, UCMJ, *10 U.S.C. § 892*. The members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. 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.

The appellant initially assigned three errors before this Court: (1) the evidence is legally and factually insufficient to support his conviction, (2) the military

judge violated the appellant's procedural due process rights by conducting an inadequate competency inquiry, and (3) the appellant's due process rights were violated when he was tried and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. The appellant later assigned two supplemental errors: (1) the military judge committed reversible error by omitting required instructions on the elements of Specification 4 of Charge I, and (2) Specification **[*3]** 4 of Charge I fails to state an offense where it alleges a minor herself can commit the underlying offense of creation of child pornography by sending a nude picture of herself. We disagree and, finding no prejudice to a substantial right of the appellant, affirm.

Factual Background

Between 20 June 2008 and 1 August 2008, the appellant engaged in Internet chat sessions and phone conversations with "Cheergrrr113," a person he believed was a 14-year-old girl named "Marley." The appellant identified himself as a 28-year old male in the Air Force by the name of "Rob" and used "Flyingsolo799" as his screen name. In fact, the person the appellant spoke with was an undercover officer from the Ulster County Sheriff's Department named LV, who was investigating individuals who solicit sex from minors over the Internet.

During their Internet and phone conversations, the appellant told "Marley" he wanted to have sex with her, asked her to send him nude photos of herself, and asked her to meet him in New York for sex. During their first conversation on 20 June 2008, the appellant told "Marley" that he liked her bikini photo on her MySpace profile and asked if she wanted to "talk dirty," to which she **[*4]** responded that she did. When she asked if the appellant minded that she was only 14 years old, he stated he did not. Several chat log entries later, the appellant told "Marley" he was thinking about ejaculating on her. He continued to engage in sexually explicit dialogue and stated "so baby make me cum" and "Plz I am so hard," followed by a request for nude photos:

> Flyingsolo799: do u have any nude pics?
> Cheergrrr113: no
> Flyingsolo799: can u take some
> (conversation nonresponsive)
> Flyingsolo799: so can u take some nude pics
> Cheergrrr113: I can't
> Cheergrrr113: I don't have a cam

Although "Marley" declined to provide or take any nude photographs during their initial online chat sessions, the appellant continued to engage in sexual discourse with her that day.

The appellant continued to speak with "Marley" on future occasions and repeated his request for nude photographs. On 30 June 2008, he asked "Marley" for some nude photographs and also asked when the two of them could "do some phone," meaning phone sex. On 16 July 2008, the appellant told "Marley" "I love looking at this pic of u on myspace in ur bathing sute and think about how bad I want to f*** ur young hot body." On 21 July 2008, the appellant **[*5]** sent "Marley" a photograph of his nude and erect penis and stated that he was "hard" and "now I wish I could see one of u." On 22 July 2008, the appellant stated "I wish I could see a pic of u nude" and offered to send "Marley" a nude picture of himself if she would send one of herself. On 23 July 2008, the appellant asked "Marley" "can I video us having sex" during their planned meeting. On 31 July 2008, during a sexually explicit chat, the appellant stated, "I can't wait to video u rideing it." During the same chat, the appellant sent "Marley" a video of himself masturbating.

On 31 July 2008, the appellant drove from his home in Philadelphia to rural New York State to meet Marley the following morning for a pre-planned camping trip. On 1 August 2008, while parked at a grocery store waiting for "Marley," the appellant was arrested by local law enforcement authorities. At the time of his arrest, the appellant had with him a sleeping bag and four condoms. He admitted to the arresting officer that he had traveled to New York to have sex with a 14-year-old girl.

The appellant was charged with four separate attempt offenses under *Article 80, UCMJ*, for his online interactions with "Marley." **[*6]** He was convicted, in part, of attempting to persuade, induce, entice, or coerce a minor to create child pornography in violation of *Article 80, UCMJ*, as set forth in Specification 4 of Charge I:

> 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, [LV], 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.

Specification 4 of Charge I: Creation of Child Pornography

At the outset, we note that the parties differ as to the underlying offense set forth in Specification 4 of Charge I. The appellant asserts that the specification alleges a solicitation offense under *Article 134, UCMJ*. The Government **[*7]** disagrees and asserts that it alleges an *Article 80, UCMJ*, offense for an attempt to commit conduct analogous to that proscribed by *18 U.S.C. § 2251(a)*, which is prejudicial to good order and discipline or service discrediting under *Article 134, UCMJ*.

After reviewing the record of trial and the language of Specification 4 of Charge I, we agree with the Government. ***HN1***[↑] Our superior court has previously upheld convictions when "[t]he criminal conduct and mens rea set forth in the specification satisfy the requirements of [an *Article 80, UCMJ*, attempt,] clauses 1 and 2 of *Article 134, UCMJ*, and describes the gravamen of the offense proscribed by [*18 U.S.C. § 2251(a)*]." *United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007)*. "[N]either clause 1 nor clause 2 requires that a specification exactly match the elements of conduct proscribed by federal law." *United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985)* ("Federal [crimes] may be properly tried as offenses under clause (3) of *Article 134*, but . . . if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause (1) or (2), they may be alleged, prosecuted and established under one **[*8]** of those [clauses]." (quoting *United States v. Long, 2 C.M.A. 60, 6 C.M.R. 60, 65 (C.M.A. 1952)* (internal quotations omitted)). Under this analysis, we conclude that Specification 4 of Charge I describes the attempt at the gravamen of conduct analogous to that proscribed by *18 U.S.C. 2251(a)* that, if completed, would have been a violation of Clause 1 or 2 of *Article 134, UCMJ*, as charged under *Article 80, UCMJ*.

We now turn to the three errors the appellant has raised with respect to Specification 4 of Charge I: (1) whether the evidence was legally and factually sufficient to support his conviction thereon; (2) whether the military judge properly instructed the members on the elements of attempt; and (3) whether the specification states an offense.

1. Legal and Factual Sufficiency

The appellant argues that the evidence is legally and factually insufficient to support Specification 4 of Charge I. He asserts that his conviction cannot stand because: (1) his request for nude photographs from "Marley" did not equate to a request for photographs of a lascivious nature, and (2) more than mere nudity is required to transform an image of a minor into child pornography. He also asserts that evidence of a request **[*9]** that a picture *be sent* does not satisfy the specification's allegation that a picture *be created*. We disagree.

HN2[↑] Under Article 66(c), UCMJ, *10 U.S.C. § 866(c)*, we review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (quoting *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)*). In resolving legal-sufficiency questions, "[we] [are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993)* (quoting *United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)*; *see also United States v. Young, 64 M.J. 404, 407 (C.A.A.F. 2007)*. Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)*.***HN3***[↑] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial **[*10]** and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. *Article 66(c), UCMJ*; *United States v. Bethea, 22 C.M.A. 223, 46 C.M.R. 223, 224-25 (C.M.A. 1973)*.

HN4[↑] In determining whether a particular photograph constitutes a "lascivious exhibition," we will combine a review of the totality of the circumstances with the factors articulated in *United States v. Dost, 636 F. Supp 828, 832 (S.D. Cal. 1986)*. Those factors are as follows: (1) whether the focal point of the visual depiction is on

the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed **[*11]** to elicit a sexual response in the viewer. *United States v. Roderick, 62 M.J. 425, 430 (C.A.A.F. 2006)*. *See, e.g., United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)* (holding that four electronic images depicting accused's stepdaughter in various stages of undress were not child pornography within the meaning of the Child Pornography Prevention Act because they did not contain an exhibition of the child's genitals or pubic area).

In this case, the military judge instructed the members that "child pornography" means any visual depiction of a minor engaging in sexually explicit conduct. She further instructed that "sexually explicit conduct" includes masturbation or lascivious exhibition of the genitals or pubic area of any person. The military judge also instructed that "lascivious" means exciting sexual desires or marked by lust, that not every exposure of genitals constitutes a lascivious exhibition, and that consideration of the overall content of the visual depiction should be made to determine if it constitutes a lascivious exhibition.

The nude photographs the appellant requested from "Marley" were never produced because of a legal impossibility. When placed in context, however, **[*12]** 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 *Dost*. The evidence presented at trial showed that the appellant asked "Marley" for photographs that made her genitals the focal area in order to elicit a sexual response from him. First, the appellant believed that "Marley" was a 14-year-old minor. Second, at the time the appellant requested the nude photographs from "Marley," he was engaged in sexually explicit conversations with her, which at least provided some context to the nature and purpose of the photographs requested. In the chat logs, the appellant spoke about sex and sexual acts with "Marley" even before asking her for any nude photographs. Third, the appellant provided "Marley" with photographs of his erect penis, as well as a video depiction of himself masturbating, which provided her with examples of the type of images he had in mind. Fourth, his actions suggested that the photographs were intended for sexual gratification. After not receiving nude photographs despite multiple requests, the appellant began to send the graphic photographs of his penis **[*13]** and the video of himself masturbating, and then told "Marley" that he would send more nude photographs of himself if she would send some nude photographs of herself. Finally, after multiple sexual chats with "Marley," the appellant drove several hours to meet her in order to have sex with her.

Nonetheless, the appellant argues that the specification is "nonsensical" because the act of *sending* a photograph does not *create* a type of photograph. The appellant's argument fails when placed in context with his requests for the photographs. We read the specification to allege that when the appellant asked "Marley" to send him nude photographs of herself, he was asking that she create or produce those photographs, if none existed at the time of the request. Indeed, the facts presented at trial establish that when the appellant requested the photographs, "Marley" stated she did not have any to send. When the appellant asked if "Marley" could take some photographs, she stated she did not have a camera to take any such photographs. In this context, the evidence shows that the appellant was aware that "Marley" did not have any photographs to send him. Thus, his request that she take some photographs **[*14]** contemplated that she create child pornography.

After considering the evidence in a light most favorable to the prosecution, drawing every reasonable inference from the evidence in the Government's favor, we find that the evidence is legally sufficient to support the appellant's conviction under Specification 4 of Charge I. Additionally, upon a de novo review of the facts in this case, making allowances for not personally observing the witnesses, we find the evidence is also factually sufficient to support said conviction.

2. Instructions on the Elements

The appellant next argues that the military judge erroneously instructed the members on Specification 4 of Charge I when she failed to instruct on the elements of attempt set forth in *Article 80, UCMJ*. We disagree.

HN5[↑] We review de novo the instructions given by the military judge. *United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006)*; *United States v. Quintanilla, 56 M.J. 37, 83 (C.A.A.F. 2001)*; *United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996)*. "When a judge *omits entirely* any instruction on an element of the

charged offense, this error may not be tested for harmlessness because, thereby, the court members are prevented from **[*15]** considering that element at all" and "[i]t is not for us to determine what the court members would have found had they been properly advised on the elements." *United States v. Mance, 26 M.J. 244, 254-55 (C.M.A 1988)* (italics in original) (citations omitted). *See also United States v. Gilbertson, 1 C.M.A. 465, 4 C.M.R. 57, 61 (C.M.A. 1952)* (inadequacy of instructions on an element requires reversal). Conversely, "when a judge's instruction adequately identifies an element to be resolved by the members and adequately requires the members to find the necessary predicate facts beyond a reasonable doubt, then an *erroneous* instruction on that element may be tested for harmlessness." *Mance, 26 M.J. at 256* (italics in original). *See also United States v. Glover, 50 M.J. 476, 478 (C.A.A.F. 1999)*; *United States v. Goddard, 1 C.M.A. 475, 4 C.M.R. 67, 68 (C.M.A. 1952)* ("[U]nder certain circumstances," an instructional error on an offense "might be an unimportant error.").

The military judge provided both sides a draft of her findings instructions for review and asked if either side objected to the instructions as written. Defense counsel objected to the instructions on the attempt specifications on the grounds that the Government **[*16]** failed to identify with enough specificity what offenses the appellant was charged with attempting to commit, either when summarizing the general nature of the charges or in the flyer provided to the members.[1] After acknowledging the defense objection, the military judge then instructed the members on the attempt specifications, as drafted in her written findings instructions.

The military judge first instructed on the elements as follows:

> (1) that . . . the accused attempted to persuade, induce, entice, or coerce "Marley," **[*17]** 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.

She then instructed the members on the burden of proof and intent, as follows:

> MJ: 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.
>
> To be guilty of this offense, the accused must have specifically intended that the offense of creating child pornography be committed. You must also be convinced beyond a reasonable doubt that the accused's statements constituted **[*18]** 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, and that the accused specifically intended that "Marley" produce visual depictions of a minor engaged in sexually explicit conduct, as I have defined that term for you, you may not convict the accused of this offense.

The military judge continued with an instruction on the issue of impossibility:

> MJ: The evidence has raised the issue that it was impossible for the accused to have committed the offense of soliciting a minor to create child pornography because the person that the accused thought was a 14-year-old girl named "Marley" was actually an undercover detective from the Ulster County Sherriff's Office named [LV]. If the facts were as the accused believed them to be, and under those facts the accused's conduct would constitute the offense of attempting to persuade, induce, entice, or coerce a minor to create child pornography, the accused may be found guilty of

---

[1] At trial, the civilian defense counsel phrased the objection as follows:

> CDC: 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.

attempting to solicit a minor to create child pornography, even though under the facts as they actually existed it was impossible for the accused **[*19]** to complete the offense of persuading a minor to create child pornography. 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 to create child pornography. The burden of proof to establish the accused's guilt beyond a reasonable doubt is upon the [G]overnment. If you are satisfied beyond a reasonable doubt of all the elements of the offense as I have explained them to you, you may find the accused guilty of attempting to solicit a minor to create child pornography.

HN6[] The correct elements 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.). "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, ¶ 4.c.(1).

HN7[] The elements of a Clause 1 or Clause 2 Article 134, UCMJ **[*20]** , 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. At the time of trial, prosecutions concerning child pornography were consistently charged and upheld in the military under Article 134, UCMJ. *See* 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).

Notably, HN8[] 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." 18 U.S.C. § 2251(a). Although 18 U.S.C. § 2251(a) does not list out separate elements similar to UCMJ offenses, two federal circuits have stated the elements **[*21]** 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)).

We find that, 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. We further find the lack of specificity in her instructions was harmless beyond a reasonable doubt and met all four of the required elements of Article 80, UCMJ. Mance, 26 M.J. at 256.

First, the instructions described the overt act requirement, such as the appellant allegedly "requesting" that "Marley" "send of nude photos of herself to the appellant" when "Marley" was a person the appellant "believed to be a female 14 years of age." **[*22]** Second, the military judge instructed that the members must find that the appellant committed the overt act with the intent that "Marley" "actually produce one or more visual depictions of her nude body to send to him electronically" and that the appellant "must have specifically intended that the offense of creating child pornography be committed." Third, she instructed the members that they "must also be convinced" the appellant's actions were "a serious request to commit the requested act," thereby finding that the appellant's overt act was a substantial step amounting to more than mere preparation. Finally, she instructed that the members could find that the appellant's act would tend to effect the commission of the intended offense if they found that the act was prejudicial to good order and discipline or service discrediting, because Article 134, UMCJ, criminalizes such conduct. Additionally, such a request would have affected the commission of the offense if "Marley" had actually been a 14-year-old female and not an adult. Ultimately, the military judge's instructions did not relieve the Government of its burden to prove the elements beyond a reasonable doubt and did not remove **[*23]** the issues from the members' consideration. The members were instructed they had to find that the appellant would have completed the underlying offense but for the fact that "Marley" was not

an actual minor.[2]

Moreover, the military judge's instructions included conduct analogous to 18 U.S.C. § 2251(a). While the instructions clearly stated an act done by the appellant that was prejudicial to good order and discipline or service discrediting, they specifically required the members to find: (1) that the subject of the appellant's actions was someone the 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 interstate commerce requirement.

Finally, the appellant argues that the military judge erred by not defining for the members the term "create" or "creating" in the context of child pornography. We disagree. These terms are well understood, and there is nothing in the record to indicate that these terms were used in a way other than their normal definitions. Our superior court has declined to find error in cases where the military judge did not define well-understood **[*25]** terms. Ober, 66 M.J. at 406-07 (finding no error when the military judge failed to define the term "uploading" for the members); Glover, 50 M.J. at 478 (finding no error when the military judge failed to define the term "wrongful" for the members). In light of these cases, we decline to find that the military judge erred in not providing a specific definition for the term "create."

3. Failure to State an Offense

The appellant argues that Specification 4 of Charge I fails to state an offense because it alleges that a minor can commit the offense of creating child pornography by sending a photograph of herself, an act he claims is a legal impossibility. HN9[↑] Whether a specification is defective is a question of law that we review de novo. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." Id. at 211 (citing United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial (R.C.M.) 307(c)(3).

The appellant relies, in part, on United States v. Sutton, 68 M.J. 455 (C.A.A.F. 2010).[3] **[*26]** The appellant in *Sutton* was charged under Article 134, UCMJ, for asking his stepdaughter to lift up her shirt and offering her money to do so. The specification stated that the appellant "wrongfully solict[ed] his dependant step-daughter . . . to engage in indecent liberties by asking her to lift up her shirt and show him her breasts for $20.00 . . . with intent to gratify [his] lust." Id. at 458. During the trial, the military judge asked the trial counsel whether the appellant was charged with indecent liberties with a minor, or with solicitation to commit indecent liberties with a minor, both offenses under Article 134, UCMJ. After considerable discussion, trial counsel finally stated that the offense charged was for solicitation to commit indecent liberties with a minor. Id. at 457. The military judge instructed the members accordingly and the members convicted the appellant of the solicitation offense.

On appeal, our superior court addressed whether a minor child could be solicited to commit the offense of indecent liberties when she would be both the victim and perpetrator of the crime. The Court answered "no," holding that the elements of an indecent liberty with a child contemplate two actors, the accused and the victim. As such, a minor "cannot commit the offense of indecent liberties with a child on herself" because of the separate "with a child" element of indecent liberties. Id.

---

[2] In United States v. Winckelmann, 70 M.J. 403 (C.A.A.F. 2011), our superior court held that the evidence was legally insufficient to establish a substantial step toward enticement to support a conviction for attempted enticement of a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). Although the focus in *Winckelmann* was whether the evidence was legally sufficient to establish a substantial step, the Court noted that the military judge had improperly instructed the members on what constitutes a substantial step. In dicta, the Court stated that the "better practice" would be for the military judge to "craft an instruction that provides definitional guidance to the members." Id. at 407, n. 5. The Court also noted that the judge must provide instructions that "sufficiently cover the issues in the case and focus on the facts presented by the evidence." Id. In this case, we find that the military judge did craft instructions that sufficiently covered the issues **[*24]** in the case, focused on the facts presented by the evidence, and provided definitional guidance for the members.

[3] The appellant also argues that Specification 4 of Charge I fails to state an offense because "it is questionable" whether the UCMJ prohibits a service member from soliciting a civilian to commit a crime; a civilian who is a minor cannot be solicited to commit a crime; and a minor **[*27]** cannot be prosecuted for creating child pornography, because to do so would violate the minor's constitutional rights to privacy and free speech. We have considered the appellant's arguments and find them to be without merit. United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

at 459. The Court stated that the appropriate way to charge the appellant's conduct would have been as an indecent liberty with a child, not as a solicitation. *Id.* See also United States v. Miller, 67 M.J. 87, 90-91 (C.A.A.F. 2008) (a live Internet feed of the appellant masturbating his penis to a person he thought was a minor was not an attempted indecent liberty with a child, based on a lack of physical presence that is **[*28]** required for that offense);[4] United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006).

We find the case before us distinguishable from Sutton. Here, the appellant was charged with an Article 80, UCMJ, attempt to solicit the creation of child pornography, **[*29]** in violation of Article 134, UCMJ. Specification 4 of Charge I does not allege attempted solicitation to commit indecent liberties with a minor. He was not in the physical presence of the undercover detective, but ***HN10***[↑] Article 134, UMCJ, does not require physical presence. Unlike indecent liberties with a child, child pornography offenses under Article 134, UMCJ—and 18 U.S.C. § 2251(a) for that matter—envisions the minor as both a victim and an actor involved in the offense. Thus, we find that Specification 4 of Charge I states an offense.

Mental Competency

The appellant next argues that his due process rights were violated when: (1) the military judge conducted an inadequate competency inquiry at trial, and (2) he was tried and convicted despite being rendered incompetent by medications he was taking as a result of a misdiagnosis. We disagree.

1. Colloquy with the Military Judge

[4] In United States v. Miller, 67 M.J. 87 (C.A.A.F. 2008), the Court reasoned that indecent liberties with a child require that the liberties be taken in the "physical presence" of the child. Thus, the Court refused to find that the appellant's "constructive presence" via the web camera was enough to satisfy a physical presence requirement "without completely disregarding the plain meaning of 'physical presence' as used in the *Manual for Courts-Martial, United States (MCM)* explanation of the offense." The Court noted that the *Manual* does not define "presence." The Court also noted, however, that the *Manual* explanation states that "the liberties must be taken in the physical presence of the child, but physical contact is not required." *See MCM*, Part IV, ¶ 87.c.(2) (2008 ed.). The Court further noted that "[a]lthough MCM explanations are not binding on this Court, they are generally treated as persuasive authority." Miller, 67 M.J. at 89.

HN11[↑] A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b). The trial may proceed unless it is established by a preponderance of the evidence that the accused "is presently suffering from a mental disease or defect rendering him or her mentally incompetent" to the extent **[*30]** that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(e). ***HN12***[↑] If it appears to any commander, counsel, or other officers of the court that there is reason to believe that the accused lacks the capacity to stand trial, that fact and its basis shall be transmitted to the person authorized to order an inquiry into the mental condition of the accused. R.C.M. 706(a). Before referral of charges, the convening authority orders the inquiry. R.C.M. 706(b)(1). After referral of charges, the military judge orders the inquiry. R.C.M. 706(b)(2). "The phrase . . . 'understand the nature of the proceedings . . . or to conduct or cooperate intelligently in the defense of the case' [] means that the accused 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and . . . a rational as well as factual understanding of the proceedings against him.'" United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993) (quoting Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)).

Prior to trial, the appellant's trial defense counsel requested a sanity board, arguing **[*31]** that the appellant had been treated for depression and bipolar disorder during the period of the charged offenses. The request for a sanity board was granted and the sanity board took place between 31 March 2009 and 8 April 2009. The board involved psychological testing, interviews with the appellant, and review of his available mental health records. The sanity board concluded that the appellant did not suffer from a mental disease or defect at the time of the offenses, was able to appreciate the wrongfulness of his actions, was not suffering from a severe disease or defect at the time of prosecution, and had the mental capacity to cooperate intelligently in his defense.

At one point during trial, the trial counsel played the audio-taped confession of the appellant for the members. Immediately thereafter, the appellant's civilian defense counsel (CDC) asked for a break, because his client appeared "dazed," "out of it," and "kind of sleepy." The military judge granted the request. After the break, the CDC told the military judge that his client was ready to proceed:

CDC: My client, Staff Sergeant Payne, has consulted with the psychologist and has gotten some assistance from his family **[*32]** member and from the consulting forensic psychologist for the defense and I believe he is prepared to assist in the defense for the remainder of today. I just ask leave of the court if it appears that he is again getting drowsy or woozy as he appeared during the playing of the interrogation tape that he be allowed a brief recess to take care of it. As the court is aware from information provided prior, he is under mental health treatment. We have had a sanity board in this case and we are doing our best to ensure that he is alert and able to fully participate in his defense.
MJ: Understood. So there was a sanity board that concluded that at the time of the alleged offenses he was?
CDC: He was responsible for his conduct and that he was competent to assist in the defense of his case.
MJ: And prior to taking the last recess, I mean, have you had concerns that as we have gone through today that he has not been able to participate in his own defense?
CDC: During — I noticed him getting woozy and looking asleep during portions of the interrogation tape which is why I asked for the recess in order to take care of that.

The military judge then turned her attention to the appellant, and engaged **[*33]** in the following colloquy:

MJ: Understood. Sergeant Payne?
ACC: Yes, ma'am.
MJ: It's obviously very important for your case that you be able to articulately and intelligently help your counsel in your defense. You understand that, right?
ACC: Yes, ma'am.
MJ: If at any point you feel too tired to go on, if you get dizzy — I mean, I don't know what meds you are taking right now so I don't know what the side effects are and I recognize that the whole court-martial is a very stressful event in your life. If at any point you need a break for any reason, you just indicate that to your counsel and he will take care of asking for it and we won't let the members know that anything is going on. Okay?
ACC: Yes, ma'am.
MJ: Were you able to listen to the tape? I mean, were you —
ACC: Absolutely.
MJ: Okay. So you were mentally present while that tape was playing?
ACC: Yes, ma'am, I was.
MJ: All right. Anything else — and are you prepared to proceed now?
ACC: Absolutely. Yes, ma'am.

In his post-trial declaration, the appellant avers the following:

During the trial I found it very difficult to keep attention on what was going on. I couldn't stay focused. I also was extremely drowsy. I can remember my attorneys **[*34]** admonishing me, but there was nothing I could do to change my action. At one time in the trial, [the CDC] asked for a break so that I could collect myself, the judge directed me to call my doctor on the base. I called and was told there was nothing that could be done; I just had to deal with it. Just side effects.

HN13[↑] Because mental competence to stand trial is a question of fact, we will overturn the military judge's determination on appeal only if it is clearly erroneous. R.C.M. 909(e)(1); *United States v. Barreto, 57 M.J. 127, 130 (C.A.A.F. 2002)*; *Proctor, 37 M.J. at 336*. We conclude that the colloquy between the military judge and the appellant was sufficient and is supported by the record. The appellant seems to suggest that his competency was at issue because he was drowsy and woozy, was under mental health treatment, and was on medications. These particular facts did not raise a preponderance of the evidence sufficient to overcome the presumption that the appellant was competent to stand trial. Rather, the colloquy with the military judge suggests that the appellant was fully aware of what was happening around him. He answered "yes, ma'am" to the questions the military judge asked, **[*35]** with the exception of the questions "[w]ere you able to listen to the tape" and "are you prepared to proceed now," to which the appellant answered "Absolutely."

Additionally, the appellant's defense counsel assured the military judge that the sanity board found the appellant competent to assist in his defense, that the appellant was prepared to assist in his defense for the remainder of that day's proceedings, and that the appellant had access to the services of a forensic psychologist on base and at trial. Given all these facts, we cannot say that the military judge was required to conduct a more detailed inquiry with the appellant. The appellant cogently answered the military judge's questions, he affirmed that he was "absolutely" able to proceed with his defense, his counsel agreed that he

was able to proceed and participate in his defense, and the sanity board report stated that he was able to participate in his defense. *See* United States v. Riddle, 67 M.J. 335, 338-40 (C.A.A.F. 2009); *see also* Proctor, 37 M.J. at 336. After reviewing the record using the "clearly erroneous" standard, we find that the military judge did not err.

2. Competence to Stand Trial

In his post-trial declaration, **[*36]** the appellant asserts that his diagnosis of bipolar disorder was incorrect. He states that, during his initial hospitalization at Baylor, his provider diagnosed him as bipolar and prescribed numerous psychotropic drugs. He further states that another provider confirmed the bipolar diagnosis and prescribed him stronger psychotropic drugs and increased the dosages. As previously noted, the appellant asserts that the medications affected him physically and mentally and that during the trial, he was inattentive, lacked focus, and was extremely drowsy. During his confinement, the appellant states that his doctor concluded that his bipolar diagnosis was incorrect, took him off all medications, and he has retained his normal faculties. He claims that it was fundamentally unfair for him to be tried and convicted while rendered incompetent by a "concoction" of psychotropic medications.

We have reviewed this assignment of error in light of the record of trial and find it to be without merit. United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987). The facts in the record undermine the appellant's argument that the drugs made him incompetent. Prior to trial, the appellant was taking the same or **[*37]** similar drugs as those he took during his court-martial. The sanity board found that the appellant reported only mild sedation and weight gain as side effects from these drugs. Additionally, the sanity board found that the appellant understood the legal proceedings, charges, and potential punishments associated with those charges and understood the role of the judge, members, defense, prosecution, and witnesses. The sanity board also found that the appellant did not suffer from a mental disease or defect, was able to appreciate the wrongfulness of his actions, was not then suffering from a severe disease or defect, and had the mental capacity to cooperate intelligently in his defense. Finally, the colloquy between the military judge and the appellant showed that he was aware of the proceedings and able to participate in his defense.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with and the date of completion of review by this Court is facially unreasonable. **HN14**[↑] Because the delay is facially unreasonable, we examine the four factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1) the length of the delay, (2) the reasons for **[*38]** the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. United States v. Moreno, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See* United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record shows no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the entire record, should be approved. United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

Chief Judge Orr participated in this decision prior to **[*39]** his retirement.

End of Document