United States Navy–Marine Corps Court of Criminal Appeals

Before
HOUTZ, MYERS, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Andrew J. MARSDEN
Aviation Ordnanceman Third Class (E-4), U.S. Navy
Appellant

No. 202100259

Decided: 28 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Monte G. Miller (arraignment)
Derek D. Butler (motions and trial)
Kimberly J. Kelly (entry of judgment)

Sentence adjudged 27 May 2021 by a general court-martial convened at Naval Station Mayport, Florida, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for four months, and a bad-conduct discharge.

For Appellant:
Captain Jasper W. Casey, USMC

For Appellee:
Major Kerry E. Friedewald, USMC
Lieutenant Commander Jeffrey S. Marden, JAGC, USN

Judge MYERS delivered the opinion of the Court, in which Senior Judge HOUTZ and Judge KISOR joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

MYERS, Judge:

Appellant was convicted, contrary to his pleas, of one specification of attempted sexual abuse of a child for communicating indecent language to a person who had not attained the age of 16 years, one specification of attempted production of child pornography, and one specification of attempted viewing of child pornography, all in violation of Article 80, Uniform Code of Military Justice [UCMJ].[1]

Appellant asserts one assignment of error (AOE): whether the Government presented legally and factually sufficient evidence for all three specifications of the Charge. We find merit in Appellant's AOE because the evidence admitted at trial for the Charge and its three specifications is legally and factually insufficient. We take action in our decretal paragraph.

I. BACKGROUND

A Federal Bureau of Investigation [FBI] special agent, Special Agent [SA] Hotel,[2] established an account on a social media and dating application called Skout, which "connects [users] to [other users] using the cell phone's global positioning system. It finds other users within a general radius."[3] SA Hotel's profile stated that she was 117 years old, and she used the screen name "EmmaA." Despite her purported old age, she adopted the persona of a 13-year-old

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[1] 10 U.S.C. § 880. Specification 3 was conditionally dismissed in accordance with Rule for Courts-Martial 906(b)(12) upon Specification 2 successfully surviving appellate review.

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

[3] R. at 116.

female child and used pictures of herself when she was approximately 13 or 14 years old. She began communicating on Skout with a person using the screen name "AJ," and later moved to a messaging application called Kik. SA Hotel continued her conversation with the same person on Kik who then used the screen name "AJMarsden1," and who utilized the same profile photo that was used by AJ on the Skout application. The profile photo depicted a white male wearing a dark-colored shirt and a hat that said "Navy." While chatting with EmmaA on Kik, AJMarsden1 claimed to be 25 years old,[4] had just moved to the area, and was looking for fun. SA Hotel shared that she was a 13-year-old girl. When asked whether that was a problem, AJMarsden1 responded, "[m]aybe cause I'm looking for fun…I'm talking about sex and your [sic] 13."[5] AJMarsden1 then asked for a picture and in response, SA Hotel sent him a close-up photograph of an eye and asked for a picture in return. AJMarsden1 sent two pictures; one was the "AJMarsden1" and "AJ" Skout and Kik profile picture depicting a young man in a Navy uniform, and the second photograph was of what appeared to be the same young man's face. AJMarsden1 again asked EmmaA for a photograph and SA Hotel sent a photograph of her at the age of 13 or 14 years old in a cheerleading outfit. AJMarsden1 then asked to see a naked picture. When EmmaA asked exactly what it was that AJMarsden1 wanted, he stated, "just to see you naked lmfao,"[6] and "just you naked with your face in it."[7] After a bit more conversation in which SA Hotel refused to provide a photograph, AJMarsden1 wrote "…Or your p[****] maybe."[8] SA Hotel responded with a picture of a cat, prompting AJMarsden1 to write, "I meant your vagina."[9] SA Hotel again refused, but suggested they "hang out in person,"[10] which AJMarsden1 declined. Communications ended.

At trial, SA Hotel testified that the profile photograph of "AJ" and "AJMarsden1" looked like Appellant as he sat at counsel table. The military

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[4] Appellant's date of birth on the charge sheet indicates he would have been 24 years old at the time the chats were exchanged, not 25 years old.

[5] Pros. Ex. 2 at 2-3.

[6] Pros. Ex. 2 at 12-13.

[7] Pros. Ex. 2 at 13.

[8] Pros. Ex. 2 at 15.

[9] Pros. Ex. 2 at 15-16.

[10] Pros. Ex. 2 at 18.

]judge (the trier of fact) noted the similarities in appearance between the person in the photograph and Appellant.[11]

At the conclusion of the Government's case, Appellant moved to dismiss the offenses under Rule for Courts-Martial [R.C.M.] 917 on several grounds, including: (1) the Government failed to show that the Skout and Kik accounts belonged to Appellant; (2) the Government failed to show that Appellant intended to say such words to a 13-year-old girl because he believed that he was speaking with a cop; (3) Appellant's language is not indecent; and (4) the Government improperly charged Specification 2 as attempted production of child pornography rather than solicitation under Article 82, UCMJ. The military judge denied Appellant's motion.

II. DISCUSSION

Appellant asserts that the evidence is legally and factually insufficient to support his convictions of the three specifications under the charge. We agree.

We review legal and factual sufficiency de novo.[12] In determining legal sufficiency, we must ask ourselves if, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[13] In doing so, we "draw every reasonable inference from the evidence of record in favor of the prosecution."[14] "[T]he standard for legal sufficiency involves a very low threshold to sustain a conviction."[15]

In determining factual sufficiency, we must be convinced of an appellant's guilt beyond a reasonable doubt after weighing the evidence in the record of trial and making allowances for not having observed the witnesses.[16] We presume neither innocence nor guilt, but instead take "a fresh, impartial look at

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[11] R. at 129.

[12] Article 66(d), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[13] *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[14] *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015).

[15] *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

[16] *Turner*, 25 M.J. at 325.

the evidence" to independently determine whether each element has been satisfied with proof beyond a reasonable doubt.[17] Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free from conflict."[18] As we consider the factual sufficiency of a case, we may only consider admitted evidence found in the record of trial.[19]

Appellant argues that the Government failed to prove beyond a reasonable doubt that Appellant is "AJMarsden1." The evidence admitted at trial consisted of the chat transcripts between SA Hotel and an individual with the screen name of AJMarsden1 from the Kik application, and AJ from the Skout application. During the presentation of the Government's case, trial counsel attempted to introduce evidence of the internet protocol [IP] address associated with the Kik account as well as Appellant's Comcast records which revealed Appellant's home IP address, but trial counsel failed to authenticate those particular Kik records with either a certifying affidavit or a records custodian in accordance with Military Rules of Evidence [Mil. R. Evid.] 803(6). Trial counsel also failed to establish that the records provided by Kik (which contained the IP information for the AJMarsden1 account) were machine-generated records, leaving it unclear as to whether the records were hearsay or machine-generated non-hearsay. The military judge appropriately sustained the objection and held that the IP address of the Kik account was inadmissible. Thus, we may not consider that inadmissible evidence in our legal and factual sufficiency review.[20] We observe that the failure of the trial counsel to lay the basic evidentiary foundation to authenticate a business record was critical to the military judge's determination that these records were inadmissible.

Trial counsel next attempted to introduce Comcast records, which would have linked Appellant's home IP address with the Kik account. The military judge excluded these records because trial counsel failed to give notice to defense counsel in accordance with Mil. R. Evid. 902(11).[21] The military judge did not make a relevance finding regarding the Comcast records, but it is clear that

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[17] *Washington*, 57 M.J. at 399.

[18] *United States v. Rankin,* 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

[19] *United States v. Heirs*, 29 M.J. 68, 69 (C.M.A. 1989). *See also United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

[20] *Id*.

[21] Trial counsel also failed to provide notice to defense counsel of his intent to introduce the Kik records as evidence, but the records were excluded on other grounds.

without the IP address of the Kik chats, the Comcast records would be irrelevant because the foundation for relevance had not been established. The military judge excluded all evidence related to the Kik chat's IP address and Appellant's Comcast account, precluding the Government from directly linking Appellant's IP address with the Kik account. If the IP addresses had been admitted, they might have provided evidentiary corroboration sufficient to sustain a conviction.

There were two photographs which purported to be AJ or AJMarsden1 that were shared with SA Hotel in the Kik chat. Both SA Hotel and the military judge found that the photographs matched the likeness of Appellant as he sat at counsel table during trial.[22] However, SA Hotel testified that there was no requirement in the Kik application that photos shared in a chat be taken real-time or taken through the application, as evidenced by the fact she shared her own photograph, taken 18 to 19 years prior.[23] The applications do not validate the identity of its users, and similarly do not validate the content or photos uploaded by its users. The photographs in the chat, on their own, are insufficient to prove it was Appellant chatting with SA Hotel. In the current environment wherein photographs of individuals are readily available online through social media and otherwise, the Government needs to be able to link actual people to the underlying account in order to prove identity.

At the time the Government concluded its case, the only evidence admitted before the court were the transcripts from the Skout and Kik chats, and the embedded two photographs within the chats that resembled Appellant. Earlier in the trial, when the military judge considered the admissibility of the Kik chat, he did so acknowledging that it was merely "sufficient" to meet the threshold for admissibility:

> [The objection to the Kik chat] is overruled based on the fact that [Appellant's] name is Andrew J. Marsden and the username listed there was AJMarsden, the photos and the similarity in appearance. *It's sufficient at this point. I understand that [trial counsel will] offer additional evidence that would further substantiate the foundation for these two documents*…I find that [trial counsel has] laid a sufficient basis to show that these are, for admissibility purposes, the statements of [Appellant] and gthat the document is what it purports to be.[24]

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[22] R. at 128 and 129.

[23] R. at 158.

[24] R. at 129-30 (emphasis added).

The military judge acknowledged that additional evidence would be admitted to "further substantiate the foundation for these two documents," yet additional evidence (the IP address evidence) was not successfully admitted. Presuming that the military judge did not consider or attach any weight to evidence not admitted, this effectively resulted in the military judge finding Appellant guilty based on a preponderance of the evidence (the burden of proof used to find the Kik chat "sufficiently" admissible), rather than beyond a reasonable doubt, which is the standard for a finding of guilty at court martial.

Although the Government introduced Appellant's local address into evidence via service record documents, his address was never linked to the Skout or Kik chats. SA Hotel testified that the Skout application connected users based on their location within a certain general radius. She further testified that she was in the vicinity of Jacksonville, Florida, when she chatted with AJ and AJMarsden1, but no further evidence was admitted regarding the scope or distance of the general radius used. Nor was evidence introduced regarding how the Skout application determines general radius parameters—whether it was based on elections made by a user, or whether the Skout application applied a default radius. There was no admissible evidence that suggested Appellant was in Jacksonville, Florida, when the chats occurred, although he did live in Jacksonville. The general radius used by the Skout application to connect its users was never established or explained, therefore evidence of Appellant's home address became irrelevant.

The military judge provided special findings in accordance with R.C.M. 918(b), based on a request made by civilian defense counsel at trial.[25] The purpose of special findings is to preserve questions of law for appeal, much like members instructions. "Special findings are to a bench trial as instructions are to a trial before the members," and had the military judge recited the factual basis of the convictions and the supporting evidence, as we expect to see in special findings, this Court would be in the privileged position of assessing the weight given by the military judge to the evidence.[26] Instead, the special findings were, quite literally, a mere recitation of the elements of the offenses without one word more, and special findings of this nature do not help this Court determine the factual or legal sufficiency of Appellant's convictions.

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[25] App. Ex. XXXV.

[26] *United States v. Postle*, 20 M.J. 632, 638 (N.M.C.M.R. 1985).

> When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence.[27]

While acknowledging the presumption in favor of military judges, we find the evidence legally insufficient. In light of the analysis above, we do not believe that a reasonable fact-finder could have found all of the essential elements beyond a reasonable doubt. Specifically, we are not convinced with any degree of certainty that the person on the other end of the chats was Appellant. Even while drawing every reasonable inference from the *admitted* evidence in the record in favor of the prosecution and recognizing that the threshold for legal sufficiency is lower than that of factual sufficiency, we find that the trial court did not have sufficient evidence to link Appellant to the charged offenses.

While not required to do so, we also find the evidence factually insufficient. We do not opine on what it would have taken to make Appellant's conviction factually sufficient, and we do not hold here that IP addresses are always required to find an accused guilty of the offenses charged under these circumstances. What we require is more than cursory chats that share little to no personal identifying information (and we note that the personal information that was shared regarding AJMarsden1's age was not consistent with Appellant's actual age), and more than photographs that could be retrieved from the internet or many other sources. Appellant makes further arguments that we need not address here.

We have reviewed the record of trial and evaluated the arguments by Appellant and the Government, and we have made allowances for not having heard or observed the witnesses. Based on the evidence admitted at trial, we are not convinced of Appellant's guilt beyond a reasonable doubt.

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[27] *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000).

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that error materially prejudicial to Appellant's substantial rights occurred.[28]

The findings and sentence are **DISMISSED WITH PREJUDICE**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[28] Articles 59 & 66, UCMJ.