UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALEJANDRO V. ARRIAGA
United States Air Force

ACM 37439

07 May 2010

Sentence adjudged 28 August 2008 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: W. Thomas Cumbie.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A panel of officer and enlisted members found the appellant guilty, contrary to his pleas, of one specification of housebreaking and one specification of indecent assault, in violation of Articles 130 and 134, UCMJ, 10 U.S.C. §§ 930, 934.[1] The approved

[1] Consistent with his pleas, the appellant was found not guilty of one specification of aggravated sexual assault, one specification of indecent assault, and one specification of assault consummated by a battery, in violation of Articles 120, 134, and 128, UCMJ, 10 U.S.C. §§ 920, 934, 928. The finding of guilty to housebreaking was a lesser included offense to the charged offense of burglary under Article 129, UCMJ, 10 U.S.C. § 929, for which the appellant was found not guilty. The appellant was also credited with 156 days of pretrial confinement.

sentence consists of a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to E-1.[2]

The appellant asserts seven assignments of error before this Court: (1) Whether the military judge committed plain error when he instructed the members on the lesser included offense of housebreaking when there was no evidence to suggest that the allegations were anything less than burglary; (2) Whether the appellant was deprived of his right to speedy post-trial review when over 243 days elapsed between the date of sentencing and the date the convening authority took action; (3) Whether the finding of not guilty for the offense of aggravated sexual assault is impermissibly inconsistent with the finding of guilty for the offense of housebreaking; (4) Whether the military judge committed plain error when he failed to instruct the members on the lesser included offense of assault consummated by a battery to the offense of indecent assault; (5) Whether the evidence is factually sufficient to support findings of guilt that the appellant committed an indecent assault on a female airman; (6) Whether unlawful command influence deprived the appellant of due process of law; and (7) Whether, given the appellant's honorable service and combat service, a sentence which included confinement for four years and a dishonorable discharge was inappropriately severe.[3]

Background

At the time of trial, the appellant was 25 years old and had been on active duty since 22 April 2003. He was assigned to the 20th Civil Engineer Squadron at Shaw Air Force Base (AFB), South Carolina. He was single with one dependent and his service was characterized as average.

Sometime in March or April 2007, Senior Airman (SrA) JJ was at the appellant's off-base duplex with her boyfriend and two of her female friends from work. SrA JJ did not know the appellant that well and they had never been sexually or romantically involved. At some point, SrA JJ became tired and wanted to leave but her boyfriend wanted to stay so the appellant indicated that she could sleep in his bed. As the appellant was making his bed, he commented to SrA JJ, "Gosh, you're hot." SrA JJ then went to sleep alone in the appellant's bed. A little while later, SrA JJ's boyfriend woke her up and they moved to another room. Approximately 30 minutes later, SrA JJ went to the bathroom across the hall. She closed the bathroom door but did not lock it. While washing her face, she heard the door open and thought it was her boyfriend. However, it

[2] Pursuant to Articles 57(a)(2) and 58b(a)(1), UCMJ, 10 U.S.C. §§ 857(a)(2), 858b(a)(1), the convening authority deferred all of the adjudged and mandatory forfeitures commencing retroactively as of 14 days from the date of the adjudged sentence. Pursuant to Article 58b(b), UCMJ, the convening authority waived all of the mandatory forfeitures for the benefit of the appellant's dependent for a period of six months, release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing retroactively as of 14 days from the date of the adjudged sentence.

[3] Issues 3 through 7 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

was the appellant, and he started talking to her while he was urinating. The appellant was completely naked. SrA JJ quickly finished washing her face and started to depart the bathroom. The appellant said, "Hold on, I've got to tell you something, I have something to tell you." The appellant came up to her and pulled her toward him. The appellant grabbed the top part of her breast with one of his hands and placed his other hand on her right hip area. SrA JJ tried to move away but the appellant pulled her back towards him and said, "girl, you're hot." He tried to kiss her neck but she resisted and tried to get closer to the door. The appellant moved in front of her, pressing her up against the bathroom wall. The appellant then placed his right hand on her breast and his left hand on her hip. The appellant continued to say she was hot and again tried to kiss her. He moved one of his hands to her thigh underneath her skirt. At this point, Airman First Class (A1C) MD, her friend, opened the door. SrA JJ then left the bathroom upset, grabbed her belongings, and left the house. SrA JJ's boyfriend was in the hallway behind A1C MD, and he asked the appellant what the appellant was doing in the bathroom naked with his girlfriend. The appellant replied, "I can do whatever I want, it's my house."

In October 2007, the appellant lived in an off-base duplex that had two housing units. His next door neighbors were Mrs. DC and her husband, Mr. JC, who was in the military at the time. During the evening hours of 6 October 2007, the appellant stopped by Mr. JC's and Mrs. DC's house, knocked on the door, and waited until Mrs. DC granted him permission to enter. Once inside, he asked Mrs. DC and her friends if they wanted to go to a bar that evening. Mrs. DC and her friends declined the offer because they were watching a football game. At some point that evening, Mrs. DC fell asleep on her love seat next to her female friend. Mr. JC fell asleep on the floor in front of the television. Meanwhile, another friend, Mr. WT, exited the house to smoke a cigarette. He did not lock the front door on his way out.

When Mr. WT went outside, the appellant was also outside with some of his friends. The appellant asked where everyone was and Mr. WT told him that they were all inside asleep. During his conversation with the appellant, Mr. WT received a call on his cell phone. While pacing in the yard talking on his phone, Mr. WT noticed a shadow in the front window of Mrs. DC's and Mr. JC's residence. Mr. WT thought one of the girls had awoken so he got off the phone and headed toward the door. He tried opening the door but it was locked. He thought that someone had awoken and locked the door. He then knocked on the door and shortly thereafter the appellant opened the door. As Mr. WT entered the house, the appellant rushed past him and left.

Mr. WT noticed that Mrs. DC was upset so he asked her what was wrong. She told him that she had woken up with the appellant's hand down her pants. Mrs. DC did not have an open door policy with the appellant. The back door to her house had a deadbolt lock on it and it could only be opened with a key. One key was on her key ring, and her husband had the other key. The back door remained locked at all times. On the morning of 7 October 2007, after the Air Force Office of Special Investigations arrived,

Mrs. DC noticed that the back door was unlocked. The appellant was acquitted of sexually assaulting Mrs. DC, but he was found guilty of housebreaking, a lesser included offense of the charged offense of burglary.

Discussion

Instructions on the Lesser Included Offense of Housebreaking

The appellant asserts that the military judge erred by instructing the members on housebreaking as a lesser included offense of burglary because the facts presented at trial did not warrant this instruction.

"The question of whether a jury was properly instructed [is] a question of law, and thus, our review is de novo." *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007) (alteration in original) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). Failure to object to an instruction or omission of an instruction prior to commencement of deliberations waives the objection in absence of plain error. Rule for Courts-Martial (R.C.M.) 920(f). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights."' *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). "A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence." *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008).

Housebreaking and unlawful entry are listed as lesser included offenses of the greater offense of burglary, which was alleged against the appellant under the Specification of Charge II. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 55.d. (2005 ed.). Housebreaking has two elements: "(1) That the accused unlawfully entered a certain building or structure of a certain other person; and (2) That the unlawful entry was made with the intent to commit a criminal offense therein." *MCM*, Part IV, ¶ 56.b. The offense of burglary differs from the lesser included offense of housebreaking in that burglary requires a "breaking" whereas the lesser included offense of housebreaking does not include such element. *Compare MCM*, Part IV, ¶ 55.c.(2) *with MCM*, Part IV, ¶ 56.c.(1). Additionally, the criminal offense can be any offense and does not have to be the same offense alleged in the burglary specification. *MCM*, Part IV, ¶ 56.c.(1), (3). Further, the only proof required is that the accused intended to commit some criminal offense at the time of the unlawful entry. *MCM*, Part IV, ¶ 56.c.(2). Proof that the accused actually committed or attempted to commit any criminal offense is not required. Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-56-1 (1 Jan 2010).

In this case, the military judge properly instructed the members on the lesser included offenses of housebreaking and unlawful entry based upon the evidence presented at trial. The government presented evidence that the appellant was not authorized to enter Mrs. DC's home without permission. The defense presented evidence that a breaking did not occur. Given these circumstances, the lesser included offenses, to include housebreaking, were reasonably raised by the evidence. Moreover, there was no objection made by the trial defense counsel concerning the military judge's instructions on the lesser included offenses.

Considering that the offense of housebreaking only requires that the appellant had the intent to commit any criminal offense and that the facts at trial reasonably raised the lesser included offense of housebreaking, we find that the military judge committed no error, plain or otherwise, in instructing the members on the lesser included offense of housebreaking.

Post-Trial Delay

The appellant's second issue is that his due process right to timely post-trial processing was violated when it took the convening authority 243 days from the date of sentencing until the date he took action in this case.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In conducting this review, we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(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." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). We apply a presumption of unreasonable delay when the convening authority's action is not completed within 120 days of announcement of the sentence, thereby triggering the *Barker* four-factor analysis. *Id*. at 142.

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. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The appellant's court-martial concluded on 28 August 2008, and the convening authority took action 243 days later on 27 April 2009. Due to a busy docket, the 820-page record of trial was not completed until 17 November 2008, 82 days after the court-martial concluded. Due primarily to the trial counsel being on maternity leave, the review of the transcript was not completed until 5 February 2009. The military judge authenticated the record of trial on 2 March 2009, and

the convening authority took action on 27 April 2009. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal due to the additional 123-day delay was harmless beyond a reasonable doubt. Accordingly, no relief is warranted.

Legal and Factual Sufficiency of Housebreaking

The appellant contends that the finding of not guilty for the offense of aggravated sexual assault is impermissibly inconsistent with the finding of guilty for the offense of housebreaking. In accordance with 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, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

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 [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*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant's position is that since the members found him not guilty of the aggravated sexual assault, which was the underlying offense for the burglary charge, no reasonable fact finder could have made a finding of guilty on the housebreaking charge. The appellant's position is without merit. As stated above, housebreaking has two elements: "(1) That the accused unlawfully entered a certain building or structure of a certain other person; and (2) That the unlawful entry was made with the intent to commit a criminal offense therein." *MCM*, Part IV, ¶ 56.b. The criminal offense can be any offense and does not have to be the same offense alleged in the burglary specification. *MCM*, Part IV, ¶ 56.c.(1), (3). The military judge advised the members that

> Proof that the accused actually committed or attempted to commit any criminal offense is not required. However, you must be convinced beyond a reasonable doubt that the accused intended each element of the offense at the time of the unlawful entry and, again, I have previously provided you the elements of aggravated sexual assault.

The military judge further advised the members that

> The offense of housebreaking requires an unlawful entry into a building or structure, and a building includes a house. The offense of burglary differs from the lesser included offense of housebreaking in that burglary requires, as an essential element, that you be convinced beyond a reasonable doubt that the offense occurred in the night time and requires a "breaking," as I've previously defined that term, whereas the lesser included offense of housebreaking does not include such element. Further, housebreaking only requires the accused enter the house with the intent to commit any criminal offense.

We find that the government presented sufficient evidence to show that the appellant unlawfully entered Mrs. DC's residence. Mrs. DC testified that when she woke up the appellant was rubbing her vagina. She testified that the appellant never had permission to enter her home and she did not let him into her home. Mr. WT testified that he informed the appellant that everyone in the house was asleep. Mrs. DC testified that she and the appellant had previously engaged in sexual banter via text messaging and that the appellant had hit on her prior to the alleged incident. Although the appellant was ultimately found not guilty of aggravated sexual assault, the evidence shows that the appellant had the intent to have sexual relations with Mrs. DC, the spouse of another military member, upon entering her home without permission. Accordingly, the finding of guilty for housebreaking is consistent with the evidence presented at trial.

Instruction on the Lesser Included Offense of Assault Consummated by a Battery

The appellant next claims that the military judge committed plain error when he failed to instruct the members on the lesser included offense of assault consummated by a battery to the offense of indecent assault, as alleged under Specification 2 of Charge III. We disagree.

"The question of whether a jury was properly instructed [is] a question of law, and thus, our review is de novo." *Schroder*, 65 M.J. at 54 (alteration in original) (quoting *Maxwell*, 45 M.J. at 424). Failure to object to an instruction or omission of an instruction prior to commencement of deliberations waives the objection in absence of plain error. R.C.M. 920(f). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights."' *Maynard*, 66 M.J. at 244 (quoting *Hardison*, 64 M.J. at 281). "A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence." *Miergrimado*, 66 M.J. at 36.

The evidence in this case did not reasonably raise the lesser included offense of assault consummated by a battery. The defense theory at trial appeared to be that the indecent assault upon SrA JJ never occurred or that it was consensual. No evidence was presented that showed a lesser degree of criminal liability than the charged offense.

Further, the appellant did not object to the military judge's instructions and has failed to show how the lack of an instruction on the lesser included offense of assault and battery unfairly impacted the finding of guilty to the indecent assault upon SrA JJ, as the evidence clearly shows that the appellant committed the charged offense. Accordingly, no error occurred, plain or otherwise.

Legal and Factual Sufficiency of Indecent Assault

The appellant contends that the conviction for indecent assault upon SrA JJ is factually and legally insufficient. In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *Washington*, 57 M.J. at 399. "The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *Day*, 66 M.J. at 173 (citing *Turner*, 25 M.J. at 324).

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 [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; *Bethea*, 46 C.M.R. at 224-25.

Based on our review of the entire record of trial, a reasonable fact finder could have found that the appellant committed an indecent assault upon SrA JJ. The appellant's contention is that he acted under the belief that SrA JJ had consented to his advances. However, the evidence shows otherwise. SrA JJ testified that she had never been romantically involved with the appellant and that she was at the party with her boyfriend. There is no evidence that she either encouraged the appellant or gave him any indication that she would be receptive to his sexual advances. When A1C MD opened the bathroom door, SrA JJ was visibly upset and quickly left the appellant's residence.[4]

Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant committed an indecent assault upon SrA JJ. Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses in-court testimony, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we find the evidence is legally and factually sufficient to sustain the conviction for indecent assault.

[4] We note that during the trial counsel's closing argument, he highlighted to the members that SrA JJ was crying on the stand during her testimony due to being ashamed and embarrassed.

Unlawful Command Influence

We review questions of unlawful command influence de novo, deferring to the military judge's findings of fact unless they are clearly erroneous. *United States v. Denier*, 43 M.J. 693, 698 (A.F. Ct. Crim. App. 1995), *aff'd*, 47 M.J. 253 (C.A.A.F. 1997). The military judge did not make any findings of fact on this issue, thus, in resolving this issue we will look to the record.

The prohibition against unlawful command influence arises from Article 37, UCMJ, 10 U.S.C. § 837, which provides, in part, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ." Article 37(a), UCMJ. Additionally, the burden of production on unlawful command influence issues lies with the party raising the issue. *Denier*, 43 M.J. at 698 (citing *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994)). Here, the burden rests with the appellant.

In determining whether or not unlawful command influence exists, "[t]he test is [whether there exists] 'some evidence' of 'facts which, if true, constitute unlawful command influence, and [whether] the alleged unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Once the appellant has met the burden of production and proof, the burden shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* (quoting *Biagase*, 50 M.J. at 151).

In July 2008, shortly before the appellant's trial on the merits, the 20th Fighter Wing Commander at Shaw AFB conducted briefings about recent sexual assault allegations involving a perpetrator who had used a weapon on his victims. The briefings were given to 250-300 of the dorm residents and to approximately 100 military members and civilians at a town hall meeting. The briefings stressed the importance of the wingman concept to ensure the safety of everyone on the installation. Additionally, the wing commander issued a "Commander's Briefing" via e-mail and ordered that flyers be placed on bulletin boards and in bathrooms around the installation. The flyers stressed the importance of being vigilant and watching out for each other.

At trial, the trial defense counsel moved for a change of venue, alleging that the actions of the wing commander resulted in unlawful command influence that denied the appellant a fair trial. The military judge deferred ruling on the motion until after voir dire.

During individual voir dire, each of the court members was specifically questioned about their knowledge of the briefing and the flyer, and whether it and had any impact on them. Concerning the members who were selected to sit on the appellant's panel, the record of trial shows that the briefing and flyers had no impact on them. Of the members who either attended the briefing or were aware of its content, they stated that it was a safety briefing that emphasized the importance of being vigilant. One member who attended the briefing stated that the wing commander did not discuss the details of any particular case and he never called for any particular action in response to the allegations. Of those members who had actually read the flyer, they indicated that the focus was again on safety and protecting each other.

At the conclusion of voir dire, the trial defense counsel stated, "But we agree that the remedy we requested for a change of venue is moot at this point. We've been able to select a panel that appears to be not affected at all by these statements, if they even heard them or paid attention to them or read them." The military judge then denied the defense motion for a change of venue. The military judge further held that he did not believe that the facts raised the issue of unlawful command influence, and he found beyond a reasonable doubt that there was no unlawful command influence that would affect the appellant's case in the event an appellate court later determined that the defense did raise some evidence of unlawful command influence.

Considering our review of the record of trial, we concur with the military judge that the actions of the wing commander do not rise to the level of unlawful command influence. The wing commander initiated the briefings and the posting of the flyers in response to recent allegations of sexual assaults involving a perpetrator who used a weapon on his victims. At no point did the wing commander mention the appellant's case nor did he indicate any type of required disciplinary action in response to such an allegation. The focus was safety and taking care of your fellow airmen. Further, the court members who actually sat to hear the appellant's case were in no way influenced by the wing commander's briefings and flyers. Accordingly, there was no unlawful command influence in this case.

Sentence Appropriateness

The appellant's final assignment of error is that his sentence, which includes a dishonorable discharge and confinement for four years, is inappropriately severe considering he was only found guilty of housebreaking and indecent assault. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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. We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268

(C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In *Jackson v. Taylor*, 353 U.S. 569, 576-77 (1957), the Supreme Court considered the text of Article 66, UCMJ, and its legislative history, and concluded it gave the courts of criminal appeals the power to review not only the legality of a sentence but also its appropriateness. Our superior court has likewise concluded that the courts of criminal appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

The maximum sentence authorized in this case was a dishonorable discharge, 10 years of confinement, forfeiture of all pay and allowances, and reduction to E-1. Although the government only argued for a bad-conduct discharge and confinement for three years, the members sentenced the appellant to a dishonorable discharge and confinement for four years. Based on our review of this case, the appellant's sentence is more consistent with a finding of guilty for all of the charged offenses. Even though housebreaking and indecent assault are serious offenses, the facts and circumstances of this case do not warrant such a severe sentence.

Accordingly, based on the authority granted above, we approve only so much of the sentence as includes a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.[5]

Conclusion

The approved findings and sentence, as modified, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[5] We do not disturb either the appellant's award of 156 days of pretrial confinement credit or the convening authority's deferral and waiver of the mandatory forfeitures.

Accordingly, the approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court