UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant EUGENE M. BELAIRE II
United States Air Force

ACM 35968

16 May 2006

Sentence adjudged 20 February 2004 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: James L. Flanary.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, Major Jennifer K. Martwick, Major David P. Bennett, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Clayton O'Connor (legal intern).

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant stands convicted, contrary to his pleas, of three specifications of indecent acts or liberties with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He pled guilty to, and was also convicted of, one specification of dereliction of duty for providing alcohol to minors, in violation of Article 92, UCMJ, 10 U.S.C. § 892. His sentence, imposed by a panel of officer and enlisted members, consisted of a dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and

reduction to the grade of E-1. The convening authority approved the sentence as adjudged, but waived a portion of the appellant's mandatory forfeitures to be paid to the appellant's wife for the benefit of herself and the appellant's dependent child.

On appeal, the appellant contends that the evidence is legally and factually insufficient to sustain his conviction;[*] that the military judge improperly limited the trial defense counsel's cross-examination of KB, the 15-year-old victim in this case; and that the convening authority's action did not follow the proper format for waiver of mandatory forfeitures as required by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). We find merit as to the final assignment of error only.

Legal and Factual Sufficiency

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the elements of the offense proven beyond a reasonable doubt. For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

We first address the offense to which the appellant pled guilty: dereliction of duty. The appellant admitted during his providency inquiry that he had a duty as a military member not to provide alcohol to persons under the age of 21; that he was aware of this duty because he previously received several briefings in which it was discussed; and that he nonetheless provided alcohol to two teenagers, RT and KB. The appellant's plea of guilty to this offense was provident; his statements during the providency inquiry were sufficient to establish his guilt. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

The record is likewise legally and factually sufficient to establish the appellant's guilt as to the contested specifications under Article 134, UCMJ. KB and RT both testified concerning the appellant's conduct toward KB, and their testimony, while not free from minor conflicts, was credible and compelling.

[*] The assignment of errors filed on the appellant's behalf contains several apparent typographical errors making it difficult to discern which specifications the appellant believes were not proven. We do not hold these errors against the appellant, but we strongly recommend that appellate counsel and their supervisors do a more thorough job reviewing and quality-checking their briefs before submission to this Court. In an abundance of caution, we have examined all four specifications, regardless of the appellant's pleas, as though they were the subjects of this assignment of error.

The appellant asserts that no reasonable factfinder could have believed KB because a neighbor, MC, and MC's 17-year-old son, contradicted her testimony. The appellant's point would be valid if one assumed that MC and her son testified truthfully. The members, who had the benefit of seeing and hearing all of the witnesses, apparently did not believe that they testified truthfully. Our examination of the record leads us to the same conclusion. MC's testimony, in particular, was so marked by evasion and bias as to be almost completely unbelievable. For example: MC initially tried to pass off her relationship with the appellant as "not more than good friends," about whom she cared "like I do any other friend." On cross, however, she admitted she carried on a year-long sexual relationship with the appellant while her husband was deployed, facts which belie her description of their relationship as just "the same friendship" she would have "with anyone else." Her son's testimony was also not credible. Prior to trial, he provided two signed, sworn statements corroborating KB's testimony in every major respect. Yet on the stand he told an entirely different story, alleging that KB was untruthful and had asked him to lie for her. On questioning by the trial counsel, however, he admitted his new story only "came to light" after discussing the case with his mother, and that he was intimidated by his mother, who had, that very week, been arrested for assaulting his sister.

This evidence was sufficient for the members to infer that MC was lying to protect her paramour, the appellant, and that she had induced her son to lie for him as well. We find this inference reasonable and, like the members, we give credence to the version of events put forth by KB and RT over that of MC and her son. *See United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000). The evidence is legally and factually sufficient to establish the appellant's guilt on each of the litigated specifications. *Turner*, 25 M.J. at 324-25.

Limitation on Cross-Examination

The appellant alleges that the military judge "precluded" his trial defense counsel from cross-examining KB about prior occasions in which the appellant supposedly touched her breasts and put his hands down her pants. The appellant apparently believed that if he could show that he touched KB before, it would show that his actions on the day of the charged offenses were not legally indecent.

We are unconvinced that such evidence would negate the indecency of the appellant's conduct. Regardless of how we view this issue, however, the military judge did *not* prevent trial defense counsel from asking about prior touchings. He merely warned that such evidence would likely not be helpful to the defense, stating:

> MJ: [C]ounsel, the only thing that's been opened -- *and you can go into it if you want to* -- is your client's potential misconduct in the past. That's the only thing that, at best, this

> could be viewed as opening. If you want to open that up, which I don't think you do, but I would tend to agree with trial counsel. That was a clarification of some questions you had asked.

(Emphasis added). We review rulings limiting cross-examination for an abuse of discretion. *United States v. Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997). We discern none here. The military judge permitted cross-examination of KB as to the appellant's alleged prior acts. However, trial defense counsel elected, wisely in our view, not to pursue the matter further.

Assuming, arguendo, that the latter portion of the military judge's ruling can be interpreted as prohibiting cross as to the appellant's prior touchings -- in effect, reversing the first part of the military judge's ruling, which explicitly permitted such questions -- we conclude that the military judge did not abuse his discretion. The appellant's theory of the case, as articulated by his trial defense counsel at opening and throughout the trial, was that KB was lying about the charged offenses. Evidence that the appellant had previously touched her inappropriately would have added nothing to his defense. *See, e.g., United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1998). The military judge did not err.

Convening Authority's Action

The convening authority ordered that mandatory forfeitures under Article 58b, UCMJ, 10 U.S.C. § 858b, be waived for a period of up to six months and paid to the appellant's spouse, but did not modify the adjudged forfeiture of all pay and allowances. This action does not meet the requirements of *Emminizer,* 56 M.J. at 445, and, if left uncorrected, could create a liability for future recoupment action against the appellant or his dependents. *See United States v. Lajaunie*, 60 M.J. 280, 281 (C.A.A.F. 2004). We can eliminate that possibility, however, and cure the error at our level by disapproving the adjudged forfeitures. *United States v. Johnson*, 62 M.J. 31, 38 (C.A.A.F. 2005). We therefore reassess the sentence and approve only so much as provides for a dishonorable discharge, confinement for 4 years, and reduction to the grade of E-1.

Conclusion

The findings and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *See United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator