

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman PIERCE L. BURNES
United States Air Force

ACM 36696

30 May 2008

Sentence adjudged 01 September 2005 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Eric L. Dillow.

Approved sentence: Bad-conduct discharge, confinement for 7 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Mary T. Hall (civilian attorney), Lieutenant Colonel Mark R. Strickland, and Major John N. Page, III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Major Donna S. Rueppell

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of making a false official statement, one specification of rape, and one specification of obstruction of justice, in violation of Articles 107, 120 and 134, UCMJ, 10 U.S.C. §§ 907, 920, and 934. The approved sentence consists of a bad-conduct discharge, confinement for 7 years and 6 months, total forfeitures, and reduction to E-1.

The issues on appeal are whether the evidence was legally and factually insufficient to sustain the appellant's conviction for rape, and whether the approved sentence, which includes confinement for 7 years and 6 months is inappropriately severe.

Background

On 14 January 2005, the appellant and Airman First Class (A1C) AKM, the victim, were in A1C M's dormitory room with several others and were drinking alcohol. A1C M and the victim were friends and during the evening spent time between their two dormitory rooms. Eventually, A1C M escorted the victim to her room where she appeared to be going to sleep. A1C M returned to his room but got concerned that the victim had not locked her door.

A1C M returned to the victim's room, found the door unlocked, opened the door and saw a man on top of a person. He closed the door, returned to his room and asked another airman to accompany him back to the victim's room. A man, identified as the appellant, appeared to be unclothed and on top of a female, A1C AKM. Eventually, A1C M and two other airmen saw the appellant leave the area near the victim's room, rapidly leave that building, and head toward his dormitory. They called out to him but he did not answer, so they followed him to his dormitory room.

After arriving at the appellant's dormitory room, they pounded on his door and asked him what was going on (without mentioning anything about anyone), to which he replied "I didn't do nothing with that girl." He finally said they didn't have sex because he didn't have a condom.

The victim remembers going to her room and then waking up to find someone on top of her having sex and that it was very painful. She called two friends, and confronted A1C M and asked him what he had done to her. He explained he hadn't done anything. They then returned to her room, found a necklace belonging to the appellant on the floor, and contacted the authorities.

The appellant denied having sex with the victim (there was DNA matching the appellant's collected during the rape protocol), and requested another friend provide incorrect information to the authorities if questioned.

The litigation of the case consisted of the witnesses involved, expert medical and DNA testimony, and the defense expert testifying that the victim's actions were consistent with her interacting normally with others in a blackout condition resulting from drinking alcohol, and therefore able to consent.

Discussion

The test for factual sufficiency is whether this Court is convinced beyond a reasonable doubt of the appellant's guilt, after weighing all the evidence and making allowances for not having personally observed the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). *See also United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether considering the evidence in the light most favorable to the government, a reasonable factfinder could have found all of the essential elements beyond a reasonable doubt. *Turner*, 25 M.J. at 324. In resolving questions of legal sufficiency, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

After carefully reviewing the record of trial, it is clear the appellant's conviction for rape is legally and factually sufficient, and we are convinced of the appellant's guilt. This issue is without merit.

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, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007).

After reviewing the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence to confinement for 7 years and 6 months is not inappropriately severe.

The findings and the sentence 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). Accordingly, the findings, and sentence, are

AFFIRMED.

*Although we would note the Court Martial Order (CMO) has the Charges listed as Charge I, Charge II, and Additional Charge when the charge sheet, the flyer, and the findings worksheet have the charges listed as Charge I, Charge II, and Charge III. Also, it should be noted the CMO does not identify the forum adjudging the sentence which was officers and enlisted.

OFFICIAL



Christina E. Parsons
CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court