UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANTHONY CAMACHO
United States Air Force

ACM 36473

30 March 2007

Sentence adjudged 16 June 2005 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Maria A. Fried, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

PER CURIAM:

We have reviewed the record of trial, the errors assigned by the appellant, and the government's reply. As to the first assignment of error, we have carefully considered the appellant's assertion that the military judge erred by excluding evidence that Airman First Class (A1C) GW had falsely accused another airman of nonconsenusual sexual acts. We review a judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000) (citing *United States v. Schlamer*, 52 M.J. 80, 84 (C.A.A.F. 1999)).

We agree with the military judge that the testimony from A1C GW and her ex-boyfriend was not clear enough to show an out-of-court lie relevant to truthfulness and

the probative value, if any, was substantially outweighed by the danger of confusing the issues and misleading the members. We hold that the military judge did not abuse his discretion when he excluded testimony on this issue.

The appellant also avers the military judge erred by instructing the members on the lesser-included offense of indecent assault, rather than indecent acts with another. Citing this Court's decision in *United States v. Foster,* 40 M.J. 140, 145-46 (C.M.A. 1994), the appellant argues that indecent assault is not a lesser-included offense of rape as it requires proof of an additional element not required for the offense of rape. *See also United States v. Oatney*, 45 M.J. 185, 188 (C.A.A.F. 1996). That element is that the victim not be the spouse of the accused. Whether members were properly instructed is a question of law we review de novo. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996). We concur with the appellant and in accordance with *Foster,* we set aside the appellant's conviction for indecent assault.

The appellant also argues the evidence is factually insufficient to support the conviction for indecent assault. This argument is mooted by our setting aside his conviction for indecent assault. We will, however, review whether the evidence is legally and factually sufficient to support his conviction for the lesser-included offense of indecent acts with another. *United States v. Schoolfield*, 40 M.J. 132, 137 (C.M.A. 1994).

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. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). 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. *Id.* Applying this guidance, we conclude the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994). Further, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

In light of our substitution of a finding of guilty of a lesser-included offense of indecent acts vice indecent assault, we must now reassess the sentence. We note that the maximum sentence for indecent assault and committing indecent acts with another is identical: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years. The court members were correctly instructed on the maximum allowable punishment, and we believe appellant was not prejudiced in their resolution of this matter. Therefore, we find the sentence imposed by the court members to be no greater than that which would have been imposed by them had they been correctly instructed as to

the lesser-included offense of indecent acts. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990). Examining the entire record once again, we find the approved sentence is appropriate. Article 66(c), UCMJ.

The approved findings, as modified, and the 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator