UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CLINTON R. CROSS
United States Air Force

ACM 35539

25 April 2005

Sentence adjudged 1 February 2003 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: David F. Brash (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Kyle R. Jacobson, Major Natasha V. Wrobel, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the two assignments of error, and the government's response thereto. The appellant argues that the evidence is legally and factually insufficient to support his conviction for indecent assault. Legal sufficiency is a question of law the Court reviews de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Here, there is sufficient competent evidence in the record of trial to find legal sufficiency to support the military judge's findings. Based on the evidence, any rational trier of fact could find that the appellant indecently

assaulted Master Sergeant (MSgt) TC as she slept on a couch in a neighbor's on-base house following a 4th of July party that both she and the appellant attended.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the factfinder at trial, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Applying this standard, we are convinced beyond a reasonable doubt that the appellant indecently assaulted MSgt TC.

The appellant also argues that the military judge erred in admitting evidence of his efforts to remove a letter of reprimand from his unit personnel record to show his consciousness of guilt. This reprimand concerned a previous indecent assault on a male noncommissioned officer when the appellant was intoxicated. The appellant sought to have the document removed from his unit record within days of learning that he was a possible suspect for the offense in this case. The military judge made detailed findings of fact supporting his ruling, properly balanced the competing interests of the parties under Mil. R. Evid. 403, and placed restrictions on the government use of the underlying facts of the reprimand.[1] We hold that he did not abuse his discretion in admitting this evidence. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999).

Finally, we have considered whether a dishonorable discharge is inappropriately severe. This Court may only affirm those findings and sentence that we find are correct in law and fact and determine, based on the entire record of trial, should be affirmed. Article 66(c), UCMJ. In exercising our authority under Article 66(c), UCMJ, we must ensure that justice is done and the appellant receives the punishment he deserves. Performing this function does not allow us to grant clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this duty is to give individualized consideration to an appellant on the basis of the nature and seriousness of the offense and the character of the appellant. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). After carefully considering the entire record, and applying this standard, we conclude that only so much of the sentence as provides for a bad-conduct discharge, confinement for 3 months, and reduction to E-1 is appropriate and shall be affirmed.

[1] The military judge was concerned that the details of the incident, since it involved a homosexual assault, would unfairly prejudice the appellant before members. Accordingly, he precluded the government from disclosing the specific facts of the incident to the members. The appellant's subsequent request for trial by military judge alone eliminated this concern.

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court