

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class TYRONE L. DAVIS
United States Air Force**

ACM 36153

31 October 2006

Sentence adjudged 30 July 2004 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Kevin P. Koehler.

Approved sentence: Dishonorable discharge, confinement for 3 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, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

The appellant was convicted contrary to his pleas, by a general court-martial of making a false official statement, unlawfully entering a dormitory room, and committing an indecent act, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934. A panel of officer and enlisted members sentenced the appellant to a dishonorable discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The case is before the Court for review under Article 66, UCMJ, 10 U.S.C. § 866. On appeal, the appellant challenges the legal and factual sufficiency of his conviction for

committing an indecent act and for making a false official statement. He also asks that we find his sentence to be inappropriately severe. We find all three assignments of error to be without merit and affirm.

Background

On 10 October 2003, the appellant and several of his co-workers were drinking at a party in the dayroom on the second floor of the dormitory. Airman (Amn) FJ decided to celebrate her nineteenth birthday by drinking shots of rum, followed by a beer chaser. One of the appellant's friends, Amn Gentry was also drinking rum and actively pursuing Amn FJ at the party. Some of the airmen who attended the party said Amn FJ was talkative, flirtatious and obviously drunk. After drinking several shots of rum, Amn FJ started feeling like she was losing control of herself so she called her friend Airman First Class (A1C) Mitchell at work. She asked A1C Mitchell to come and get her and to take her back to her room. While Amn FJ was on the phone, Amn Gentry poured rum into her cup containing beer. Amn FJ drank the beer spiked with rum and again called A1C Mitchell to tell him to hurry up, because she was ready to go. A1C Mitchell arrived and took Amn FJ to her room on the first floor. When they arrived, they noticed that Amn Gentry was passed out lying across Amn FJ's bed. As a result, A1C Mitchell escorted Amn FJ upstairs to his room and put her on his bed. He then locked the door and went to a pool hall.

About an hour later, A1C Trott went to Amn FJ's room and woke Amn Gentry up. Amn Gentry asked them whether he knew where Amn FJ was. A1C Trott told Amn Gentry that she was upstairs in A1C Mitchell's room. The appellant, who was standing outside Amn FJ's room, accompanied Amn Gentry up the stairs and down the hall to A1C Mitchell's room. The appellant called A1C Mitchell twice. During the second phone call, he asked A1C Mitchell when he was coming back to his room. A1C Mitchell told the appellant that he was not coming back to the dormitory anytime soon.

The appellant had a master key to all the rooms in the dormitory and a plethora of evidence presented at trial indicated that he unlocked the door to A1C Mitchell's room. Amn Gentry went inside A1C Mitchell's room and saw Amn FJ lying on the bed. As he started talking to her, he noticed the vomit on her clothes and on the corner of the bed. He then convinced her to let him take off her shirt and pants. As he was doing so, Amn FJ started to vomit. He grabbed around her stomach so that the vomit would go on the floor. When she finished, he put her back on the bed. The smell of her vomit made Amn Gentry so sick he went outside onto the balcony. A1C Trott and the appellant were standing outside A1C Mitchell's door. At approximately 0030 hours, the appellant started to pat Amn Gentry on his back while he was vomiting over the railing on the balcony. Once Amn Gentry finished vomiting, he went back inside the room and sat on the bed. He asked Amn FJ whether she was okay. He then started having sexual intercourse with her from behind. Then Amn Gentry noticed that A1C Trott was

standing inside the room at the front of the bed, near Amn FJ's face, and that the appellant was at the doorway. While standing in the doorway, appellant asked Amn Gentry to "Let me hit it." Amn Gentry waived the two of them out of the room while he continued to have sex with Amn FJ. When Amn Gentry finished, he put a blanket over Amn FJ and went back to his room. On the way to his room he saw the appellant and A1C Trott sitting inside A1C Trott's room.

When A1C Mitchell returned to his room about 0230 hours, he could smell alcohol and vomit as soon as he opened the door. He also noticed that Amn FJ was wrapped up in a blanket wearing only her underwear. He had difficulty waking her so he put water on her face. A1C Mitchell stayed with her for the rest of the night and slept in his recliner chair. He left for work three hours later. On 11 October 2003, the appellant came to see A1C Mitchell and Amn Gentry at work. During their conversation, the appellant denied going into A1C Mitchell's room the previous night. The appellant also spoke to Amn Gentry about the same time, and told him to leave him out of it and to tell anyone who asked, that he was with a female friend the night before. On 17 October 2003, Special Agent (SA) Fields from the Air Force Office of Special Investigations called the appellant in for an interview. The appellant told SA Fields that he was with Ms. Nicole Reid between the hours of approximately 2300 on 10 October and 0045 on 11 October 2003.

Legal and Factual Sufficiency

The appellant is contesting the legal and factual sufficiency of his conviction on two of the specifications. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

In his first assignment of error, the appellant argues that the evidence presented at trial was legally and factually insufficient to sustain the findings of guilty to the specification of committing an indecent act because he was not an active participant in the sexual activity between Airman Gentry and Amn FJ. We disagree. The appellant not only facilitated the act, he gave Airman Gentry the impression that he also wanted to have sex with Amn FJ.

In his second assignment of error, the appellant asserts that the evidence presented at trial was legally and factually insufficient to sustain the findings of guilty of making a false official statement because he was not asked to give an exact time that he was with

Ms. Nicole Reid. Although the appellant was not asked to give an exact time, the intent of the appellant's statement was to establish an alibi. The appellant intended to give SA Fields the impression that he was not at the dormitory during the sexual encounter between Amn Gentry and Amn FJ, and that he had no involvement in the events that occurred. However, there is strong evidence indicating that the appellant was not in the parking lot with Ms. Reid until 0045 as he claimed. Specifically, several people saw the appellant on the balcony during the time he said he was with Ms. Reid. We are convinced that the gravamen of this offense was not the exact time given by the appellant; it was whether the appellant was at the dormitory during the relevant timeframe. In fact, the trial counsel told the panel members not to find the appellant guilty of making a false statement if they believed he was 15 minutes off on his statement to the OSI. As a result, we are confident that the panel members found the appellant guilty of this specification because he intended to deceive SA Fields, and not because of the exact times alleged in the specification.

After considering the evidence in the light most favorable to the prosecution, we are convinced beyond a reasonable doubt that the appellant's convictions for committing an indecent act and for making a false official statement are legally sufficient. After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt of the offenses for which he was found guilty.

Sentence Appropriateness

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the nature and seriousness of his offenses. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant avers that his punishment is inappropriately severe because no violence was involved in the offenses. Additionally, he claims that the most he did was to be present momentarily while others engaged in sex. The critical factor that the appellant failed to mention is that without his master key, these offenses would probably not have occurred. Additionally, he stood by and watched Amn Gentry have sex with Amn FJ who was obviously sick and intoxicated. After carefully examining the record and taking into account all the facts and circumstances surrounding the crimes of which the appellant was convicted, we do not find his sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court