UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NICHOLAS R. ELESPURU
United States Air Force

ACM 38055

09 July 2013

Sentence adjudged 14 July 2011 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Vance H. Spath.

Approved sentence: Dishonorable discharge, confinement for 36 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn; Captain Shane McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was charged with three specifications of sexual misconduct, in violation of Article 120, UCMJ, 10 U.S.C. § 920: 1) aggravated sexual assault, by digital penetration of Airman (Amn) AL; 2) abusive sexual contact, by touching Amn AL's genitalia and breasts while she was substantially incapacitated; and 3) wrongful sexual contact, by touching Amn AL's genitalia and breasts without legal justification, lawful authorization, or permission. He was also charged with two specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928, for 1) slapping Amn AL on the buttocks and 2) pulling down Amn AL's pants on divers occasions. Contrary to his pleas, the appellant was convicted of the abusive sexual

contact, the wrongful sexual contact, and the assault involving slapping Amn AL on the buttocks. He was sentenced to a dishonorable discharge, confinement for 36 months, and a reduction to the grade of E-1.

Background

The specifications of Charge I stem from an evening of drinking with friends. The appellant and his wife were friends with Amn AL and her husband. Since it was going to be a night of drinking, the appellant agreed to let the victim, Amn AL, sleep on his couch in the living room. As planned, after Amn AL and the appellant went drinking with a larger group of friends, Amn AL went to sleep on the appellant's couch. She had taken some prescription medication that day, which enhanced the effects of alcohol. During the evening, on separate occasions, the appellant placed his hand twice on Amn AL's breast, and once on her genitals. She awoke during these incidents and told him to stop, and when he touched her genital area, she attempted to push or "swat" him away. She did this while under the combined influence of the alcohol and her medication and immediately fell back asleep after each incident. She remembered what happened the next day. The appellant apologized to her several times that day, but she told him to leave her alone and to get away from her. She eventually reported the incident through her chain of command, and the appellant was questioned first, by his first sergeant, then a second time, weeks later, by an agent from the Air Force Office of Special Investigations (OSI) along with a member of the Air Force Security Forces.

On appeal, the appellant claims (1) the rights warning given by his first sergeant, pursuant to Article 31, UCMJ, 10 U.S.C. § 831, was inadequate, and tainted both of his confessions; (2) the military judge erred when he failed to find Specifications 2 and 3 of Charge I multiplicous for findings; and (3) his sentence was inappropriately severe.

Rights Advisement

Senior Master Sergeant (SMSgt) C was the appellant's first sergeant at the 18th Munitions Squadron, Kadena Air Base, Japan. Amn AL told SMSgt C that the appellant had sexually assaulted her the night she stayed at his apartment after the evening of drinking. After hearing Amn AL's story, SMSgt C suspected the appellant of committing an offence. He called the appellant in and read him his rights off of a standard military rights advisement card. The interview occurred within three days of the incident described by Amn AL. When he got to the section which required a description of the suspected offense, he testified that he informed the appellant that he was suspected of "inappropriate conduct or inappropriate sexual conduct with or against [Amn AL]." SMSgt C continued on to ascertain if the appellant understood his rights and whether he wished to make a statement. The appellant said he understood his rights and would give a statement. After that, SMSgt C told the appellant to "go ahead and tell me what happened." Without any more prompting or need to further refine the subject matter of

the questioning after this open-ended question, the appellant confessed to sexually assaulting Amn AL while she was asleep on his couch. The appellant later wrote a brief confession on an Air Force Form 1168, *Statement of Suspect /Witness/Complainant* (1 April 1998), upon which SMSgt C wrote "inappropriate conduct" in the suspected offense block.

Some weeks after this interview, the appellant was questioned again by investigators from OSI and the Security Forces. He confessed once more and provided additional details about his conduct that night. At that interview, he was advised that he was suspected of a violation of "Article 120 sexual assault."

At trial and on appeal, the defense argues that the Article 31, UCMJ, rights advisement given by SMSgt C was inadequate and violated the appellant's rights. In a nutshell, he claims advising him that he was suspected of "inappropriate conduct" but did not adequately inform the appellant of the nature of the accusation and "failed to orient [the a]ppellant as to allow him intelligently to weigh the consequences of responding to SMSgt [C] inquiries." As a consequence, he claims the military judge erred when he admitted the appellant's initial confession and the subsequent one given to the OSI, which he claims was "tainted" by the first confession to SMSgt C.

"We review the military judge's decision on whether to admit or exclude evidence . . . under an abuse of discretion standard." *United States v. Staton*, 68 M.J. 569, 574 (A.F. Ct. Crim. App. 2009) (citing *United States v. Bare*, 65 M.J. 35, 37 (C.A.A.F. 2007)), *aff'd*, 69 M.J. 228 (C.A.A.F. 2010). An abuse of discretion occurs when the findings of fact are clearly erroneous or the conclusions of law are based on an erroneous view of the law. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). "The abuse of discretion standard is a 'strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)) (internal quotations omitted in original).

In *United States v. Simpson*, 54 M.J. 281(C.A.A.F. 2000), the Court of Appeals for the Armed Forces listed a three-part test for use when determining whether the obligation to inform a suspect of the nature of the accusation was successfully complied with under Article 31, UCMJ. Those three factors, which are not an exhaustive list, include: "whether the conduct is part of a continuous sequence of events . . . whether the conduct was within the frame of reference supplied by the warnings . . . or whether the interrogator had previous knowledge of the unwarned offenses." *Simpson*, 54 M.J. at 284 (citations omitted). The *Simpson* Court stated that notice to the suspect is sufficient if the accused is "informed of the general nature of the allegation, to include the area of suspicion that focuses the person towards the circumstances surrounding the event." *Id.*

In *United States v. Pipkin*, 58 M.J. 358 (C.A.A.F 2003), our superior court cited earlier cases for the principle that:

> [A]dvice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge. A partial advice, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy this requirement of Article 31[, UCMJ].

Pipkin, 58 M.J. at 360 (citing *United States v. Davis*, 24 C.M.R. 6, 10 (C.M.A. 1957)).

The *Pipkin* Court noted that, in these types of cases, "each case must turn on its own facts." *Id.* at 361 (quoting *United States v. Nitschke*, 31 C.M.R. 75, 78, (C.M.A. 1961)) (internal quotation marks omitted). Given the facts of this case, the appellant was aware of what he was suspected of when questioned by SMSgt C. Although the term "inappropriate conduct" alone might not have been sufficiently detailed to orient the accused as to the nature of the offense, SMSgt C also told the appellant that it was inappropriate conduct involving Amn AL. This added detail focused the appellant on exactly the conduct of which he was suspected. The appellant's subsequent response proves it. The only other question SMSgt C asked the appellant after giving the Article 31, UCMJ, warning was the open-ended question to prompt him to describe what happened. The appellant's response showed no confusion and directly addressed the incident under investigation, and he confessed to touching the victim inappropriately while she was asleep on his couch. The fact that he needed no further prompting or orientation and he did not address some unrelated incident when asked to tell what happened showed, without a doubt, that he was oriented towards the suspected offense and was aware of the incident that was being investigated.

The defense claims that the term "inappropriate conduct" was so broad it could have encompassed the appellant's drinking that evening, which they claim was prohibited due to an ongoing exercise and a general order prohibiting drinking during the exercise. However, examining the facts of this case, we have no doubt that the appellant's very specific and responsive confession to the open-ended question demonstrates he was not confused by the rights warning. The appellant's confession itself, under these circumstances, shows there was no confusion and proves he was well orientated to the offense of which he was suspected. Given this, we find no merit in the appellant's claim. This, of course, also defeats his corresponding claim that the second interview was tainted by the first under the law as expressed in *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990).

Multiplicity

The next issue asserts Specifications 2 and 3 of Charge I, alleging abusive sexual contact and wrongful sexual contact, are multiplicous for findings.

We review a military judge's decision concerning unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004); *United States v. Quiroz*, 55 M.J. 333 (C.A.A.F. 2001)). *Campbell* instructs us to consider the factors found in *Quiroz* and specifically "to allow the military judge, in his or her discretion, to merge the offenses for sentencing purposes by considering the *Quiroz* factors and any other relevant factors that lead the military judge to conclude that the remedy of merger for sentencing is appropriate." *Id.* at 24 n.9. In determining issues of unreasonable multiplication, we apply a five-part test, which considers: (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *Id*. (citing *Quiroz*, 55 M.J. at 338). The factors are to be balanced, with no single factor dictating the result. *Id*.

Considering the record of trial and the legal arguments presented by both sides, we do not find that the military judge abused his discretion by failing to dismiss one of the specifications before findings and, rather, deciding to merge them for sentencing. We also note he did not dismiss one of these two specifications, even after the appellant was found guilty of both. We do not find this to be an error either.

The judge had before him the situation where a drunk and drugged,[1] semiconscious woman was sexually assaulted while asleep. She possessed the ability to only ineffectively communicate her non-consent to the appellant's actions before quickly drifting off again to a drunken and drugged sleep. On at least two occasions once the victim fell asleep after telling the appellant to stop what he was doing, he continued to sexually abuse her. While the first part of the *Quiroz* test was satisfied, the rest of the test does not fall in favor of the appellant. The two charges clearly cover different criminal acts. One specification addresses assault while a victim is incapacitated, and the other specification addresses a lack of consent, whether incapacitated or not. Here the appellant faced both situations. He sexually assaulted her while she was passed out, but, by doing so, he awakened her enough so that she was able to manifest her lack of consent. Despite being told to stop, he returned again to assault her once more. Thus, he assaulted her while she was incapacitated and again after hearing her lack of consent. We do not see an exaggeration of criminality here, nor was the Government

[1] Airman AL's prescription medication interacted with the alcohol to increase the effects and make her drowsier than if she had not taken the medication.

overreaching. Finally, combining the two specifications for sentencing prevented any unreasonable increase of the punitive exposure.

Sentence Appropriateness

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982) the defense asserts the appellant's sentence of reduction to the grade of Airman Basic, confinement for 36 months, and a dishonorable discharge was inappropriately severe. He also compares his sentence with other unrelated cases with different facts, offenses and sentences.

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384–85 (C.A.A.F 2005). 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. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). While our responsibility is to ensure that justice was done, it is not part of our function to exercise clemency. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).

We are required to "engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *See United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is appropriate if the cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. Closely related cases include those which pertain to "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id*. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a 'rational basis for the disparity.'" *Id*. Applying the above law and after carefully reviewing the entire record, we find no merit to the appellant's claim that his sentence was inappropriate.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66 (c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).