UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant RYAN P. EVANS
United States Air Force

ACM 38218

3 December 2013

Sentence adjudged 16 August 2012 by GCM convened at Seymour-Johnson Air Force Base, North Carolina. Military Judge: Joshua E. Kastenberg.

Approved Sentence: Dishonorable discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James and Dwight H. Sullivan, Esquire.

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

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

HARNEY, Senior Judge:

The appellant was charged with one specification of false official statement and one specification of aggravated sexual assault, in violation of Articles 107 and 120, UCMJ, 10 U.S.C. §§ 907, 920. A panel of officer and enlisted members convicted the appellant, contrary to his pleas, of both charges and specifications. The panel sentenced him to a dishonorable discharge, confinement for 1 year, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before this Court, the appellant asserts that (1) The military judge erred by excluding evidence under Mil. R. Evid. 412;[1] and (2) The evidence is factually insufficient to support his conviction for aggravated sexual assault. We find no prejudice to a substantial right of the appellant and affirm the findings and sentence.

Background

At 2100 hours on the evening of 27 January 2012, Airman First Class (A1C) GM, the victim in this case, arrived at a party in a dormitory at Seymour-Johnson Air Force Base (AFB), North Carolina (NC). While there, she consumed two beers. Another party-goer, Senior Airman (SrA) ER decided to go to a bar in downtown Goldsboro, NC, called "Heroes." A1C GM, who had only met SrA ER once before, asked if she could go along. He agreed and drove them to Heroes, arriving at 2300 hours. At Heroes, SrA ER and A1C GM joined some of SrA ER's friends. Among those friends were the appellant, Staff Sergeant (SSgt) SB, and SrA JL. The group stayed at Heroes until 0200 on 28 January 2012, at which time they went to the appellant's residence for a house party.

Upon arriving at the appellant's house, A1C GM, SSgt SB, SrA ER, and the appellant played a drinking game. At some point during the party, A1C GM and SrA ER got into a "little wrestling match" while they were both drunk. SrA ER stated that he was "taking very good care not to hurt" A1C GM. She, however, did not take the same precautions and scratched his neck and chest and ripped his shirt. The wrestling match between the two of them was recorded on video.

Not long after the wrestling match, SrA ER saw A1C GM lying in the back seat of his car, apparently passed out. The appellant and another Airman at the party, SrA AJ, pulled her out of the car; SrA AJ carried her into the house and placed her on a futon in the appellant's room. SrA ER fell asleep on a couch in the living room at 0430 hours. A few hours later, the appellant woke him up, stating "we have a problem." They went to the appellant's bedroom, where they saw A1C GM sitting on the bed looking distraught and as if she "had been crying." When asked what had happened, A1C GM told SrA ER and the appellant that she "thought she had been raped."

At trial, A1C GM testified that on the night in question, she recalled drinking "two beers, two shots of Jamison [sic], and a sip of [SrA ER's] drink" while she was at Heroes. By the time she left the bar with the group, A1C GM said she was drunk. She remembered going to the appellant's house, playing the drinking game, wrestling with SrA ER, and being "pretty intoxicated." She recalled going to SrA ER's car to get her purse, which was the last thing she remembered until she awoke to someone being "inside" her. She testified that she was on her stomach when she felt "some thrusting" and a penis inside of her. She denied that it could have been a finger, stating that it felt

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

"too large to be a finger." She estimated she was awake for about a minute, felt someone's knees beside her, and may have said something. The next thing A1C GM remembered is waking up in the appellant's bed still feeling intoxicated and aware that her pants were unbuttoned. A1C GM found SrA ER and told him "somebody had sex" with her and "something happened last night." She also asked the appellant how she got into his bed. He told her that she got into bed with him in the middle of the night because she was cold. A1C GM then called two friends, who picked her up and took her to a local hospital, where she underwent a sexual assault examination, which included a vaginal swab. Hospital staff also collected other evidence, including her underwear, and provided it to authorities.

The appellant provided a statement and a DNA sample to the Air Force Office of Special Investigations (AFOSI) on 28 January 2012.[2] Two days later, the appellant returned to AFOSI to provide additional information. After rights advisement, the appellant told them that he remembered A1C GM had put her leg over him while they were in bed together. Thinking A1C GM wanted to engage in sex, the appellant began to kiss her neck and nipple, and digitally penetrated her. Once the appellant realized A1C GM was asleep, he stopped and went back to sleep. The appellant denied putting his penis inside her vagina. He conceded that his DNA could be in A1C GM's vagina because he "spit" on his finger before digitally penetrating her.

The appellant's DNA was sent for testing to the United States Army Criminal Investigation Laboratory (USACIL). Testing confirmed the appellant's DNA profile was consistent with the *semen* DNA profiles obtained from the vaginal swabs taken from A1C GM and found in her underwear. The testing excluded SSgt SB, SrA AJ, and SrA ER as contributing to the DNA found in the underwear and on the vaginal swabs.

Multiple witnesses testified at trial that they observed A1C GM drinking alcohol on the night of 27 January 2012 and the early morning hours of 28 January 2012. They described her behavior as drunk "by the way she was acting" and because she had been "drinking all night"; stated she was "clumsy," "giggly," and "too intoxicated to walk"; observed her "walking sideways"; and as "pretty much dead weight, like she was completely passed out" while being carried into the house from SrA ER's car. A forensic toxicologist who testified for the prosecution stated that A1C GM's blood alcohol level was 0.14 grams per deciliter at 0530 and 0.12 grams per deciliter at 0630 on the morning of 28 January 2012.

[2] The Air Force Office of Special Investigations also interviewed Staff Sergeant SB, Senior Airman (SrA) AJ, and SrA ER, all of whom provided statements and DNA samples for testing.

Evidence Excluded under Mil .R. Evid. 412

Prior to trial, the appellant's trial defense counsel provided notice of their intent to offer evidence under Mil. R. Evid. 412. Specifically, the defense sought to introduce a video clip of A1C GM and SrA ER wrestling during the party at the appellant's house in which the two may have engaged in a kiss and partially exposed A1C GM's undergarments and backside. Trial defense counsel asserted the video showed A1C GM's state of mind that she intended to engage in a sexual act, and provided the basis for a mistake of fact defense. The military judge conducted a closed hearing in accordance with Mil. R. Evid. 412. After hearing argument, the military judge ruled to exclude evidence of the video clip showing A1C GM and SrA ER "wrestling" with each other. However, the military judge ruled that witnesses could testify "that there was wrestling, that [SrA ER] was scratched up, they were intensely fighting, and certainly it can be characterized as a fight or is [sic] not a fight, as play wrestling, but it cannot be characterized as sexual activity at this point." The military judge concluded that A1C GM's conduct was directed towards third parties, not the appellant. He found no evidence that A1C GM communicated a desire, either directly or indirectly to engage in sexual activity with the appellant. The military judge upheld his ruling after a request for reconsideration by the defense.

The appellant argues that the military judge erred by excluding the video clip of A1C GM and SrA ER wrestling. We disagree.

We review a military judge's decision to admit or exclude evidence under Mil R. Evid. 412 for an abuse of discretion. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011); *see also United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010); *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). We may not uphold a military judge's decision 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). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed de novo. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010).

As a general rule, evidence of a victim's past sexual behavior is inadmissible in a case involving an alleged sex offense. *See* Mil. R. Evid. 412. "Evidence offered to prove that any alleged victim engaged in other sexual behavior" is "not admissible in any proceeding involving an alleged sexual offense except as provided in [Mil. R. Evid. 412] subdivisions (b) and (c)." Mil. R. Evid. 412(a). Subdivision (b) provides three exceptions to this general rule of exclusion. The third of these exceptions, the "constitutionally required exception," permits the admission of "evidence the exclusion of which would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Mil. R. Evid. 412(c) provides the procedure to determine the

admissibility of evidence offered under the three exceptions. This procedure includes the "Mil. R. Evid. 412 balancing test," which requires that:

> If the military judge determines . . . that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

Mil. R. Evid. 412(c)(3). *See United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011); *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

Evidence may be admitted under Mil. R. Evid. 412(b)(1)(C) when the evidence is relevant, material, and its probative value outweighs the dangers of unfair prejudice. *See* Mil. R. Evid. 402; *Gaddis*, 70 M.J. at 255. Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." Mil. R. Evid. 401. The evidence must also be material, which requires looking at "'the importance of the issue for which the evidence was offered in relation to the other issues in th[e] case; the extent to which th[e] issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.'" *United States v. Banker*, 60 M.J. 216, 222 (alterations in the original) (quoting *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983)).

If evidence is material and relevant, then it must be admitted under subsection (b)(1)(c) when the accused, under the Mil. R. Evid. 412 balancing test, can show that the probative value of the evidence outweighs the dangers of unfair prejudice to the victim's privacy. *See* Mil. R. Evid. 412(c)(3); *Ellerbrock*, 70 M.J. at 319. If the military judge, after then applying the Mil. R. Evid. 403 balancing test, finds that the probative value of the evidence outweighs the danger of unfair prejudice, "it is admissible no matter how embarrassing it might be to the alleged victim." *Gaddis*, 70 M.J. at 256. Unfair dangers include concerns about "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Likewise, if a military judge determines that the evidence is not constitutionally required, the military judge must exclude the evidence under Mil .R. Evid. 412 because the evidence does not fall under an exception to the rule of exclusion. *Gaddis*, 70 M.J. at 256.

We find the military judge properly excluded the video clip of A1C GM wrestling with SrA ER because it was not constitutionally required. In his findings of fact and conclusions of law, the military judge ruled that the video clip was not relevant to show

that A1C GM intended to engage in a sexual act with the appellant and she had no interaction with him that could "reasonably be relevant to the issue of consent." The military judge further concluded that even if the video clip was relevant, the evidence was "excluded under [Mil. R. Evid.] 403 because the unfair prejudice and confusion of the issue substantially outweighs any relevance probative to the issue of consent." We agree and find no basis upon which to conclude that the military judge abused his discretion.

Even so, the appellant cites *United States v. Jensen*, 25 M.J. 284 (C.M.A. 1987) to argue that the evidence should have been admitted. In *Jensen*, our superior court held it was error to exclude evidence of sexual intercourse between the victim and the co-accused. In that case, the prosecution theory was that the victim had been raped by Specialist (SPC) Greer, immediately thereafter raped by the appellant, and finally raped by Sergeant Williams. At trial, both SPC Greer and the appellant testified that shortly before the alleged rapes, the victim danced with SPC Greer in a bar, where she grabbed his penis. Pursuant to this invitation, SPC Greer and the victim went to an alley where they engaged in consensual sexual intercourse. According to Jensen, immediately thereafter he tried to have sexual intercourse with the victim, was unable to do so, and when she refused to engage in fellatio, he departed. In ruling the evidence of the victim's prior sexual conduct with SPC Greer was admissible, the Court stated that "the evidence of prior consent was very material to disprove the prosecution theory that [the victim] had initially been raped by [SPC] Greer, then immediately thereafter by [the appellant], and finally by Williams." *Id*. at 287. The Court further ruled that the excluded evidence of consent supported the defense theory that the appellant reasonably believed the victim was willing to have intercourse with him: "If [the victim] consented to intercourse with [SPC] Greer and then immediately thereafter was lying on her back in the alley with her legs widespread when the appellant approached, there is corroboration as to his state of mind." *Id*.

We find *Jensen* distinguishable from this case. Here, the excluded evidence in the form of the video clip showed A1C GM wrestling with and possibly kissing SrA ER. Unlike the victim in *Jensen*, there is no additional evidence showing that immediately afterwards she kissed or otherwise interacted with the appellant. We find the facts in this case are too disparate from those in *Jensen* for us to find the evidence of the video clip admissible.

Legal and Factual Sufficiency

The appellant argues that the evidence is factually insufficient to support his convictions for aggravated sexual assault. He asserts that the evidence does not support the prosecution theory of penile penetration because the semen collected from A1C GM's vaginal swabs contained only 25 sperm.

We review issues of factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We have reviewed the evidence and find it factually sufficient. At trial, MC, a forensic biologist from USACIL, testified for the prosecution. MC conducted the tests on the DNA samples collected from the appellant, three male Airmen present on the night in question, and A1C GM, and compared them to vaginal swabs and swabs from her underwear. MC testified that she found a mixture of DNA on the underwear that matched the DNA belonging to A1C GM, and the appellant's semen. MC also testified there was a high concentration of female DNA present on the vaginal swabs with a tiny amount of male DNA. After separating out the female DNA, and testing only the male DNA on a microscopic slide, MC found that the semen from the vaginal swabs matched the appellant's DNA profile. She stated that she found "[p]robably less than 25 [sperm] on the entire slide." During testing of the underwear and vaginal swabs, MC excluded the DNA belonging to SSgt SB, A1C AJ, and SrA ER.

On cross-examination, MC conceded that a normal adult male ejaculates millions of sperm, and a slide of the ejaculate for testing would contain "hundreds of sperm." When asked by trial defense counsel if it was plausible in this case that she tested "pre-ejaculate and not a full ejaculation," MC answered that "pre-ejaculate doesn't necessarily contain sperm." She further explained, however, that if there was a "recent ejaculation, then pre-ejaculate may contain sperm left over in the body from that prior ejaculation." On re-direct examination, MC reiterated her professional opinion that the semen she found during DNA testing belonged to the appellant.

We find the evidence sufficient to support the appellant's conviction for aggravated sexual assault. Whether it was ejaculate or pre-ejaculate, the appellant's semen was found in A1C GM's vagina. This is consistent with her testimony that she awoke to "thrusting" and the sensation of a penis inside of her. Moreover, there is sufficient evidence to show that A1C GM was substantially incapacitated when she was sexually assaulted by the appellant. In addition to her own testimony, numerous witnesses testified that she had been drinking alcohol throughout the night, had shown signs of intoxication, and had passed out in the backseat of a car before being carried into the house and placed on a futon in the appellant's bedroom. The members also heard experts testify about A1C GM's blood alcohol level, how the alcohol interacted with the prescription valium she was taking, and the results of the DNA testing.

Considering the evidence in the light most favorable to the prosecution, and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt of aggravated sexual assault beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 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

LEAH M. CALAHAN
Deputy Clerk of the Court