UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant MICHAEL D. FLANAGAN
United States Air Force

ACM 37268

24 September 2009

Sentence adjudged 04 April 2008 by GCM convened at Hickam Air Force Base, Hawaii. Military Judge: Gregory O. Friedland.

Approved sentence: Bad-conduct discharge, confinement for 6 months, reduction to E-4, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Captain Phillip T. Korman, and Mary T. Hall, Esquire (civilian attorney).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of three specifications of indecent acts with his stepdaughter, a female under 16 years of age, in violation of Article 134, 10 U.S.C. § 934. The

convening authority approved the adjudged sentence consisting of a bad-conduct discharge, confinement for six months, reduction to E-4, and a reprimand.[*]

The appellant asserts three assignments of error before this Court: (1) the evidence is legally and factually insufficient as to the findings that the appellant committed indecent acts on EBC; (2) the sentence which included a punitive discharge is inappropriately severe considering the appellant's combat experience, awards and decorations, and the absence of any evidence of long-term trauma to EBC; and (3) the staff judge advocate (SJA) misled the convening authority as to his clemency power by advising that an uncorroborated statement that EBC had recanted her testimony was not enough to overturn the findings.

Background

At his court-martial, the appellant was found guilty of three specifications of indecent acts with his stepdaughter, EBC. At the time of the charged offenses, EBC was 10 years old and was living with the appellant, her mother, and her 18-month-old sister on Hickam Air Force Base (AFB). The appellant and EBC would often watch movies together in the family's living room while they sat close together on their sectional couch. EBC would lie on the appellant in what was described as a spooning position. EBC was tall for her age and was only about two inches shorter than the appellant.

EBC testified that a few days before she started 5th grade on 1 August 2007, she engaged in a kissing game with the appellant wherein he would have her kiss his forehead, chin, cheeks, nose, and eyes. The appellant would point to where he wanted to be kissed and expected EBC to comply. On one occasion, the appellant pulled down his pants and had EBC kiss his exposed pelvic area. On a separate occasion, which was also a few days before school started, the appellant and EBC engaged in a scratching game. EBC and the appellant were on the couch watching a movie. EBC was sitting up and the appellant was lying down with his legs across her body. He was wearing shorts and a T-shirt. The appellant told EBC to get some lotion and to scratch his legs. He then had her work her way up around his thighs, and then moved her hand to his penis. On another occasion, the appellant kissed EBC with an open mouth. He told her to kiss him and her top lip went in between the appellant's lips. EBC described the kissing as similar to how the appellant would kiss her mother.

EBC testified that she was unable to concentrate in school due to the appellant's conduct so she reported what had happened to her mother, SBF, on 6 August 2007. EBC told her mother that she saw something that little girls should never see. SBF then called her own mother and stepfather who contacted the authorities. EBC was subsequently

[*] Pursuant to Article 58b(b), UCMJ, 10 U.S.C § 58b(b), the convening authority waived the mandatory forfeitures for a period of six months or until the appellant was released from confinement, whichever was sooner.

interviewed by a civilian criminal investigator. The videotaped recording of the interview was played by the defense for the members during the trial. Although there are some differences, EBC's in-court testimony was generally consistent with what she told the investigator eight months earlier.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain his conviction of the three specifications of indecent acts with a child. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866 (c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

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." *Turner*, 25 M.J. at 325. 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).

At trial, the defense called Dr. JY, an expert in the field of forensic psychology, who testified that the interview of EBC was not conducted in accordance with established protocols for interviewing child victims, primarily because EBC was asked too many closed-ended questions when she should have been asked more open-ended questions. The defense also tried to show that EBC was being influenced by her mother because the appellant and her mother were having marital problems. The appellant and SBF had a huge fight on 5 August 2007, the day before EBC reported the appellant's actions. The defense also called SW, a neighbor who EBC spoke to on 6 August 2007. According to SW, EBC only disclosed that the appellant made her touch his thigh, not his penis. In rebuttal, the prosecution presented testimony that SW was dishonest and that there was a conflict between SBF and SW over payment due SW for taking care of SBF's pet. Finally, the appellant took the stand and testified that he did not commit the offenses. However, in rebuttal, the prosecution called three witnesses who testified that the appellant was untruthful.

Considering our review of the entire record of trial, a reasonable fact finder could have found that the appellant committed the charged offenses upon EBC. Although the defense made several attempts to impeach the victim in this case, the court members

ultimately had to decide whether or not they believed EBC's testimony. Considering that EBC's in-court testimony was generally consistent with her statement to the civilian criminal investigator eight months earlier, it was reasonable for the fact finder to find her to be a credible witness. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses in-court testimony, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we find the evidence is legally and factually sufficient to sustain the conviction.

Sentence is Inappropriately Severe

The next issue is whether the appellant's sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. 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). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The maximum possible punishment in this case was a dishonorable discharge, confinement for 21 years, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for six months, reduction to E-4, and a reprimand.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, to include his combat service and 14 years of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

Staff Judge Advocate's Recommendation

The appellant asserts that the SJA misled the convening authority as to his clemency power by advising him that an uncorroborated post-trial statement made by SW that EBC had recanted her testimony was not enough to overturn the findings. The appellant requests a new post-trial review.

In the appellant's 3 June 2008 clemency package, he requested that the convening authority disapprove the findings and sentence. He included a letter from the appellant's neighbor, SW, who stated that she saw EBC at the Hickam AFB Base Exchange (BX) after the trial and EBC told her that, "she was scared of her mom and that her mom told her to, she said that her mom said it was the only way to keep [the appellant] from taking [her baby sister] away." SW also states in her letter that EBC e-mails her when she needs someone to talk to. On 11 June 2008, the Hickam AFB legal office obtained a sworn statement from SW, wherein she states, "[EBC] told me she was sad and she missed [the appellant] and that she wished that her mommy wouldn't have gotten [the appellant] in trouble. I then ask [EBC] [sic] what she ment [sic] by that and I asked her if her mommy told her to say that [the appellant] had touched and kissed her then in [EBC] [sic] baby talk she said yes, and that she is scared of what her mommy would do to her if she told the truth." On 10 and 12 June 2008, Captain MS from the Hickam AFB legal office spoke with EBC and questioned her concerning the statement made by SW. EBC stated that she did run into SW at the BX but that no conversation took place between them. EBC also denied e-mailing SW and stated that she did not even have SW's e-mail address. When Captain MS asked SW to provide a copy of the e-mails between herself and EBC, SW stated that she recently purchased a new computer and no longer had access to the e-mails.

In his addendum to the SJA's recommendation (SJAR), dated 13 June 2008, the SJA noted that he was unable to corroborate SW's statement as to her post-trial conversation with EBC. He informed the convening authority of the actions his office took to corroborate SW's statement and the results of those efforts. The SJA concluded by stating, "[SW's] uncorroborated statement is not enough to overturn the decision of the members." On 23 June 2008, the appellant responded to the addendum to the SJAR.

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000)). Rule for Courts-Martial (R.C.M.) 1106(d)(4) provides:

> *Legal errors*. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

The appellant contends that by informing the convening authority that SW's uncorroborated statement was not enough to overturn the findings, the SJA was essentially advising the convening authority that he could not even consider SW's version of the BX conversation with EBC, and therefore, he could not take mitigating action on the findings. We disagree. In our opinion, the SJA did not give incorrect legal advice. He was simply providing his opinion, in accordance with R.C.M. 1106(d)(4), that SW's post-trial statement was not enough to overturn the guilty findings. Additionally, the appellant was afforded the opportunity and did provide a response to the addendum to the SJAR wherein he took exception to the SJA's advice concerning this issue. The convening authority was appropriately advised under R.C.M. 1107(b)(3)(A)(iii) that he was required to consider the additional matters provided by the appellant, and did, in fact, consider those matters before taking final action on his case. Accordingly, this issue is without merit.

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court