UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEFFREY W. GREENWAY JR.
United States Air Force

ACM 37008

31 May 2007

Sentence adjudged 27 October 2005 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Bruce T. Smith.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Mark R. Strickland, Major Maria A. Fried, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of one specification of disobeying a lawful regulation on divers occasions and one specification of forgery, in violation of Articles 92 and 123, UCMJ, 10 U.S.C. §§ 892, 923. He was also convicted, contrary to his pleas, of one specification of assault consummated by battery on divers occasions, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The adjudged and approved sentence consists of a bad-conduct discharge and reduction to the grade of E-1. Although this case was submitted on its merits, we find error necessitating the set aside of Charge III and its remaining Specification and a corresponding sentence reassessment.

Background

The appellant was charged with assaulting his wife on divers occasions in multiple manners.[1] However, in his instructions on the elements of the offense, the military judge

[1] Charge III, Specification 2, reads: In that AIRMAN FIRST CLASS JEFFREY WAYNE GREENWAY, JR., United States Air Force, 437th Operations Support Squadron, Charleston Air Force Base, South Carolina, did within

omitted "divers occasions" and included only one of the manners of assault, the "pushing".[2] There was also no instruction given on variance. That the members were unclear as to their responsibility was apparent when one of them asked the military judge whether they had to find the appellant guilty or not guilty of each specification in its entirety. The member then referred to the specification now at issue. The military judge merely referenced the option of making exceptions and substitutions without further explanation and told the members that, if it became an issue, they could notify him.

Discussion

The government chose to charge divers occasions within one specification. Although Rule for Courts-Martial (R.C.M.) 906(b)(5), and its Discussion, indicate that duplicitous pleadings are disfavored, our superior and sister courts have repeatedly recognized that consolidating numerous individual acts into a single specification is permissible. *See United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988); *United States v. Lovejoy*, 42 C.M.R. 210, 211-12 (C.M.A. 1970); *United States v. Holt*, 31 M.J. 758, 762 (A.C.M.R. 1990). However, each individual act remains an element of the offense if an accused is to be convicted of that act.

The military judge is required to advise the court members of each element of any offense with which an accused is charged. *See* Article 51(c), UCMJ, 10 U.S.C. § 851(c); R.C.M. 920(e)(1). As our superior court has noted, "[W]hen a judge omits entirely any instruction on an element of the charged offense, this error may not be tested for harmlessness because, thereby, the court members are prevented from considering that element at all. In a real sense, the members in such an instance are directed to find that the evidence proves that element beyond a reasonable doubt." *United States v. Cowan*, 42 M.J. 475, 478 (C.A.A.F. 1995) (citing *United States v. Mance*, 26 M.J. 244, 255-56 (C.M.A. 1988)).

In *United States v. Gilbertson*, 4 C.M.R. 57, 61 (C.M.A. 1952), our superior court determined that inadequacy of instructions on an element of the offense requires reversal. "It is not for us to determine what the court members would have found had they been properly advised on the elements." Id. (citing *United States v. Rhoden*, 2 C.M.R. 99 (C.M.A. 1952). Accordingly, the language in the specification that includes "on divers occasions" and all manners of assault except for "pushing" are stricken.

It is clear from the evidence that only one incident of "pushing" was alleged, so it is not necessary to analyze the effect of the deletion of the "divers occasions" language.

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the continental United States, on divers occasions between on or about 5 November 2003 and on or about 19 October 2004, unlawfully strike his wife, CG (name omitted), by pushing her, slapping her in the head with a checkbook, throwing a checkbook into the back of her head, holding her face down on the bed, ripping her shirt by grabbing the back of her shirt collar, and slamming her leg with the car door.

[2] The instruction was "Let me read those elements to you. That between on or about 5 November 2003 and 19 October 2004, the accused did bodily harm to [CG]. The second element is, that the accused did so by unlawfully pushing his wife. The third element is that bodily harm was done with unlawful force or violence."

However, the remaining allegation must still withstand a review for legal and factual sufficiency, especially in light of any spillover effect of the manners of assault which were not instructed as elements.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government - as the prevailing party at trial - any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of his guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We review legal and 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 gist of the evidence of "pushing" is found in the responses by the alleged victim to two questions from the trial counsel and two questions from the members:

> Q: "Tell us about the time you were pushed down the stairs."
> A: "We were coming out of the house into the garage, and I stepped out on the steps. When I did he was right behind me, and he shut the door and I fell down the steps."
> . . . .
> Q: "You got bumped and fell down the stairs?"
> A: "Right."

The members questions were:

> Q: "When you were going from your house to the garage was it contact with your husband or contact with the door that caused you to fall down the steps?"
> A: "My husband. When he shut the door, it shut behind him and moved him forward which bumped into me."
> Q: "And that caused you to fall?"
> A: "Correct."

In addition to victim testimony, the prosecution introduced a Family Advocacy report which stated "Husband admits to accidentally knocking wife down steps . . . He says that he followed her and did not know she was standing on the step outside the door when he opened it." We are not confident that the members could have found the appellant guilty of "pushing" beyond a reasonable doubt in the absence of any spillover. In any event, the specification fails for factual sufficiency. We are not convinced of the appellant's guilt of assault by pushing beyond a reasonable doubt. Accordingly, Specification 2 of Charge III is set aside. Since the members acquitted the appellant of

the only other Specification of Charge III, the finding of guilty on Charge III is likewise set aside.

Having set aside Charge III and Specification 2 of that Charge, it is necessary to reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We can make such a determination here. After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt the members would have imposed at least a bad-conduct discharge and reduction to the grade of E-1 in the absence of error. *See Doss*, 57 M.J. at 185. Accordingly, we reassess the sentence as follows: a bad-conduct discharge and reduction to E-1. Further, we find this sentence to be appropriate for the appellant and his crimes. *United States v. Peoples*, 29 M.J. 426, 427-28 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The approved findings, as modified, and the sentence, as reassessed, 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 findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator