UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant NICHOLAS R. INTRERY
United States Air Force

ACM 35554

28 April 2005

Sentence adjudged 25 February 2003 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Captain Diane M. Paskey, Captain David P. Bennett, and William E. Cassara.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant was tried at Grand Forks Air Force Base (AFB), North Dakota, by a military judge sitting as a general court-martial. Contrary to his pleas, the appellant was convicted of two specifications of committing indecent acts on divers occasions with his stepdaughter, a female under the age of 16 years, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge found the appellant not guilty of two additional specifications of committing indecent acts with his stepson and daughter, but found him guilty of the lesser included offense of assault consummated by a battery on divers

occasions, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced the appellant to a dishonorable discharge, confinement for 9 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority suspended the portion of the sentence extending to the total forfeiture of pay for six months, and approved the remainder of the adjudged sentence.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts two errors for our consideration: (1) The evidence is legally and factually insufficient to sustain the convictions for committing indecent acts upon his stepdaughter; and (2) The evidence is legally and factually insufficient to sustain the convictions for assault consummated by a battery upon his daughter and stepson. We disagree, and affirm the findings and the sentence.

Background

The appellant lived in base housing at Grand Forks AFB with his wife, two stepchildren, and his biological daughter. The appellant and his family planned to go on a family vacation to Colorado in July of 2002. However, the appellant's wife learned that she would be unable to go on the trip because of her work schedule. She suggested to the appellant that he take EKK (the appellant's 15-year-old stepdaughter) on the trip and she would keep the younger children, EJM (the appellant's 12-year-old stepson), and EMI (the appellant's 9-year-old daughter), at home with her. Originally, EKK agreed to make the trip with the appellant but changed her mind after the appellant told her that they were going to have sexual intercourse on the trip. EKK told her grandmother about this conversation with the appellant and also that the appellant sexually abused her on a daily basis. After talking to her mother, the appellant's wife learned that the appellant might have been sexually abusing the other two children as well. When the appellant's wife asked him what he was doing with EKK when she wasn't around, he replied, "If this gets out of this room my career is over." When the appellant's mother-in-law asked the appellant about the allegations later that evening, the appellant told her that this was all a "misunderstanding."

The government's case consisted of the testimony of the three victims, the appellant's wife, her brother, and his wife. EKK testified that the appellant started sexually molesting her when she was five years old. From the third grade on, he molested her on a daily basis. The abuse consisted of fondling her breasts, legs and vagina, pinching and biting her breasts and nipples, inserting his fingers and a marker into her vagina, French kissing her, and forcing her to fondle his penis. She also testified that the appellant would get into her bed, lay on top of her, and simulate sexual intercourse over her clothes.

EMI testified that the appellant, on more than one occasion, touched and pinched her chest, and poked her in the buttocks with his fingers. EJM testified that the appellant,

on more than one occasion, grabbed his genitals both over and under his clothes, and stuffed toys and pencils down his pants. He also said that on many occasions the appellant pulled his pants down in front of his family, exposing his buttocks and genitals.

The appellant's wife testified that she saw the appellant "pants" her children on many occasions. She said that the appellant would come up behind her children and pull their pants down exposing their underwear or buttocks. She also said that the appellant would "goose" the children by sticking his fingers in their buttocks. Additionally, she said her husband would give the children "titty twisters" by squeezing their nipples and twisting them. She often heard her children tell the appellant to stop or leave them alone, but she thought that the appellant was just kidding around with them. She testified that on many occasions she would wake up in the morning and find the appellant and EKK together in EKK's bed. The appellant's wife summed up her testimony by saying that she didn't think anything about the appellant being in her daughter's bed. She testified, "He was my husband. I don't think any wife is going to think her husband is going to be doing something awful to their children."

Legal and Factual Sufficiency

We may affirm only those findings of guilty that we determine are correct in law and fact and, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the 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 personally observed the witnesses, this Court is 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)). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

The appellant contests the factual and legal sufficiency of the evidence pertaining to the indecent act specifications because he contends that is was not possible for him to have committed these acts on a daily basis without detection. During the cross-examination of EKK, the trial defense counsel thoroughly explored a number of possible motivations for EKK to make false allegations against her stepfather. Additionally, she challenged EKK's credibility by getting her to restate that the inappropriate touching occurred every day over a period of several years and by pointing out that no one saw any of the bruises that EKK claimed the appellant gave her. The appellant characterizes EKK's testimony as "sensationalistic" and inconsistent with the testimony of the other witnesses. We do not agree.

While we believe that it is unlikely that the appellant committed indecent acts upon his stepdaughter every day during the charged time period, we are convinced that he committed these acts on many occasions. EKK's testimony is also corroborated by several witnesses, including the testimony of an Air Force Office of Special Investigations (AFOSI) Special Agent. During a pretext telephone call with EKK, the appellant acknowledged telling EKK they were going to have sex when they got to Colorado. He also told EKK that he did not know why he touched her between her legs or why he touched and kissed her breasts. The AFOSI agent testified that she overheard this pretext telephone conversation.

EKK's aunt and uncle testified that they resided with the family for several months and stayed in the room next to EKK. The appellant asserts that if these incidents occurred, they would have heard something. Though they heard no strange noises, they did walk in EKK's bedroom on several occasions and notice that the appellant was in EKK's bed with her, and the lights were off. Additionally, they testified that they both saw the appellant "goose" and "pants" the children. The children's uncle testified that he saw the appellant French kiss EKK, and pinch, grab, and squeeze her breasts. He testified that on one occasion the appellant came up behind EKK, grabbed her breasts, lifted them up, and said, "Where were these when we were 15?" Even though the uncle thought that the appellant's actions were inappropriate, he believed that the appellant thought his actions were funny.

The appellant also contests the factual and legal sufficiency of the assault and battery offenses, and argues that the children impliedly consented to his touching as "horseplay." Even though there is evidence to show that the appellant believed he was being funny when "goosing," "pantsing," and giving "titty twists" to the children, there is also ample evidence to show that the children did not think so. On some occasions the children would yell at the appellant, on others they would scream or cry. We are convinced that such touching was offensive and unwanted by the children, and constituted an assault consummated by a battery.

We conclude that the military judge's findings are correct in law; that is, we are convinced that when considering the evidence in the light most favorable to the prosecution, any rational factfinder could have found the appellant guilty beyond a reasonable doubt of the elements of Specifications 1 and 2 of Charge I, and Specifications 4 and 5 of Charge I, as modified through the exceptions and substitutions by the military judge. Additionally, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt of the litigated offenses. *See Turner*, 25 M.J. at 324-25.

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.

OFFICIAL

ANGELA M. BRICE
Clerk of Court