UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MATTHEW L. LEE
United States Air Force

ACM 38703

24 March 2016

Sentence adjudged 6 August 2014 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Lyndell M. Powell (arraignment) and Todd E. McDowell (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 40 days, and reduction to E-3.

Appellate Counsel for Appellant: Major Isaac C. Kennen.

Appellate Counsel for the United States: Major Jeremy D. Gehman and Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY
Appellate Military Judges

OPINION OF THE COURT

MAYBERRY, Judge:

At a general court-martial composed of a military judge sitting alone, Appellant was convicted, contrary to his pleas, of two specifications of maltreatment of a person subject to his orders and two specifications of assault consummated by a battery, in violation of Articles 93 and 128, UCMJ, 10 U.S.C. §§ 893, 928. Appellant was acquitted of several other specifications. The court sentenced Appellant to a bad-conduct discharge, confinement for 40 days, and reduction to E-3. The convening authority approved the sentence as adjudged.

On appeal, Appellant contends that the evidence regarding one specification of maltreatment is factually insufficient. For the reasons set forth below, we agree that the evidence is factually insufficient to support the conviction for one of the specifications of maltreatment.

Background

The charges in this case stem from Appellant's conduct with a number of female Airmen, who, like himself, were all members of the Security Forces Squadron at Davis-Monthan Air Force Base (AFB), Arizona. Appellant's convictions involved sexual harassment and inappropriate touching of three females, two Senior Airmen (SrA)[1] and a Staff Sergeant (SSgt). Appellant was a response force leader whose duties entailed general responsibility and supervision for a given sector of security on the base. In this position, he interacted with the other security forces members manning the gates, working the vehicle search area, or performing other law enforcement duties. The charged offenses spanned more than two years, with most of them occurring in the spring/summer of 2013. During this time Appellant was married.

Sometime between late 2011 and mid-2012, Appellant (then a SrA) was at the law enforcement (LE) desk with SSgt BL who was the desk sergeant. SSgt BL had previously counseled Appellant on making inappropriate comments. Appellant brought paperwork to the LE desk for SSgt BL's review. While SSgt BL was reading the documents, Appellant grabbed her left buttocks. SSgt BL confronted Appellant about his actions, expressed her extreme displeasure with his conduct, counseled him about his behavior, and believed the issue was resolved. SSgt BL was certain that the touching was not accidental, and it was definitely not consensual. She did not report this incident at the time because she felt she had taken care of it. Months later, after she returned from a deployment, she again counseled Appellant on being a noncomissioned officer; informed him of what Airmen in the unit thought of him; and encouraged him to step up, be a leader, and mentor within the squadron. Appellant's inappropriate touching of SSgt BL was the basis for one of the assault consummated by a battery convictions.

Security forces personnel at Davis-Monthan AFB typically wore either a flak jacket or "second chance" vest while on duty. The "second chance" vests had removable armor plates which were required, but not always worn by law enforcement personnel. The front plate was located in the center mass of the chest. Appellant routinely performed "plate checks" on personnel, by placing his hand in the area where the front plate should be, sometimes asking, "Are you wearing your plates?" In August of 2013, Appellant walked up to SrA AS and placed his right hand, open palm, on her chest and walked away. It was SrA AS's first day on flight, and she did not know Appellant. A few moments later,

[1] One of the victims, CL, was an Airman First Class at the time of the offense, a Senior Airman (SrA) when charges were preferred, and had separated from the Air Force by the time of trial. The charge sheet refers to her as SrA CL, and we will refer to her as such.

Appellant walked past her again and informed her that he "was checking if [she was] wearing [her] plates." SrA AS testified she had never been subject to this process in the past, and asked another male security forces member if this was normal. She was told that Appellant did this to males and females. Two days later, Appellant stopped at the gate shack where SrA AS was performing entry control duties with another Airman. Appellant sent the other Airman out of the gate shack and conducted job knowledge training with SrA AS. Appellant and SrA AS were sitting across from one another, with Appellant asking her a series of questions. On the last question, Appellant indicated that if she answered it correctly, he would give her a surprise. She answered the question correctly, at which point Appellant stood up, grabbed her by the vest, with his hand going inside her Airman Battle Uniform (ABU) undershirt and touching her skin, and pulled her toward him saying, "Kiss me, kiss me." SrA AS refused, stood up, and moved away from Appellant. Appellant followed her, again grabbed her by the vest, with his hand going inside her ABU undershirt onto her skin, and said, "Kiss me, kiss me, I know you want it, kiss me." SrA AS refused again and "stormed off outside." Appellant ultimately departed the gate shack. A week or so later, when riding with Appellant from another gate to the squadron building, SrA AS told Appellant that she did not appreciate his conduct and did not want it. Appellant apologized, said he was going through a divorce and she was good looking, and further told her it would not happen again. These actions were the bases for one assault consummated by a battery conviction and one maltreatment conviction.

Sometime between January and May 2013, SrA CL was on duty, posted at the Swan Gate search area on Davis-Monthan AFB. SrA CL had left her phone charger in her dorm room, and asked Appellant if he would go to her dorm and get the charger. Appellant agreed; and SrA CL provided him her key, dorm room number, and the location of the charger. The charger was plugged into a lamp on her nightstand, which was beside her bed. The end of the charger was draped inside the drawer of this nightstand. Also in the drawer was a vibrator with a blue end, which was secured in a closed black silk bag and kept in the back of the drawer. To know it was blue, SrA CL testified one would have to take the vibrator out of the closed bag. Because of the intimate, personal nature of the item, SrA CL explained she always kept it in the back of the drawer and in the closed bag. Appellant and SrA CL were not, and never had been, in a relationship, and Appellant had never been to her dorm room.

Appellant returned from retrieving the charger, gave it to SrA CL, and stated, "I saw what you had in your drawer, it's blue." SrA CL testified that she felt awkward, weird, and embarrassed. After Appellant left the search pit area, SrA CL texted him and asked "if he was serious" about seeing something in the drawer. Appellant told her he was just kidding. A few days later, Appellant approached her at the armory and again told her he was "just messing with her." This was the last time the two of them spoke. When Appellant was questioned by Air Force Office of Special Investigators, he stated that he took a wild guess that SrA CL had a vibrator and further guessed it was blue. Appellant

further told AFSOI investigators that he realized, "[He] had said too much, said the wrong thing." This was the basis for the conviction regarding one specification of maltreatment.[2]

Factual Sufficiency

Appellant alleges that his conviction for maltreatment of SrA CL, involving his comment about seeing her vibrator in the drawer, is not factually sufficient. We agree.

This court reviews issues of factual sufficiency de novo. *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] convinced of [Appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

The offense of maltreatment under Article 93, UCMJ, requires proof of two elements: (1) the victim was subject to the orders of the appellant; and (2) the appellant was cruel toward, oppressed, or maltreated the victim. *Manual for Courts-Martial, United States* (*MCM*), pt. IV, ¶ 17.b. (2012 ed.). The nature of the act constituting a maltreatment offense is defined as follows:

> The cruelty, oppression, or maltreatment, although not necessarily physical, *must be measured by an objective standard*. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and *deliberate or repeated* offensive comments or gestures of a sexual nature.

MCM, pt. IV, ¶ 17.c.(2) (emphasis added).

[2] Appellant was found not guilty of conduct prejudicial to good order and discipline by opening SrA CL's personal bag containing the blue vibrator.

In a prior case when we upheld a conviction of maltreatment based on over two years of repeated comments of a sexual nature, this court wrote: "By our ruling today, we do not hold that any single offensive comment to or action against a military subordinate will necessarily constitute a criminal offense." *United States v. Hanson*, 30 M.J. 1198, 1201 (A.F.C.M.R. 1990), *aff'd* 32 M.J. 309 (C.M.A. 1991). Today, again we find that a single comment of implied sexual nature is not necessarily sufficient to sustain a maltreatment conviction. Not all tactless behavior by a superior toward a subordinate is maltreatment. "Art. 93, UCMJ, however, is not a strict liability offense punishing all improper relationships between superior and subordinates." *United States v. Fuller*, 54 M.J. 107, 111 (C.A.A.F. 2000) (quoting *United States v. Johnson*, 45 M.J. 543, 544 (Army. Ct. Crim. App. 1997). We do not condone Appellant's action of opening up a subordinate's nightstand drawers and then commenting on the contents with the expected outcome of embarrassing her; however, this is not sufficient to sustain the conviction. Maltreatment does not require proof of actual physical or mental harm or suffering on part of the victim; however, it is necessary to objectively show under a totality of the circumstances that Appellant's actions reasonably could have caused physical or mental harm or suffering. *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002). Appellant made a single comment, "I saw what you had in your drawer, it's blue." This comment embarrassed SrA CL, but this is not sufficient to sustain the conviction. "[E]mbarrassment does not support a finding of maltreatment by sexual harassment." *Fuller*, 54 M.J. at 112. Based on an objective view of the totality of the circumstances, this single, vague comment by Appellant is not sufficient to sustain a criminal conviction for maltreatment. We set aside and dismiss the specification.

Sentence Reassessment

Having found Appellant's conviction for maltreatment of SrA CL factually insufficient, we must consider whether we can reassess the sentence or whether this case should be returned for a sentence rehearing.

This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has observed that judges of the Courts of Criminal Appeals can modify sentences "'more expeditiously, more intelligently, and more fairly' than a new court-martial." *Id*. at 15 (quoting *Jackson v. Taylor*, 353 U.S. 569, 580 (1957)). In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances with the following as illustrative factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what sentence would have been imposed at trial. *Id.* at 15–16.

In the present case, dismissing one of the maltreatment convictions reduces the maximum length of confinement from three years to two years. Appellant was sentenced by a military judge, and the remaining offenses adequately capture the gravamen of Appellant's criminal conduct. We are confident that we have the experience and familiarity with the remaining offenses to properly determine an appropriate sentence.

Considering the totality of the circumstances in this case, we are able to "determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Having so found, we reassess Appellant's sentence to a bad-conduct discharge, confinement for 35 days, and reduction to E-3.

Conclusion

The finding of guilty as to Specification 5 of Charge II is set aside and dismissed. The remaining findings are affirmed. We have reassessed the sentence to a bad-conduct discharge, confinement for 35 days and reduction to E-3. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and sentence, as reassessed, are **AFFIRMED.**

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist