UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BENJAMIN R. LOVERIDGE
United States Air Force

ACM 37872

01 August 2013

Sentence adjudged 10 December 2010 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: Scott E. Harding, Jr.

Approved Sentence: Dismissal, confinement for 3 months, and a reprimand.

Appellate Counsel for the Appellant: Major Michael S. Kerr; Major Daniel E. Schoeni; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

HARNEY, MITCHELL, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

Pursuant to his pleas, the appellant was convicted, by a general court-martial comprised of a military judge sitting alone of willful disobedience of a superior commissioned officer's order not to have contact with Staff Sergeant (SSgt) JAR, conduct unbecoming an officer for engaging in an unprofessional relationship with SSgt JAR while he was her primary care manager, and adultery with SSgt JAR, in violation of Articles 90, 133, and 134, 10 U.S.C. §§ 890, 933, 134.

Contrary to his pleas, the appellant was also convicted of one specification of negligent dereliction of duty for e-mailing sensitive medical notes to SSgt JAR's ex-husband without her permission, two specifications of making a false official statement, one specification of assault consummated by a battery for touching SSgt CH on the face and kissing her on the lips, one specification of assault consummated by a battery for touching Airman First Class (A1C) TB on her uniform collar and hair, four specifications of conduct unbecoming an officer for attempting to establish an unprofessional relationship with SSgt CH,[1] for attempting to establish an unprofessional relationship with A1C TB, for making inappropriate comments and gestures to SSgt LP, and for tickling the waist of SSgt MP, in violation of Articles 92, 107, 128 and 133, 10 U.S.C. §§ 892, 907, 928, 933.

The adjudged and approved sentence consisted of a dismissal, confinement for 3 months, and a reprimand.

On appeal, the appellant asserts two issues: (1) that the evidence is factually and legally insufficient to support the finding of guilty to the lesser included offense of negligent dereliction of duty for releasing SSgt JAR's medical records to her ex-husband without her permission, and (2) that Specification 1 of Charge VII which alleges adultery, in violation of Article 134, UCMJ, fails to state an offense because it did not include the terminal element of that offense

Background

The appellant was a married 33-year-old captain (Capt) with more than three years of service as a medical doctor stationed at the United States Air Force Academy (USAFA). After completing his funded medical training through the Uniform Services University of the Health Services, the appellant was assigned to the 10th Medical Operations Squadron at the USAFA. The appellant was well regarded, and patients praised his compassion and bed-side manner.

SSgt JAR was a medical technician at the USAFA and had been in the Air Force for 15 years. She first met the appellant in July 2009 when he was assigned as her Primary Care Manager (PCM). The appellant's medical treatment of SSgt JAR later included prescribing medication for treatment of her anxiety, panic attacks, and depression due to her recent divorce and physical separation from her children who lived with her ex-husband. Over the course of several months, he engaged in an unprofessional relationship with her, to include socializing after duty hours, a date at the zoo, sexual contact, and adultery. The appellant continued as her PCM while they were engaged in this unprofessional affair. SSgt JAR was also reassigned to the Family Practice Clinic and worked with the appellant.

[1] The appellant entered a plea of guilty to this Specification by exceptions; after a litigated case in findings, the military judge found him guilty as charged.

In early February 2010, SSgt JAR became distraught and was voluntarily admitted by the appellant for in-patient resident treatment at an off-base facility. SSgt JAR authorized the appellant to provide her contact information to her ex-husband, Capt RD, so that Capt RD could reach her if he needed to communicate with her about their children.

The appellant provided Capt RD the contact information as well as a copy of his most recent clinic note. After receiving this emailed copy of his ex-wife's medical records, Capt RD had concerns about his interactions with the appellant and asked his ex-wife about his odd behavior. SSgt JAR informed Capt RD that she and the appellant were "seeing each other." Capt RD informed the appellant's chain of command. The squadron commander ordered the appellant to not have any contact with SSgt JAR. However, the appellant chose to violate this order on at least 15 occasions. The appellant later made false official statements to an investigating officer that he only had a professional relationship with SSgt JAR because she was a medical technician who worked with him, was the non-commissioned officer in charge (NCOIC) of the Family Practice Clinic, and was his patient**.**

The appellant's misconduct was not limited to interactions with SSgt JAR. He also attempted to establish an unprofessional relationship with SSgt CH while she was his patient by kissing her on the mouth during a medical appointment, by asking her out to dinner, and inviting her over to his personal residence after the appointment. The appellant later made a false official statement to an investigating officer denying he kissed her.

The appellant also attempted to establish an unprofessional relationship with A1C TB, a medical technician. He invited her to his personal residence "if [she] wanted to be daring." He also played with her hair, and reached into her shirt on the pretext of fixing her uniform. The appellant also invited her to dinner and, through text messages, believed he was arranging to meet her for an afternoon assignation. The appellant also assaulted another medical technician he worked with by tickling her waist.

After being removed from patient care and from the Medical Group, the appellant was detailed to work at the Plans and Programs office. While there, he made inappropriate comments to a female staff sergeant by mimicking a provocative strip-tease song as she removed her outer fleece jacket. He convinced her to walk on his back to help with his "back problems." Although she was initially reluctant to walk on his back, the appellant was persistent and convinced her to do so in part by reassuring her, "Trust me; I am a doctor."

Factual and Legal Sufficiency

We review issues of factual and legal 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 the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A.1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal quotation marks omitted). 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 test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *Turner*, 25 M.J. at 324, *as quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). 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) (citations omitted).

The appellant was originally charged with willful dereliction of duty for failing "to refrain from E-mailing sensitive medical notes to the former husband of [SSgt JAR] without the permission of [SSgt JAR]." The military judge, as the finder of fact, found him not guilty of willful dereliction of duty, but guilty of the lesser included offense of negligent dereliction of duty.

When SSgt JAR told the appellant that she wanted him to notify Capt RD of her hospital admission and to give him her contact information, the appellant emailed Capt RD with an attachment of his most recent clinic notes. The clinic notes included all current prescribed medications and the appellant's summary of SSgt JAR's mental health condition that was resulting in her referral to in-patient treatment. The email included the disclaimer: "Healthcare information is personal and sensitive and must be treated accordingly."

In response to trial counsel's questions at trial, SSgt JAR testified that:

> Q: Did you ever have a particular conversation with [the appellant] concerning written medical records while you were inpatient?
>
> A: No sir. I did not.
>
> Q: Did you ever give permission to [the appellant] to release your medical records to your husband?

A: No sir. I did not.

. . . .

Q: Did you give permission to [the appellant] to release any medical information about you other than where you were currently staying?

A: No, sir.

As he did at trial, the appellant argues the evidence is insufficient to find him guilty of dereliction of duty because it reveals SSgt JAR authorized the release of her location for in-patient treatment and all information regarding her medical treatment. In the alternative, he argues that, even if she did not authorize the release, he honestly believed she had and this belief was reasonable under the circumstances. We disagree.

Having weighed the evidence in the record of trial, with allowances for not having personally observed the witnesses, including SSgt JAR, we are personally convinced of the appellant's guilt beyond a reasonable doubt to the lesser included offense of negligent dereliction of duty. Similarly, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Article 134, UCMJ, Offense of Adultery

In his second assignment of error, the appellant asserts that Specification 1 of Charge VII fails to state an offense because it fails to allege any of the three clauses of the terminal element of Article 134, UCMJ. Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). In *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011), a contested case, our superior court held that when an Article 134, UCMJ, specification fails to allege the terminal element, it fails to state an offense. Our superior court has also held that, in a guilty plea case, where the military judge describes Clauses 1 and 2 of Article 134, UCMJ, during the plea inquiry, and where "the record 'conspicuously reflect[s] that the accused 'clearly understood the nature of the prohibited conduct' as a violation of clause 1[or] clause 2" of Article 134, UCMJ, there is no prejudice to a substantial right. *United States v. Ballan*, 71 M.J. 28, 35 (C.A.A.F. 2012) (alterations in original) (internal quotation marks omitted) (citing *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008)). *See also United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012).

Here, the appellant did not challenge the sufficiency of the specification at trial and pled guilty to the charge and specification of adultery. The military judge conducted a thorough plea inquiry and described and defined both Clause 1 and 2 of the terminal element of the Article 134, UCMJ, Charge. He asked the appellant whether he believed his conduct was prejudicial to good order and discipline, service discrediting, or both.

The appellant acknowledged understanding of all the elements, and explained to the military judge why he believed his conduct was both prejudicial to good order and discipline and service discrediting. Thus, "while the failure to allege the terminal elements in the specification[s] was error, under the facts of this case the error was insufficient to show prejudice to a substantial right." *Ballan*, 71 M.J. at 36; *Nealy*, 71 M.J. at 77–78; *United States v. Watson*, 71 M.J. 54, 58–59 (C.A.A.F. 2012).

Post-Trial Processing Delays

Though not raised as an issue on appeal, we note the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers the service courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Having considered the totality of the circumstances and the entire record, we find the appellate delay in this case was harmless beyond a reasonable doubt. *Moreno*, 63 M.J. at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Furthermore, given the totality of the circumstances and the entire record, we conclude that sentence relief is not justified. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Articles 59(a) and 66(c), UCMJ.

[2] The Staff Judge Advocate Recommendation (SJAR) did not address the military judge's clemency recommendation to waive forfeitures. However, this clemency recommendation was earlier provided to the Convening Authority as part of the SJA's response to the trial defense counsel's request for deferment and waiver of forfeitures. The Convening Authority waived but did not defer the forfeitures. This issue was not raised by either the trial defense counsel or the appellate defense counsel. Furthermore, since the SJA earlier had informed the Convening Authority of the clemency recommendation and the Convening Authority's action matched that recommendation, there is no prejudice to the appellant. *See United States v. Capers*, 62 M.J. 268 (C.A.A.F. 2005).

Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court