UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HAXEL D. MARCENARO
United States Air Force

ACM 35852

21 November 2005

Sentence adjudged 7 November 2003 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Kevin P. Koehler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Captain Diane M. Paskey, and Jonathan S. Schwartz, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

The appellant was convicted, contrary to his pleas, of one specification of rape of a person who had not attained the age of 16 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920. A military judge sentenced him to a dishonorable discharge, confinement for 6 years, and reduction to E-1. The convening authority approved the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts four errors for our consideration: (1) Whether the appellant's court-

martial conviction should be set aside because the court-martial was not properly convened by a general court-martial convening authority; (2) Whether the appellant received ineffective assistance of counsel; (3) Whether the evidence is legally and factually sufficient to sustain the appellant's conviction for rape; and (4) Whether the appellant's sentence is inappropriately severe. Finding no error, we affirm.

Background

The appellant's wife asked AW, a 15-year-old female, to baby-sit her children so that she and the appellant could attend a New Years Eve party. AW agreed and came to the appellant's house to watch the children. AW brought her pajamas because the appellant's wife asked her to spend the night. Sometime during the evening, after a number of the appellant's friends had gathered at their house, the group decided to stay in rather than going out. The friends remained at the appellant's house, drinking and playing cards, until well after midnight. After the guests left, AW put her pajamas on and fell asleep on the couch in the living room. When AW woke up, she found the appellant on top of her, with his pants around his knees. She then realized that her pajama bottoms were off. AW told the appellant to get off of her. AW quickly found her pajama bottoms, put them back on, and ran out of the house without putting on her shoes. An Air Force Security Forces officer noticed AW around 0330 hours as she approached an installation gate. AW had no shoes on and was crying hysterically. AW told the Security Forces officer that she was raped.

Jurisdiction

The appellant asserts that the convening authority, 9th Air Force Provisional Commander (9 AF(P)/CC), was without jurisdiction to try the appellant and to take action on this case because he was not authorized to convene general courts-martial. Specifically, the appellant argues that the Secretary of the Air Force (Secretary) withdrew general court-martial convening authority from the 9 AF(P)/CC in his 8 October 2002 special order when he omitted 9 AF(P) from the list of general court-martial convening authorities. We disagree. The Secretary never intended to withdraw authority from 9 AF(P)/CC by omission in the 2002 special order, which was explained in his 26 June 2003 memorandum.

Therefore, we conclude that the Secretary of the Air Force did not divest the Commander of 9th Air Force Provisional of authority to convene general courts-martial. *See United States v. Hardy*, 60 M.J. 620, 621 (A.F. Ct. Crim. App. 2004), *pet. denied*, 60 M.J. 459 (C.A.A.F. 2005).

Ineffective Assistance of Counsel

The appellant gives four reasons why he believes he received ineffective assistance of counsel. First, he argues that his trial defense counsel failed to adequately conduct discovery of the deoxyribonucleic acid (DNA) evidence or to adequately cross-examine the government's DNA expert. Second, his trial defense counsel failed to file a pretrial motion to suppress the statements he made to investigators. Third, his trial defense counsel failed to advise him that testifying would result in the introduction of his prior statements. Finally, he believes that his trial defense counsel failed to adequately investigate the victim. As a result, he asks this Court to set aside the findings and the sentence and dismiss the Charge and Specification.

Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). To prevail on a claim of ineffective assistance of counsel, appellant must show (1) that counsel's performance was deficient, and (2) that counsel's deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong of *Strickland* requires the appellant to show "counsel's representation fell below an objective standard of reasonableness," according to the prevailing standards of the profession. *Id.* at 688. There is a "strong presumption" that counsel was competent. *Id.* at 689. The prejudice prong requires that appellant show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. The *Strickland* standard applies to representation at courts-martial, as well as representation in post-trial proceedings. *Wiley*, 47 M.J. at 159.

The appellant's trial defense counsel submitted an affidavit in response to the appellant's assertion that he received ineffective assistance. The appellant's trial defense counsel denied each claim of ineffective assistance and explained the tactical reasons for his trial decisions. He also insists that he fully advised the appellant of the risks and consequences of testifying. In fact, the trial defense counsel states that he advised the appellant not to testify.

While the appellant has chosen to second-guess his trial defense counsel's tactical decisions, he has not shown that without these decisions the result of the proceeding would have been different. "We will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Therefore, we conclude that the appellant has not met his burden of showing that his trial defense counsel provided ineffective assistance.

Legal and factual sufficiency

The appellant asserts that the evidence presented at trial was legally and factually insufficient to sustain his conviction. In particular, the appellant claims that the evidence was insufficient to show: (1) that penetration occurred, (2) lack of consent of the victim or use of force by appellant, and (3) that the appellant did not make a reasonable mistake as to the victim's consent or the identity of the victim. The test for legal sufficiency is whether, in considering the evidence in the light most favorable to the government, a reasonable factfinder could have found the accused guilty of all the essential elements of the crime beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after reviewing the evidence in the record and making allowances for not having personally observed the witnesses, we believe that the accused is guilty beyond reasonable doubt. *Id.* at 325.

First, the appellant contends that because AW testified that she never saw his penis, was not certain what caused the burning sensation in her vaginal area, and that her hymen was still intact, no penetration occurred. We disagree. "Any penetration, however slight, is sufficient to complete the offense." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45c(1)(a) (2002 ed.). Although AW testified that while she did not see the appellant's penis, she felt the appellant's penis pull out of her vagina.

Additionally, the prosecution presented two separate sources of physical evidence indicating that penetration occurred. After the incident, a forensic nurse examiner examined AW. She videotaped the examination with a device called a colposcope, and pulled two magnified photographs off of this tape. During her testimony, the nurse identified several spots on the photographs which she believed to be tears or injuries to AW's vagina. Although she could not rule out digital penetration as a cause of the tears or injuries, she said that the tears were more than likely the result of penile penetration. She also said that the position of AW's hymen was consistent with penetration injury.

Dr. Susan Horowitz, an expert in forensic child and adult abuse, gave much the same testimony based on the same photographs. Dr. Horowitz said that she was fairly certain that the colposcope photographs showed tears or injuries, and opined that these injuries were most likely caused by penile rather than digital penetration. Moreover, Mr. Phillip Mills, a forensic biologist testified that a test swab taken from appellant's pubic area had DNA that matched the DNA pattern of AW. He believed that based on the amount of cells found in the swab, the "most probable" explanation was that the appellant had sexual intercourse with AW. Taking this evidence in the light most favorable to the government, a reasonable factfinder could have concluded beyond reasonable doubt that appellant had sexual intercourse with AW. We are also convinced beyond a reasonable doubt that the appellant had sexual intercourse with AW.

Next, the appellant contends that AW consented to the intercourse because she did not scream or leave the room. He also claims that AW's conduct was permissive because she lifted her buttocks up so the appellant could take off her pajama bottoms and her panties. As a result, he claims that AW was capable of resisting but chose to remain silent. We find no merit to the appellant's contention that the evidence was insufficient to find use of force or lack of consent. The appellant testified that he looked at AW's face shortly after he removed her pajama bottoms and her eyes were closed. AW testified that she was asleep. "When a victim is incapable of consenting because she is asleep, no greater force is required than that necessary to achieve penetration." *United States v. Briggs*, 46 M.J. 699, 701 (A.F. Ct. Crim. App. 1996), *aff'd*, 48 M.J. 143 (C.A.A.F. 1998); *MCM*, Part IV, ¶ 45c(1)(b). The appellant's testimony, coupled with AW's testimony he was on top of her when she woke up and she felt pain in her vagina when the appellant pulled out of her, is sufficient evidence to show both force and lack of consent.

The appellant also raises a mistake of fact defense. He asserts two separate theories as to why he believes he has a viable mistake of fact defense to his rape conviction. First, he avers that he had an honest and reasonable belief that AW consented to having sexual intercourse with him. Secondly, he claims that he thought that the person on the couch was his wife.

Because rape is a general intent offense, an honest and reasonable mistake of fact as to the victim's lack of consent is an affirmative defense. *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003), *cert. denied*, 539 U.S. 928 (2003); *see also* Rule for Courts-Martial (R.C.M.) 916 (j)(1). The defense theory at trial and the nature of the evidence presented are factors we may consider in determining whether the appellant's defense of mistake of fact is available. *Hibbard*, 58 M.J. at 73. *See also United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995). At first glance, the appellant's assertion that no penetration occurred is inconsistent with his defense of mistake of fact. In essence, he claims that he did not have sexual intercourse with AW, but if he did, it was a mistake. However, because we are convinced that sexual intercourse occurred, we considered whether the appellant's defense of mistake of fact was viable. We find that there is ample evidence showing that the defense of mistake of fact was available; so the prosecution had the burden of proving beyond reasonable doubt that the defense did not exist. R.C.M. 916(b).

In his first theory, the appellant asserts that AW consented to having sexual intercourse with him. Specifically, the appellant testified that AW helped him take off her pajama bottoms by lifting her buttocks up and kicking them off, which is evidence that she may have consented. Because AW did not tell him no, scream, or leave the room, her consent can be inferred.

In his second theory, the appellant avers that he honestly believed the person on the couch was his wife. He claims his belief was reasonable because both appellant and

AW testified that the only light came from a TV screen. In addition, their testimony regarding AW's position on the couch was substantially the same: her face was toward the back of the couch and was hidden from view. Both AW and the appellant's wife had a similar build -- AW said she weighed about 154 pounds at the time, and appellant said that his wife was also of medium build. There were a few discrepancies in appearance between the women, i.e., that AW was about three inches taller and had lighter color hair. However, in the dark, with the woman lying down, these discrepancies were not visible. Finally, AW testified that appellant had his eyes closed when she woke up and found him on top of her, which is consistent with appellant's testimony that he had his eyes closed through much of the incident.

After comparing the appellant's version of the incident to the other evidence in the case, we are not convinced that he has a viable mistake of fact defense. Specifically, the appellant testified that the last time he saw his wife she was fully clothed. He knew AW was on the couch because he sat down next to her and watched television. The appellant then remembers falling asleep on the couch and then waking up and removing AW's pajamas. He then looks at AW's face and realizes that her eyes are closed. At some point, he realized that AW was not a willing participant. Based on the totality of the circumstances, we find that the appellant's assertion that either AW consented to sexual intercourse, or that if sexual intercourse occurred, he believed that the person on the couch was his wife is not credible. Therefore, the prosecution has presented sufficient evidence to convince this Court beyond a reasonable doubt that the defense of mistake of fact does not exist in this case.

Sentence Appropriateness

The appellant also claims his sentence is inappropriately severe. Specifically, he asks this Court to reduce the amount of confinement and set aside the dishonorable discharge. This Court may only affirm those findings and sentences we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ. In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the accused receives the punishment he deserves. Performing this function does not authorize this Court to grant clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant on the basis of the nature and seriousness of the offenses and the character of appellant. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

In the instant case, the appellant was convicted of raping his 15-year-old babysitter. Although, the appellant had an excellent military record, the offense had an extremely detrimental impact on the victim. We find that, based on the serious nature of the appellant's offense and his record of service, his sentence is not inappropriately severe.

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

ANGELA M. BRICE
Clerk of Court