UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman HERBERT J. MCDOWELL
United States Air Force

ACM 37354

12 May 2010

Sentence adjudged 15 August 2008 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Gregory O. Friedland.

Approved sentence: Bad-conduct discharge, confinement for 173 days, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Jennifer J. Raab, and Captain Reggie D. Yager.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of aggravated assault with a dangerous weapon, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The members acquitted him of one charge and specification of wrongfully discharging a firearm, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge consolidated the

two aggravated assault specifications for sentencing purposes.[1] The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 173 days, and reduction to the grade of E-1. The appellant raises five issues on appeal: (1) the factual and legal sufficiency of the evidence, (2) the effectiveness of his counsel, (3) the impact of security personnel on his right to a fair trial, (4) the exclusion of retention evidence in sentencing, and (5) the appropriateness of a bad-conduct discharge. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Factual and Legal Sufficiency

The appellant attacks the factual and legal sufficiency of his aggravated assault conviction under the charged offer theory on the basis that the evidence fails to show the victim feared immediate bodily harm. The appellant correctly notes that aggravated assault by offer requires that the victim reasonably apprehend immediate bodily harm and that this apprehension of harm must occur contemporaneous with the offer of violence rather than upon later reflection. *Manual for Courts-Martial, United States*, Part IV, ¶ 54.c.(1)(b)(ii) (2008 ed.). The appellant also renews his self-defense claim in arguing the sufficiency of the evidence. For the reasons set forth below, we find the evidence factually and legally sufficient to support his conviction of the charged aggravated assaults.

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "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.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). "[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). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). 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 [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-

[1] Charge I alleged two specifications of aggravated assault with a dangerous weapon by (1) firing the weapon, a .40 caliber pistol, toward the victim and then (2) pressing the weapon against the victim's head. The military judge denied a defense motion to dismiss either of the specifications based on multiplicity or unreasonable multiplication of charges. We agree with that finding. *See generally* Rule for Courts-Martial 907(b)(3)(B) (stating a specification may be dismissed, upon timely defense motion, if the specification is multiplicious with another specification); *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001) (distinguishing between the distinct concepts of multiplicity and unreasonable multiplication of charges).

examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

This aggravated assault began as an argument over rent and a dog. The victim sublet part of a house owned by the appellant, and they each had a dog. When the victim asked the appellant if he would reduce the rent because he would be caring for the appellant's dog while he was deployed, the appellant replied that the victim was already getting a rent reduction. The victim did not respond, but the appellant assumed that the victim thought he was lying. When the appellant began yelling at him, the victim left the kitchen for the living room where he stood in a defensive stance.

The appellant followed the victim into the living room, screaming at him, demanding to know if he wanted to fight, but the victim did not reply. The appellant went to his bedroom and returned with a pistol. As he entered the living room, the appellant fired a round at the floor near the victim's feet and then approached the victim and placed the gun to his head. The appellant said, "Tap out," a mixed martial arts phrase understood by the victim to be asking if he surrendered. Again, the victim said nothing, explaining at trial that he did not know what to do and thought it "best to keep quiet and let him show his pride or whatever it was that made him do what he did." The appellant returned to his room, slammed the door, and the victim heard shots fired. The victim left the house.

The appellant notes that following the event the victim made statements to the effect that he would have disarmed the appellant if he really thought the appellant would shoot him, but the victim testified that such statements were false bravado: "These things have got me so emotional, I may say things . . . where I try to act big and stuff." Indeed, the victim's actions in the reality of the moment show, as he testified, that he experienced a "certain shock factor." A witness to the attack confirms that the victim appeared to be "in a state of shock." The victim states that his only thought when the appellant left the room was, "I got to get out of here," and he had been trying to forget the appellant putting a gun to his head "ever since [it] happened."

The appellant relies on *United States v. Tran*, NMCCA 200600880 (N.M. Ct. Crim. App. 28 Mar 2007) (unpub. op.), to support his argument that the victim did not apprehend harm, but his reliance is misplaced. In *Tran*, the alleged victim of an aggravated assault by offer testified that at the time of the event he did not feel threatened but later, in retrospect, realized that he should have felt threatened. *Tran*, unpub. op. at 3. Here, the evidence shows the opposite: the victim felt threatened at the time and only later made statements that attempted to minimize his fear. Whatever false bravado the victim may have exhibited in his statements after the event, we find that the victim in this case reasonably apprehended immediate bodily harm when the appellant pulled his .40 caliber handgun on this unarmed victim, fired at him, and then held the gun to his head.

The appellant also attacks the factual and legal sufficiency of his aggravated assault conviction by renewing his claim of self-defense raised at trial.[2] The appellant attempts to conjure his claim of self-defense out of his awareness that the victim and his friend were martial arts enthusiasts and that the victim's friend may have had a weapon in his car located outside the home. This claim is meritless.

In response to the appellant's screaming at him in the kitchen, the victim left for the living room where he stood in a "ready" stance with his fists at his side. The victim weighs about 145 pounds, and the appellant weighs 240. The appellant's knowledge of the victim's martial arts prowess included knowing that when the victim had previously demonstrated some of his moves on the appellant, the appellant broke free of his hold.

When the appellant spoke to a responding civilian police officer after the incident, the appellant omitted any reference to fearing the victim or fearing the victim's friend. In fact, the appellant told the officer that "he got mad and went back to his room, and he grabbed his pistol and went back to the living room and shot it next to [the victim's] feet." Under the facts of this case, self-defense clearly does not apply. *See* Rule for Courts-Martial (R.C.M.) 916(e)(1); *United States v. Straub*, 30 C.M.R. 156, 160 (C.M.A. 1961) (noting that "[t]he theory of self-defense is protection and not aggression" and "the force to repel should approximate the violence threatened").

Effectiveness of Counsel

The appellant asserts that he was denied his Sixth Amendment[3] right to effective assistance of counsel by the actions of his counsel that essentially deprived him of his right to testify.[4] The appellant acknowledges that before trial he signed a memorandum in which he documented his decision not to testify based on his counsels' advice that other witnesses could better convey his theory of self-defense. He states in a post-trial declaration that since he was "unfamiliar with the process" he thought this decision was final. At trial, his counsel made a tactical decision not to call those other witnesses. The appellant states in his post-trial declaration that he does not "remember" his counsel discussing this change of strategy with him and does not "believe" he was told that he could still testify.

The trial defense counsel submitted responsive declarations pursuant to court order. Consistent with the appellant's declaration, the counsel state that the appellant elected not to testify based on their advice and that he documented his decision in a signed memorandum. Among the reasons given by the counsel for advising the appellant not to testify were the memory lapses exhibited by the appellant during practice cross-examination on critical details of his self-defense claim. The appellant states that it was

[2] The self-defense argument is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] U.S. CONST. amend. VI.
[4] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

only his impression that the decision not to testify was final, and his counsel confirm that neither their advice nor the memorandum stated that this was the case. The declarations diverge when discussing the subsequent events at trial: contrary to the appellant's declaration, the trial defense counsel state that they reengaged with the appellant during the trial concerning his decision not to testify, particularly in light of their decision not to call certain witnesses. They state that these conversations occurred during recesses and/or at the counsel table before the defense rested and that the appellant reaffirmed his decision not to testify.

"A determination regarding the effectiveness of counsel is a mixed question of law and fact." *United States v. Baker*, 65 M.J. 691, 696 (Army Ct. Crim. App. 2007), *aff'd*, 66 M.J. 468 (C.A.A.F. 2008). "We review findings of fact under a clearly erroneous standard, but the question of ineffective assistance of counsel flowing from those facts is a question of law we review de novo." *Id.* In assessing such claims, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984), *quoted in United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

To prevail, the appellant bears the burden of showing both: (1) that his counsel's performance fell measurably below an objective standard of reasonableness and (2) that any perceived deficiency operated to the prejudice of the appellant. *Strickland*, 466 U.S. at 687-88; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). With regard to the first prong, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. With regard to the second prong, an appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"When challenging the performance of counsel, [an appellant] bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance. *Tippit*, 65 M.J. at 76 (citing *Polk*, 32 M.J. at 153). As a general matter, reviewing courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977). Concerning the claimed abridgement of the right to testify at issue here, we view this under a *Strickland* analysis rather than a separate constitutional error. *United States v. Dewrell*, 52 M.J. 601, 612 (A.F. Ct. Crim. App. 1999), *aff'd*, 55 M.J. 131 (C.A.A.F. 2001).

The right to testify is a fundamental, personal right and the decision on whether to testify lies with an accused after consultation with his counsel. *Id.* An accused's right to testify on his own behalf is considered common knowledge and, given the personal nature of the right, the military judge is not required to insure that an accused has been advised of the right to testify. *Id.* at 613-14 (citing *United States v. Belizaire*, 24 M.J. 183

(C.M.A. 1987)). "[N]ot testifying in one's own behalf is deemed a knowing waiver;" therefore, "to garner even an evidentiary hearing, an appellant must demonstrate that, by coercion or otherwise, his or her counsel affirmatively prevented him or her from testifying." *Id*. at 614.

To resolve the appellant's claim, we must first determine whether an evidentiary hearing is necessary. Our superior court has affirmed that a "barebones assertion" by an appellant that his lawyer prevented him from testifying is not enough to give such claims "sufficient credibility to warrant a further investment of judicial resources in determining the truth of the claim. . . ." *United States v. Dewrell*, 55 M.J. 131, 135 (C.A.A.F. 2001 (quoting *Dewrell*, 52 M.J. at 614). Some substantiation is necessary, "such as an affidavit from the lawyer who allegedly forbade his client to testify." *Id*. (quoting *Dewrell*, 52 M.J. at 614). Generally, evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Applying these standards to the issue at hand, we find that any material conflict in the respective declarations regarding this issue may be resolved by reference to the record and appellate filings without the need for an evidentiary hearing.

As in *Dewrell*, the appellant here clearly acknowledges that he was advised concerning his right to testify and elected not to do so. Although he now claims that he thought this decision was final, no one told him that it was. He does not remember discussions during trial with his counsel about strategy and testifying, but his counsel do. They state that they reengaged with the appellant concerning his right to testify before resting their case on the third day of trial, and the record includes a parenthetical stating "[t]he Defense conferred" before publishing exhibits and resting.

The appellant said nothing about wanting to take the stand during a lengthy Article 39(a), UCMJ, 10 U.S.C. § 839(a), session on instructions after the defense rested nor did he mention being deprived of doing so in his unsworn statement during sentence. Even his clemency letter mentions nothing about being kept off the stand by his lawyers and, in fact, confirms the trial defense counsels' stated concern that the appellant's selective memory would cause problems on cross-examination.[5] As our superior court said in *Dewrell*, an "[a]ppellant's failure to speak up at or after trial belies his assertion that his desire to testify was improperly cut off by his counsel." *Dewrell*, 55 M.J. at 135.

The declarations of the appellant's trial defense counsel show a sound basis for their trial strategy. First, as previously stated, the counsel advised the appellant not to testify because pretrial interviews revealed significant gaps in the appellant's version of

[5] In his clemency petition the appellant states: "I have absolutely no memory of what happened after I fired one round into the floor, and I was therefore unable to plead guilty to the second specification of the Article 128[, UCMJ, 10 U.S.C. § 928,] charge."

events that could be significantly exploited on cross-examination. Second, the counsel elected not to present the appellant's version through an expert psychologist because the expert would opine that the appellant fired the weapon out of anger rather than fear. Third, the counsel did not elect to call other witnesses because each would have damaged the defense theory of self-defense rather than supported it.

The appellant has failed to meet the first prong of *Strickland*. His counsel presented the best case for self-defense without exposing serious flaws in that theory to government cross-examination and rebuttal. Further, the strategy of offering character evidence through selective written statements and live testimony in sentencing effectively limited government efforts to impeach this positive evidence. The strategic decisions of the counsel were both objectively reasonable and, though not the proper measure of performance, also successful in securing a relatively light term of confinement for this appellant who shot at and put a gun to the head of an unarmed man. We find the performance of the appellant's trial defense counsel far above that which would be questioned under *Strickland*. To the extent that the appellant's declaration also questions "the defense tactics at trial, he has failed to demonstrate either a conflict of interest or prejudice." *Dewrell*, 52 M.J. at 616.

Presence of Security Officers at Sentencing

The appellant argues that the presence of security personnel during the sentencing phase of his court-martial deprived him of his fundamental right to a fair trial. The sentencing phase began on the fourth day of trial. Four uniformed and armed security forces members with metal detector wands were stationed outside the courtroom at two entry points. In making a motion for a mistrial based on the presence of these personnel, the trial defense counsel asserted that the courtroom had degenerated into "some fascist state where we put goons out there to intimidate with wands" and that this would send some unspoken message to the members that would "seep into their very soul."

Not every security measure is inherently prejudicial, and a trial judge's authorization to use security measures is accorded broad discretion. *United States v. Miller*, 53 M.J. 504, 506 (A.F. Ct. Crim. App.), *aff'd*, 54 M.J. 334 (C.A.A.F. 2000). When security measures are not inherently prejudicial, an appellant must show actual prejudice to prevail on a claim that the security measures deprived him of a fair trial. *Id.* at 506-07. Here, the presence of security personnel outside the courtroom with metal detecting wands was not inherently prejudicial. *See id*. at 507 (finding that even the use of *in-court* security officers and metal detectors is not inherently prejudicial).

Contrary to the appellant's assertion that the likelihood of prejudice is high and requires a post-trial hearing to assess, the record sufficiently shows otherwise. The security measures occurred only after the members had found the appellant guilty of aggravated assault with a firearm and had heard evidence that one of the witnesses also

owned a weapon. No security personnel were present in the courtroom to indicate in any way that the measures were directed at the appellant. The measures taken were, as government appellate counsel states, "prudent, generally-aimed precautions." Indeed, contrary to the trial defense counsel's fear and speculation about the effect of these rather modest security measures, not much of a message adverse to the appellant appears to have "seep[ed] into [the members'] very souls" as a result of the presence of security guards: the maximum authorized confinement was eight years, the trial counsel argued for two years, and the members adjudged 173 days. We find the security measures permitted by the military judge in this case were neither inherently nor actually prejudicial.

Exclusion of Defense Sentencing Evidence

The appellant asserts that the military judge erred by excluding certain statements during sentencing that pertained to the appellant's future service. The evidence excluded falls into three categories. First, the military judge did not permit the appellant's former supervisor, Technical Sergeant (TSgt) DL, to answer on defense cross-examination whether the appellant should be retained in the Air Force but did allow him to state that the appellant had rehabilitative potential to be a productive member of the military or civilian society. Second, the military judge excluded language in five defense character letters from civilian family members and acquaintances that generally recommended retention on active duty. Third, the military judge excluded language in a character letter by a senior airman recommending that the appellant not be discharged. Conversely, the military judge admitted other statements endorsing retention by: (1) a master sergeant who was the appellant's former supervisor, (2) a staff sergeant who worked with the appellant, and (3) a senior airman who is a friend of the appellant.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* (alteration in original) (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The law is clear that the defense may present retention evidence in the sentencing phase of a court-martial pursuant to R.C.M. 1001(c). *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005). When such evidence is erroneously excluded reviewing courts must determine whether the error substantially influenced the adjudged sentence and, thereby, substantially prejudiced the appellant. *Id*. at 410 (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)).

We agree with the appellant that exclusion of the testimony of TSgt DL concerning retention and the exclusion of references to retention in letters from the appellant's family and friends constituted error, but we find that the error did not

materially impact the sentence.[6] First, the military judge permitted TSgt DL to offer his positive opinion on the appellant's rehabilitative potential, describing the appellant as having a strong work ethic and integrity and as someone he could rely on. Second, the retention recommendations of a master sergeant, a staff sergeant, and a senior airman that were admitted likely carried much more weight than the excluded retention recommendations of civilian family members and friends. As our superior court stated in *Griggs*, evidence from fellow service members, both superiors and peers, could have a significant impact on sentence determination. *Id.* Third, even in the letters from civilian friends and family members, the military judge allowed language that urged the court to permit the appellant an opportunity to "continue development in the Air Force."[7] Thus, unlike *Griggs* where the excluded statements of fellow service members resulted in prejudice, the military judge in this case permitted retention evidence from both military superiors and peers. Balancing the qualitative nature of the admitted and excluded statements and viewing that balance in the context of the entire record, we find that the erroneous exclusion of this defense retention evidence did not prejudice the substantial rights of the appellant.

Sentence Appropriateness

The appellant asserts that a bad-conduct discharge is inappropriately severe.[8] This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

In support of his argument against approval of a bad-conduct discharge, the appellant cites his good military character and duty performance and again raises self-

[6] We find that the military judge properly excluded a senior airman's recommendation that the appellant not be discharged since such a statement crossed the line into an impermissible recommendation on the appropriateness of a punitive discharge. *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005) (finding that a recommendation on the appropriateness of a punitive discharge impermissibly invades the province of the court members in determining an appropriate sentence).

[7] Though not raised at trial, retention recommendations of civilian family members and friends may lack a proper foundation since, as our superior court stated in *Griggs*, the scope of defense sentencing evidence is not "boundless." *Id.* at 410.

[8] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

defense. We find the bad-conduct discharge entirely appropriate for this appellant who escalated a minor verbal dispute over rent and dog-sitting into an armed conflict by firing a .40 caliber handgun at an unarmed man and then putting the muzzle to his head. Having given individualized consideration to this particular appellant, the nature of the offenses, and all other matters in the record of trial, we hold that the approved 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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court