

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class SHAWN M. MORRIS
United States Air Force**

ACM 37252

24 June 2009

Sentence adjudged 22 May 2008 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Jennifer A. Whittier (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Imelda Paredes, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

In accordance with his pleas, a military judge sitting alone convicted the appellant of one specification of aggravated sexual contact with a minor under the age of 12 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920. Contrary to his pleas, the appellant was found guilty of one specification of indecent acts with a child, in violation of Article

134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for four years, and reduction to E-1.¹

The sole issue on appeal is whether the evidence is factually and legally sufficient to support the finding of guilty to the specification of indecent acts with a child.² Finding no error, we affirm.

Background

On the afternoon of 1 December 2007, the appellant was at his on-base residence with his 8-year-old stepdaughter, AMF. His wife, AMF's mother, was at a neighbor's house. Their two-year-old daughter, LM, was upstairs taking a nap. The appellant and AMF were sitting on a sleeper sofa in the living room while the appellant played a video game. The appellant was wearing a sleeveless shirt and boxer shorts. The appellant stopped playing his game and started to cuddle with AMF.

The appellant had his arm around AMF and his hand on her stomach. At some point, the appellant rubbed AMF's vagina with his hand, pressing his middle two fingers against her vagina over her clothing. A few minutes later, the appellant touched AMF's buttocks and squeezed. He then touched her crotch area and continued to rub her vagina. At this point, the appellant's penis became erect and he started to press his erect penis against her buttocks. The appellant then touched AMF's breast over her clothing, squeezing multiple times. Next, the appellant guided her hand towards him and her hand touched his penis. AMF moved her hand away and got off the sofa to get a glass of water.

AMF returned to the sofa and the appellant decided it was too cramped so they pulled the bed out from under the sofa. After lying down on the bed, the appellant started to rub his hand against her vagina, again applying pressure with his fingers through her clothing. At this point, the appellant's erect penis had come through his boxer shorts, and he pressed his penis against her buttocks. His penis then went between her legs, and he applied pressure against her with his crotch.

The appellant heard LM come down the stairs so he moved away from AMF, and LM jumped on the bed with them. Eventually, AMF took LM back upstairs to watch a movie. When she returned, the appellant continued to rub her vagina over her clothing with his fingers. He then asked AMF, "You don't want the real thing, do you?" AMF replied "no." The appellant discussed what had just happened with AMF and lectured her that it was wrong to have sex with him.

¹ Consistent with the recommendation of the military judge, the convening authority deferred the reduction in grade and mandatory forfeitures until he took action and waived the mandatory forfeitures for a period of six months from the date of action.

² This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Afterwards, the appellant went upstairs and called his wife, TM, and told her something had happened that they needed to talk about when she came home. When TM returned home, she spoke with both the appellant and AMF. The appellant's version of what happened was much different than AMF's. After speaking with AMF, TM became upset and sent AMF to her friend's home. AMF then told the friend, Staff Sergeant (SSgt) TA, what had happened and SSgt TA called the police.

At trial, the appellant pled guilty to the sexual contact he had with AMF on 1 December 2007. However, he pled not guilty to an alleged incident that occurred with AMF sometime between April and June 2007.

To prove the Specification of Charge II, the government called Special Agent (SA) MG, Air Force Office of Special Investigations. SA MG testified that he conducted two interviews of the appellant, the first on 1 December 2007 and the second on 4 December 2007. During the 4 December 2007 interview, the appellant admitted to an earlier incident that occurred with AMF approximately six months prior to the 1 December 2007 incident. The appellant stated that he and AMF were playing Monopoly in the living room and at some point they became tired so they decided to take a nap on a mattress that was in the living room. According to the appellant, he woke-up with AMF touching his hand. He claimed that she guided his hand to her crotch area and began rubbing his hand on her crotch area for about 30 seconds to one minute.³ The appellant also indicated that his penis was erect.

The government also played the video recording of AMF's Article 32, UCMJ, 10 U.S.C. § 832, testimony.⁴ At the time, AMF was 8 years old and in the third grade. In addition to the incident that occurred on 1 December 2007, AMF also testified about a previous incident that occurred when she was in the second grade. She and the appellant were on a mattress on the living room floor underneath a blanket. Her mother was on the computer but was facing the opposite direction. AMF was lying on her side and the appellant was lying on his side right behind her. The appellant touched what she called her wu-wu (vagina) and started rubbing her crotch area. AMF also testified that the appellant touched what she called her booby (breast).

Finally, the government called TM. She confirmed that in the spring of 2007, when she was two to four months pregnant,⁵ there was a time when the appellant and AMF fell asleep together on a mattress in the living room of their home. TM was on the computer facing the wall in the corner of the room. They were supposed to play Monopoly but for some reason ended up not playing. TM also confirmed that the appellant and AMF were underneath a blanket while they were on the mattress together.

³ Concerning the 1 December 2007 incident, the appellant also told Special Agent MG that AMF was the aggressor and initiated the sexual contact.

⁴ The Article 32, UCMJ, 10 U.S.C. § 832, hearing was held on 4 March 2008.

⁵ TM gave birth to twins on 13 December 2007.

TM further testified that when she is on the computer, she does not hear anything at all. After hearing all of the evidence, the military judge found the appellant guilty of Charge II and its Specification.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction for committing an indecent act upon AMF. 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, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.” *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

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

To obtain a conviction under Article 134, UCMJ, for indecent acts with a child, the prosecution must prove:

- (a) That the accused committed a certain act upon or with the body of a certain person;
- (b) That the person was under 16 years of age and not the spouse of the accused;
- (c) That the act of the accused was indecent;
- (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
- (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 87.b.(1) (2005 ed.).

The appellant asserts that the evidence is legally and factually insufficient because AMF was unable to say with any certainty when this alleged incident occurred; the appellant’s testimony to SA MG concerning this alleged incident is not contained in his

written statements; TM only had a vague recollection of the possible time of the alleged incident and testified that nothing seemed out of the ordinary; there is no evidence of an erect penis or that the act was done to gratify the lust or sexual desires of the appellant; and the appellant's reaction of 1 December 2007 is consistent with his plea to engaging in sexual contact with a child on only one occasion.

We have carefully reviewed the evidence of record in this case. SA MG testified that the appellant admitted to an earlier incident that occurred approximately six months prior to 1 December 2007. The appellant told SA MG that he and AMF were playing Monopoly in the living room and they fell asleep on a mattress together. When he awoke, he claimed that AMF was touching his hand and guided it to her crotch area and his hand was on her vagina for approximately 30 seconds to one minute. Contrary to what the appellant now alleges, he told SA MG that his penis was erect. AMF's testimony corroborated the appellant's statement to SA MG. She testified that the earlier incident occurred while she was in the second grade. She and the appellant were on a mattress on the living room floor underneath a blanket. Her mother was on the computer but was facing the opposite direction. The appellant was lying on his side behind her and touched her vagina and started rubbing her crotch area. Finally, TM confirmed that in the spring of 2007 there was a time when the appellant and AMF fell asleep together on a mattress in the living room of their home.

Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant committed an indecent act upon AMF during the charged timeframe. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced the appellant is guilty beyond a reasonable doubt.

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



Christina E. Parsons
CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court