UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RICHARD L. NAST
United States Air Force

ACM S31687

28 June 2010

Sentence adjudged 10 April 2009 by SPCM convened at Maxwell Air Force Base, Alabama. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Captain Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of obstructing justice, one specification of wrongful sexual contact, and one specification of indecent exposure, in violation of Articles 134 and 120, UCMJ, 10 U.S.C. §§ 934, 920. The adjudged and approved

sentence consists of a bad-conduct discharge, eight months of confinement, and reduction to the grade of E-1.[1]

On appeal, the appellant asks this Court to set aside his obstructing justice conviction and reassess the sentence and to set aside his Article 120, UCMJ, convictions and reassess the sentence or grant other appropriate relief. As the basis for his request, he opines that: (1) the evidence is legally and factually insufficient to support his findings of guilt on the obstructing justice specification; (2) the military judge erred by allowing the prosecution to admit the appellant's prior statements as evidence of uncharged misconduct;[2] and (3) the record of trial is incomplete because it does not include the pages from Airman First Class (A1C) CR's mental health and medical records that the military judge reviewed *in camera*. Finding no prejudicial error, we affirm the findings and the sentence.

Background

In February 2008, the appellant's unit discovered adult pornography and sexually suggestive photographs in a folder it had assigned to the appellant on its computer network. On 12 February 2008, a security forces investigator interviewed the appellant and after a proper rights advisement and waiver of rights, the appellant confessed to saving the images on his government-issued thumb drive, inadvertently copying the images to his folder on his unit's computer network, and removing the images from his unit's computer network after he became aware that his supervisor and others had discovered the images.

An investigation also revealed that in October 2007, A1C CR, a fellow airman, fell asleep while babysitting for the appellant and awoke to the appellant touching her vagina with his penis. At trial, the appellant, citing impeachment purposes, moved to compel the government to disclose A1C CR's mental health and medical records. The government opposed the motion and the military judge, after reviewing the records *in camera*, denied the appellant's motion. Despite the requirements of Mil. R. Evid. 506(i)(4)(D) and Rule for Courts-Martial (R.C.M.) 1103(b)(3)(B), the records that the military judge reviewed *in camera* are not attached to the record of trial.[3]

The appellant also moved to prevent the government from introducing evidence of uncharged misconduct, namely that the appellant allegedly told Senior Airman (SrA) HA,

[1] The convening authority waived mandatory forfeitures for six months for the benefit of the appellant's dependents.
[2] The appellant's second assignment of error is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] *See also United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F. 1999). On 21 April 2010, this Court, in recognition of its obligation to conduct a meaningful appellate review, directed the government to provide this Court with sealed copies of the records that the military judge reviewed *in camera* in making his ruling on the appellant's motion to compel.

another female airman who babysat for him, to call him "papi" and that he "bet Latina women are great in bed." During the motion hearing, SrA HA testified that the appellant told her: (1) to call him "papi;"[4] (2) that he "really like[s] Latina or black women;" and (3) that he "should have married a Latina woman." On cross-examination, the trial defense counsel elicited testimony from SrA HA that the appellant had made similar comments to other women and that the appellant has a reputation of making such comments. After hearing argument from counsel, the military judge found that the alleged comments were relevant and indicative of a plan or intent on the part of the appellant to ask young female airmen to babysit for him in order to make sexual advances toward them at his residence. However, the military judge commented that the link between the evidence and the trial counsel's proferred purpose was tenuous, and he would not have allowed the introduction of the evidence if the trier-of-fact were members.

Sufficiency of the Obstructing Justice Conviction

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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

In resolving questions of legal sufficiency, this Court is "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). We have considered the evidence produced at trial in a light most favorable to the government and find that a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the obstructing justice specification. The following evidence is legally sufficient to support the appellant's conviction: (1) the appellant's confession that he: (a) saved the images on his government-issued thumb drive; (b) inadvertently copied the images to his folder on his unit's computer network; and (c) deleted the images from his unit's computer network after he became aware that his supervisor and others had discovered the images, and (2) SrA CB's testimony that: (a) he found the images in the appellant's folder on the unit's computer network; (b) he advised the appellant that he had seen the images; (c) the appellant later asked him if the images were still in his folder on the unit's computer

[4] According to Senior Airman (SrA) HA, in the Hispanic culture the term "papi" is a sexually suggestive term for "daddy."

network; and (d) in re-examining the appellant's folder he noticed that the images had been deleted.

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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the appellant is guilty of the obstructing justice offense.

Admissibility of Uncharged Misconduct

We review a military judge's decision on whether to admit or exclude evidence of uncharged misconduct under an abuse of discretion standard. *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000) (citations omitted), *overruled on other grounds by United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003). "[Military Rule of Evidence] 404(b), like its federal rule counterpart, is one of inclusion. . . . The nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense." *Id.* (internal citations omitted).

Uncharged misconduct may be admitted for "purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Mil. R. Evid. 404(b). The admissibility of uncharged misconduct is tested using a three-prong analysis:

1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?

2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?

3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice?"

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (alterations in original) (internal citations omitted).

SrA HA's testimony reasonably supports a finding that the appellant made the alleged comments. Moreover, the military judge found that the appellant's alleged comments were relevant and indicative of a plan or intent on the part of the appellant to

ask young female airmen to babysit for him in order to make sexual advances toward them at his residence. The findings of fact are not clearly erroneous, and we adopt them as our own. Put simply, the first and second prongs of the *Reynolds* test were met. The third prong of the *Reynolds* test was also met. On this point, we note that while the military judge did not cite Mil. R. Evid. 403 in his ruling, his comments that he would not have admitted the evidence if the trier-of-fact were members and that as the trier-of-fact he could properly use the evidence for its intended purpose, evinces a Mil. R. Evid. 403 balancing test. In the final analysis, the military judge did not abuse his discretion in admitting evidence of the comments that the appellant allegedly made to SrA HA.

Incomplete Record of Trial

Whether a record of trial is incomplete is an issue we review de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). "Records of trial that are not substantially verbatim or are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of 6 months." *Id.* at 111 (citing R.C.M. 1103(b)(2)(B)). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [g]overnment must rebut. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* (internal citations omitted).

The appellant asserts that the record of trial is incomplete because it does not include those pages from A1C CR's mental health and medical records that the military judge reviewed *in camera*.[5] We disagree. A complete record of trial includes the transcript (in this case a verbatim transcript); the charge sheet; the convening order and any amending orders; any request for trial by judge alone or for enlisted members; the original dated, signed action by the convening authority; any exhibits received into evidence; and any appellate exhibits. R.C.M. 1103(b)(2)(B) and (D). It does not include matters attached to the record, such as exhibits which were marked for and referred to on the record but not received in evidence. *See* R.C.M. 1103(b)(2)(D)(3); *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997) (finding that an Article 32, UCMJ, 10 U.S.C. § 832, report of investigation and staff judge advocate's pretrial advice, two documents highlighted as matters attached to the record under R.C.M. 1103(b)(3), are not part of the complete record but are matters required to be attached to the record); *United States v. Mayville*, 32 M.J. 838, 841 (N.M.C.M.R. 1991) (noting that the term "complete record" is defined in R.C.M. 1103(b)(2)(D) and it does not include the matters attached to the record as required under R.C.M. 1103(b)(3)). *But cf. United States v. Norris*, 33 M.J. 635, 637 (C.G.C.M.R. 1991) (holding that matters attached to the record are "integral segments of the 'complete record' required by Article 54, UCMJ[, 10 U.S.C. § 854]").

[5] In the styling of this issue the appellant also asserts that the record of trial is incomplete because it does not include pages from Ms. CS's mental health and medical records. However, the appellant does not substantially discuss this issue in his brief. Moreover, the military judge dismissed the specifications pertaining to Ms. CS. Thus, any issue concerning her records are irrelevant on appeal and will not be further discussed in this opinion.

While the military judge may have reviewed and referred to A1C CR's mental health and medical records on the record in making his ruling, A1C CR's records were not received into evidence and were not marked. As such, they would have been matters attached to the record; therefore, the documents were not part of the record of trial and their omission does not give rise to a challenge of incompleteness. In short, the record of trial is complete.

On an ancillary note, this Court directed the government to provide the Court with sealed copies of the records not because they were required to make the record complete but because without them we were unable to conduct a meaningful appellate review—namely, to determine whether the denial of these records violated the appellant's constitutional right to confront A1C CR. Having reviewed the records, which we now order sealed, we find them to be of little, if any, impeachment value and hold that their denial did not violate the appellant's right to confrontation or otherwise deprive him of a fair trial.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[6] 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

[6] The court-martial order fails to reflect that the military judge dismissed two Article 134, UCMJ, 10 U.S.C. § 934, specifications after arraignment. Preparation of a corrected court-martial order, properly reflecting the arraignment and dismissal of the two Article 134, UCMJ, specifications is hereby directed. *See* Rule for Courts-Martial 1114(c)(1); Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.8.2.2 (21 December 2007).