**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class JESUS PANETO, JR.**
**United States Air Force**

**ACM 37342**

**24 September 2009**

Sentence adjudged 15 August 2008 by GCM convened at Lackland Air Force Base, Texas. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Tiffany M. Wagner, Major David P. Bennett, and Captain Reggie D. Yager.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, Captain Jamie L. Mendelson, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT



JACKSON, Senior Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of one specification of willful dereliction of duty, one specification of conspiracy to commit indecent acts with another, and two specifications of committing an indecent act with another, in violation of Articles 92, 81, and 134 UCMJ, 10 U.S.C. §§ 892, 881, 934. The adjudged and approved sentence consists of a bad-conduct discharge, six months of confinement, total forfeiture of pay and allowances, and reduction to the grade of E-1.

On appeal, the appellant asks this Court to set aside his findings and sentence or, in the alternative, order a sentence rehearing. As the basis for his request, he asserts: (1) the military judge erred by instructing the members that Airman Basic (AB) MS, the appellant's co-actor, was unavailable when a member asked the trial court why AB MS did not testify; (2) the evidence is legally and factually insufficient to support his finding of guilt on Specification 2 of Charge IV; and (3) the military judge abused his discretion by denying the defense request for an expert consultant in the field of forensic psychology. Finding the evidence legally and factually insufficient to support the appellant's finding of guilt on Specification 2 of Charge IV, we: (1) set aside the finding of guilt on Specification 2 of Charge IV; (2) affirm the findings of guilt on the remaining charges and specifications; and (3) reassess the sentence.

*Background*

On 17 June 2007, the appellant accompanied two fellow airmen, Ms. SW[*] and AB MS, to an on-base billeting room. While there, the three consumed alcoholic beverages, some of which the appellant provided. During the evening, Ms. SW "passed out" and when she later awoke on the floor, she was nude, cold, and disoriented. She got dressed and asked the appellant and AB MS to drive her to her dormitory room. Upon returning to his room, the appellant bragged to his roommates that he and AB MS "got with" a female and stuck a bottle in her rectum. The appellant's roommates later realized the female from the billeting room was Ms. SW. They told Ms. SW about their conversation with the appellant, and she reported the incident to the Air Force Office of Special Investigations (AFOSI).

AFOSI agents summoned the appellant to their office for an interview. The agents gave a proper rights advisement, and the appellant waived his rights. During his interview, the appellant denied having sexual intercourse with Ms. SW; however, he admitted he put on a condom. At trial, the government called Ms. SW and several other witnesses to testify. AB MS did not testify. The absence of AB MS from the proceedings did not go unnoticed by the members, as one member asked the military judge why they were not hearing AB MS's testimony. After discussing the issue with counsel, the military judge advised the members that AB MS was unavailable.

*Discussion*

*Erroneous Findings Instruction*

"Military judges have 'substantial discretionary power in deciding on the instructions to give.'" *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)

[*] Ms. SW was an enlisted member in the United States Air Force at the time of the alleged incidents; however, she separated from the United States Air Force before the appellant's court-martial.

(quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)). "We review the judge's decision to give or not give a specific instruction, as well as the substance of any instructions given, 'to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence. The question of whether a jury was properly instructed [is] a question of law, and thus, review is *de novo*.'" *Id*. (alterations in original) (quoting *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)).

If there is a constitutional error, we may not affirm the case unless the error was harmless beyond a reasonable doubt. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001) (citing *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991)). The Court reviews de novo whether a constitutional error was harmless beyond a reasonable doubt. *Id.* A constitutional error was harmless if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *McDonald*, 57 M.J. at 20 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "Stated differently, the test is: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" *Id*. (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Here, it is unclear whether the member was seeking an explanation as to why AB MS did not testify or whether the member was making an unartful request for AB MS to testify. Assuming the former, we find the military judge did not err in advising the members that AB MS did not testify because he was unavailable. AB MS was pending court-martial charges at the time of the appellant's court-martial and had not been granted immunity. Based on these facts, it is reasonable to infer, as the military judge obviously did, that AB MS would have invoked his right against self-incrimination if he were called to testify. Accordingly, he was unavailable to testify at trial and the military judge did not err in so instructing the members.

Assuming the member was requesting the military judge call AB MS to testify, we likewise find the military judge did not err. "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846. However, this right to obtain additional evidence is not absolute. While members may request additional witnesses or evidence, their request is subject to an interlocutory ruling by the military judge. Rule for Courts-Martial 801(c); *United States v. Campbell*, 37 M.J. 1049, 1051 (N.M.C.M.R. 1993) (citing *United States v. Lents*, 32 M.J. 636, 638 (A.C.M.R. 1991)).

We review a military judge's ruling on a request for a witness for abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). We will not set aside a military judge's denial of a witness request "unless [we have] a definite and firm conviction that the [trial court] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id*. (alterations in

original) (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)). In exercising discretion over requests for production of additional witnesses, the military judge must consider, inter alia, "the likelihood that the testimony sought might be subject to a claim of privilege." *United States v. Lampani*, 14 M.J. 22, 26 (C.M.A. 1982).

If AB MS had testified at the appellant's court-martial, presumably he would have been questioned about the 17 June 2007 incidents. For that reason, there clearly is a strong likelihood that the testimony sought would have been subject to a claim of privilege under Article 31, UCMJ, 10 U.S.C. § 831. In making his ruling, the military judge considered the fact that AB MS was pending court-martial charges and had not been granted immunity to testify. Therefore, it was not an abuse of discretion for the military judge to find AB MS was unavailable. Nor did he abuse his discretion by not calling AB MS as a witness at trial.

Lastly, any error on the part of the military judge deriving from an erroneous instruction or from failing to call AB MS to testify was harmless beyond a reasonable doubt. For the aforementioned reasons, if the military judge had called AB MS to testify, he would likely have invoked his right against self-incrimination. Moreover, even if he did not invoke his right against self-incrimination, we can only speculate as to what he would have testified. To be clear, even if the military judge had erred by advising the members that AB MS was unavailable or by failing to call AB MS to testify, it was of no consequence and did not affect the verdict rendered.

*Legal and Factual Sufficiency*

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)). In 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).

In Specification 2 of Charge IV, the appellant was charged with committing an indecent act by placing a condom on his penis in the presence of Ms. SW and AB MS. We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could not have found all of the essential elements of this specification. On this point, while there was sufficient evidence that the

appellant placed a condom on his penis on the night in question, the government presented no evidence that he did so in the presence of Ms. SW and AB MS.

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). We have carefully considered the evidence and are not convinced beyond a reasonable doubt that the appellant is guilty of this specification. Accordingly, we set aside the finding of guilt on this specification.

*Military Judge's Denial of the Appellant's Motion for an Expert Consultant*

"A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citing *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001)). A military judge abuses his discretion when his findings of fact are clearly erroneous or his conclusions of law, reviewed de novo, are incorrect. *See id.* at 143-44 (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). "An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *Id.* at 143 (citing *Gunkle*, 55 M.J. at 31).

To establish necessity, an appellant must show more than a "mere possibility of assistance from a requested expert," he must show "a reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Id. (*citing *Gunkle*, 55 M.J. at 31).

Courts apply a three-part test to determine whether expert assistance is necessary. *Id.* (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996)). The defense must demonstrate: (1) why the expert consultant is needed; (2) what the expert consultant would accomplish for the defense; and (3) why the defense counsel is unable to gather and present the evidence that the expert consultant would be able to develop. *Id.* (citing *Gonzalez*, 39 M.J. at 461; *Ndanyi*, 45 M.J. at 319). Here, we agree with the military judge that trial defense counsel failed to make the requisite showing of necessity. In short, the military judge did not abuse his discretion in denying the appellant's motion for an expert consultant in the field of forensic psychology.

*Sentence*

Since we set aside the finding of guilt on Specification 2 of Charge IV, we must determine if we can reassess the sentence. Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that "the sentence would have been at least of a certain magnitude, we must order a sentence rehearing." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000) (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

After setting aside Specification 2 of Charge IV, the maximum sentence remains the same in all but one aspect—the confinement. The maximum confinement changes from 15 years and six months to 10 years and six months. This is not a dramatic change in the penalty landscape. Applying the criteria set forth in *United States v. Sales*, we are able to determine what sentence would have been imposed based on the affirmed charges and specifications. We are convinced beyond a reasonable doubt that the panel would have awarded a sentence of at least a bad-conduct discharge, six months of confinement, total forfeiture of pay and allowances, and a reduction to the grade of E-1. Therefore, we reassess the sentence accordingly. Furthermore, we find the sentence, as reassessed, to be appropriate. *See Sales*, 22 M.J. at 308.

*Conclusion*

The findings, as modified, and sentence, as reassessed, 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 findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL


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