UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant DONALD R. SWIGER, JR.
United States Air Force

ACM 38231

22 November 2013

Sentence adjudged 31 August 2012 by GCM convened at Eielson Air Force Base, Alaska. Military Judge: W. Shane Cohen (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 13 years and 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of two specifications of aggravated sexual assault; one specification of abusive sexual contact; three specifications of assault; and two specifications of communicating a threat, in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 928, 934. The adjudged sentence consisted of a dishonorable discharge, confinement for 13 years and 9 months, and reduction to E-1. With the exception of the automatic forfeitures, the convening authority approved the sentence as adjudged.

On appeal, the appellant argues: (1) The facts supporting Specification 2 of Charge I were insufficient to support the finding of guilty (sexual assault of AK); (2) The facts supporting Specifications 1 and 3 of Charge I, Charge II and all of its specifications, and Specification 2 of Charge III were insufficient to support the finding of guilty (all charges relating to RG); (3) His sentence, which included confinement for 13 years and 9 months and a dishonorable discharge, was inappropriately severe; (4) The military judge abused his discretion when he denied the defense request for a consultant in computer forensics; and (5) Trial counsel's findings argument unconstitutionally shifted the burden of proof to the appellant.[1]

Background

The appellant and RG first married in 1994. They subsequently divorced but remarried soon after the appellant enlisted in the Air Force. They divorced a second time in 2011. Their marriage produced one child, a daughter. Even through the time of the appellant's court-martial, the issue of the custody of their daughter was being litigated in the civilian courts.

In February 2007, the appellant and RG moved to Germany when the appellant was assigned to Ramstein Air Base (AB). In June 2008, while RG was putting away laundry, the appellant attempted to engage her in an argument. When RG tried to walk past the appellant, he blocked her way. RG raised her hand to push the appellant aside. As she did so, the appellant hit her in the face with his hand, knocking her to the ground. As a result of being hit in the face, RG had a bloodied and swelled lip as well as bruises on her face.

In 2009, RG met and fell in love with another man. Her relationship with that individual, whom she eventually married, proved to be a constant source of friction between the appellant and RG.

In January 2010, shortly before PCSing from Ramstein AB, the appellant and RG had another physical altercation. The appellant, who had been drinking whiskey, confronted RG in their bedroom around 2300 hours. As RG lay in bed trying to sleep, the appellant kept rolling her, telling her to wake up and talk to him. RG told the appellant she was tired and did not want to talk. As the appellant continued to try to get RG to talk, she repeatedly tried to get up out of bed and leave the room. Each time she did so, the appellant pushed her back on the bed. When RG did not respond to the appellant's requests to talk, he slapped her across the head. Over the course of the next eight hours, the appellant hit RG approximately 10 times in the head and punched her in the arm. In the midst of hitting RG over the course of the night, the appellant also

[1] Issues 2 through 5 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982).

penetrated her vagina with his fingers without her consent. As a result of the assaults, RG's face was red and her left arm was bruised.

Soon after this incident, the appellant PCSed to Eielson Air Force Base (AFB), Alaska, accompanied by RG and their daughter. On 5 February 2010, while driving from Eielson AFB to Fairbanks, the appellant began to argue with RG. The appellant yelled at RG and called her names. The appellant then said "I've got you now and your pussy" and put his hand on RG's crotch in an aggressive manner and shook it. RG got out of the car and the appellant drove off. As RG was walking along the road, a woman stopped and gave her a ride back to base.

RG returned to base and tried to get into their billeting room. The appellant would not let her back into the room. As a result of the ensuing commotion, the police were called. The appellant claimed that RG had choked him and she was arrested. The charges were eventually dropped and she returned to billeting with the appellant and their daughter.

In March 2010, the appellant and RG moved into base housing. One day that month, another argument occurred. The appellant repeatedly told RG she needed to immediately book an airline ticket to return to Germany. As RG was on the computer looking at flights, the appellant hovered over her and prodded her to find a flight more quickly. While RG was sitting in a chair at the computer, the appellant pushed her, toppling the chair and sending her to the ground. When she tried to get up, the appellant knocked her to the ground again and started slapping her on the sides of her head.

Their daughter came home from school shortly thereafter. When she went outside to play, and while RG was sitting at the table, the appellant approached her again. The appellant leaned close to RG's ear and said, "[I]f you don't get out of here, I'm going to kill you. You need to listen to me. Do you understand me[?]"

Later, after RG had made a telephone call, the appellant questioned her about it. RG asked the appellant where their daughter was. The appellant would not answer. RG tried to walk past the appellant to check on their daughter. When she did so, the appellant pushed her against the wall and then to the floor. As she lay on the floor, the appellant got on top of her and started to choke her with his hands. RG screamed and the appellant stopped.

In early November 2010, the appellant met CV when he took a government vehicle to her place of employment for repairs. Over time, a romantic relationship began to develop between the two. CV, while in the process of getting a divorce, was married at the time. The appellant was also still married. When CV's estranged husband found out about the appellant, he contacted the appellant's first sergeant and the appellant was given an order to have no contact with CV. Despite the order, the appellant and CV

continued to communicate. The appellant convinced CV that RG and CV's husband were involved sexually. In an attempt to find out more information, CV befriended RG.

Notwithstanding her friendship with RG, CV's romantic relationship with the appellant continued to grow. However, in April or May 2011, CV saw a notice in the local newspaper that the appellant had applied for a marriage license with another woman.

When CV confronted the appellant about the notice, he claimed someone else, possibly RG, must have done it. When CV pointed out this was not possible, the appellant admitted he had applied for the license but claimed it was just to help with his custody battle for his daughter by making it look like he could provide a more stable home life.

Despite the appellant's assurances that he was not getting married to the woman named in the marriage license notice, CV noticed that the appellant was wearing a wedding ring when she went to see him unannounced. After a short discussion, CV returned home but the two spoke later that evening on the telephone. CV continued to press the appellant about the marriage issue. The appellant started yelling at CV and told her he was going to burn down her house with her in it.

The appellant met AK in November 2010 at the Eielson AFB Base Exchange, where AK worked. Thereafter, the two dated for a short time before AK broke off the relationship. After AK broke up with the appellant, the appellant would often show up unexpectedly at places where she was.

On 28 February 2011, the appellant showed up at AK's residence with his daughter. AK invited the appellant's daughter in to play with her children but, when the appellant tried to enter, she asked him to step into the hallway. When AK asked the appellant why he was there, he shoved her against the wall, placed one hand over her mouth and shoved his other hand down her pants, penetrating her vagina with his finger. As the appellant slid his hand from her mouth to her throat, he told AK that he loved her and that she was going to be his wife. While the appellant was assaulting AK, he pinned her against the wall, pressed his body against hers and exerted such pressure that AK's feet were lifted off of the ground. When AK looked to the door of her residence out of fear one of the children would see what was happening, the appellant released her. She told the appellant he had to leave and went into the apartment to tell the appellant's daughter her dad was waiting outside for her.

At trial, the appellant filed a motion to compel the appointment of an expert consultant in the field of computer forensics. The defense proffered that an expert would be able to discover deleted e-mails by and between various alleged victims. As a result of the motion, additional discovery was provided to the defense. Despite the production

of additional evidence, the defense maintained it needed an expert consultant to determine if there were additional e-mail communications that were not disclosed. The military judge attempted to get trial defense counsel to articulate what exactly they expected to find with the assistance of an expert consultant. No less than eight times, the military judge asked trial defense counsel what it was they were expecting to find. Trial defense counsel was never able to articulate what specifically they were seeking and essentially maintained they would not know what they would find without looking for it. After making detailed findings of fact and conclusions of law, the military judge denied the motion stating that "the defense has failed to demonstrate that additional relevant evidence or even exculpatory evidence is likely to . . . be found in additional review . . . ."

Testifying in his own defense, the appellant denied committing any of the charged offenses. In relation to the specification alleging he sexually assaulted AK, the appellant asserted it was physically impossible for him to have committed the assault in the way described by AK. The appellant testified that he had a medical profile restricting him to a five pound lifting limit and that he "certainly [couldn't] pick someone up off the ground with either arm . . . ."

On cross-examination, the Government attacked the credibility of the appellant, questioning him about numerous prior falsehoods. In his Air Force enlistment paperwork, the appellant answered that he had never been detained by law enforcement when in fact he had. In that same enlistment paperwork, he indicated he had not previously been punished under Article 15, UCMJ, 10 U.S.C. § 815, when he had received such punishment while previously enlisted in the Army. Additionally, in seeking a hardship discharge from the Army, the appellant submitted a letter purportedly from his then-wife describing her mental health issues. The description of the mental health issues of appellant's then-wife was actually the lyrics from an Ozzy Osbourne song.

In closing argument, trial counsel argued the evidence presented by the Government and also attacked the credibility of the testimony provided by the appellant. Trial counsel summarized the case as a question of who was lying and who was telling the truth and observed that the question of who was telling the truth would ultimately decide the case. Trial defense counsel did not object to the arguments of trial counsel. In fact, trial defense counsel's closing argument echoed a similar theme albeit arguing that the appellant, and not the alleged victims, was more worthy of belief.

Factual Sufficiency: AK

The appellant argues that the evidence is factually insufficient to support a finding that he sexually assaulted AK in the manner described in Specification 2 of Charge I. Under 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 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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The essence of the appellant's argument is that, because of his shoulder injury and the weight of AK, it was impossible for him to have lifted AK off of the ground during the sexual assault as she described in her testimony. The appellant's argument mischaracterizes and overstates the actual evidence presented at trial. AK did not testify that the appellant lifted her off of the ground with his finger. To the contrary, she testified that the appellant applied immense pressure on her vaginal area while at the same time pushing her against the wall with the weight of his body. AK specifically stated that it was the appellant's body weight against hers that caused her to be lifted from the ground. We do not find it to be impossible for the appellant, despite his shoulder injury, to be able to lift AK off of the ground using his hand in combination with the pressure he was exerting with his body against her as she was pinned against the wall. Having weighed the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt the appellant is guilty of this offense.

Although not specifically raised by the appellant, we will also address the legal sufficiency of the evidence. "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 (C.M.A. 1987)). In resolving legal sufficiency questions, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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) (citing *Turner*, 25 M.J. at 325)).

We must consider whether, viewing the evidence in the light most favorable to the Government, a reasonable factfinder could have found the essential elements beyond a reasonable doubt. *Turner*, 25 M.J. at 325. AK's description of the incident was credible.

During the defense cross-examination of her, she even demonstrated with the use of a dummy how the assault was committed. The military judge observed the demonstration and obviously found it to be credible. We conclude that a reasonable factfinder could have found all of the elements of sexual assault beyond a reasonable doubt despite the appellant's injury.

Factual Sufficiency: RG

The appellant also attacks the factual sufficiency of the evidence on all charges and specifications involving his ex-wife, RG. The appellant asserts that RG falsely accused him of threatening, assaulting, and sexually assaulting her in order to gain sole custody of their daughter in their child custody litigation.

A child custody dispute could provide someone with the motive to make false allegations against another. Trial defense counsel thoroughly argued this motive to fabricate in his closing argument. Like the factfinder, we reject this argument based on the facts presented at trial. RG described each of the crimes in detail. Her descriptions of the incidents were credible and supported by the evidence in the case other than the testimony of the appellant. Weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt the appellant is guilty of these offenses.

Sentence Severity

The appellant argues that his sentence, which included confinement for 13 years and 9 months and a dishonorable discharge, was inappropriately severe in light of his nearly 15 years of military service. He asks that we remand his case for a new sentencing hearing.

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). 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, 10 U.S.C. § 866(c). "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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007); *see also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We have reviewed the record of trial, giving individualized consideration to this appellant on the basis of the nature and seriousness of his offenses and his character, to include his extensive military record. The appellant's conduct clearly fell short of the standard expected of a senior noncommissioned officer in the United States Air Force. He sexually assaulted two women, physically assaulted his then-wife on multiple occasions, and threatened to kill his then-wife as well as another woman. The record contains more than sufficient evidence to support the appellant's sentence. Thus, we find that the adjudged and approved sentence in this case, including the confinement and dishonorable discharge, was appropriate, was within the discretion of the convening authority, and not inappropriately severe.

Motion to Compel Defense Consultant

The appellant further argues that the military judge abused his discretion in denying his motion to compel the production of a confidential consultant in the field of computer forensics. At a court-martial, the parties and the court "shall have equal opportunity to obtain witnesses and other evidence. . . ." Article 46, UCMJ, 10 U.S.C. § 846. Prior to trial, the defense must submit a request for employment of an expert to the convening authority supported, in part, by a "statement of reasons why the employment of the expert is necessary." Rule for Courts-Martial 703(d). If the request is denied by the convening authority, that request may be renewed at trial before the military judge. *Id*. On appeal, we review the military judge's ruling on a request for expert assistance for abuse of discretion. *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001) (citing *United States v. Ford*, 51 M.J. 445, 455 (C.A.A.F. 1999)).

An accused's entitlement to expert assistance is not limited to actual expert testimony at trial. The entitlement to that expertise is available "before trial to aid in the preparation of his defense upon a demonstration of necessity." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *see also United States v. Kreutzer*, 61 M.J. 293, 305 (C.A.A.F. 2005). To demonstrate that necessity, "[t]he accused must show that 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." *Bresnahan*, 62 M.J. at 143 (citations omitted) (internal quotation marks omitted). To test the adequacy of this showing of necessity, we apply a three-part test: "[t]he defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *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).

We find the military judge did not abuse his discretion when he denied the defense motion to compel. In oral argument, the military judge repeatedly gave trial defense an opportunity to articulate what they were looking for or what they thought they would find

if an expert were appointed and had the opportunity to examine electronic data in this case. The defense was unable to specify what they hoped to find. Instead, the clear goal of the defense was to be able to examine the computers in hopes of finding some evidence that the witnesses in the appellant's case had colluded against him. Absent some evidence to suggest that such evidence actually existed, the appellant's request for expert assistance was nothing more than a fishing expedition. The appellant failed to demonstrate the necessity for appointment of expert assistance in this case and, after examining the record, we find no abuse of discretion in the military judge's determination so finding.

Improper Burden Shift

Lastly, the appellant complains that the findings argument of trial counsel improperly shifted the burden of proof to the appellant. The appellant's argument attempts to recast what actually took place at trial. At trial, both sides understood that a key issue was the credibility of the witnesses. The alleged victims took the stand and testified that the appellant engaged in the acts as alleged. The appellant also testified, denying having committed any of the offenses and raising issues intended to show motives of the complaining witnesses to fabricate. Both trial counsel and trial defense counsel argued in favor of the credibility of the witnesses for their side and attacked the credibility of the witnesses for the opposing side. Trial defense counsel did not object to the trial counsel's argument.

Because trial defense counsel did not make a timely objection, the issue is waived absent plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citations omitted). Under the plain error standard, an appellant must show, "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Id.* (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)). An error is not plain and obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). We do not find error in this case, plain or otherwise, and therefore resolve this issue against the appellant.

First, the appellant testified at trial, putting his credibility at issue before the factfinder. Trial counsel could properly comment upon his credibility and any potential bias that could impact his testimony. *See United States v. Ruiz*, 54 M.J. 138, 144 (C.A.A.F. 2000).

Second, the appellant's case was tried before a military judge sitting alone. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Assuming just for the sake

of argument that trial counsel's argument attempted to shift the burden of proof to the appellant, we are confident such an argument would have no improper influence on the military judge, who is quite familiar with the law on the burden of proof.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court