UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DERICK R. THOMPSON
United States Air Force

ACM 37443

06 May 2010

Sentence adjudged 19 December 2008 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Major Darrin K. Johns.

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, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

The appellant was found guilty, in accordance with his pleas, by a military judge of one specification of dereliction of duty and two specifications of indecent conduct, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920. Contrary to his pleas, the appellant was found guilty by a panel of officer members, of three specifications of dereliction of duty, one specification of failing to obey a lawful order, one specification of assault consummated by a battery, and one specification of wrongful sexual contact,

in violation of Articles 92, 128, and 120, UCMJ, 10 U.S.C. §§ 892, 928, 920.[1] The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.

The appellant asserts six assignments of error before this Court: (1) Whether the no-contact order that prohibited the appellant from contacting anyone is his flight was overly broad; (2) Whether the military judge erred in ruling that the change made to Specification 5 of Charge I was a minor change; (3) Whether the military judge erred in giving a findings instruction on wrongful sexual contact under Article 120, UCMJ, by stating that permission was the same as consent; (4) Whether the appellant's conviction for wrongful sexual contact with Airman (Amn) AW is factually and legally insufficient where a mistake of fact defense existed; (5) Whether the military judge erred in not giving the members an instruction on their ability to recommend clemency in the form of a general discharge when members specifically asked the military judge if a general discharge was permissible; and (6) Whether the appellant's sentence to a bad-conduct discharge is inappropriately severe.[2]

Background

The appellant pled guilty to engaging in sodomy and attempting to engage in sexual intercourse with Amn KW while others were in the room watching. The appellant also pled guilty to engaging in sodomy with Amn MM while others were in the room watching. On 20 January 2008, the appellant was in the dorm watching football. He was drinking with a friend when Amn KW, Amn MM, and another female airman arrived. It appeared that they all had been drinking. Amn MM and Amn KW both started dancing and stripping. At some point, Amn KW came over to the appellant, pulled down his pants and began performing oral sex on him. There were at least five people in the room at the time. The appellant attempted to engage in sexual intercourse with Amn KW while the others were still in the room. Amn MM also performed oral sex on the appellant. The entire incident was videotaped. In addition to the incidents on 20 January 2008, the appellant also pled guilty to providing alcohol to minors on 3 July 2008 while on a camping trip with other members of his squadron.

Concerning the offenses for which the appellant pled not guilty but was found guilty, according to the testimony of Airman First Class (A1C) AW,[3] on 21 December 2007, she went to a party in the appellant's dorm room at the United States Air Force Academy (USAFA). A1C AW was 20 years old at the time and the appellant was aware that she was underage. At least four other airmen were at the party. Throughout the night, the appellant provided A1C AW with approximately four mixed drinks containing

[1] Consistent with his pleas, the appellant was found not guilty of three specifications of wrongful sexual contact and one specification of aggravated sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920.
[2] Issues 2, 3, and 6 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] Airman First Class AW was an Airman (E-2) at the time of the incident.

alcohol. A1C AW was also given three shots of alcohol. Eventually, the party proceeded to the day room. At some point, A1C AW dropped one of the appellant's glass cups. The appellant became very angry with A1C AW and guided her to the stairwell. When A1C AW started crying, the appellant calmed down and invited her to his room. A1C AW agreed to go. At the time, the appellant was the dorm president. When they arrived at the appellant's room, no one else was present. The appellant told A1C AW to sit on his love seat. He then started telling her that he wanted her to spend the night with him. She told him that she did not want to have sex, and the appellant agreed they would not have sex but he still wanted her to spend the night with him.

They then started kissing and eventually moved to the appellant's bed. The appellant attempted to remove her bra, at which point she reminded him that she did not want to have sex. The appellant agreed so she allowed him to remove her bra. The next thing she remembers is they were both lying on their sides facing each other. Her pants were off at this point but she was still wearing her underwear. The appellant started to digitally penetrate her vagina with his fingers but she pushed his hand away. The appellant again digitally penetrated her but she again pushed his hand away. At this point, A1C AW started to perform oral sex upon the appellant. However, the appellant pulled her up so that she was on top of him. A1C AW did not want to engage in sexual intercourse so she again tried to perform oral sex on the appellant. The appellant pulled her back up on top of him, and then turned her over so that he was on top of her. He then inserted his penis into her vagina. She again told him "no." She repeatedly told him "no" but the appellant continued. She then told him, "No, you don't even have a condom on," at which point the appellant stopped. The appellant went and obtained a condom and resumed sexual intercourse. He commented, "There, is that better?" She replied, "No, I still don't want to have sex with you."

A1C AW testified that at this point she froze. She had never before been in a situation where she told someone to stop and the person failed to comply. The appellant eventually quit and ejaculated on the bed. During the sexual intercourse, the appellant pulled A1C AW's legs up over his shoulders and held them until he was finished. Afterward, the appellant went to the bathroom and when he returned, he laid down on the bed next to A1C AW. A1C AW waited until the appellant fell asleep before going to A1C RM's room because she was upset.

A1C AW remembered that earlier in the evening, while she was in the appellant's room, someone had been trying to call her but she did not answer her phone. A1C RM testified that when he tried contacting A1C AW on the night of 21 December 2007, she unintentionally answered her phone and he could hear the appellant talking to her. He listened to their conversation and heard the appellant saying that "he could see himself falling in love with her." The appellant also said that he wanted to lie with A1C AW all night.

On the night of 24 December 2007, the appellant had another party in his room. A1C AW went to the appellant's room to see Amn MM. A1C AW testified that when she sat down, the appellant came up to her and tried to kiss her but she pulled away. Later that same night, when A1C AW left the appellant's room and returned to her room, the appellant followed her and started banging on her door. A1C AW answered the door and came out into the hallway. The appellant raised his hand and told her that as the dorm president, he had the power to do whatever he wanted to her. He pinned her up against the wall and kept telling her to kiss him like she meant it. As he was trying to kiss her, his tongue touched her face. A1C AW resisted his advances as she did not want the appellant to kiss her.

On 3 January 2008, the appellant volunteered to pick up two new female airmen, Amn BC and Amn KW, at the airport in Colorado Springs, Colorado, and return them to the USAFA. The appellant met Amn BC at the airport after her flight arrived at approximately 2100 on 3 January 2008. As they were leaving the airport, the appellant asked her if she wanted to drink. She replied, "You know I'm 19, right?" and the appellant said, "I don't care." They went to the government-owned vehicle (GOV) the appellant was driving, and Amn CA and Amn KW were waiting for them. They drove to a liquor store. While Amn CA was in the liquor store, the appellant drove around the parking lot. He informed the airmen that what he was doing was illegal because he was in a GOV. When they arrived at the USAFA, the appellant invited the two female airmen to his dorm room where he was having a party. When Amn KW and Amn BC arrived at the appellant's room, he handed them each a plastic cup that contained alcohol.

In January 2008, the appellant's First Sergeant, Senior Master Sergeant (SMSgt) JL, received a complaint that Amn BC may have been sexually assaulted. He contacted the sexual assault response coordinator at the USAFA to set up a meeting for Amn BC. Amn KW and A1C AW were also involved. Both Amn KW and Amn BC were members of the 10th Medical Support Squadron (10 MDSS), Medical Logistics Flight. At the time, the appellant was also a member of the Medical Logistics Flight. The Air Force Office of Special Investigations eventually became involved and started an investigation. On 29 January 2008, SMSgt JL issued an order to the appellant not to have any contact with anyone in the Medical Logistics Flight. On 9 February 2008, the appellant violated the order by using Amn MM's cell phone to invite Senior Airman (SrA) PM, a member of the Medical Logistics Flight, to a party at a local Best Western hotel.

Violation of No-Contact Order

The appellant contends that the no-contact order issued by SMSgt JL prohibiting the appellant from contacting anyone in his flight was overly broad since not all of the

members of the appellant's flight were involved in the investigation.[4] Whether an order is legal is a question of law we review de novo. *United States v. Moore*, 58 M.J. 466, 467 (C.A.A.F. 2003). "[A]n order is presumed lawful, provided it has a valid military purpose and is a clear, specific, narrowly drawn mandate." *Id.* at 468. To determine if an order meets this test, we look to "the specific conduct at issue in the context of the purposes and language of the order," not to hypothetical applications. *Id.*

In this case, SMSgt JL testified that he issued the order because he wanted to ensure the integrity of the investigation. At the time he issued the order, there were already seven individuals, not including the appellant, from the 30-person Medical Logistics Flight involved, and he was uncertain how many would ultimately be involved since the number continued to grow as the investigation continued. SMSgt JL also felt the order was necessary to maintain good order and discipline in the Medical Logistics Flight. He wanted to protect the appellant from a hostile work environment and was concerned for the safety of the alleged victims.

We concur with the military judge that the portion of the order prohibiting contact with members of the Medical Logistics Flight had a specific military purpose and was not overly broad. The order was issued to ensure the integrity of the investigation, to protect the appellant and the alleged victims, and ultimately to maintain good order and discipline within the unit. Accordingly, under these circumstances, we find that the no-contact order was a valid lawful order.

Specification Change

The appellant contends that the military judge erred when he ruled that the change made to Specification 5 of Charge I was a minor change when in fact it was a major change.

Whether a change in a specification is a minor change or a major change is a question of law we review de novo. *United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995). This Court uses a two-pronged test to determine if a change is a minor change or a major change. *Id*. at 365. The test is: (1) does the change result in an "additional or different offense" and (2) does the change prejudice "substantial rights of the [accused]." *Id*. (quoting Fed. R. Crim. P. 7(e)). Rule for Courts-Martial (R.C.M.) 603(a) defines minor changes as "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." R.C.M. 603(c) permits minor

[4] The first part of the order prohibited the appellant from having any contact with members of the 10th Medical Logistics Flight, United States Air Force Academy. The second part ordered the appellant not to have any contact with anyone involved in the investigation. The military judge upheld the first part of the order but ruled that that the second part of the order was overly broad and vague.

amendments of charges and specifications "at any time before findings are announced if no substantial right of the accused is prejudiced."

The no-contact order stated that the appellant was to "cease all contact and communication, direct or indirect, with all persons assigned to the 10 MDSS Medical Logistics Flight." However, the appellant was originally charged with violating the order by wrongfully contacting SrA PM, a "member of the 10th Medical Support Squadron." At trial, the prosecution moved to do a pen-and-ink change to the charge sheet to change "10th Medical Support Squadron" to "10 MDSS Medical Logistics Flight" under the rationale that the change was a minor change under R.C.M. 603(a). The defense moved to dismiss Specification 5 of Charge I for failure to state an offense, as the specification alleged that SrA PM was a "member of the 10th Medical Support Squadron" and the order only prohibited contact with members of "the 10 MDSS Medical Logistics Flight."

The government asserted that under notice pleading, the appellant was aware that SrA PM was a member of the 10 MDSS Medical Logistics Flight and that amending the specification was a minor change. The defense countered that such a change is a major change because the specification went from failing to state an offense to now alleging an offense. The military judge ruled that the change was a minor change because the appellant was apprised of the nature of the offense and the identity of the individual involved in the specification.

We concur with the military judge that the change was minor. The change in this case was purely administrative in nature in that it properly identified SrA PM's unit of assignment and did not change the nature of the alleged offense. The change did not add a party or an offense, and it did not mislead the appellant as to the offense charged. Accordingly, the appellant's claim is without merit.

Findings Instruction

The appellant contends the military judge erred in giving a findings instruction on wrongful sexual contact under Article 120(m), UCMJ, by stating that permission was the same as consent.

The issue of whether a panel was properly instructed is a question of law this Court reviews de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). "Military judges have 'substantial discretionary power in deciding on the instructions to give."' *Id.* (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993)).

During the findings portion of the trial, the military judge used the *Military Judges' Benchbook*[5] to instruct the members on the elements of wrongful sexual contact.

[5] Department of the Amy Pamphlet 27-9, *Military Judges' Benchbook* (Interim Changes since Ch-2, 15 Jan 2008).

One of the elements of wrongful sexual contact is that the appellant acted without the victim's permission. *Manual for Courts-Martial, United States*, Part IV, ¶ 45.b.(13)(b) (2008 ed.). The appellant claims the military judge erred when he instructed the members that the definition of without permission was the same as without consent. The trial defense counsel objected to the instruction and claimed that permission is in fact a more passive act than the act of granting consent, which entails taking some affirmative act. The military judge disagreed.

On appeal, the appellant argues that Webster defines "permission" as "[t]he act of permitting." *Webster's II New Riverside University Dictionary* 875 (1984). It further defines "permit" as not only "[t]o consent to" but also contains the additional definitions "[a]llow" and "[t]o afford opportunity to." *Id*. at 875-76. Therefore, the word permission is broader than the word consent.

Under the statutory construction of Article 120(m), UCMJ, *Wrongful Sexual Contact*, the terms permission and consent are used interchangeably. *See* Article 120(r), UCMJ.[6]

Although the appellant contends that the word permission is broader than the word consent, considering the statutory construction of Article 120, UCMJ, it is clear that Congress intended for permission and consent to be synonymous as these words pertain to wrongful sexual contact under Article 120(m), UCMJ. Accordingly, we find that the military judge did not err in his findings instructions for wrongful sexual contact and the members were properly instructed.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain his conviction for wrongful sexual contact with Amn AW. He argues that the government failed to prove beyond a reasonable doubt that the appellant did not have a mistake of fact defense as to whether Amn AW granted him permission to engage in sexual intercourse with her.

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.*

[6] Article 120(r), UCMJ, 10 U.S.C. § 920(r), *Consent and Mistake of Fact as to Consent*, provides: "Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact)."

Day, 66 M.J. 172, 173-74 (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).

Considering our review of the entire record of trial, a reasonable fact finder could have found that the appellant committed the charged offense upon A1C AW. The appellant claims that because A1C AW engaged in other sexual conduct, to include performing oral sex upon him, he had an honest and reasonable belief that A1C AW granted him permission to engage in sexual intercourse. However, the evidence shows otherwise. A1C AW testified that throughout the entire night of 21 December 2007, she repeatedly communicated to the appellant that she did not want to engage in sexual intercourse with him. Despite telling him "no" several times, the appellant continued to engage in sexual intercourse with A1C AW. A1C AW did consent to other forms of sexual contact, but she was adamant that she did not want to have sexual intercourse. Although the defense made several attempts to impeach A1C AW in this case, the court members ultimately had to decide whether or not they believed her testimony. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant did not have an honest and reasonable belief that A1C AW granted him permission to engage in sexual intercourse.

Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses' in-court testimony, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we find the evidence is legally and factually sufficient to sustain the conviction.

Sentencing Instruction

The appellant contends that the military judge erred in not giving the members an instruction on the possibility of a general discharge for the appellant when specifically asked by the members if a general discharge was permissible.

During sentencing deliberations, the members asked if a general discharge was allowed. The military judge responded, "The short answer to that question is no. Again, in adjudging a sentence you are restricted to the kinds of punishment which I listed during my original instructions or you may adjudge no punishment." The trial defense counsel did not object to this instruction. On appeal, the appellant claims that the net

effect of the military judge's instruction was to leave the members with the perception that either they sentence the appellant to a punitive discharge or he would be retained in the Air Force. The appellant asserts that the military judge should have instructed the members that the convening authority was permitted to separate the appellant from the Air Force with a general discharge if the members decided a punitive discharge was not warranted.

We review the military judge's sentencing instructions for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002). "The military judge has considerable discretion in tailoring instructions to the evidence and law." *Id*. "[C]ollateral consequences of a court-martial conviction should not be the concern of the court-martial and that instructions thereon should be avoided." *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (citing *United States v. McElroy*, 40 M.J. 368, 371-72 (C.M.A. 1994); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988)). The possibility of receiving an administrative discharge in the event a punitive discharge is not adjudged is a collateral matter to a court-martial. *United States v. Tschip*, 58 M.J. 275, 277 (C.A.A.F. 2003). By failing to object to sentencing instructions before the members begin to deliberate, an appellant waives any objection absent plain error. R.C.M. 1005(f). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004)). The appellant has the burden to establish plain error. *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999).

The appellant contends that the military judge should have given an instruction similar to the one given in *United States v. Friedmann*, 53 M.J. 800, 801-02 (A.F. Ct. Crim. App. 2000). In that case, the accused requested during his unsworn statement that the members not give him a bad-conduct discharge but instead allow his commander to administratively separate him. *Friedmann*, 53 M.J. at 801. In response, the military judge's instructions provided the following:

> You, of course should not rely on any of this in determining an appropriate punishment for this accused for the offenses of which he stands convicted. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service. If you don't conclude the accused should be punitively separated from the service, than [sic] it is none of your business or concern as to whether anyone else might choose to initiate separation action, or how the accused's service might be characterized by an administrative discharge authority.

Id. at 802 (alteration in original).

The appellant asserts that had the members been instructed in the same manner as those in *Friedmann*, it would have been clear to the members that a general discharge was permitted.

The possibility of an administrative discharge in the event a punitive discharge is not adjudged is a collateral issue. Our superior court has routinely held that instructions regarding collateral matters are disfavored. *Hall*, 46 M.J. at 146 (citing *McElroy*, 40 M.J. at 371-72; *Griffin*, 25 M.J. 423). Considering that military judges have broad discretion to give appropriate sentencing instructions, we find the instruction given in this case by the military judge was appropriate. Although an instruction similar to the one provided by the military judge in *Friedmann* would have been permissible, it was certainly not required to be given by the military judge in this case. Accordingly, no error was committed by the military judge, plain or otherwise.

Sentence Severity

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 offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *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). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

"The Courts of Criminal Appeals are required to engage in sentence comparison only 'in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Sentence comparison is generally inappropriate unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the [g]overnment must show that there is a rational basis for the disparity." *Id.*

The maximum possible punishment in this case was a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, and reduction to E-1. The

appellant's approved sentence was a bad-conduct discharge, confinement for six months, and reduction to E-1.

The appellant asserts that his sentence is too severe when compared to the little or no punishment received by others who were involved in the incidents that led to the appellant's court-martial. This includes the conduct of the victim, A1C AW. However, none of the other individuals engaged in as many acts of misconduct as the appellant nor were their acts of misconduct as serious as the appellant's. Accordingly, under the circumstances of this case, sentence comparison is not warranted.

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, 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