UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman PHILLIP E. WARREN
United States Air Force

ACM 37908

6 August 2013

Sentence adjudged 2 March 2011 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: J. Wesley Moore (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz; and Captain Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. Didomenico; and Gerald R. Bruce, Esquire.

Before

ORR, SANTORO, and WEBER
Appellate Military Judges

PER CURIAM:

A military judge sitting at a general court-martial convicted the appellant, contrary to his pleas, of attempted premeditated murder, absence without leave, wrongful appropriation of a motor vehicle, and aggravated assault in which grievous bodily harm was intentionally inflicted, in violation of Articles 80, 86, 121, and 128, UCMJ, 10 U.S.C. §§ 880, 886, 921, 928.[1] The adjudged and approved sentence was a dishonorable discharge, confinement for 22 years, forfeiture of all pay and allowances,

[1] The appellant was acquitted of the greater offenses of desertion and larceny, which were charged under Articles 85 and 121, UCMJ, 10 U.S.C. §§ 885, 921.

and reduction to E-1. Before us, the appellant argues that (1) the convictions for attempted premeditated murder and aggravated assault are multiplicious, (2) the evidence is legally and factually insufficient to sustain the attempted premeditated murder conviction, and (3) trial counsel committed prosecutorial misconduct by asking the military judge to return findings of guilt on both the attempted murder and aggravated assault charges.

Background

The appellant met Senior Airman (SrA) BL in the spring of 2010 shortly after he was assigned to the F-22 Aircraft Parts Supply shop at Holloman Air Force Base, New Mexico. Although they were each married to others, their friendship developed as they discussed the state of their troubled marriages. The appellant lived apart from his wife, and even though SrA BL and her husband were estranged and also living separately, they had a daughter together. Initially, the appellant and SrA BL started seeing each other off-duty, and the friendship progressed into a sexual relationship during the summer.

The appellant and victim had been "dating" for several months by the time of SrA BL's birthday, 21 September 2010. They had planned to celebrate together. By that time, the appellant was de facto living with SrA BL. He would often stay at her house for weeks at a time, and even had a key to the house.

On 21 September 2010, SrA BL worked the swing shift, from 1500 to 2230. After work, she and the appellant returned to her apartment, changed clothes, and ate dinner together. SrA BL saw the appellant have one drink while she had only a sip of his drink. Earlier that day and during the evening, SrA BL had been exchanging text messages with her husband and another male. During her testimony, SrA BL explained that during those text conversations she told her husband that she loved him, and that she was flirting with the other man.

After dinner, SrA BL took a shower, got into bed, and watched TV before falling asleep. Between 2230 and midnight, the appellant sent a text message to a friend that stated, "I'm sorry . . . I have fallen into the darkness." SrA BL later awoke to use the restroom and when she returned to her bedroom, she saw the appellant standing by her bed ostensibly reaching for or putting back her cell phone. The appellant walked out of the bedroom, and SrA BL went back to sleep.

SrA BL testified that she remembered waking up to the feeling of a kiss on her cheek and then the appellant forcefully grabbing her face and pulling her face to expose her neck. She then felt the appellant cutting her throat and her blood dripping down onto her chest. She asked what he was doing and tried to fight back. As she screamed at him, the appellant covered her face with a pillow in an attempt to smother her while continuing to cut her throat.

SrA BL asked, "what about [her daughter]?" The appellant replied, "Your parents will raise her, or he can raise her because you're going to get back with him anyway." SrA BL testified that she believed the "he" the appellant was referring to was her estranged husband. The appellant stopped cutting SrA BL, but began to choke her. As the struggle continued, they both fell to the floor, knocking over a television set. In an effort to defend herself, SrA BL seized a nearby power drill and attempted to "stick" the appellant. However, he stabbed her in the stomach, causing her to drop the drill.

Hoping the stabbing would end, SrA BL decided to play dead. The appellant stopped stabbing her, walked over to a dresser, took her car keys, and left the room. Believing the appellant was gone, SrA BL got up off of the floor, but when she did, she saw the appellant standing in the doorway. He said, "Let me leave before I finish," and then fled the house in SrA BL's car.

SrA BL looked around and found her cell phone. Because the phone's screen was largely obscured by blood, she pressed the "send" button to have the phone dial the last number she had called. The call went to her supervisor, Staff Sergeant (SSgt) EA. He testified that he received the call at 0316 and SrA BL said, "Help me. Come and get me . . . Senior Airman Warren is trying to kill me; he stabbed me." SSgt EA rushed to the scene as his wife called Security Forces. SSgt EA told her to get in his car, and he proceeded to drive SrA BL to the hospital. En route, he flagged down a Security Forces vehicle that was responding to the scene. An ambulance arrived a few minutes later. As the Emergency Medical Technicians (EMT) were treating SrA BL, the appellant called SSgt EA, told him he was in Mexico and said, "I'll be straight up. I know I'm probably not going to be forgiven. The Lord's probably not going to forgive me and I'm probably going to hell, but I'm sorry and somebody needs to check on [SrA BL]."

SrA BL was eventually medically airlifted to an El Paso, Texas, hospital and was treated for wounds to her neck, face, hand, and abdomen. The lacerations on her face and neck required about 100 stitches to close. She lost two units of blood, had her colon surgically repaired, and underwent physical therapy for a hand injury. She had not fully regained range of motion or feeling in her hand and neck by the time of trial.

After remaining away from the Air Force for approximately two days, the appellant turned himself in to law enforcement agents.

Legal and Factual Sufficiency

The appellant asks this Court to set aside Charge I and its Specification because the evidence is legally and factually insufficient to support his conviction of attempted premeditated murder. Specifically, appellant argues the evidence does not support a

showing of premeditation, but rather the appellant was acting in the heat of passion that night.

We review issues of factual and legal 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. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))); *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted); *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted). To test for factual sufficiency we look at "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. 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 elements of the offense of attempted premeditated murder are: (1) the appellant did a certain overt act (in this case, attacking the victim with a weapon), (2) the act was done with the specific intent to commit premeditated murder, (3) the act amounted to more than mere preparation, and (4) the act apparently tended to bring about the commission of the offense. As noted, the appellant specifically challenges the sufficiency of proof of the element of premeditation.

Proof of premeditation requires a showing of the formation of a specific intent to kill and consideration of the act intended. *United States v. Miergrimado*, 66 M.J. 34, 37 (C.A.A.F. 2008) (citation omitted); *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 43.c.(2)(a) (2008 ed.). However, the length of time between the formation of the design to kill and action on that design is immaterial. *United States v. Williams*, 39 M.J. 758 (A.C.M.R. 1994); *MCM*, Part IV, ¶ 43.c.(2)(a). The intent to commit premeditated murder can be established by direct or circumstantial evidence. *United States v. Davis*, 49 M.J. 79 (C.A.A.F. 1998). When considering whether the circumstantial evidence supports a finding of premeditation, the finder of fact may consider:

> (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts

> about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

Id. at 83 (citations omitted).

In light of these factors, we conclude that the evidence presented at trial is sufficient to find all the essential elements of attempted premeditated murder beyond a reasonable doubt. Although SrA BL testified that the appellant was a peaceful person, her birthday was not the first indication that the appellant was jealous of other males with whom she was in contact. About a month before her birthday, the appellant became angry with her when she danced with another man at a party for a longer period of time than she danced with the appellant. When "confronted" by the appellant, SrA BL tried to walk away, but the appellant forcefully grabbed her arm and directed that she engage in a conversation. SrA BL also recounted two other instances in which the appellant became angry and jealous, once in response to a text message the appellant saw on her phone and once while at a club. Additionally, a co-worker testified that about three weeks before the charged offenses, the appellant started to become more agitated and aggressive toward SrA BL. Whatever feelings the appellant had for SrA BL, his prior expressions of jealousy did not lead the military judge to conclude that the appellant's actions on 22 September 2010 occurred in the heat of passion.

Moreover, the appellant acknowledged falling "into the darkness" at or before the time of the attack. His attack upon SrA BL did not occur immediately after he saw the text messages that apparently fueled the jealousy, but some time thereafter. He attacked her while she slept and posed no physical threat to him. His statement to SrA BL that someone else would have to raise her daughter, followed by his continued stabbing, also supports the trial court's judgment that the appellant continued to act after a period of reflection. Moreover, the fact that the appellant was able to change his mind about killing SrA BL and to plan his escape indicate that he was capable of making rational decisions. Finally, the nature, number, and locations of the stab wounds — as reflected both by crime scene photographs and medical testimony — all support the military judge's finding that the appellant acted with premeditation. Making allowances for not having personally observed the witnesses, we are ourselves also convinced of the appellant's guilt beyond a reasonable doubt.

Multiplicity of Attempted Premeditated Murder and Aggravated Assault

We review claims of multiplicity de novo. *United States v. Anderson*, 68 M.J. 378 (C.A.A.F 2010).

At trial, the Government acknowledged that the facts and circumstances supporting the aggravated assault specification were the same as those supporting the

attempted premeditated murder specification, but that aggravated assault was charged in the alternative pursuant to our superior court's holding in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).

The parties discussed this issue before the court closed to deliberate on findings. Trial counsel told the military judge:

> Your Honor, I will concede that it is charged like this because of *Jones*; however, the [G]overnment's primary concern is should the court return a finding on the attempted murder—a finding of guilty to a [lesser included offense] or something like that, and then it goes up on appeal and they find that it wasn't factually sufficient, then the [G]overnment would like to be able to affirm on the [Article] 128[, UCMJ,] offense, if that's the way the court rules.

The military judge took the matter under advisement and subsequently returned findings of guilt as to both specifications.

Before us, the Government concedes, and we agree, that under the facts of this case, the appellant cannot properly stand convicted of both attempted premeditated murder and aggravated assault. As we have found the evidence of attempted premeditated murder both legally and factually sufficient, we set aside the findings and dismiss the aggravated assault specification. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (when offenses are charged in the alternative due to exigencies of proof, court may dismiss affected specifications).[2]

Having set aside the aggravated assault specification, we next assess prejudice. Because attempted premeditated murder carries a maximum sentence of life without parole, dismissal of the aggravated assault specification does not change the penalty landscape. *See MCM*, Part IV, ¶ 4.e. The prosecution presented the same evidence for both attempted premeditated murder and aggravated assault, so no additional evidence was before the factfinder during deliberations. Finally, and most significantly, the military judge merged both the attempted premeditated murder and aggravated assault specifications for sentencing. Therefore, we are confident that even in the absence of the aggravated assault conviction, the adjudged sentence would have been the same. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*, we affirm the sentence as approved by the convening authority.

[2] Given our superior court's decision in *United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010), and our dismissal of Charge IV and its Specification, we find that the appellant's third assignment of error is without merit.

Conclusion

Charge IV and its Specification are dismissed. The remaining findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[3] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id*. at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).