

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman CALVIN J. WHEELER JR.
United States Air Force**

ACM 36796 (f rev)

19 January 2010

Sentence adjudged 24 February 2006 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Steven Hatfield.

Approved sentence: No punishment.

Appellate Counsel for the Appellant: Colonel James B. Roan, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Michael A. Burnat, Captain Griffin S. Dunham, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Matthew S. Ward, Lieutenant Colonel Jeremy S. Weber, Captain Jamie L. Mendelson, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

On 22-24 February 2006, the appellant was tried by a general court-martial composed of a panel of officer members. Contrary to his pleas, the appellant was found guilty of rape and adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. Initially, the appellant's approved sentence consisted of a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.

On 16 May 2008, this Court set aside the finding of guilty to rape and the sentence, and remanded the case to the convening authority authorizing a rehearing on the rape charge and on the sentence. We affirmed the adultery conviction. *United States v. Wheeler*, ACM 36796 (A.F. Ct. Crim. App. 16 May 2008) (unpub. op.). The basis for our decision to set aside the rape conviction was the testimony of the government's expert psychologist who essentially provided human lie detector evidence that impermissibly bolstered the credibility of the victim in this case. Consistent with our superior court's decision in *United States v. Brooks*, 64 M.J. 325 (C.A.A.F. 2007), we found this constituted error, the error was plain and obvious, and the appellant was prejudiced by the error. However, we found the testimony in question was not relevant to the only contested element of the adultery charge, that being whether the appellant's conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

On 3 October 2008, the convening authority severed the rape charge from the action and deemed a rehearing on the sentence to be impracticable. The convening authority then approved a sentence of no punishment. On 2 April 2009, on consideration of the appellant's petition for grant of review of this Court's decision, our superior court remanded the case for our consideration of the following granted issue:

APPELLANT WAS CONVICTED OF RAPE AND ADULTERY BASED ON A SINGLE ACT OF SEXUAL INTERCOURSE. DURING THE COURT-MARTIAL, THE PROSECUTION'S EXPERT PSYCHOLOGIST PROVIDED HUMAN LIE DETECTOR TESTIMONY THAT BOLSTERED THE ALLEGED VICTIM'S RAPE ACCUSATION. BASED ON THIS TESTIMONY, THE AIR FORCE COURT OF CRIMINAL APPEALS SET ASIDE THE RAPE CONVICTION. HOWEVER, IT AFFIRMED THE ADULTERY CONVICTION. DID THE COURT ERR SINCE THE MEMBERS MUST HAVE BASED THEIR ADULTERY CONVICTION ON THE FORCE AND CONSENT FINDINGS OF RAPE THAT WERE SET ASIDE?

Background

The alleged victim in this case, Staff Sergeant (SSgt) TS, first met the appellant sometime in 2001 when they both were stationed and worked in the same office at Nellis Air Force Base (AFB), Nevada. At the time, SSgt TS was unaware the appellant was married and did not learn he was married until shortly before the trial. SSgt TS knew the appellant had a child but the appellant referred to his spouse as his child's mother. According to SSgt TS, the appellant was interested in having a romantic relationship with SSgt TS but she just wanted to be friends. One night shortly before SSgt TS departed Nellis AFB for Osan Air Base (AB), Republic of Korea, the appellant prepared a romantic dinner for her. At the time, SSgt TS was staying with Senior Airman (SrA) AF. SSgt TS testified they kissed on the lips that evening and fell asleep together watching television.

SSgt TS arrived at Osan AB in January of 2004 and the appellant arrived at Osan AB in August of 2004. They did not see each other often while at Osan AB as their relationship had become strained.

On 17 April 2005, SSgt TS attended a barbecue with several other airmen that was hosted by the appellant. During the barbecue, the appellant told SSgt TS that he was going to try to “hook up” with SSgt TS. At the party, SSgt TS and the appellant discussed why they had not spent much time together while at Osan AB. After the barbecue, a small group of people, including SSgt TS and the appellant, went to a club. After leaving the club, SSgt TS, the appellant, and SrA AM went to a McDonald’s. When SSgt TS came out of McDonald’s, SrA AM had already left and the appellant informed SSgt TS that SrA AM had asked him to walk SSgt TS home. They decided to take a cab instead of walking. While in the cab, the appellant told SSgt TS that he liked her but she brushed it off because she believed he was drunk.

When they got to SSgt TS’s dorm, the appellant asked if he could sleep in her room and she agreed. They initially discussed the appellant sleeping on the floor. SSgt TS went to the restroom and when she returned to her bedroom, the appellant was on her bed. SSgt TS got in bed with the appellant and the appellant kissed her on the cheek and whispered to her. She reminded the appellant that she had a boyfriend. The appellant continued to kiss her, she told him to stop, and then she dozed off. Sometime later, the appellant and SSgt TS had sexual intercourse. She claimed it was by force and without consent. At trial, the appellant disputed this claim, primarily by attacking SSgt TS’s credibility.

As their final witness, the government called a clinical psychologist, Dr. TM. It was Dr. TM’s testimony that led this Court to set aside the appellant’s rape conviction. However, his testimony only concerned the rape charge and did not concern the adultery charge, including whether or not the sexual intercourse was conduct prejudicial to good order and discipline or service discrediting.

The military judge instructed the members in relation to the third element of the adultery charge, as follows:

Not every act of adultery constitutes an offense under the Uniform Code of Military Justice. To constitute an offense, the government must prove beyond a reasonable doubt that the accused’s adultery was either directly prejudicial to good order and discipline or service discrediting.

Conduct prejudicial to good order and discipline includes adultery that has an obvious and measurably divisive effect on the discipline, morale, or cohesion of a military unit or organization, or that has a clearly detrimental impact on the authority, stature, or esteem of a service member.

Service discrediting conduct includes adultery that has a tendency, because of its open and notorious nature, to bring the service into disrepute, or make it subject to public ridicule, or to lower it in public esteem.

Under some circumstances, adultery may not be prejudicial to good order and discipline but, nonetheless, may be service discrediting, as I have explained those terms to you. Likewise, depending on the circumstances, adultery can be prejudicial to good order and discipline, but not be service discrediting.

During closing argument, the trial counsel specifically addressed the adultery charge separate from the rape charge. The trial counsel argued that the appellant's open and notorious pursuit of SSgt TS over several years and his concealment that he was married at more than one location constituted conduct that was prejudicial to good order and discipline and/or service discrediting.

Concerning the adultery charge, in our earlier decision, dated 16 May 2008, we stated:

On the charge of adultery, the only contested issue was whether the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. We do not believe that Dr. [TM's] testimony was relevant to that question and therefore we do not find that the appellant was materially prejudiced to as to that charge.

Wheeler, unpub. op. at 11.

Discussion

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)). "[I]n 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). 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).

The elements of adultery are:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, Part IV, ¶ 62.b. (2005 ed.).

The appellant asserts that the finding of guilty to the third terminal element of adultery is a necessary consequence of the finding of rape; therefore, the reversal of the finding of guilty to rape likewise implicates the adultery finding. The appellant argues the members' finding that the sexual intercourse was by force and without consent preordained a conclusion that the appellant's adultery was conduct prejudicial to good order and discipline or service discrediting. The appellant asserts there is no way of knowing whether the members would have concluded beyond a reasonable doubt that the government proved the elements of adultery absent the rape conviction. Since the appellant and SSgt TS were not assigned to the same unit, they were comparable in rank, neither were on-duty at the time of their sexual relations, and the government presented no evidence that the appellant's wife was aggrieved by the act, the appellant argues the government failed to prove that the sexual intercourse was prejudicial to good order and discipline. Finally, the appellant asserts there is no evidence the adultery was service discrediting because it was not open and notorious.

We are not persuaded that the reason the members found the adultery to be conduct prejudicial to good order and discipline or service discrediting was based on their finding that the sexual intercourse was by force and without consent. The testimony of Dr. TM concerning the improper bolstering of SSgt TS's credibility only applied to the rape charge as the issue was whether or not the sexual intercourse was consensual. There was no dispute as to whether sexual intercourse actually occurred. The main issue concerning the adultery charge was whether it was prejudicial to good order and discipline or service discrediting. In his closing argument, the trial counsel specifically addressed each offense separately and did not tie the force and lack of consent element of rape to the third terminal element of adultery. Finally, considering the appellant had pursued an intimate relationship with SSgt TS over several years, which was observed by several other airmen at two different installations, while at the same time concealing his

marriage from her and others, the government submitted ample evidence for the members to conclude the adultery was conduct prejudicial to good order and discipline or service discrediting. Accordingly, upon further review of this case, we ourselves are convinced the appellant is guilty of adultery.

Conclusion

The approved findings as to Charge II and its Specification and the approved 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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal and extends to the right.

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