UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant JASON M. WILLIAMS
United States Air Force

ACM 35350

30 November 2004

Sentence adjudged 19 July 2002 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Dismissal, confinement for 74 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major John D. Douglas, Major Shannon J. Kennedy, and Captain C. Taylor Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

In accordance with his pleas, the appellant was convicted of one specification each of conduct unbecoming an officer and gentleman and committing an indecent assault, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934. Contrary to his pleas, the appellant was also found guilty of a second specification of conduct unbecoming an officer and gentleman, one specification of indecent exposure, and two specifications of taking indecent liberties with a female under the age of 16, in violation of Articles 133 and 134, UCMJ. A military judge sentenced him to a dismissal, confinement for 74

months, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts three errors for our consideration. First, that his conviction for Specifications 3 and 5 of Charge II is legally and factually insufficient. Second, that his sentence is inappropriately severe. And third, that he received ineffective assistance of counsel.[1] For the reasons set out below, we find no error and affirm.

The military judge found the appellant guilty of pursuing and following three children under the age of 16 around two apartment complexes in North Charleston, South Carolina, wearing only thong underwear. Additionally, the appellant was convicted of taking indecent liberties with two of these same children by publicly exposing his genitals in their presence with the intent to satisfy his sexual desires.

Legal and Factual Sufficiency of the Evidence

On 11 November 2001, AW (a 12-year-old girl), BCW (a 15-year-old girl), and XD (a 9-year-old boy), saw the appellant driving around the apartment complex where they lived. After they saw his car drive by several times, they ran to the apartment complex across the street. When they noticed the appellant follow them into the parking lot of this apartment complex, they ran back across the street. The appellant's car then followed them back to their apartment complex, causing the three children to run and hide in the laundry room of the complex. As they entered the laundry room, one of the children noticed the appellant's car entering the parking lot adjacent to the laundry room. Unsure of the appellant's intentions, the children turned out the lights in the laundry room and looked outside the window through the horizontal blinds. Because the blinds were closed, the children had to lift the slats to see outside. The three children testified they were not certain that the appellant saw them enter the laundry room. However, the appellant drove his car through the parking lot and stopped it parallel to the laundry room window. AW testified that the appellant stopped his car approximately ten feet from the laundry room window. The appellant placed his car in park and got out of his car on the driver's side, holding a cellular phone and wearing only thong underwear. The appellant's car was not in a parking space and the driver's side was the closest to the laundry room window and the door the children used to enter the laundry room. While the appellant was talking on the phone, he sat down in the driver's seat with his feet outside of his car. He then adjusted his underwear, exposed his penis, and began rubbing it for about ten seconds. Although the appellant was a short distance away from the children, he never looked toward the children while they were in the laundry room. The appellant faced toward the front of the car during his phone conversation. Once the appellant finished his telephone conversation, he closed the car door and drove away.

[1] This assignment of error is submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The children, believing they were safe, left the laundry room and started walking home when they again encountered the appellant sitting in his car. One of the children asked the appellant whether he was following them. The appellant denied that he was following the children and stated that he thought they might know a person he was looking for. As the children started to walk away from the appellant, a police officer from the North Charleston Police Department arrived. The police officer came to the apartment complex in response to a complaint about a man exposing himself. When the police officer noticed the appellant sitting in his car with the car door open wearing only thong underwear, he placed the appellant under arrest.

Article 66(c), UCMJ, 10 U.S.C § 866(c), requires that we approve only those findings of guilt we determine to be correct in both law and fact. In doing so, this Court is required to conduct a de novo review of the legal and factual sufficiency of the case before us. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency requires us to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *United States v. Richards*, 56 M.J. 282, 285 (C.A.A.F. 2002) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325. (C.M.A. 1987). We may affirm a conviction only if we also conclude, as a matter of factual sufficiency, that the evidence proves the appellant's guilt beyond a reasonable doubt. *Washington*, 57 M.J. at 399 (citing *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002)). We must assess the evidence in the entire record and take into account the fact that the trial court saw and heard the witnesses. *Washington*, 57 M.J. at 399.

The appellant argues that the evidence in support of the specifications involving AW and BCW is legally and factually insufficient because the prosecution failed to prove beyond a reasonable doubt that the appellant knew the children were watching him while he exposed and stroked his penis. In support of his argument, the appellant asserts that the victims AW and BCW were not certain that the appellant knew they were watching him. Additionally, the appellant never looked in the direction where the children were hiding while he was fondling his penis. Moreover, the appellant avers that the victims took no active participation in the appellant's actions and the appellant took no affirmative action to get the victims' attention.

The appellant cites *United States v. Barbosa*, ACM 33444 (A.F. Ct. Crim. App 5 Feb 2001) (unpub. op.), *pet. denied*, 55 M.J. 373 (C.A.A.F. 2001), as authority for his position. In *Barbosa*, this Court held that the prosecution must show that the victim was more than just a passive or involuntary observer of the appellant's masturbation. Specifically, the Court stated:

> In order to obtain a conviction for indecent liberties with a child the prosecution must show that the accused committed a certain act in the presence of the child and that the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both. *MCM*, Part IV, ¶ 87(b)(2). While physical contact is not required, the act must be indecent and must be done in conjunction or participation with another person. *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987) (citations omitted). Active participation requires more than just involuntary observation. *United States v. Eberle*, 41 M.J. 862, 865 (A.F. Ct. Crim. App. 1995) (citing *United States v. McDaniel*, 39 M.J. 173 (C.M.A. 1994)).

Barbosa, unpub. op. at 9.

While the appellant asserts that he took no affirmative action to turn the victims attention to him and that the children were merely accidental involuntary observers, we disagree. The number of times that the appellant encountered the children alone makes it difficult to believe that their witnessing the appellant masturbating was merely an accident. In fact, the appellant went through a great deal of effort to ensure that the children saw him. First, he was dressed in such a manner that would call attention to himself. Next, he followed them through two different apartment complexes and parked his car ten feet from where the children were hiding. Additionally, the appellant positioned his car in such a manner that the children could see him fondle his penis. Even after the children witnessed the appellant's actions, the appellant parked his car in a location where the children managed to encounter him again as they were walking home. We find that the appellant's actions clearly show that he intended for the children to see him. Accordingly, there is sufficient evidence in the record that a reasonable factfinder could be convinced beyond a reasonable doubt that the appellant committed the offense of taking indecent liberties with these children. In making our own independent determination, we are convinced beyond a reasonable doubt that the appellant took indecent liberties with AW and BCW.

Sentence Appropriateness

The appellant asserts that his sentence is inappropriately severe. The appellant claims that he suffers from two disorders that caused him to act as he did. Specifically, the appellant states that he suffers from exhibitionism, which causes him to expose his genitals to an unsuspecting public. He also claims that he suffers from frotteurism, a condition that causes him to rub his genitals against the buttocks or thighs of an unwilling participant. Recognizing that his actions deserve some punishment, he asks this Court to reduce his confinement by 2 years or to provide other appropriate relief because lengthy

confinement would make his condition worse. The appellant believes that he would benefit far more from a rigorous treatment program than from lengthy confinement.

Under Article 66(c), UCMJ, this Court has a duty to affirm only such findings and sentence that are correct in fact and law, and it requires that we affirm only so much of the sentence as we find "should be approved." Additionally, this Court must give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Assessing sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

At trial, both sides presented medical opinions providing a rationale for the appellant's behavior. While the two medical experts differed on the severity of the appellant's condition, they both agreed that the appellant's behavior would likely continue and then diminish over time. Additionally, both experts agreed that an essential component of the appellant's behavior was an unsuspecting victim. In the instant case, the appellant's unsuspecting victims included children and adult females. While he only exposed himself to one of the women and the two children, he pled guilty to rubbing his genitals against another woman's buttocks on divers occasions. Given the appellant's need for an audience and the likelihood of recidivism, the military judge had a rational basis for imposing lengthy confinement. Considering the nature and seriousness of the offenses, and having given individualized consideration to the appellant, we find the sentence to be appropriate.

Conclusion

Finally, we have reviewed the appellant's claim of ineffective assistance of counsel raised pursuant to *United States v. Grostefon*, and find it to be without merit. 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

ANGELA M. BRICE
Clerk of Court