UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class NATHAN W. WILSON
United States Air Force

ACM 36129

29 August 2006

Sentence adjudged 30 September 2004 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: William M. Burd (sitting alone).

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was charged with raping Airman First Class (A1C) JB. He pled guilty, before a military judge sitting alone as a general court-martial, to committing an indecent assault upon A1C JB, in violation of Article 134, UCMJ, 10 U.S.C. § 934. After the government attempted to prove the greater offense of rape, the military judge found the appellant guilty of attempted rape, in violation of Article 80, UCMJ, 10 U.S.C. § 880. He then sentenced the appellant to a bad-conduct discharge, confinement for 1 year, reduction to the grade of E-1, forfeiture of all pay and allowances, and a reprimand. The

convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 1 year, and reduction to the grade of E-1. On appeal, the appellant asserts (1) the evidence is legally and factually insufficient to support the findings of guilty; and, (2) the appellant's sentence is inappropriately severe.[*] We find both assertions to be without merit and affirm.

Factual and Legal Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 324-25 (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 appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We conclude that there is sufficient competent evidence in the record of trial to support the court's findings.

The testimony of A1C JB was credible and compelling and supported by other government witnesses. A1C JB testified that she ingested a large amount of alcohol, returned to her billeting room, and passed out on her bed wearing a t-shirt, bra, and panties. Other witnesses testified that they looked into A1C JB's room and observed her sleeping, face down and clothed as she described. The appellant admitted that A1C JB was sleeping when he entered the room, pulled down his pants, and climbed into bed with her. He testified that he wanted to receive oral sex from A1C JB and left the room when she woke up and refused. A1C JB testified, however, that when she woke up, her panties were off, her bra and t-shirt were pulled up, and the appellant was attempting to penetrate her vagina with his penis. He left the room after she told him to stop.

After weighing all the evidence and making allowances for not having personally observed the testimony of the appellant, A1C JB, and the other witnesses, we decline to second-guess the military judge's finding of guilty. Applying the standard set forth by our superior court, we have no difficulty concluding that the evidence contained in the record is legally and factually sufficient to support the appellant's conviction. *See Id.* at 324-25. Although trial defense counsel was able to point out minor inconsistencies and flaws in various aspects of the government's case, the weight of the evidence leaves us convinced of the appellant's guilt beyond a reasonable doubt. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Turner*, 25 M.J. at 325; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

[*] Both issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Sentence Appropriateness

The appellant asks that we find his sentence inappropriately severe. This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the nature and seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In this case we cannot say that the adjudged sentence is inappropriately severe. Although the appellant presented a good service record, was strongly supported by his family, and apparently had no prior criminal record, the seriousness of his offenses warranted significant punishment. The appellant sought out his victim by progressing down the billeting hallway in search of an unlocked door, entered A1C JB's room while she was passed out, pulled down his pants, pulled up her shirt, removed her panties, and attempted to have sex with her. This crime was committed against a fellow Airman who had just returned from a deployment to Iraq, was passed out from alcohol consumption, and was sleeping in her assigned billeting room. Prior to committing the crime, the appellant's friend had already pulled him out of A1C JB's room after observing her sleeping within. After carefully examining the submissions of counsel and taking into account all of the facts and circumstances surrounding the appellant's crimes, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

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.

Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator