UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RONALD M.E. DANIEL
United States Air Force

ACM 38186

21 November 2013

Sentence adjudged 15 June 2012 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Michael J. Coco.

Approved Sentence: Dishonorable discharge, confinement for 3 years and 3 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Scott W. Medlyn and Nigel S. Scott, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

Appellant was convicted by a panel of officers, contrary to his plea, of aggravated sexual assault[1] in violation of Article 120, UCMJ, 10 U.S.C. § 920. His adjudged sentence included a dishonorable discharge, confinement for 3 years and 3 months,

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[1] The appellant was charged with rape, but convicted of the lesser included offense of aggravated sexual assault.

forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the sentence as adjudged.[2]

The appellant raises two issues for our consideration: (1) Whether he was denied his Sixth Amendment[3] right to effective assistance of counsel; and (2) Whether the contested findings and sentence in the present case should be set aside under the cumulative error doctrine.

Background

The appellant was accused of raping CN in the front passenger seat of his car outside the base bowling lanes on a Saturday night in January 2012 while both of them were attending technical training at Wright-Patterson Air Force Base, Ohio. As junior technical training students, CN and her friend were not permitted to leave the base, to wear their civilian clothing outside their dormitories, or to ride anywhere in privately owned automobiles. As a more senior student, the appellant was no longer subject to these restrictions. On the night of the charged offense, CN and another student met the appellant and a friend of his at a park near the base bowling lanes, whereupon the four of them socialized and drank alcohol. The appellant asked CN to join him in his car; CN's friend and the other airman went into the bowling facility.

Though the appellant's and CN's versions of what happened next differ in some respects, they both agree that they started out consensually kissing – "making out." At some point the appellant crawled over the center console, pulled down CN's Air Battle Uniform bottoms, pushed her underwear to the side, and had sex with her, ultimately ejaculating inside her while not wearing a condom. CN testified that she tried several times to push the appellant's hand away when he tried to place it under her shirt and when he was removing her pants, that she repeatedly told him "no," and that she cried as the assault progressed.

The defense theory was that CN was an impressionable, soft-spoken young woman who engaged in regrettable sex and who was thereafter talked into reporting that she had been raped. At trial, defense counsel argued CN's actions during and after the alleged offense were inconsistent with a person who had been raped, or at the very least gave rise to appellant's reasonable mistake as to her consent.

When the appellant was interviewed by investigators from the Air Force Office of Special Investigations (AFOSI), he was evasive and uncooperative throughout the interview, and his story changed substantially. At first he said he had no physical interaction with CN at all the night in question, but eventually admitted to having sex

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[2] The Court-Martial Order (CMO) incorrectly states the appellant's rank as Airman Basic instead of Airman. Accordingly, we order a new CMO to correct this non-prejudicial error.
[3] U.S. CONST. amend. VI.

with her in his car, to CN crying afterwards, and to telling her to stop crying and "be cool" when he dropped her off at the dormitory. During the interview and while testifying under oath at trial, he said he could not remember a host of other potentially incriminating details about his or CN's actions before, during, or after the alleged assault. All in all, his videotaped interview with AFOSI, which was played for the members and admitted into evidence, in combination with other evidence adduced during trial, provided compelling evidence of his guilt of the offense of aggravated sexual assault.

Ineffective Assistance of Counsel (IAC)

On appeal, the appellant alleges various errors made by trial defense counsel amounted to a deprivation of his constitutionally guaranteed right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. We disagree.

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). We review de novo claims that an appellant did not receive effective assistance of counsel. *United States v. Mazza,* 67 M.J. 470, 474 (C.A.A.F. 2009) (citations omitted).

"In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984)." *Gooch*, 69 M.J. at 361 (parallel citations omitted). To overcome the presumption of competence, the *Strickland* standard requires an appellant to demonstrate "both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687). When assessing *Strickland's* first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

We find none of trial defense counsels' alleged missteps meet the requisite standard for establishing ineffective assistance of counsel.

The appellant alleges that by misstating the law on consent, trial defense counsel provided an opportunity for trial counsel to argue that the appellant was "grasping at straws," to the detriment of the appellant's case. When read in its entirety, trial defense counsel's closing argument is more appropriately described as an effort to explain how the vagaries of human interactions that occur during the "give and take" of a sexual encounter may potentially give rise to a reasonable mistake of fact as to consent. The appellant also alleges that trial defense counsel's brief discussion of the lesser included offense of aggravated sexual assault during closing argument evinced a lack of preparation to deal with that issue. We reject this characterization as well. The

vulnerabilities or weaknesses in the appellant's case were not the product of trial defense counsel's representation or advocacy; rather they resulted from the weight of evidence against the appellant, including not incidentally, his own words and conduct recorded during the AFOSI interview. Having reviewed trial defense counsel's closing argument, we find nothing about that argument to fall below expected standards. *Green*, 68 M.J. 360.

The appellant also alleges that trial defense counsel failed, in multiple respects, to effectively cross-examine CN when she was on the stand, citing failure to point out weaknesses in her story by reference to prior statements she had made, or by several of her actions that could have suggested her willing participation in sex. He also notes that trial defense counsel conceded the inadmissibility of the substance of a text message CN sent the appellant the day following the alleged assault. Specifically, the day after the incident, the appellant sent CN a text message saying she didn't "look happy" that day. She responded, "I'm happy, just tired." Trial and defense counsel argued over the admissibility of the statement, but defense ultimately conceded, and the statement was not introduced. In her affidavit, trial defense counsel admits that she erred to the extent she conceded the inadmissibility of CN's statement, but notes that she did so because there was other compelling evidence that CN was upset that morning, and that her text to the appellant was simply an effort to discontinue communicating with him.

Finally, the appellant also alleges his trial defense counsel failed to effectively delve into the potential bias of three panel members. As to two of the members, trial defense counsel state in their affidavits that trial counsel had effectively addressed the potential bias grounds and/or rehabilitated both members, a proposition supported by the record of trial. The appellant took issue with the third member because he sat as a member on a rape court-martial a few weeks before the appellant's trial, and trial defense counsel failed to adequately probe whether he could keep the two cases separate in his own mind. During the brief colloquy with this member, he discussed his involvement as a member in the prior case, affirmed that he could keep the two cases separate in his mind, and said he had never been advised on any matters by members of the base legal office. The senior defense counsel assigned to the appellant's case at trial was also familiar with the facts of the case the member had sat on, and because of that familiarity "had no concern that the facts of the case would confuse or influence [the member]."

To prevail on a claim of ineffective assistance of counsel, an appellant must overcome a strong presumption that defense counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. at 690. Having reviewed each of appellant's allegations of ineffective assistance of counsel, the record, and post-trial filings now before us, we find the appellant has offered insufficient evidence to overcome that presumption.

Cumulative Error

"The cumulative effect of all plain errors and preserved errors is reviewed de novo. Under the cumulative-error doctrine, 'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'" *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011) (citations omitted). We will reverse only if we find "the cumulative errors denied Appellant a fair trial." *Id.* (citations omitted).

Even if we were to find trial defense counsel's concession on the inadmissibility of the text message to constitute ineffective assistance of counsel, in light of the other convincing evidence of the appellant's guilt, we would not find such an error – alone or in combination with the remainder of trial defense counsel's performance in the case below – to have denied the appellant a fair trial. *Id.*

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court