UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SHAWN D. HENDERSON
United States Air Force

ACM 37874

21 December 2012

Sentence adjudged 20 January 2011 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Jefferson B. Brown.

Approved sentence: Bad-conduct discharge, confinement for 15 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Ja Rai A. Williams.

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

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant contrary to his pleas of maltreatment, false official statement, and adultery, in violation of Articles 93, 107, and 134, UCMJ, 10 U.S.C. §§ 893, 907, 934. The court adjudged a sentence of a bad-conduct discharge, confinement for 15 days, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant raises three issues: (1) legal and factual sufficiency of the conviction for maltreatment; (2) sufficiency of the Article 134, UCMJ, adultery specification to allege an offense; and (3) sentence appropriateness.

Sufficiency of the Evidence

The court-martial convicted the appellant of maltreatment of a subordinate, in violation of Article 93, UCMJ, by ordering A1C KT to report to his off-base residence to study career development course materials and threatening her with a letter of reprimand if she did not obey. The elements of maltreatment are: (1) that a certain person was subject to the orders of the accused; and (2) the accused was cruel toward, or oppressed, or maltreated that person. *Manual for Courts-Martial, United States*, Part IV, ¶ 17.b (2008 ed.). "The essence of the offense [of maltreatment] is abuse of authority." *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002) Measured from an objective viewpoint in light of the totality of the circumstances, the charged acts must be such that they "reasonably could have caused physical or mental harm or suffering" but the offense does not require proof of "actual physical and mental pain or suffering." *Id.* The appellant argues that the evidence is insufficient to show an abuse of authority.

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 (C.M.A. 1987)). "The test for factual sufficiency 'is whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Turner*, 25 M.J. at 325).

A1C KT testified that within a few months of her arrival the appellant, her acting supervisor, attempted to give her a massage while they were on duty and also kissed her. She did not report either incident because she "didn't want to be outcast for that." About a month later, the appellant called her at approximately 2000-2100 hours and told her to come to his house to review the materials she had been studying in her career development courses (CDC). She told the appellant that she did not feel comfortable going to his house "especially that late at night." The appellant told her that he would send a taxi for her because he had been drinking and could not drive to pick her up. A1C KT called another supervisor, who told her to explain to the appellant the reason she did not feel comfortable going to his house. She did as directed, and the appellant responded by threatening her with a letter of reprimand if she did not come to his house. She again called the other supervisor, who relayed that he would talk to the flight chief about the situation and not to worry about it. An assistant flight chief testified that CDC study sessions were permitted in supervisor's homes, but they were usually group sessions. He testified that it would be "unusual" for a male supervisor who had been drinking to direct a female subordinate to come to his home for a one-on-one study session.

We find the evidence legally and factually sufficient to support conviction of maltreatment. Under the totality of the circumstances in this case, the appellant abused his authority by ordering a subordinate of the opposite sex to come to his residence after he had been drinking and toward whom he had made physical advances. His actions reasonably could have caused mental harm or suffering in that A1C KT was clearly concerned by the appellant's actions and called another supervisor to ask what she should do. After weighing the evidence and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.

Sufficiency of the Adultery Specification

Although not challenged at trial, the appellant argues that the specification alleging adultery fails to state an offense because it does not expressly or by necessary implication allege the terminal element required for an Article 134, UCMJ, offense. Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id*. (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)); *see also* Rule for Courts-Martial 307(c)(3).

In the case of a litigated Article 134, UCMJ, specification that does not allege the terminal element but which was not challenged at trial, the failure to allege the terminal element is plain and obvious error which is forfeited rather than waived. *United States v. Humphries*, 71 M.J. 209, 211 (C.A.A.F. 2012). The remedy, if any, depends on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice." *Id*. at 215. The prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16. (citations omitted)

The record in this case contains ample evidence of notice. During opening statements, both the Government and the defense discussed the terminal elements of conduct that is prejudicial to good order and discipline and service discrediting. Defense counsel told the court that proof of the terminal elements was essential to conviction. In closing, trial counsel specifically argued the service discrediting and prejudicial nature of the conduct by referencing the circumstances of the offense as relayed by the witness and how those circumstances proved the terminal element. The record clearly shows that, from the beginning of the trial on the merits, the appellant had sufficient notice of the terminal elements.

Sentence Appropriateness

The appellant argues that the adjudged bad-conduct discharge is inappropriately severe. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Applying these standards to the present case, we do not find a bad-conduct discharge inappropriately severe in light of the appellant's crimes and record of service, which included a nonjudicial punishment action for unprofessional relationships with two female Airmen.

Conclusion

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, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[*] We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.