UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AUSTIN R. WEBB
United States Air Force

ACM 34598

8 October 2002

Sentence adjudged 12 April 2001 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Adam Oler.

Before

YOUNG, BRESLIN, and STONE
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

The appellant pled guilty to battering his wife on divers occasions (Article 128, UCMJ, 10 U.S.C. § 928) and obstructing justice (Article 134, UCMJ, 10 U.S.C. § 934). The military judge accepted his pleas and, in addition, found him guilty of committing an assault with a dangerous weapon upon his five-week-old child (Article 128, UCMJ). The military judge acquitted the appellant of attempting to forcibly sodomize his wife (Article 80, UCMJ, 10 U.S.C. § 880). Another charge of wrongfully soliciting his wife to make a false statement (Article 134, UCMJ) was dismissed on motion of the prosecution. The convening authority approved the military judge's sentence: a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The appellant assigns three errors: (1) The evidence is legally and factually insufficient to sustain the conviction for aggravated

assault; (2) He is entitled to additional pretrial confinement credit; and (3) He is entitled to credit for nonjudicial punishment (NJP) he received pursuant to Article 15, UCMJ, 10 U.S.C. § 815 for one of the incidents to which he pled guilty at his court-martial. We affirm the approved findings and sentence, but order credit against his sentence to compensate him for the NJP.

I. Legal and Factual Sufficiency

The appellant asserts that his conviction for assaulting his child is legally and factually insufficient. He asks us to set aside his conviction because the evidence is unreliable and fails to establish that his five-week-old child could have felt a reasonable apprehension of immediate bodily harm.

A. The Facts

The appellant married on 28 April 2000; he was 20 years old. Within the year, he assaulted his pregnant wife on two occasions and became a father. On 1 January 2001, he battered his wife for the third time, causing her to black out. When she regained consciousness, she feigned a speech impediment. She hoped the speech impediment ploy would cause the appellant to be so concerned, because of their appointment to see his first sergeant the following day, that he would not strike her further. The appellant ordered his wife to stop speaking that way. When she did not comply, he grabbed their five-week-old baby out of the crib, held a steak knife to the baby's throat, and threatened to kill the baby if his wife's speech did not return to normal.

B. The Law

We may affirm only those findings of guilty that we determine are correct in law and fact and on the basis of the entire record should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (2000). Our superior court has determined that the test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

It is an offense to commit an assault with a dangerous weapon. Article 128(b)(1), UCMJ. The elements of the offense of assault with a dangerous weapon are as follows:

> (1) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(2) That the accused did so with a certain weapon;

(3) That the attempt, offer, or bodily harm was done with unlawful force or violence; and

(4) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

United States v. Emmons, 31 M.J. 108, 112 (C.M.A. 1990) (citing *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 54b(4)(a) (1984 ed.)). *See MCM*, Part IV, ¶ 54b(4)(a) (2000 ed.).

C. Discussion

A prosecution for assault with a dangerous weapon may be predicated on one or more of three theories: that the accused attempted to do, offered to do, or did bodily harm to another. The legal and factual sufficiency of the evidence depends upon the theory on which the case was tried.

An attempt-type assault "requires that an accused have a specific intent to commit a battery and that the accused take some act, beyond mere preparation, that tends to effect the intended battery." *United States v. Anzalone*, 41 M.J. 142, 146 (C.M.A. 1994). *See MCM*, Part IV, ¶ 54c(1)(b)(i) (2000 ed.) (attempt-type assault "requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm"). "An attempt-type assault may be committed even though the victim had no knowledge of the incident at the time." *MCM*, ¶ 54c(1)(b)(i). *See* 2 Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 7.16 at 314 (1986).

On the other hand, "[a]n offer-type assault requires an overt act that produces a reasonable apprehension of bodily harm." *United States v. Milton*, 46 M.J. 317, 319 (1997) (citing *MCM*, Part IV, ¶ 54c(1)(b)(ii) (1995 ed.)). It is "an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required." *United States v. Marbury*, 56 M.J. 12, 15 (2001) (quoting *MCM*, Part IV, ¶ 54c(1)(b)(ii) (2000 ed)).

During their closing arguments on findings, neither counsel focused on a theory of the case. Instead, they focused on the credibility of the appellant's wife—whether in fact the appellant ever held the knife to his daughter's throat and threatened to kill her. The appellant claims the prosecution's theory of the case was that the appellant offered to do bodily harm to another. We are not so convinced. The only reference that would support

the appellant's claim was one statement in which the trial counsel said, "We further contend that, with regard to aggravated assault on Sage Webb, he did offer to do bodily harm to her when he told Lori that he was going to kill the baby, and he did it with a weapon." R. 296. We cannot conclude that the prosecution's case rested solely on an "offer-type" theory of assault. Certainly the fact-finder—in this case, the military judge—was not so constrained.

In a trial by judge alone, there are no instructions on the record. The judge is the source of law, and she "is presumed to know the law and apply it correctly." *United States v. Robbins*, 52 M.J. 455, 457 (2000) (citing *United States v. Raya*, 45 M.J. 251, 253 (1996)). Neither the specification of assault with a dangerous weapon nor the evidence presented at trial limited the military judge's consideration of the offense to an offer-type assault.

The prosecution established the elements of an attempt-type assault with a dangerous weapon beyond a reasonable doubt. By grabbing the baby and holding the knife to her throat, the appellant took "some act, beyond mere preparation, that tend[ed] to effect the intended battery." *Anzalone*, 41 M.J. at 146. The circumstantial evidence established beyond a reasonable doubt the appellant's intent to harm the baby if his wife did not stop feigning the speech impediment: (1) The appellant was angry with his wife throughout the day on 1 January; (2) He feared that his first sergeant, with whom he was meeting the following day, would discover that he had again assaulted his wife after he had received NJP for similar incidents; (3) He obtained the knife from another part of the house, suggesting he thought about what he was going to do; and (4) The appellant's assaults on his wife while she was pregnant show his total disregard for the health of the child while in utero, and a willingness to injure the baby as a means of getting what he wanted. *See* 1 LaFave & Scott, *supra* § 3.5(f) at 317-18. It is not a defense to an attempt-type assault that the victim avoided injury because the accused's demands were met. 2 LaFave & Scott, *supra*. § 7.16(c) at 317-18.

We have carefully weighed the evidence of record and considered the appellant's contention that his wife's testimony is not to be believed because "her testimony was . . . riddled with inconsistencies" and "[h]er lack of credibility and reputation for untruthfulness were also exposed." Appellant's Br. 25. Although, the appellant's wife was the only eye-witness to the alleged assaults, the military judge had more to rely on than just her testimony. The prosecution introduced into evidence a letter the appellant wrote to his wife urging her to change her story about how the knife got into the baby's crib. In addition, key aspects of the wife's testimony were corroborated by a neighbor and investigators. After reviewing all of the evidence, and recognizing that the military judge saw and heard the witness, we are convinced of her credibility, as to the specifications of which the appellant was convicted. *See* Article 66(c), UCMJ.

The evidence is both legally and factually sufficient to sustain the appellant's conviction for the aggravated assault on his daughter. *Reed*, 54 M.J. at 41. We see no need to consider whether the appellant's misconduct also constituted an offer-type assault.

II. Additional Pretrial Confinement Credit

At 0300, 2 January 2001, First Lieutenant (Lt) Baker, the acting squadron commander, ordered the appellant into pretrial confinement for battering his wife and daughter on 1 January 2001. That same day, Lt Baker prepared a memorandum summarizing the evidence against the appellant. He noted that the appellant committed a battery on his wife by striking her in the face, raped his wife, attempted sodomy with his wife, and committed an aggravated assault on his five-week-old daughter. Based on the escalating nature of the appellant's violent behavior and his departure from the installation, apparently in an attempt "to elude both detection and apprehension," Lt Baker found that pretrial confinement was necessary and that lesser forms of restraint were inadequate to prevent the appellant from fleeing or committing additional assaults on his wife and child.

Appointed on 4 January 2001, the pretrial confinement reviewing officer, Colonel (Col) Smith, conducted the 7-day Rule for Courts-Martial (R.C.M.) 305(i)(2) review on 5 January. Although not raised at trial, the appellant now claims he is entitled to two additional days of pretrial confinement credit because the initial decision to place him into pretrial confinement was not reviewed within 48 hours by a neutral and detached magistrate. He asserts that Lt Baker was not neutral and detached when he submitted his memorandum on 2 January justifying his decision to confine the appellant. Thus, he argues, the first confinement review conducted by an impartial magistrate was that performed by Col Smith some 82 hours after the appellant was placed into confinement.

Under the Fourth Amendment right to be free of unreasonable seizure, an individual "must promptly be brought before a neutral magistrate for a judicial determination of probable cause." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)). The hearing must be held as soon as feasible, but in no event later than 48 hours after arrest, absent the existence of an emergency or extraordinary circumstances. *McLauglin*, 500 U.S. at 56-57. *See* R.C.M. 305(i)(1). If the arrested individual does not receive a probable cause hearing within 48 hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

These "'procedures required by the Fourth Amendment in the civilian community must also be required in the military community' unless military necessity require[s] a different rule." *United States v. Rexroat*, 38 M.J. 292, 295 (C.M.A. 1993) (quoting *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976)).

"A request for additional pretrial-confinement credit pursuant to R.C.M. 305(k) is raised at trial by a motion for appropriate relief. Failure to make a motion for appropriate relief constitutes waiver." *United States v. McCants*, 39 M.J. 91, 93 (C.M.A. 1994) (citations omitted). Having failed to raise the issue at trial, the appellant waived the issue on appeal. Furthermore, the appellant failed to meet his burden of establishing that the military judge committed plain error. *See United States v. Chapa*, 57 M.J. 140 (2002).

III. *Pierce* Credit

On 13 November 2000, the appellant accepted nonjudicial punishment for striking his wife on the back of the head with a closed fist on 22 October 2000. On 16 November 2000, the appellant's commander imposed the following punishment for that offense: reduction to E-2, suspended until 15 May 2001, 45 days' extra duty, 45 days' restriction to the confines of Eglin Air Force Base, and a reprimand.

The appellant was charged with, and pled guilty to, assaulting his wife on divers occasions between about 1 July 2000 and about 1 January 2001. During the plea inquiry, the appellant told the military judge that sometime in July 2000 he struck his wife in the face with the palm of his hand. R. 22. He admitted striking his wife in the back of the head with his closed fist in October 2000. R. 27. In addition, he advised the military judge that he struck her in the head with his hand on 1 January 2001. R. 33.

The appellant now claims he is entitled to complete credit against his court-martial sentence for the punishment he received in November 2000 as a result of the NJP. The United States asserts that the appellant is not entitled to any relief because the government never intended the specification to include the battery for which he had already been punished.

The United States correctly observes that the battery for which the appellant received NJP was not presented to the Article 32, UCMJ, 10 U.S.C. § 832, investigating officer, nor was it discussed in the pretrial advice to the convening authority. Apparently, the prosecution did not intend to try the appellant for the incident that was the subject of his NJP. Nonetheless, that battery was committed within the charged time period, and the appellant pled guilty to it without objection from the prosecutors. It was part of the basis upon which the military judge accepted the appellant's plea and found him guilty of the offense. Although the personal data sheet reflected that the appellant had received nonjudicial punishment, the NJP itself was neither introduced into evidence nor discussed at trial. That suggests to us that the prosecutor understood the appellant's guilty plea would include the battery which was the subject of the NJP and, therefore, that the appellant would be the gatekeeper as to whether and how the previous punishment would be presented to the trial court. *See United States v. Gammons*, 51 M.J. 169, 179-81 (1999). The military judge had no way of knowing that the appellant had already been

punished for some of the criminal activity to which he pled guilty. Thus, we must presume that the military judge punished the appellant for the assault for which he had already been punished under Article 15, UCMJ.

Neither the Double Jeopardy Clause nor Article 44, UCMJ, 10 U.S.C. § 844, bars the subsequent court-martial of a military member for the same offense for which he received nonjudicial punishment. *Gammons*, 51 M.J. at 179.

> [T]he complementary goals of enhancing military discipline while reducing the adverse impact of convictions on servicemembers provide a rational non-criminal justification for NJP and that the relatively modest penalties available under NJP are not so excessive as to transform NJP into a criminal proceeding under the Double Jeopardy Clause.

Id. at 178 (referring to *Hudson v. United States*, 522 U.S. 93 (1997)). Nevertheless, the accused cannot be punished for both because to do so "would violate the most obvious, fundamental notions of due process of law." *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989). Thus, an accused is entitled to "*complete* credit" against his court-martial sentence "for any and all nonjudicial punishment suffered" for the same offense: "day-for-day, dollar-for-dollar, stripe-for-stripe." *Id.*

If an accused is convicted of the offense for which he was received NJP, "Article 15(f) require[s] that the defense, not the prosecution, determine whether the NJP should be presented." *Gammons*, 51 M.J. at 179 (citing *Pierce*, 27 M.J. at 369). "If the accused, as gatekeeper, chooses not to introduce evidence of a prior NJP, the prosecution normally will be precluded from introducing or commenting on such a record." *Id.* at 180. Although not clear, it appears that an accused does not waive the issue of *Pierce* credit by failing to raise it at trial or before the convening authority. *Id.* at 184 ("Likewise, if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit."). We believe that an appellant should not be able to raise this issue for the first time at our Court. If an accused fails to bring the prior NJP to the attention of the court-martial or the convening authority, the issue should be deemed waived on appeal. Nevertheless, we are bound by what appears to be our superior court's decision to the contrary. *See United States v. Allbery*, 44 M.J. 226, 228 (1996).

Our superior court has noted the difficulties in reconciling NJP with court-martial sentences. It suggested that a table of equivalent punishments similar to that provided in *MCM 1969*, ¶¶ 127*c*(2) or 131*d* (Rev. ed.) be used. *Gammons*, 51 M.J. at 183-84 (citing *Pierce*, 27 M.J. at 369). Since the President "has chosen not to promulgate such a table," it is our responsibility to make the appropriate assessment. *Id.* at 184. We considered using the tables of equivalent punishments contained in the 1969 *Manual*, but decided that neither is the appropriate vehicle in this case because the extra duties and restriction to the base were served concurrently. The tables in the 1969 *Manual* provide that 2 days

of restriction are equal to 1 day of confinement and 1 ½ days of extra duty are equal to 1 day of confinement. If we applied the rules in the tables mechanically, an accused would be entitled to a greater credit for serving restriction and extra duties concurrently than he would for pretrial confinement. We fail to see how being restricted to the base and ordered to perform extra duties for 1 day are more onerous in today's Air Force than a day of pretrial confinement. An accused serving such concurrent punishments could still go to the movies, visit his friends, and go out for pizza. To grant an accused more than 1 day of confinement credit for each day of serving restriction and extra duties concurrently would be an undeserved windfall. We will grant the appellant 1 day of credit against his sentence to confinement for each of the 45 days he was both restricted and had to perform extra duties.

We decline to award any credit for the suspended reduction and believe that 1 day is the appropriate credit for the reprimand. Therefore, we hold that 46 days is the appropriate confinement credit in this case. As the appellant has already been released from confinement, he is entitled to pay for 46 days as an E-1.

IV. Conclusion

The approved findings and sentence are correct in law and fact. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41 (2000). The appellant is entitled to 46 days' pay. Accordingly, the approved findings and sentence are

AFFIRMED.

STONE, Judge (dissenting):

I dissent because I disagree with how the majority computed credit for the appellant's NJP. Although I concur with the majority on awarding one day of confinement credit for the reprimand and no credit for the suspended reduction in rank, I would compute the appellant's credit for restriction and extra duties by using the table of equivalent punishments found in the 1969 *Manual*.

Although the Executive Branch has remained silent as to how to convert NJP into an equivalent court-martial punishment for the purpose of awarding *Pierce* credit, the table of equivalent punishments found in the 1969 *Manual* is easily applied to punishments involving restriction and extra duties. It has the added benefits of eliminating doubt as to the adequacy of the credit actually applied and avoiding the need to engage in a case-by-case analysis of the specific circumstances surrounding restriction or extra duties at any particular installation or command. Most importantly, however, such an application is consistent with congressional and executive intent expressed elsewhere. *See generally*, R.C.M. 1003 (b)(5) and (6); 10 U.S.C. § 820; *MCM*, Part V, ¶ 5(b)(2)(B) (2000 ed.).

Finally, restriction to limits and imposition of extra duties are distinct punishments, regardless of whether they run concurrently or not, and should be considered separately on the issue of awarding credit. Therefore, I would compute the appellant's credit for restriction and extra duties as 52 ½ days. *See Pierce*, 27 M.J. at 369 n.5.

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