UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Chief Master Sergeant STEVE B. BRADY
United States Air Force

ACM 35937

20 July 2006

Sentence adjudged 5 December 2003 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Lance B. Sigmon.

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for Appellant: Frank J. Spinner, Esq. (argued), Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Captain Jefferson E. McBride (argued), Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Michael E. Savage, Major John C. Johnson, and Capt Kimani R. Eason.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

The appellant was convicted, contrary to his pleas, of two specifications of committing an indecent act upon a female under 16 years of age, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A general court-martial, consisting of officer members, sentenced the appellant to a dishonorable discharge, confinement for 2 years, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asserts, that: (1) the evidence is legally

and factually insufficient to support the findings of guilty; (2) the appellant's conviction of Specification 1 of the Charge cannot be affirmed in light of *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), and *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004); (3) the military judge erred by admitting certain propensity evidence; (4) the appellant's sentence is inappropriately severe;[1] and, (5) the appellant suffered prejudicial error as a result of a number of complaints submitted via Article 38(c), UCMJ,[2] during the clemency process. For the reasons set forth below, we find merit in the appellant's second assignment of error and order a rehearing on sentencing.

Background

The appellant is a 50-year-old Airman who has served over 30 years on active duty. At trial, he defended against allegations that he had sexually abused AS, the nine-year-old daughter of his girlfriend, Ms. KA. The appellant lived with Ms. KA, her two sons, and AS. On 14 December 2002, AS reported to her mother that the appellant had engaged in inappropriate sexual activity with her. According to AS's testimony at trial, she came forward with her allegations when she finally got sick of the things the appellant was doing to her. AS testified that the appellant came into her bedroom, wearing nothing, on five occasions. She also said that on one occasion the appellant pulled her hand back into his "private area," and on another occasion inserted his finger into her anus. She testified that, when playing a "kissing game" with the appellant, he would sometimes use his tongue on her belly button. She identified a separate time when the appellant had her touch his penis at his apartment during the daytime while she was sitting on his stomach. During the summer or fall of 2002, Ms. KA awoke during the night and noticed the appellant was not in bed. She heard a noise and went to AS's bedroom, where she found the appellant, nude, "tickling her back."

The prosecution also presented brief testimony from an Air Force Office of Special Investigations agent who said the appellant did not deny the allegations when confronted, and when asked if "something like this could have happened, were it possible," acknowledged that "yes, it could have."

The appellant defended against these allegations by presenting a sleepwalking defense. He called his mother and two former live-in girlfriends as witnesses in the findings phase. Through them, and through the cross-examination of Ms. KA, he was able to establish that he had been a sleepwalker since childhood. His female partners also testified that the appellant would initiate sex while asleep and Ms. KA admitted that the appellant had, on occasion, attempted to insert a finger into her anus while asleep. The appellant also called an expert on sleep disorders who opined that the appellant is, in fact a sleepwalker, that it is possible to engage in a variety of behaviors while sleepwalking,

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[1] Oral argument on Issues (1), (3), and (4) were heard at Travis Air Force Base, California, on 21 March 2006, as part of this Court's Outreach Program.
[2] 10 U.S.C. § 838(c).

and that it would be very difficult to tell whether the appellant was sleepwalking on the night he was found in AS's bed. The appellant also took the stand and testified that he never knowingly sexually abused AS.

Discussion

Because the appellant's second assignment of error has the greatest impact on the disposition of this case, we will discuss it first. In Specification 1 of the Charge, the appellant was accused of committing indecent acts upon AS by placing her hand upon his penis on divers occasions. The court members found the appellant guilty, but excepted out the words "on divers occasions." At this point in the court-martial, our superior court's decision in *Walters,* 58 M.J. at 391, required the military judge to "secure clarification of the court-martial's ambiguous findings prior to announcement." *Id.* at 397. Because the military judge failed to do so, our superior court has ruled that we are precluded from conducting a factual sufficiency review of the appellant's conviction for this specification because the "findings of guilty and not guilty do not disclose the conduct upon which each of them was based." *Id. See also Seider*, 60 M.J. at 36. Government appellate counsel concede the finding of guilty as to Specification 1 of the Charge must be set aside.

Legal and Factual Sufficiency

The appellant argues that the remaining specification, alleging an indecent act upon AS by kissing and licking her on the bare neck, and kissing and licking her on the bare stomach, should be set aside because it is both legally and factually insufficient to support a conviction. 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 AS was credible and compelling and supported by other prosecution witnesses. On appeal, the appellant's argument in essence is that we should believe he is telling the truth and find that AS is lying. After weighing all the evidence and making allowances for not having personally observed the testimony of the appellant, AS, and the other witnesses, we decline to label AS as untruthful. Although trial defense counsel were able to point out minor inconsistencies and flaws in various aspects of the government's case, the weight of the evidence from AS and the other witnesses leaves us convinced of the appellant's guilt beyond a reasonable doubt. *See id.*; Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See also United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R.

1986) ("Proof beyond a reasonable doubt . . . does not mean that the evidence must be free of conflict").

Mil. R. Evid. 414[3]

During its case-in-chief, the government attempted to elicit testimony from AS regarding an incident during which the appellant licked AS's toes while laying on top of her. AS was about to testify that while the appellant was licking her toes, his penis, though clothed, was first near, then in, her mouth. The trial defense counsel objected to the testimony, arguing that there had been no notice under Mil. R. Evid. 413 and that the testimony was prohibited under Mil. R. Evid. 404. The trial counsel informed the military judge that the government had only become aware of the information the night before trial. The military judge did not allow the testimony, but warned trial defense counsel that the testimony could come in later if the door was opened.

The appellant later presented his case, relying on his sleepwalking theory. The appellant took the stand and testified that he had never knowingly licked AS and any occasions involving kissing were solely within the rules of the "kiss me game" they played. He also denied ever knowingly having AS touch his penis.

In its rebuttal case, the government sought to call AS to rebut the sleepwalking defense – specifically to describe the incident described above and explain that it occurred during daylight hours when both parties were awake. The defense objected, arguing that the door was not opened, and that the testimony described uncharged misconduct and was highly prejudicial. The military judge allowed the testimony, finding that good cause existed for overcoming the five-day notice requirement under Mil. R. Evid. 414(b), that the testimony properly rebutted the appellant's defense to the intent element, that it was permitted under Mil. R. Evid. 414 as evidence of similar crimes in child molestation cases, and that although it was prejudicial in nature, it was admissible for establishing the appellant's intent after applying Mil. R. Evid. 403. The trial defense counsel did not request a delay in order to prepare for this new testimony.

We review the admission of propensity evidence for an abuse of discretion. *United States v. James*, 60 M.J. 870, 871 (A.F. Ct. Crim. App. 2005) (citing *United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001); *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001)), *aff'd,* 63 M.J. 217 (C.A.A.F. 2006). Our superior court has provided us a three-prong analysis for determining the admissibility of propensity evidence under Mil. R. Evid. 413, and such analysis is appropriate in analyzing Mil. R. Evid. 414

[3] Although all parties at trial seemed to refer to Mil. R. Evid. 413 and Mil. R. Evid. 414 interchangeably, it is apparent from the record of trial that this was a case dealing with allegations of child molestation. Therefore, Mil. R. Evid. 414 is the appropriate rule under which the proffered evidence should be analyzed. As the two rules are essentially the same in substance, "the analysis for proper admission of evidence under either should be the same." *United States v. Dewrell,* 55 M.J. 131, 138 n.4 (C.A.A.F. 2001).

evidence in child molestation cases. *James,* 60 M.J. at 871; *United States v. Wright*, 53 M.J. 476 (C.A.A.F. 2000); *United States v. Henley*, 53 M.J. 488, 490 (C.A.A.F. 2000). The three threshold findings are whether:

> 1. The accused is charged with an offense of sexual assault or child molestation--Mil. R. Evid. 413(a) [or Mil. R. Evid. 414(a)];
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> 2. "[T]he evidence proffered is 'evidence of the defendant's commission of another offense of . . . sexual assault [or child molestation]'"; and
>
> 3. The evidence is relevant under [Mil. R. Evid.] 401 and 402.

James, 60 M.J. at 871-72 (citing *Wright*, 53 M.J. at 482).

If the evidence meets these requirements, the military judge must also perform an Mil. R. Evid. 403 balancing test. *James*, 60 M.J. 871. Factors to be considered include: the strength of proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the factfinder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and, the relationship between the parties. *Wright*, 53 M.J. at 482.

Before this Court the appellant concedes that the proffered testimony "may have met the basic requirements of Mil. R. Evid. 413," but asserts that the military judge performed an insufficient balancing test under Mil. R. Evid. 403. Appellate government counsel argues that since the military judge stated on the record that he conducted a balancing test under Mil. R. Evid.403, after performing the three-prong *Wright/James* analysis, he did not abuse his discretion.

In considering the military judge's ruling,

> [A] military judge enjoys "wide discretion" in applying Mil. R. Evid. 403. "Ordinarily, appellate courts 'exercise great restraint' in reviewing a judge's decisions under [Mil. R. Evid.] 403." When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." This Court gives military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the [Mil. R. Evid.] 403 balancing.

United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations omitted).

The military judge was not verbose in explaining his ruling, but did indicate that he had, in fact, conducted an Mil. R. Evid. 403 balancing test. We, therefore, in accordance with *Manns*, grant him a lower level of deference than we would have had he made detailed findings of fact on the record. In conducting our own analysis of the proffered evidence, and after applying the Mil. R. Evid. 413/414 analysis articulated in *Wright/James*, we find the judge's conclusion reasonable. The evidence consisted of direct testimony of the victim, a witness that the defense had had an opportunity to interview. There is nothing in the record to indicate that if the trial defense counsel had asked for a delay to deal with this new evidence it would not have been granted by the military judge. Additionally, the potential probative weight of the evidence was quite strong, the evidence was not of a nature to distract the factfinders, the time needed to prove the prior conduct was minimal, and the alleged act occurred during the charged timeframe.

We find that the military judge undertook the correct analysis in evaluating the evidence and came to a reasonable conclusion. There was no abuse of discretion.

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, 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 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). *See also United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Before attempting to reassess a sentence, however, we must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003).

Under the unique facts of this case we believe that there is a "dramatic change in the 'penalty landscape'" that renders us unable to reliably determine what the members would have imposed as a punishment absent the error discussed. *See id.* The specification that we are forced to dismiss today is certainly the more egregious of the two specifications of which the appellant was found guilty. However, despite the relatively innocuous language of Specification 3 of the Charge, a great deal of evidence in aggravation would have been before the members as they deliberated on sentence. This evidence, combined with the appellant's record over a lengthy period of service, as well as his retirement eligibility would have likely given rise to a wide variety of opinions on the part of the members as to an appropriate sentence in this case. We cannot be confident that we could reliably discern what the adjudged sentence would have been,

and thus return the case to The Judge Advocate General for a rehearing on sentence. *See United States v. Taylor,* 51 M.J. 390, 391 (C.A.A.F. 1999) (conclusion about the sentence that would have been imposed must be made with "confidence").

Article 38(c), UCMJ, Submissions

Finally, we have examined the complaints submitted to the convening authority under Article 38(c), UCMJ, and find them to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

The findings are affirmed as to Specification 3 of the Charge, but set aside as to Specification 1 of the Charge. The sentence is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority. A rehearing on sentence may be ordered.

Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator