UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GABRIEL R. CONTRERAS
United States Air Force

ACM 37233

28 May 2009

Sentence adjudged 12 January 2008 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Mark L. Allred.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Captain Coretta E. Gray, and Captain Naomi N. Porterfield.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiring to commit indecent acts with another, rape,[1] and housebreaking, in violation of Articles 81, 120, and 130, UCMJ; 10 U.S.C. §§ 881, 920, and 930. He was convicted, in accordance with his plea, of committing indecent

[1] The appellant was convicted of rape under the law of principals as it was Senior Airman (SrA) JA who actually raped Airman First Class (A1C) HS.

acts with another, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority disapproved the rape specification and charge under Article 120, UCMJ, and only approved so much of the sentence as provides for a bad-conduct discharge, confinement for five months, forfeiture of all pay and allowances, and reduction to E-1. The appellant asserts the following five assignments of error:

I.

WHETHER THE HOUSEBREAKING CHARGE SHOULD BE SET ASIDE BECAUSE THE BASIS OF THE UNDERLYING CRIMINAL OFFENSE IS A PURELY MILITARY OFFENSE.

II.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY TO THE HOUSEBREAKING CHARGE.

III.

WHETHER THE MILITARY JUDGE'S FAILURE TO PROPERLY INSTRUCT ON MISTAKE OF FACT AS A DEFENSE TO THE HOUSEBREAKING CHARGE WAS HARMFUL ERROR.

IV.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY TO THE CONSPIRACY CHARGE. [2]

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

V.

WHETHER THE APPELLANT'S APPROVED SENTENCE TO A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.[3]

Background

This case involved Airman First Class (A1C) HS' alleged consensual and nonconsensual conduct with three airmen – the appellant, Senior Airman (SrA) MJ, and SrA JA. On 8 February 2007, A1C HS arrived at Osan AB, Republic of Korea. On 10 February 2007, she went out to a few bars with a group of airmen from her squadron, including the appellant. She testified[4] that she had never met the appellant prior to this night. She only remembered going to two off-base bars and drinking a variety of alcoholic dinks to the point where she became "pretty intoxicated."[5] She also only remembered flirting with the appellant, but claimed that she could not recall going anywhere else or doing anything else over the course of the evening. Other witnesses testified that A1C HS went to two other bars that night and into the early morning hours of 11 February 2007. A1C HS was observed sitting on the appellant's lap, kissing him throughout the night, and dancing with him provocatively on the dance floor. She was also observed swaying back and forth, stumbling, and her eyes were red and half closed.

A1C HS testified her first memory after attending the first two bars was waking up in her dorm room with SrA MJ digitally penetrating her vagina.[6] She noticed that the appellant was in the room at the same time, sitting at her computer desk. The next thing she remembered was waking up sometime later, but this time SrA JA was on top of her engaged in sexual intercourse. She observed that the appellant was still in the room. She told SrA JA to stop. SrA JA had a confused look on his face but he complied and immediately stopped. He then left the room at her request. According to the testimony of SrA JA,[7] after he left, he heard her yelling at the appellant saying that he was going to feel sorry for what he had done. A short time later, the appellant departed A1C HS' room and went to SrA JA's room to report that A1C HS was very upset but he, the appellant, had calmed her down.

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[3] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] A1C HS testified pursuant to a grant of testimonial and transactional immunity.
[5] According to Major (Maj) MG, an expert in the field of toxicology, she estimated A1C HS's blood alcohol concentration at 0330 on 11 Feb 2007 – the time of the alleged rape – to be between .199 and .319, depending upon her metabolism. Maj MG testified that most people who reach a level of .20 are showing clear signs of intoxication and at a level of .30, many people are medically comatose, which means unresponsive. Dr. JY, an expert in forensic toxicology, testified that blackouts, a period when individuals are still functioning but they will not remember what happened, occur at a blood alcohol concentration level of .20 and higher.
[6] A1C HS testified this encounter was consensual.
[7] SrA JA testified pursuant to a grant of testimonial immunity.

After the appellant left her room, A1C HS proceeded to find a friend whom she knew from her previous assignment. After talking to her friend, his roommate and SrA MJ, she decided to go to the hospital and report the sexual assault.

Government prosecutors called additional witnesses to offer evidence of how SrA JA came to be in A1C HS' room having intercourse with her. According to the testimony of SrA JP,[8] at approximately 0300 on 11 February 2007, the appellant came to her room and, referring to A1C HS, stated, "I just [engaged in sexual intercourse with] that girl."[9] A few minutes later, SrA JA knocked on the door and the appellant went with SrA JA to have a cigarette. SrA JA testified that on the way down to the dorm's "smoke pit," the appellant informed SrA JA that he had just had sex with A1C HS and SrA MJ was also present. The appellant stated that A1C HS was a "squirter" and asked SrA JA if he wanted to see her squirt. They proceeded to SrA JA's room to obtain some condoms and then went to A1C HS's room. The appellant knocked on the door, turned the handle and went in. The appellant did not wait for a response from A1C HS before entering her room. When they entered her room, they saw SrA MJ lying on one bed naked and A1C HS was lying on the other bed under the covers. They were both asleep. SrA JA went back to his room to obtain a camera because they wanted to take a picture of SrA MJ sleeping in the nude. After taking pictures of SrA MJ, SrA JA woke him up and escorted SrA MJ out of A1C HS's room.

SrA JA testified that, when he returned to A1C HS' room after escorting SrA MJ out, A1C HS had awoke and she and the appellant started kissing. At some point, the appellant digitally penetrated her vagina while SrA JA sat and watched. Shortly thereafter, SrA JA began to digitally penetrate A1C HS. After he digitally penetrated A1C HS, SrA JA proceeded to engage in sexual intercourse with A1C HS until she told him to stop. SrA JA's testimony contradicted A1C HS' testimony in that he claimed she consented to all of the sexual activity while she maintained that she did not give him consent as she had never met him before.

SrA MJ testified[10] that he first met A1C HS on the night of 10 February 2007 in another airman's dorm room prior to going downtown that night. Although he did not remember exactly how it occurred, at some point after they had all been out drinking, he ended up in A1C HS' room with her and the appellant. They both engaged in various consensual sexual activities with A1C HS in the presence of each other. SrA MJ testified that at no point did she ever direct either of them to leave the room. Additionally, when he spoke to A1C HS after he heard she had claimed to be raped, she stated the sexual relations with him and the appellant were consensual and she was raped by someone she

[8] SrA JP was an acquaintance of the appellant's at Osan AB.
[9] A1C HS could not remember her interactions with the appellant; however, she indicated that he had permission to be in her room while she was engaging in sexual acts with SrA MJ. In addition, SrA MJ testified that both he and the appellant engaged in consensual sexual acts with A1C HS.
[10] SrA MJ testified pursuant to a grant of testimonial immunity.

did not know. A1C HS also told him that she did not object to SrA MJ and the appellant being in her room. However, A1C HS testified that she did not give consent to either SrA JA or the appellant to be in her room the second time.

Housebreaking

The first assignment of error is that the housebreaking charge should be set aside because the underlying Article 134, UCMJ offense of indecent acts with another is a purely military offense.

The question of whether an underlying offense is a purely military offense is a question of law that we review de novo. *United States v. Conliffe*, 67 M.J. 127, 131 (C.A.A.F. 2009). Under Article 130, UCMJ, an accused who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking. The second element of housebreaking, the element at issue here, "'requires a specific intent to enter with the intent to commit [a criminal] offense.'" *Conliffe*, 67 M.J. at 131 (quoting *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997). The *Manual for Courts-Martial, United States (MCM)* Part IV, ¶ 56.c.(3) (2008 ed.) defines a criminal offense as "any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense."

The appellant relies upon *Conliffe*, in which our superior court held that conduct unbecoming an officer and gentleman under Article 133, UCMJ, 10 U.S.C. § 933, is a purely military offense, and cannot serve as the underlying criminal offense in a housebreaking charge. However, in *Conliffe*, our superior court specifically declined to decide whether an Article 134, UCMJ, offense can serve as an underlying offense in a housebreaking charge. *Conliffe*, 67 M.J. at 133 n.2. Notwithstanding this, our superior court did note one significant difference between an Article 133 and Article 134, UCMJ offense. Under Article 133, UCMJ, an accused can be charged with either the Article 133, UCMJ, offense or the enumerated punitive article based on the same underlying conduct, whereas under Article 134, UCMJ, the preemption doctrine prohibits the government from charging an accused under Article 134, UCMJ, clauses 1 and 2, for conduct that is appropriately charged under an enumerated article. *Id.* In its appellate brief, the government submitted a Minnesota State Statute that makes unlawful any open or gross, lewd or lascivious behavior, or any public indecency.

We find that the offense of indecent acts with another is not a purely military offense. Although offenses under Article 134, UCMJ, clauses 1 and 2, include a purely military element that either the conduct is prejudicial to good order and discipline or is service discrediting, the core of many of the offenses criminalizes conduct similar to other jurisdictions. In this case, it appears the conduct which formed the basis of the offense of indecent acts with another would also be considered criminal conduct in the

state of Minnesota. Accordingly, we find that the offense of indecent acts with another is not a purely military offense.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain findings of guilty to the housebreaking and conspiracy charges. In accordance with Article 66(c), UCMJ, 10 USC § 866(c), 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, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (quoting *United States v. Turner*, 25 M.J. 324 (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 accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

There is ample evidence in the Record of Trial that the appellant committed the charged offenses. The evidence clearly shows that the appellant conspired with SrA JA to commit indecent actions upon A1C HS and that he entered her dormitory room without her permission with the intent to commit indecent acts upon her. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt and concluded the appellant committed the offenses of housebreaking and conspiracy. Furthermore, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Failure to Instruct on Mistake of Fact as a Defense

The appellant contends that the military judge failed to properly instruct on mistake of fact as a defense to the housebreaking charge. The appellant claims that although the military judge advised the members of the mistake of fact defense concerning the underlying offense of indecent acts with another, the military judge failed to advise the members that the instruction on the mistake of fact defense also applied to the first element of housebreaking. The appellant contends the military judge should have instructed the members that the mistake of fact defense applied to whether the appellant mistakenly believed he had consent to enter A1C HS' room, independent of whether he believed he had consent to commit an indecent act.

The standard of review for alleged instructional error is de novo. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003). Absent objection by the trial defense counsel, the error, if any, is waived absent plain error. *United States v. Blough*, 57 M.J. 528, 534 (A.F. Ct. Crim. App. 2002). "Even if the sentencing instructions were erroneous, we will not grant relief absent a showing of material prejudice to a substantial right." *Id.* (citations omitted). If there is a Constitutional error, we may not affirm the case unless the error was harmless beyond a reasonable doubt. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

In addition to giving the members an instruction on the mistake of fact defense concerning indecent acts, the military judge also gave the members an instruction on the mistake of fact defense as it applied to the lesser included offense of unlawful entry. However, the military judge did not give this instruction with respect to the first element of the housebreaking charge. Although the military judge was trying not to confuse the members, the military judge should have instructed the members on the mistake of fact defense for the first element of housebreaking. However, we find that this error did not prejudice the appellant. Having found that the appellant conspired with SrA JA to commit indecent acts upon A1C HS, the only issue remaining for the members was whether or not the appellant had consent to reenter A1C HS' dorm room, or reasonably believed that he did. *See United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997) (the unlawful entry element of housebreaking is a general intent crime, therefore any mistake of fact must be both "subjectively held and reasonable in light of all the circumstances"). The evidence clearly shows A1C HS did not give the appellant consent to reenter her room, nor did the appellant have any reasonable belief that she did consent. The only credible evidence that the appellant believed he had A1C HS' consent to enter her room is that she had consented to his presence in her room earlier in the evening. But this fact is greatly outweighed by all other facts and circumstances surrounding the charge. Just because an accused is given permission to enter a structure at one point in time or for one purpose does not mean that accused can reenter that structure at any time, for any purpose. *See United States v. Davis*, 54 M.J. 622 (A.F. Ct. Crim. App. 2000) (accused who had unfettered access to warehouse for duties can commit housebreaking by entering warehouse while off-duty and without lawful purpose); *United States v. Carroll*, 45 M.J. 604 (Army Ct. Crim. App. 1997) (accused guilty of housebreaking where he reentered female soldier's dorm room several hours after attending a party in her room); *United States v. Fayne*, 26 M.J. 528 (A.F.C.M.R. 1988) (accused guilty of housebreaking when he re-entered his wife's home without her permission to commit a crime). In this case the appellant had no lawful authority to reenter A1C HS' room. *Cf. Davis*, 54 M.J. at 625 ("[W]hen one enters a building with proper authority but also has the intent to commit a crime, the entry is not unlawful.") Moreover, given the lateness of the hour, a considerable amount of time passed between the appellant's departure and

return.[11] We find, beyond a reasonable doubt, that the appellant had no reasonable belief that he was entitled to re-enter A1C HS' room. *Peterson*, 47 M.J. at 235.

Accordingly, the appellant was not prejudiced by the military judge's failure to instruct the members on the mistake of fact defense concerning the first element of the housebreaking charge.

Inappropriately Severe Sentence

The appellant asserts that his sentence, which includes a bad-conduct discharge, is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the 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). We have a great deal of discretion in determining whether a particular sentence is appropriate but 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). Sentence comparison is generally inappropriate, unless this Court finds that any cited cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288 (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). "An appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

The maximum punishment in this case was a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for five months, forfeiture of all pay and allowances, and reduction to E-1.

Comparing his case to his co-conspirator, SrA JA, the appellant claims that the two sentences are highly disparate. SrA JA, who was found guilty by a military judge sitting alone of conspiracy to commit indecent acts with another, indecent acts with

[11] The appellant left SrA HS' room for anywhere from 30 to 90 minutes. The appellant told investigators he was in A1C HS' room at 0200. As previously noted, SrA JP testified the appellant came to her room no later than 0300. SrA JA testified the appellant brought him to A1C HS' room at approximately 0330.

another, and adultery,[12] was sentenced to confinement for 15 days, forfeiture of $500 pay for one month and reduction to E-3. Although the two cases are closely related, even if we were to find that the sentences are highly disparate, the government has provided a rational basis for the disparity. In this case the appellant was the instigator who went bragging to various other airmen about his sexual encounter with A1C HS. He invited SrA JA and led him to A1C HS' room, he encouraged SrA JA to perform the indecent acts upon A1C HS, and A1C HS was upset with the appellant for allowing SrA JA to commit indecent acts upon her. Had the appellant refrained from engaging in this behavior, the charged misconduct would not have likely occurred. Accordingly, the appellant's conduct warranted a more severe punishment.

Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[12] SrA JA was acquitted of rape, housebreaking, and indecent assault upon A1C HS.