UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSHUA E. MCCOWEN
United States Air Force

ACM 37189

09 April 2009

Sentence adjudged 09 November 2007 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Bryan Watson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Megan E. Middleton.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted the appellant of two specifications of willful dereliction of duty by providing alcohol to minors, one specification of indecent assault, one specification of assault consummated by a battery, and six specifications of engaging in conduct prejudicial to good order and discipline or service discrediting conduct by surreptitiously videotaping five females in various stages of undress, in violation of Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, 934.

Contrary to his pleas, the military judge found the appellant guilty of one specification of forcible sodomy, in violation of Article 125, UCMJ, 10 U.S.C. § 925, and one specification of engaging in conduct prejudicial to good order and discipline or service discrediting conduct by surreptitiously videotaping another female in various stages of undress, in violation of Article 134, UCMJ. The adjudged and approved sentence consists of a dishonorable discharge, 14 years confinement, and a reduction to the grade of E-1.[1]

On appeal the appellant asserts: (1) in light of evidence of a mistake of fact defense, the evidence is legally and factually insufficient to sustain his forcible sodomy conviction; (2) the military judge abused his discretion in admitting the testimony of a victim who testified about how her testimony at the appellant's Article 32[2] hearing and court-martial affected her; and (3) his sentence to a dishonorable discharge and 14 years confinement is inappropriately severe. We disagree and, finding no error, affirm.

Background

On 31 July 2006, then-Airman First Class LM, a 19-year-old female friend of the appellant, advised Air Force Office of Special Investigations (AFOSI) agents that the appellant raped her on 7 February 2006. On 2 November 2006, AFOSI agents obtained authorization to search the appellant's on-base residence and pursuant to that search authorization seized a computer, VHS video cassettes, and an eight millimeter video cassette tape from the appellant's residence. An analysis of the appellant's computer hard drive and the video cassette tapes revealed that the appellant had surreptitiously photographed and videotaped six females, one of which was his mother-in-law, in various stages of undress while they were either sleeping or using his restroom.[3]

The analysis also revealed photographs of LM sleeping nude with the appellant's penis near and in her mouth. At trial, LM testified that she was intoxicated and that while it was possible she consented to performing fellatio on the appellant, she believed she did not consent because she was not physically attracted to the appellant nor had a desire to have sex with the appellant.

During the sentencing portion of trial, Staff Sergeant (SSgt) LY, one of the victims, testified, in part, over the objection of trial defense counsel, that her attendance at the appellant's Article 32 hearing and court-martial had affected her financially, had

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to a majority of the charges and specifications in return for the convening authority's promise to not approve confinement in excess of four years if the appellant was found not guilty on the contested charges, but there was no sentence limitation if the appellant was found guilty on any of the contested charges. Since the appellant was found guilty on two of the contested charges, there was no sentence limitation imposed by the pretrial agreement.

[2] Article 32, UCMJ, 10 U.S.C. § 832.

[3] The appellant secretly videotaped the women using his restroom by hiding a wireless mini video camera in the speaker grille of an alarm clock in his restroom.

prevented her from providing emotional support to her husband following her husband's grandfather's death, had prevented her son from attending therapy, and had caused her to postpone her military upgrade training.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 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, 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)). In resolving questions of legal sufficiency, we are "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found all of the essential elements of the forcible sodomy specification. First, we note that the record of trial is devoid of any evidence that raises a mistake of fact defense. Contrary to the appellant's assertions, we do not believe that a kiss by LM to the appellant earlier in the night, assuming the kiss occurred, raises a mistake of fact defense. Moreover, we have reviewed the photographs of LM sleeping with the appellant's penis in her mouth and the photographs do not raise a mistake of fact defense. Second, assuming *arguendo* a mistake of fact defense was raised by the evidence, the mistake as to consent must still be honest and reasonable. *United States v. Gamble*, 27 M.J. 298, 308 (C.M.A. 1988); Rule for Courts-Martial (R.C.M.) 916(j)(1). Even if the appellant honestly believed LM consented to the sodomy, his belief, in light of the fact LM was drunk and sleeping at the time of the sodomy, was not reasonable. Thus, a mistake of fact defense would have failed. Lastly, we note LM's testimony that she believed she did not consent and the photographs that depict LM drunk, sleeping, and with the appellant's penis in her mouth legally support the appellant's forcible sodomy conviction.

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this specification.

SSgt LY's Testimony

We review a military judge's decision to admit or exclude evidence, including sentencing evidence, for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Sentencing evidence, like all evidence, is subjected to the Mil. R. Evid. 403 balancing test. *Manns*, 54 M.J. at 166. When a military judge conducts a proper Mil. R. Evid. 403 balancing test, his "ruling will not be overturned unless there is a 'clear abuse of discretion.'" *Id.* (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)). However, when a military judge fails to conduct a proper Mil. R. Evid. 403 balancing test we give his ruling no deference and decide the issue de novo. *Id.* In the case at hand, the military judge did not conduct a balancing test. Thus, we will give his ruling no deference and will decide this issue de novo.

R.C.M. 1001(b)(4) provides, *inter alia*, that "trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . ." R.C.M. 1001(b)(4). SSgt LY's testimony highlighted the financial, social, and psychological impact of the appellant's crime on her and falls within the ambit of aggravation evidence.

Moreover, conducting a Mil. R. Evid. 403 balancing analysis, we find that the probative value of SSgt LY's testimony was not substantially outweighed by the danger of unfair prejudice to the appellant. On this point we note: (1) the overriding concern of Mil. R. Evid. 403 is that evidence will be used in a way that distorts rather than aids accurate fact finding—namely the concern that the trier-of-fact will misuse the evidence; (2) this was a bench trial and the potential for unfair prejudice is substantially less at a bench trial than in a trial by members; and (3) military judges are presumed to know and apply the law correctly. *United States v. Stephens*, No. 08-0589/AF, slip. op. at 7 (C.A.A.F. 12 Mar 2009); *Manns*, 54 M.J. at 167; *United States v. Raya*, 45 M.J. 251, 253-54 (C.A.A.F. 1996). In the final analysis, the military judge did not abuse his discretion in admitting and considering SSgt LY's testimony.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (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).

In this case, the appellant: (1) forcibly sodomized and photographed himself forcibly sodomizing one victim (LM); (2) indecently assaulted and photographed himself indecently assaulting another victim (TB); (3) assaulted yet another victim (AM); and (4) secretly photographed or videotaped three other victims while they were nude (TW, EP, and LY). An aggravating factor surrounding the appellant's crimes is that he betrayed the victims' trust to commit his crimes. The appellant's actions in victimizing no less than six individuals seriously detract from his standing as a member of society and a military member. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, a sentence which includes a dishonorable discharge and 14 years confinement, 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.[4] 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

[4] The Court notes the court-martial order (CMO), dated 21 March 2008, fails to state the language from the Action verbatim. We order the promulgation of a corrected CMO.