UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CURTIS N. AUSTIN
United States Air Force

ACM 37159

10 February 2009

Sentence adjudged 09 November 2007 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Jennifer A. Whittier.

Approved sentence: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Steven R. Kaufman.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a panel of officers and enlisted members sitting as a general court-martial convicted the appellant of one specification of attempted escape from confinement, one specification of assault with a dangerous weapon, one specification of simple assault, and one specification of indecent assault, in violation of Articles 80, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 928, 934.[1] The adjudged and approved sentence consists of a dishonorable discharge, six years confinement, total forfeitures of pay and

[1] The appellant had also been charged with raping and communicating a threat to Airman First Class CM. The members found the appellant not guilty of the rape charge and the military judge dismissed the communicating a threat charge as multiplicious.

allowances, and a reduction to E-1. On appeal, the appellant asserts that the evidence is legally and factually insufficient to sustain his indecent assault conviction.[2] Finding no prejudicial error, we affirm.

Background

During February and March 2007, the appellant and Airman First Class (A1C) CM dated. In April 2007, A1C CM terminated the romantic relationship, but she and the appellant remained friends. On 26 July 2007, the appellant went with A1C CM to her dorm room, and while there, brandished a knife, threatened to cut A1C CM's throat if she screamed, and locked A1C CM in the bathroom with himself. The appellant instructed A1C CM to disrobe, and after she did so he kissed her breasts and licked her vagina.

After sexually assaulting A1C CM, the appellant asked her to drive him off base. As they walked toward the appellant's car they encountered A1C JS. A1C JS had planned to ride to work with A1C CM, but the appellant convinced A1C CM to inform A1C JS that A1C CM would be driving the appellant off base that morning. A1C CM gave A1C JS her car keys and accompanied the appellant to his car. Upon reaching the appellant's car, A1C CM ran to her car, sat down in the passenger seat, instructed A1C JS to drive, and attempted to lock the car doors. The appellant pursued A1C CM on foot.

Upon reaching A1C CM's car, the appellant brandished a knife, ordered A1C CM and A1C JS out of the car, and attempted to enter A1C CM's car. A1C JS and A1C CM sped off and reported the appellant to the base security forces. Later that day, Air Force Office of Special Investigations (AFOSI) agents apprehended the appellant. After a proper rights advisement, the appellant waived his rights and confessed to sexually assaulting and threatening A1C CM with a knife. On 1 August 2007, the appellant was placed in pretrial confinement. On 5 August 2007, the appellant attempted to escape from confinement by running outside the confinement facility. Security forces personnel pursued and re-apprehended the appellant.

On appeal, the appellant asserts that: (1) the government failed to prove that his acts of kissing A1C CM's breasts and licking her vagina were done with the intent to gratify his sexual desires and (2) the evidence is therefore legally and factually insufficient to support his finding of guilt on the indecent assault specification.

Legal and Factual Sufficiency

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

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

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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

"[I]n 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). 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant's assertions are without merit. He confessed to kissing A1C CM's breasts and licking her vagina, and his confession is corroborated by A1C CM's testimony. Moreover, the military judge properly instructed the members that the appellant's intent may be proved by circumstantial evidence. If there is ever a case where the legal maxim *acta exteriora indicant interiora secreta*[3] is applicable, it is this case. The appellant's acts of kissing A1C CM's breasts and licking her vagina are facts, in and of themselves, by which a reasonable fact finder could conclude the appellant had the intent to gratify his sexual desires.

In short, 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, beyond a reasonable doubt, all of the essential elements of the specification in question. Moreover, we have carefully considered the evidence under the factually sufficient standard and are convinced beyond a reasonable doubt that the accused is guilty of indecently assaulting A1C CM.

Erroneous Promulgating Order

Finally, we note that the promulgating order erroneously states that the sentence was adjudged by officer members rather than by officer and enlisted members. Preparation of a corrected court-martial order, properly reflecting that the sentence was adjudged by officer and enlisted members, is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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[3] Outward acts indicate inward intent.

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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court