UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant JEFFREY D. BEATTY
United States Air Force

ACM 35523

30 May 2006

Sentence adjudged 25 October 2002 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: R. Scott Howard and Nancy J. Paul (*DuBay* hearing).

Approved sentence: Confinement for 18 months and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major James M. Winner, Major N. Anniece Barber, and William E. Cassara, Esq.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Major Nurit Anderson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

Contrary to his pleas, the appellant was found guilty by officer and enlisted court members of one specification of taking indecent liberties with his daughter, JB, and one specification of committing indecent acts with JB, both in violation of Article 134, UCMJ, 10 U.S.C. § 934. The court members found the appellant not guilty of assaulting JB.

The appellant assigned four errors for our consideration, but only three remain. The appellant's first assigned error incorporated by reference a petition for new trial[1] that was filed simultaneously with his assignment of errors. In his petition, the appellant alleged the existence of newly discovered evidence and fraud on the court-martial: JB's recantation of the allegations against her father. On 31 May 2005, pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), we ordered a hearing to explore the circumstances of JB's post-trial statements. On 13 April 2006, we denied the appellant's petition for new trial. *United States v. Beatty*, Misc Dkt. No. 2006-03 (13 Apr 2006).[2] The issues raised were properly resolved under Article 73, UCMJ, not as an assigned error.

The three remaining issues are:

I. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTIONS FOR TAKING INDECENT LIBERTIES WITH A PERSON UNDER THE AGE OF 16 AND COMMITTING INDECENT ACTS WITH ANOTHER– THE OFFENSES ALLEGED UNDER SPECIFICATIONS 1 AND 2 OF CHARGE II.

II. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO STRIKE THE "AND GIVING HER A VIBRATOR" LANGUAGE FROM SPECIFICATION 2 OF CHARGE II AND FAILING TO EXCLUDE THE INFLAMMATORY EMAILS OFFERED TO SUPPORT THIS ALLEGATION, AND THE CUMULATIVE AND SPILLOVER EFFECT OF THE MILITARY JUDGE'S ERRORS DEPRIVED THE APPELLANT A FAIR TRIAL.

III. WHETHER THE APPELLANT IS ENTITLED TO A NEW POST-TRIAL REVIEW BECAUSE THE STAFF JUDGE ADVOCATE FAILED TO PROVIDE THE DEFENSE WITH NOTICE AND AN OPPORTUNITY TO RESPOND TO THE NEW MATTERS ASSERTED IN THE ADDENDUM PRIOR TO THE CONVENING AUTHORITY'S ACTION.

Finding no error, we affirm the findings and sentence.

[1] In accordance with Article 73, UCMJ, 10 U.S.C. § 873.

[2] On 25 May 2004, we granted appellate defense counsel's motion for oral argument on this and two other issues. Based on our resolution of the petition for new trial, appellate defense counsel indicated to us they no longer desired the opportunity to present argument.

Legal and Factual Sufficiency

The appellant's court-martial was held in late October 2002. The charges and specifications were based almost entirely on JB's allegations. The appellant contends JB was "fundamentally unreliable," in that she lacked credibility and was motivated to fabricate her allegations in an effort to gain freedom from her parents' rules and discipline. He emphasizes that his own testimony at trial, as well as the testimony of JB's mother and brother, contradicted JB's version of events.

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, when the evidence is viewed in the light most favorable to the government, a rational factfinder could have found the appellant guilty of all the 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 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally 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)).

JB was 17-years-old when she testified at trial, and she was unwavering in her account of the appellant's actions. JB testified four times under oath during the course of the proceeding: Twice during pretrial motion practice, once on the merits, and once in presentencing. She testified that the appellant frequently masturbated in her presence and, on occasion, asked her to participate – once by dripping or pouring oil on his penis while he masturbated and one or more other times by collecting tissues to help him clean up after he ejaculated. JB testified these sessions typically would occur while the appellant was checking her homework after school.

The appellant's distinctive physical appearance was important to the government's case, particularly in terms of JB's ability to describe specific aspects of his appearance. As was apparent from photographs of the appellant admitted into evidence, he had a number of elaborate tattoos and, more importantly, additions to his penis. JB was able to clearly describe the appellant's genital modifications: "He has two piercings on his penis, on the underside. They go horizontal, one on top of the other, and they are round rods with one ball on each end of both of them."

In her trial testimony, JB admitted to a history of telling lies to numerous people about a variety of things. But, she was consistent in her testimony throughout the proceeding and presented a nearly clinical description of the appellant's actions. We conclude a rational factfinder could have found the appellant guilty of all the elements of the offenses beyond a reasonable doubt. *See Reed*, 54 M.J. at 41. Further, we too are firmly convinced of the appellant's guilt beyond a reasonable doubt. *See id.* The

appellant's convictions for committing indecent liberties and indecent acts with JB are legally and factually sufficient.

Specification 2 of Charge II

The challenged specification alleged the appellant did, "at or near Box Elder, South Dakota, on divers occasions, between on or about 5 April 2001 and on or about 18 December 2001, wrongfully commit indecent acts with his daughter, [JB], by exposing his penis and masturbating in her presence and giving her a vibrator." The focus is, and was at trial, on the words "and giving her a vibrator." Prior to arraignment, the trial defense counsel moved to strike those words from the specification on the grounds that they failed to state an offense under Article 134, UCMJ.[3]

The elements of the offense of committing an indecent act are:

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 90b (2005 ed.).[4] The term "'[i]ndecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *MCM*, Part IV, ¶ 90c.

The trial defense counsel in this case sought a ruling by the military judge that the conduct alleged was not a crime at all. The attack was two-pronged: Even if the appellant gave JB a vibrator for her own use, that act itself was not "indecent" as defined in the *Manual* and it was not done "with another" (the latter contention based on *United States v. Eberle*, 41 M.J. 862, 865 (A.F. Ct. Crim. App. 1995) ("to be an indecent act 'with' another person, regardless of age, there must be active participation by that other person"), *aff'd*, 44 M.J. 374 (C.A.A.F. 1996)).

[3] Interestingly, the members found the appellant guilty of the specification by exceptions: They found him guilty of committing indecent acts with JB by exposing his penis and masturbating in her presence, but they found him not guilty of the words "and giving her a vibrator." We review the military judge's ruling because the appellant contends there was an improper spillover effect from the evidence admitted to support the challenged portion of the specification.

[4] The elements were the same in the 2002 edition of the *Manual*, the edition in effect at the time of the appellant's trial.

We construe the trial defense counsel's motion to strike language from the specification to have been a motion to dismiss that portion of the specification for failure to state an offense, according to Rule for Courts-Martial (R.C.M.) 907(b)(1)(B). Typically, challenges to a specification on this basis concern failure by the government to include language of criminality or enough specificity otherwise to allow an accused to defend against the allegation. *See, e.g.*, *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim. App. 2002), *aff'd*, 61 M.J. 175 (C.A.A.F. 2005), *cert. denied*, 126 S. Ct. 576 (2005).

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3). To state an offense, a specification must provide: "(1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

The appellant does not allege a defect in the context of R.C.M. 307(c)(3) and *Dear*, and we find no defect.

The defense motion at trial was actually an attack on the first two elements of the offense – "[i]n essence, then, it constituted a motion for a finding of not guilty. *See* R.C.M. 917(a)." *United States v. Bamayangaymassaquoi*, 32 M.J. 1030, 1032 (A.F.C.M.R. 1991). The motion was not capable "of resolution without trial on the general issue of guilt"[5] and, therefore, was "inappropriate for settlement prior to pleas and presentation of the government's case." *Id.* (citing *United States v. McShane*, 28 M.J. 1036 (A.F.C.M.R. 1989)).

After considering JB's testimony and copies of e-mail exchanges between JB and the appellant while he was deployed to Saudi Arabia, the military judge denied the defense motion. He entered findings of fact and conclusions of law ("an act was performed with another and that there was active participation by the victim in this case"), but he need not have done so. The specification was not defective and he properly denied the motion. The evidence to support the specification, including the e-mail exchanges between JB and the appellant, were admissible.

Addendum to the Staff Judge Advocate's Recommendation (SJAR)

The appellant and his trial defense counsel vigorously challenged JB's credibility in their post-trial clemency submissions to the convening authority. *See* R.C.M. 1106(f)(4). The addendum to the SJAR included this observation about the defense challenge:

[5] R.C.M. 907(a).

> I note that a mixed panel of officer and enlisted members tried the accused. They were in a position to evaluate the evidence presented to them during findings and judge the credibility and demeanor of all of the witnesses called before them. They presumably took the factors the accused now points out when they reached their decision concerning the accused's guilt.

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law to be reviewed de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). *See also* R.C.M. 1106(f)(7), Discussion. If a comment constitutes "new matter," and if the appellant "makes some colorable showing of possible prejudice," then he or she will be entitled to relief. *Chatman*, 46 M.J. at 324. To do that, the appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Id*. at 323 (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a) (error must materially prejudice substantial rights of accused)).

In a declaration to us, the trial defense counsel avers she was not served with the addendum. Had she known about the comments prior to action, she contends she would have countered them by reminding the convening authority of his independent responsibility under Article 60, UCMJ, 10 U.S.C. § 860, and by emphasizing "that the appellant's clemency petition contained numerous documents that were excluded at trial but were, nevertheless, proper matters for him to consider in his post-trial review."

To the extent the addendum implied the court members saw all of the evidence submitted in the appellant's post-trial clemency matters, the convening authority was informed otherwise. He initialed the trial defense counsel's memorandum, which informed him that, "[i]n his letter, [the appellant] asks that you relook at the conviction and particularly at some of the evidence that was sealed and not available to the members when deliberating on his conviction." The convening authority initialed the appellant's personal letter to him, and he highlighted and underlined particular portions of the letter.

In short, even if the SJA's comments amounted to "new matter," we find no colorable showing of possible prejudice.

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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator