UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KEVIN D. BROWN
United States Air Force

ACM 36195

20 June 2006

Sentence adjudged 2 September 2004 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Print R. Maggard.

Approved sentence: Bad-conduct discharge and confinement for 12 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Major Sandra K. Whittington, and Captain Christopher S. Morgan.

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

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The charges in this case arose from three altercations between the appellant and Staff Sergeant (SSgt) AS. The appellant faced three specifications of damaging or destroying non-military property, in violation of Article 109, UCMJ, 10 U.S.C. § 909; five specifications of assault upon SSgt S, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and, one specification of communicating a threat to kill SSgt S and one specification of kidnapping SSgt S, both in violation of Article 134, UCMJ, 10 U.S.C. § 934.

The appellant was convicted, in accordance with his plea, of one specification of destroying non-military property. He pled not guilty to the other nine specifications and was convicted by officer and enlisted members of three of the nine: destroying non-military property valued at less than $500, assaulting SSgt S, and communicating a threat to kill SSgt S. He was sentenced to a bad-conduct discharge and confinement for 12 months. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asserts three errors:

> I. WHETHER APPELLANT'S CONTINGENT DECLARATION CONSTITUTES COMMUNICATING A THREAT.
>
> II. WHETHER THE STAFF JUDGE ADVOCATE'S [SJA] COMMENTS IN HIS ADDENDUM TO THE STAFF JUDGE ADVOCATE'S RECOMMENDATION [SJAR] CONSTITUTED NEW MATTER.
>
> III. WHETHER IT WAS PLAIN ERROR TO ADMIT THE TESTIMONY OF MSGT [MASTER SERGEANT] MICHAEL CREWS WHEN HIS TESTIMONY REGARDING APPELLANT'S REHABILITATION POTENTIAL INCLUDED SPECIFIC INSTANCES OF MISCONDUCT.

Finding no error that materially prejudices the substantial rights of the appellant, we affirm the findings and sentence. *See* Article 59(a), UCMJ, 10 U.S.C. § 859.

Communicating a Threat

The appellant and SSgt S were not married, but they had a son together in July, 2003. The appellant deployed to Iraq from November 2003 until January 2004. In April 2004, the appellant and SSgt S argued about, among other things, a relationship she had with another man while the appellant was deployed. SSgt S alleged the threat to kill her was made during the course of the argument.

The assistant trial counsel asked SSgt S about the alleged threats:

> Q. What did he say?
>
> A. He was just going on and on about how he couldn't believe that I did that to him and he said that if he ever saw the guy again that he would kill him and he said that if I wasn't his baby's mother that he would kill me too and a few minutes later he changed it and said that if my son wasn't there then I would be dead. At that point, I stood up and said that if he wasn't going to leave the apartment that I was going to leave and he stood up off the couch and hit me upside the head and ----

Q. Where was your child when he hit you upside the head?

A. He was in my arms.

Q. Now you mentioned earlier about a comment about words that if you weren't my baby's mom, you would be dead and he changed it later to if the baby wasn't here, you would be dead. How did that comment make you feel?

A. I was scared to death. He had already put his hands around my neck twice that night and he'd never threaten [sic] to kill me before.

On cross-examination, the trial defense counsel laid the groundwork for the current challenge:

Q. Now, you mentioned in your testimony that [the appellant] stated to you that, "If I wasn't the baby's mother he would kill you", right?

A. He said, "If I wasn't his baby's mother then I would be dead".

Q. But you are his baby's mother, correct?

A. Yes, I am.

Q. And then he changed his statement to say, "If the baby wasn't here, you'd be dead", correct?

A. Yes, sir.

Q. But the baby was there, is that correct?

A. Yes, sir.

The appellant testified at trial and denied making any threats against SSgt S. On appeal, his appellate defense counsel challenge the legal sufficiency of the members' guilty finding, contending the statements, even if made, did not constitute a threat.[1]

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

[1] The government did not include the alleged language in the specification.

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)).

The crux of the appellant's argument is that the words, if used as SSgt S testified, did not express "a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 110(b)(1) (2005 ed.).[2]

In assessing legal and factual sufficiency, "[b]oth the circumstances of the utterance and the literal language must be considered." *United States v. Cotton*, 40 M.J. 93, 95 (C.M.A. 1994). We untangle the circumstances from the point of view of a "reasonable [person],"[3] mindful that,

> The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. Thus, the presence or absence of an actual intention on the part of the declarant to effectuate the injury set out in the declaration does not change the elements of the offense. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensively establish this element of the offense, *but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal it to be a mere jest or idle banter*.

United States v. Phillips, 42 M.J. 127, 129-30 (C.A.A.F. 1995) (quoting *United States v. Gilluly*, 32 C.M.R. 458, 461 (C.M.A. 1963) (citations omitted)).

We agree with the appellant that the alleged threat to kill SSgt S, were she not his baby's mother, did not amount to a present determination or intent to wrongfully injure SSgt S. The utterance was conditioned on a variable that could not occur. Therefore, the condition negated the threat. *United States v. Shropshire*, 43 C.M.R. 214, 215-16 (C.M.A. 1971).

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[2] The 2002 edition of the *Manual* was in effect during the processing of the appellant's case. This provision is unchanged in the 2005 edition.

[3] *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995) (citing *United States v. Shropshire*, 43 C.M.R. 214, 215-16 (C.M.A. 1971).

The revised threat, to kill SSgt S if her son wasn't there, is another matter. Although SSgt S's son *was* there, we are convinced this was a threat in the context of the surrounding circumstances and the appellant's literal language. The relationship between the appellant and SSgt S was turbulent and their arguments occasionally turned physical. Nevertheless, the language of this declaration was distinctive in that the appellant, according to SSgt S, never threatened to kill her before – and the language was accompanied by a blow to SSgt S's head as she started to leave with their son.

We conclude a rational factfinder could have found the appellant guilty of all the elements of the offense beyond a reasonable doubt. *See Reed*, 54 M.J. at 41. Further, we too are convinced of the appellant's guilt beyond a reasonable doubt. *See id.* The appellant's conviction for communicating a threat to kill SSgt S is legally and factually sufficient.

Addendum to the SJAR

In his post-trial submission to the convening authority, the trial defense counsel challenged the appellant's conviction for communicating a threat. The addendum to the SJAR included the following:

> This issue is not new, as the defense specifically raised it in a motion for a finding of not guilty . . . and the military judge denied the motion finding there was "sufficient evidence to go to the members." . . . The appropriate judicial standard of review of whether or not the evidence at trial was sufficient to sustain a conviction for communicating a threat is "whether a rational fact finder, 'viewing the evidence in the light most favorable to the prosecution' could find beyond a reasonable doubt that appellant's language constituted a threat," as defined in Article 134 of the UCMJ. See U.S. v. Phillips, 42 M.J. 127, 129 (CAAF 1995), *citing* U.S. v. Cotton, 40 M.J. 93, 95 (CMA 1994). The members found the Accused guilty of communicating a threat after being instructed by the presiding military judge on what the law required for a finding of guilty and hearing defense counsel argument on the issue.

The appellant contends this comment constitutes new matter under Rule for Court-Martial (R.C.M.) 1106(f)(7), which requires the SJA to serve him with a copy of the addendum. We disagree. We consider the SJA's comment fair and required under R.C.M. 1106(d)(4). The SJA responded to the trial defense counsel's allegation of legal error and he presented nothing "new" requiring service of the addendum. *See* R.C.M. 1106(f)(7), Discussion.

MSgt Crews' Presentencing Testimony

The government called MSgt Crews to offer his opinion about the appellant's rehabilitative potential. R.C.M. 1001(b)(5). A witness offering an opinion about rehabilitative potential generally may not testify about specific instances of conduct on direct examination, or on redirect examination, unless the cross-examination concerned specific instances of misconduct. R.C.M. 1001(b)(5)(E) and (F).

On direct examination, MSgt Crews indicated he had occasional difficulties locating the appellant during the duty day. But, he concluded, "[h]e may have been working, I just don't know." The trial defense counsel's cross-examination of MSgt Crews was very brief and did not include specific instances of conduct. On redirect examination, the assistant trial counsel initiated this exchange:

> Q. Sergeant Crews, you mentioned that you often saw him when he returned from deployment. What were the problems you saw him about?
>
> A. We had him returned from his overseas deployed location due to a revoked security clearance. He had come back from a periodic investigation, the security manager for the base recommended that a [Security Incident File] be opened up and that his security clearance had been canceled.
>
> Q. Was there anything that you can remember that you had to see him about often when he returned from deployment?
>
> A. We were in the process of an administrative separation for fraudulent enlistment.

Trial defense counsel did not object, and the members were not given a limiting instruction by the military judge either at the time or later. The assistant trial counsel referred to these matters in his sentencing argument, again without objection.

In the absence of objection at trial, we review the admission of the challenged evidence for plain error. Mil. R. Evid. 103(d); *United States v. Armon*, 51 M.J. 83, 87 (C.A.A.F. 1999) (citing *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998)). Appellate government counsel contend that, "[w]hile the references to administrative separation, fraudulent enlistment, and security clearance revocation may have been improper, their admission did not rise to the level of plain error in consideration of the abundance of properly admitted evidence in aggravation, which included several prior instances of assault resulting in serious injuries." We agree.

We find it was error to admit references to administrative separation, fraudulent enlistment, and the appellant's security clearance revocation. We also find that error to be clear. The issue, then, is whether the appellant was prejudiced by the admission of this evidence, and if so, to what extent.

The military judge instructed the members they were to sentence the appellant "for the offenses of which the accused has been found guilty." The appellant was convicted of serious offenses that carried a maximum punishment of a dishonorable discharge and confinement for five years and six months.

The military judge properly admitted a significant amount of information from the appellant's record that spoke volumes about his rehabilitative potential, without the need for MSgt Crews' testimony: a mediocre record of duty performance; a nonjudicial punishment action for an assault on then-Senior Airman S in 2002; a letter of reprimand for an October 2001 fist-fight in the dorms which resulted in an Airman losing so much blood a special bio-hazard team was required; a letter of reprimand for a failure to report to duty at the expected time; a letter of reprimand for being delinquent in paying his government travel card bill; a letter of counseling for failing to return to duty after a physical therapy appointment; and a written counseling addressing a number of performance deficiencies.

In light of the findings of the court-martial and the abundance of presentencing evidence independent of MSgt Crews' testimony, we do not find the error materially prejudiced the substantial rights of the appellant. *See* Article 59(a), UCMJ.

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