UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BRANDON T. COLVIN
United States Air Force

ACM 34399

15 January 2002

Sentence adjudged 14 November 2000 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Michael J. Rollinger (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel William B. Smith, and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

ROBERTS, Judge:

The appellant was convicted, pursuant to his pleas, of one specification of indecent exposure, and contrary to his pleas of one specification each of taking indecent liberties with females under 16 years of age and committing an indecent act upon the body of a female under 16 years of age, and two specifications of communicating indecent language to children under 16 years of age, all in violation of Article 134, UCMJ, 10 U.S.C. § 934. The approved sentence consists of a dishonorable discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to E-1. The appellant avers the following errors on appeal: (1) The evidence is factually and legally insufficient to support his conviction for committing an indecent act with a child; and (2) The trial

judge erred when he failed to dismiss either Specification 3 or 4 of the Charge (the indecent language specifications), after concluding that the two specifications were an unreasonable multiplication of charges. We disagree and affirm.

The appellant first claims that the evidence is factually and legally insufficient to support his conviction for committing an indecent act with S.L. by having her place her hand on his penis, because there is no evidence that S.L. actually touched his penis. This Court has the duty to determine the legal and factual sufficiency of the evidence. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We may approve only those findings of guilt that we determine to be correct in both law and fact. "The test for [legal sufficiency] 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. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)); *United States v. Ladell*, 30 M.J. 672, 673 (A.F.C.M.R. 1990). It is understandable that a five-year-old child's memory of a traumatic event may be somewhat unclear. However, there is sufficient evidence that the appellant had S.L. touch his penis and that a reasonable factfinder could conclude that the appellant committed the indecent act upon S.L.'s body.

> "[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 convinced of the [appellant's] guilt beyond a reasonable doubt." *Ladell*, 30 M.J. at 673, (citing *Turner*, 25 M.J. at 325). In *United States v. Washington*, 54 M.J. 936, 941 (A.F. Ct. Crim. App. 2001) this Court observed that Congress clearly intended the service courts of criminal appeals to affirm the trial court's factual findings if "the weight of the credible evidence for conviction outweighed that for acquittal." We find the evidence to be factually sufficient to sustain the appellant's conviction of committing the indecent act upon the body of S.L. under either standard.

The appellant next claims that the trial judge erred when he failed to dismiss either Specification 3 or Specification 4 of the Charge, after the trial judge found there to be an unreasonable multiplication of charges. The appellant misstates the trial judge's ruling. We do not see in the record of trial that the trial judge concluded there was an unreasonable multiplication of charges. Instead, the trial judge ruled that "[b]ased upon the evidence that has been presented as it relates to Specifications 3 and 4, it appears as if the indecent language contained in these specifications were communicated contemporaneously with the indecent liberties and the indecent act that the [appellant] was found guilty of." He then stated, "I'm therefore going to consider Specifications 3 and 4 as a single specification for purposes of calculating the maximum punishment authorized in this case."

The appellant claims that the trial judge's consideration of the two specifications as one for sentencing was an inadequate remedy, and that one of the specifications should

have been dismissed. We disagree. At trial, the appellant asked the trial judge to find that there was an unreasonable multiplication of charges and dismiss either Specification 3 or 4, "or alternatively, grant other appropriate relief because failing to dismiss one of these two specifications would be fundamentally unjust." As noted above, the trial judge considered these two specifications as one for calculating the maximum sentence. This had the effect of granting the appellant "other appropriate relief" and no further relief is warranted. As this Court stated in *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997),

> Because this was a bench trial, we may fairly assume that in adjudging the sentence the [trial] judge considered appellant's pitch [that there was an unreasonable multiplication of charges] in this respect, and sentenced him based upon his view of the severity of appellant's actual behavior, implicitly making any equitable adjustment he thought appropriate. He was required to do no more because appellant asked for nothing more.

Id. at 652. We further decline to grant additional relief because the appellant has not convinced us that he suffered any material prejudice to a substantial right. Article 59(a), UCMJ, 10 U. S. C. § 859(a).

CONCLUSION

The 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator