UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL S. DESPLINTER
United States Air Force

ACM S31635

08 March 2010

Sentence adjudged 24 February 2009 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: Stephen Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 46 days, and reduction to E-2.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Major Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Roberto Ramirez, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to his pleas, a military judge sitting as a special court-martial found the appellant guilty of two specifications of willful dereliction of duty, one specification of divers cruelty and maltreatment, and one specification of making a false claim, in violation of Articles 92, 93, and 132, UCMJ, 10 U.S.C. §§ 892, 893, 932. Contrary to his pleas, the military judge found the appellant guilty of one specification of assault consummated by a battery and one specification of divers assault consummated by a

battery,[1] in violation of Article 128, UCMJ, 10 U.S.C. § 928. The military judge sentenced the appellant to a bad-conduct discharge, 75 days of confinement, and reduction to the grade of E-2. The convening authority approved the bad-conduct discharge, 46 days of confinement, and reduction to the grade of E-2.

On appeal, the appellant asks this Court to set aside the findings on Specification 2 of Charge III and to reassess the sentence. As the basis for his request, the appellant opines that the evidence is legally and factually insufficient to support the aforementioned assault consummated by a battery conviction because: (1) he touched Airman First Class (A1C) RCH, the alleged victim, to attract her attention; (2) she did not experience any pain or bruising; and (3) he touched her in a joking manner. Finding no prejudicial error, we affirm the findings and the sentence.

Background

In late July 2008, A1C LMH was at a party and as she attempted to enter the bathroom, the appellant pushed her in her chest area with his hands. Later that same evening, the appellant "bear hugged" A1C LMH and lifted her off the floor until another service member told the appellant to release A1C LMH. On 5 August 2008, the appellant went on temporary duty for training and though he spent no money for lodging, he filed a travel voucher in September 2008 claiming $48 for lodging. During mid-August to early September 2008, the appellant pushed A1C RCH and hit her with his beret. On 25 September 2008, the appellant used his government travel card to withdraw money to pay his personal bills. On or about 8 November 2008, the appellant, a security forces member on duty, willfully removed his ballistic vest, which he was required to wear on duty. That same day, while the appellant was on duty with A1C SMK, a subordinate, he exposed his penis to A1C SMK and showed her photographs of his penis that he had taken on his cell phone. A few days later, while the appellant was on duty with A1C SMK, the appellant initiated a conversation about masturbating and again showed her photographs of his penis that he had taken on his cell phone.

Legal and Factual Sufficiency of Findings on Specification 2 of Charge III

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, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

---

[1] The military judge found the appellant guilty of the divers assault consummated by a battery specification, Specification 2 of Charge III, by exceptions and substitutions.

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, beyond a reasonable doubt, all of the essential elements of the questioned specification in this case.

On this point, we note that the evidence—namely, A1C RCH's testimony—clearly establishes that the appellant pushed her and hit her with his beret. There is simply no evidence in the record that the appellant pushed and hit A1C RCH to get her attention. Moreover, the fact that the appellant may have been joking and that A1C RCH experienced no pain or bruising does not negate the illegality of the appellant's touching.

Lastly, 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). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of this specification.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] We note that the promulgating order erroneously states that the finding on Charge III was not guilty; however, the military judge found the appellant guilty of Charge III. Preparation of a corrected court-martial order, properly reflecting the finding on Charge III, is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court