UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CREON D. FAISON
United States Air Force

ACM 37464

19 April 2010

Sentence adjudged 19 February 2009 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Beth A. Townsend (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 35 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael S. Kerr.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of divers rape of a child who was under the age of 12, one specification of divers rape of a child who had attained the age of 12 but was under the age of 16, one specification of divers forcible sodomy with a child who had attained the age of 12 but was under the age of 16, and one specification of divers indecent acts with a child, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934. The adjudged sentence consists of a dishonorable discharge, 35 years of

confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the dishonorable discharge, 35 years of confinement, and reduction to the grade of E-1.[1]

On appeal, the appellant asks this Court to reduce his period of confinement by five years, to set aside the findings and sentence, and to remand the case for a new Article 32, UCMJ, 10 U.S.C. § 832, hearing. As the basis for his request, he opines that: (1) his sentence to 35 years of confinement is inappropriately severe considering the government's sentence recommendation was 30 years of confinement; (2) the military judge abused her discretion by not ordering a new Article 32, UCMJ, hearing after the Article 32, UCMJ, investigating officer (IO) considered, over defense objection, a videotaped interview of the alleged victim; (3) the military judge abused her discretion by admitting the appellant's involuntary statement to agents with the Air Force Office of Special Investigations (AFOSI); (4) he received an unfair court-martial due to unlawful command influence; (5) the evidence is legally and factually insufficient to support his findings of guilt on the charges and specifications; and (6) he received ineffective assistance of counsel.[2] We disagree and, finding no prejudicial error, we affirm the approved findings and sentence.

Background

In May 2004, the appellant lived with his then 10-year-old stepdaughter, TRD, on Whiteman Air Force Base, Missouri. Around this time period, the appellant began touching TRD's breasts, buttocks, and vaginal area; this touching evolved into oral sex and sexual intercourse. Over the course of approximately two and one-half years, the appellant and TRD had sexual intercourse once or twice a week and occasionally engaged in cunnilingus and fellatio. TRD eventually reported the incidents to her guidance counselor. AFOSI agents were informed of the appellant's alleged misconduct and on 13 May 2008, they summoned the appellant to their office for an interview. After a brief rapport building period, an AFOSI agent advised the appellant of his rights. The appellant waived his rights and agreed to answer questions. He then told the agents that on three occasions, beginning when TRD was 10 years of age, he rubbed her breasts and vaginal area, had sexual intercourse with her, and may have had oral sex with her.

On 9 October 2008, an Article 32, UCMJ, hearing was held in the appellant's case and the IO, over defense objection, considered TRD's 14 February 2008 videotaped interview with an employee of Child Protective Services wherein TRD recounted her sexual contact with the appellant. As the basis for his objection, the appellant opined that TRD's recorded interview was unsworn and did not qualify as an alternative to testimony under Rule for Courts-Martial (R.C.M.) 405(g)(4)(B). The IO, citing this Court's

[1] The convening authority waived mandatory forfeitures for the benefit of the appellant's dependants.
[2] Issues 1, 3, 4, 5, and 6 are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

unpublished opinion in *United States v. Simpson*,[3] found that TRD was unavailable and that her videotaped statement was the functional equivalent of a sworn statement admissible under R.C.M. 405(g)(4)(B)(i). At trial, the appellant moved for a new Article 32, UCMJ, hearing and a new referral. He also alleged that his 13 May 2008 statement to AFOSI was involuntary and moved for its suppression. After hearing argument on the issues, the military judge denied the appellant's motions.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant's crimes rank among the most heinous crimes recognized by society and severely compromise his standing as a non-commissioned officer, a military member, and a member of society. Moreover, the fact that the military judge adjudged five years more confinement than that recommended by the trial counsel does not mean that the appellant's sentence is inappropriately severe. A counsel's sentencing recommendation is just that—a non-binding recommendation—and the sentencing authority, in this case the military judge, was obliged to adjudge a sentence she thought fair and appropriate. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find that the appellant's sentence, one which includes 35 years of confinement, is inappropriately severe.

Military Judge's Ruling on a New Article 32, UCMJ, Hearing

We review a military judge's decision on whether to grant a motion for a new Article 32, UCMJ, hearing for an abuse of discretion. *United States v. Diaz*, 61 M.J. 594, 610 (N.M. Ct. Crim. App. 2005), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *United States v. Larson,* 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). An accused has the

[3] *United States v. Simpson*, ACM 32749 (A.F. Ct. Crim. App. 7 Sep 1999) (unpub. op.), *aff'd*, 54 M.J. 281 (C.A.A.F. 2000).

right to a "thorough and impartial investigation" of all charges referred to a general court-martial. *United States v. Castleman*, 11 M.J. 562, 562-63 (A.F.C.M.R. 1981).

An IO may consider, over defense objection, a sworn statement of an unavailable witness. R.C.M. 405(g)(4)(B)(i). An oath or affirmation to tell the truth must be "administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." Mil. R. Evid. 603; *see also United States v. Simpson*, ACM 32749, unpub. op. at 3-4 (A.F. Ct. Crim. App. 7 Sep 1999), *aff'd*, 54 M.J. 281 (C.A.A.F. 2000). "No particular oath or affirmation is prescribed." *Simpson*, unpub. op. at 4 (citing Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual*, § 883 (7th ed. 1998)). Flexibility in the oath or affirmation requirement is often warranted for child witnesses who might be hard-pressed to understand a formal oath or affirmation. *United States v. Washington*, 63 M.J. 418, 424 (C.A.A.F. 2006); *United States v. Morgan*, 31 M.J. 43, 48 (C.M.A. 1990); *Spigarolo v. Meachum*, 934 F.2d 19, 24 (2nd Cir. 1991).

In the case at hand, the IO found that TRD was unavailable and that her videotaped statement was sworn. The military judge properly reviewed the IO's findings and conclusions for an abuse of discretion. In so doing, the military judge determined that the IO had not abused his discretion by finding that TRD was unavailable and that her videotaped statement was sworn. We agree. The record supports a finding that TRD was unavailable for the Article 32, UCMJ, hearing. Moreover, after reviewing the videotape, we find that TRD stated that she knew the difference between the truth and a lie and promised to tell the truth. This colloquy more than adequately satisfied the oath/affirmation requirement so as to make TRD's videotaped statement a sworn statement under R.C.M. 405(g)(4)(B)(i). Accordingly, we find that the IO did not abuse his discretion in considering TRD's videotaped interview and hold that the military judge did not abuse her discretion by denying the appellant's motion for a new Article 32, UCMJ, hearing.

Admissibility of the Appellant's Confession

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). As stated earlier in this opinion, under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *Larson,* 66 M.J. at 215; *Rodriguez*, 60 M.J. at 246 (quoting *Ayala*, 43 M.J. at 298).

The voluntariness of a confession is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005). A confession is involuntary, and thus inadmissible, if it was obtained "through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3); Article 31(d), UCMJ, 10 U.S.C. § 831(d). In determining

whether an appellant's will was overborne in a particular case so as to render his confession involuntary, we assess the totality of the circumstances, considering both the characteristics of the appellant and the details of his interrogation. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Some of the factors taken into account include the appellant's age; the appellant's education; the appellant's intelligence; whether any advice was given to the appellant concerning his constitutional rights; the length of any detention; the length and nature of the questioning; and the use of any physical punishment, such as the deprivation of food or sleep. *Id.* (citations omitted).

In the case at hand, we find no error. The military judge made detailed findings of fact and conclusions of law. Her findings are amply supported by the record and her conclusions of law are correct. The appellant's characteristics and the details on the AFOSI interrogation favor a finding of voluntariness. With respect to the former, we note that: (1) the appellant was a 32-year-old staff sergeant who had served in the United States Air Force for approximately 12 years; (2) the appellant had some knowledge of the criminal justice system because he had worked as a prison guard at a confinement facility; and (3) there is no evidence that the appellant was not of average intelligence, did not complete high school, could not read or write, or was otherwise mentally impaired.

Concerning the interrogation, we note that: (1) there is no evidence that the rapport building session was designed to elicit an incriminating response; (2) AFOSI agents read the appellant his rights; (3) the appellant appeared to understand his rights; (4) the appellant waived his rights and agreed to answer questions; (5) AFOSI agents offered and the appellant took approximately six breaks during the interview; (6) AFOSI agents offered and the appellant accepted food and water during the interview; and (7) there is no evidence that the AFOSI agents made promises to, yelled at, threatened, coerced, unlawfully influenced, or touched the appellant. We agree with the military judge that, under a totality of circumstances, the appellant's confession was voluntary. Accordingly, the military judge did not abuse her discretion by admitting the appellant's 13 May 2008 confession.

Unlawful Command Influence

The prohibition against unlawful command influence arises from Article 37(a), UCMJ, 10 U.S.C. § 837(a), which provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ." Additionally, the burden of production on unlawful command influence issues is on the party raising the issue. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). In determining whether or not unlawful command influence exists, we ask whether there is "'some evidence' of 'facts which, if true, constitute unlawful command influence, and [whether] the alleged

unlawful command influence has a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *United States v. Harvey*, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)).

Once the appellant has met the burden of production and proof, the burden shifts to the government to "prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* (quoting *Biagase*, 50 M.J. at 151). In the case at hand, the appellant has failed to meet his burden of production. At best, he offers a general allegation of unlawful command influence on the part of his trial defense counsel and the military judge. While the threshold for triggering an unlawful command influence inquiry is low, bare allegations or mere speculation are not sufficient to warrant such an inquiry. *Stombaugh*, 40 M.J. at 213. Put simply, we find that there was no unlawful command influence and that the appellant is not entitled to relief.

Legal and Factual Sufficiency of the Findings

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))).

In resolving questions of legal sufficiency, this Court is "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 restricted 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 that a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted. On this point, we note that the following evidence is legally sufficient to support the appellant's convictions: (1) the appellant's 13 May 2008 written confession; (2) Special Agent RF's testimony wherein he alleged that the appellant confessed to the crimes; and (3) TRD's testimony wherein she alleged that the appellant fondled her chest and vaginal area and engaged in sexual intercourse and oral sex with her.

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 appellant is guilty of the offenses of which he has been found guilty.

Ineffective Assistance of Counsel

It is without question that service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). When there is a lapse in judgment or performance alleged, we ask: (1) whether the trial defense counsel's conduct was in fact deficient and, if so, (2) whether his counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). Counsel is presumed to be competent and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

In response to the appellant's ineffective assistance of counsel allegation, the government submitted a joint post-trial affidavit from the appellant's trial defense counsel, Major MT and Captain JJ. The trial defense counsel assert that they explored various ways to defend the appellant against the charges and were unable to locate any witnesses, alibi or otherwise, who would have been beneficial to the appellant's case. They further assert that they offered the appellant's military decorations, evaluations, certificates, and unsworn statement during sentencing but did not offer any character statements because none were written for him.

In the case at hand, the affidavits conflict in only one aspect—whether the appellant's trial defense counsel admitted mitigation evidence on the appellant's behalf. Mitigation evidence, which is evidence introduced to lessen the court-martial punishment or to furnish grounds for a clemency recommendation, includes "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." R.C.M. 1001(c)(1)(B).

When conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone and must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the record as a whole compellingly demonstrates the improbability of the asserted facts. *Id.* Such is the case here. The appellant's allegation that his counsel failed to admit mitigation evidence is without merit because the record clearly shows that his trial defense counsel admitted the mitigation evidence they were able to obtain.

Concerning the appellant's allegation that his counsel failed to call witnesses and present alibi evidence, there is no conflict between the affidavits because both the appellant and his counsel acknowledge that the appellant's trial defense counsel failed to call any witnesses, alibi or otherwise, during the trial. The question is whether such a failure constitutes deficient conduct and whether the appellant was prejudiced by his counsel's action. We answer both questions in the negative. There has been no showing that alibi evidence existed and that the appellant's trial defense counsel failed to admit it. Nor has there been any showing that beneficial defense witnesses existed and that the appellant's trial defense counsel failed to call them. Put simply, the trial defense counsel were not deficient.

Moreover, even assuming deficient conduct, we find no prejudice. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that but for counsel's unprofessional error the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Here, it is purely speculative whether the testimony of unknown and unidentified witnesses would have positively changed the outcome of the appellant's trial. Under the aforementioned facts, we find no 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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