UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant SHAWN P. FISHER
United States Air Force

ACM 36700

2 March 2007

Sentence adjudged 8 March 2006 by GCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Carl L. Reed II (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-3.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Jamie L. Mendelson.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge, sitting alone, convicted the appellant, contrary to his pleas, of one specification of service discrediting conduct and one specification of indecent assault, both in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a bad-conduct discharge, 7 months confinement, and reduction to E-3. The convening authority approved the sentence as adjudged.

Prior to the initial trial date (17 Jan 2006), the trial defense counsel requested that JS (the victim) be subpoenaed and compelled to produce her journal.[1] At the initial session of the trial, JS explained to all counsel that she had destroyed the journal. At the second session of the trial, JS testified, under cross-examination, that prior to the issuance of the subpoena, she queried the government about whether she had to produce her journal and was told by government counsel that she did not have to produce it.

Upon announcing his findings, the military judge specifically indicated that although JS had testified about all four specifications, he only convicted the appellant of the two to which the appellant had confessed.[2]

The two issues on appeal are:

> I. WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR INDECENT ASSAULT WHERE THERE IS NO EVIDENCE IN THE RECORD THAT ANY SEXUAL CONTACT WAS NON-CONSENSUAL.[3]
>
> II. WHETHER SPECIFICATION 4 OF THE CHARGE MUST BE SET ASIDE DUE TO PROSECUTORIAL MISCONDUCT.[4]

As to the first assignment of error, we reviewed the record of trial, the assignments of error, and the government's answer thereto. We carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for indecent assault. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Applying this guidance, we conclude the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Turning to the second assignment of error, we review de novo, the appellant's assertion that the trial counsel engaged in misconduct. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). After a full review of the record, paying special attention to the evidence whether JS was told by the government that she did not have to produce the journal when she asked what her obligation was, we first find that the appellant has failed

[1] A subpoena was issued on 3 January 2006, and served shortly thereafter.
[2] Appellant made admissions through statements to JS, JS's father, and the local police, in addition to writing two letters of apology.
[3] This issue is raised pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).
[4] Specifically, the appellant alleges misconduct occurred when government counsel told JS she did not have to produce her journal.

to establish that the prosecutors engaged in any misconduct.[5] To the contrary, the record has several references to the questionable credibility of JS. Furthermore, when asked if they had any evidence of prosecutorial misconduct, the defense stated "Absolutely not, Your Honor. The Defense in no way suggested or even believed that the Prosecution had any part in the destruction of the journals by Miss [JS]. In fact, it is the Defense's perspective that in fact her blaming the Prosecution was erroneous." Assuming *arguendo* the prosecutor had told the victim, prior to the service of the subpoena, she did not have to produce her journal, there still would be no prosecutorial misconduct. Even if there had been misconduct, the appellant has failed to show how any alleged misconduct prejudiced a substantial right of the appellant. *United States v. Fletcher,* 62 M.J. 175, 184 (C.A.A.F. 2005).

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[5] No legal norm or standard was violated. *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).