UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ZACHARY R. FLESTER
United States Air Force

ACM S31965

5 March 2013

Sentence adjudged 12 May 2011 by SPCM convened at Joint Base Elmendorf-Richardson, Alaska. Military Judge: Vance H. Spath.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and SANTORO
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant, pursuant to his pleas, of one specification alleging a violation of a no-contact order on divers occasions, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Contrary to his pleas, he was convicted of one specification alleging aggravated sexual assault of a child on divers occasions, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The appellant assigns as error that: (1) the military judge erred in his findings instructions on the burden of proof; (2) the evidence is factually insufficient to prove that the appellant engaged in sexual intercourse with the victim after learning that she was not yet 16; and (3) the bad-conduct discharge is inappropriately severe because,

after the convening authority took action in the case, the appellant married and conceived a child with the victim, and he has been forgiven by the victim and her family.

Findings Instructions

In the summer of 2010, the appellant, then a married 22-year-old Russian linguist, met the 15-year-old victim, BR, at an off-base party. Although the victim's and the appellant's statements differ in some respects regarding the time line, both agree that they engaged in sexual intercourse on multiple occasions in the six months prior to BR's 16th birthday. The litigated issues were the date on which the appellant became aware of BR's age and whether they engaged in intercourse between that date and her birthday.

The appellant argues that the military judge erred when he instructed the members, twice, that the prosecution did not have to prove beyond a reasonable doubt that the appellant knew BR was not yet 16 years old. We review de novo the military judge's instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maynulet*, 68 M.J. 374 (2010); *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981). If we find error, we must determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462 (2011).

Here, both sides concurred that the evidence warranted an instruction on mistake of fact as to age. The military judge provided draft written instructions to counsel for both sides, invited discussion, and received no objections. The military judge instructed the members both orally and in writing. While the appellant correctly asserts that the military judge twice said that the prosecution did not have to prove that the appellant knew BR was under 16, these statements must be viewed in the context of the instructions as a whole.

The first of those two statements immediately preceded the instructions regarding mistake of fact as to age. The military judge correctly explained the affirmative defense and the prosecution's burden to disprove it beyond a reasonable doubt. The second statement was included in the instruction regarding consent. The military judge correctly explained that the prosecution was not required to prove that the appellant knew BR was under age 16, because those who are under 16 are legally incapable of consenting to sexual intercourse. When viewed in context, we find no error in the military judge's instructions. *Id*. at 465.

Factual sufficiency

The appellant next argues that the evidence is factually insufficient to establish his guilt beyond a reasonable doubt. Under the law existing at the time of the appellant's conduct, the elements of aggravated sexual assault of a child were: (1) The appellant engaged in a sexual act with a child, and (2) At the time of the sexual act, the child had attained the age of 12 years but had not attained the age of 16 years. As the military

judge properly instructed, the affirmative defense of mistake of fact as to age was available if the appellant honestly and reasonably believed that BR was 16. *See* Article 120(o)(2), UCMJ.

BR testified substantially as follows. She met the appellant at a party on or about May of 2010 and, shortly thereafter, began having sexual intercourse with him. After a two-month trip to Valdez, Alaska, to visit her grandmother, BR returned and resumed her sexual relationship with the appellant. BR testified that beginning in September, she and the appellant had sex "probably like every other week." According to BR, she first told the appellant she was 15 at some point in or after September. She turned 16 on 3 December 2010.

The appellant was interviewed by the Air Force Office of Special Investigations (OSI) in February 2011. He initially told agents that he met BR "late" in 2010 at a friend's house party. They didn't see each other for a "couple of months," until late November. When confronted by agents with BR's timeline, the appellant said he met her in late summer or early fall, but then he said that BR had been to his house sometime between July and November. He told agents that, "a couple of months" after the appellant met BR, BR went to Valdez to live with her grandmother. About a month after BR returned—in October—she came back to his house and the appellant's then-girlfriend caught him and BR "kissing and stuff" in his bedroom. The appellant denied engaging in intercourse on that occasion but admitted having sex with BR a few days later.

The appellant admitted that BR told him she had to sneak out of her house and lie to her parents in order to see him. He said he only learned BR's true age in November and, once he learned her age, they stopped having intercourse until her birthday. However, the appellant also told investigators that, when he learned BR was 15, they discussed it and decided the relationship was worth "the risk." The appellant provided a written statement that said he learned BR was a minor shortly after she returned from Valdez. He wrote, "[a]lthough we were both concerned, we decided to continue the relationship regardless." The appellant said that, after she turned 16, "some of the stress plaguing us subsided." At trial, the appellant testified that he first had sex with BR in September 2010 but, in November, when he realized she was 15, he stopped having sex with her until her birthday. On cross examination, the appellant admitted that several aspects of his OSI statement (particularly the time line) were inconsistent with his trial testimony. He attributed the differences to "being put on the spot" by OSI.

We review claims of factual insufficiency de novo. *United States v. Turner*, 24 M.J. 324 (C.M.A. 1987). The test 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. *Id.* 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).[1] Having reviewed the evidence in the record, including the recording of the appellant's interview, we are ourselves convinced beyond a reasonable doubt of his guilt.

Sentence appropriateness

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (2006); *United States v. Baier*, 60 M.J. 382, 383-84 (2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the 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 (2007).

In conjunction with his appeal and over Government objection,[2] we granted the appellant's motion to supplement the record with a certificate purportedly showing his post-trial marriage to BR and declarations from BR and both of her parents. BR's declaration states that she and the appellant did not have intercourse in the period between when she told him of her actual age and her 16th birthday. All three declarations generally assert that the appellant and BR married and conceived a child and that BR's parents have now forgiven and welcomed the appellant into their family. All request mitigation of the bad conduct discharge.

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 approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe for a married Airman who had sexual intercourse with a child on multiple occasions, violated his commander's no-contact order on multiple occasions, and had a disciplinary history that included two letters of reprimand and non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for providing alcohol to minors.

[1] While appellant submitted declarations from BR and her family on appeal, he did so with regard to the sentence appropriateness claim. We decline to consider those declarations as they were not submitted at trial and subject to cross-examination or rebuttal. *United States v. Bethea*, 46 C.M.R. 223 (C.M.A. 1973).

[2] *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988), held that the courts of criminal appeals (CCA) had no obligation to allow an appellant to supplement the record after convening authority action but did not decide whether a CCA could, in its discretion, grant such a motion.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[3] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).