UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ALFRED K. GALLARDO
United States Air Force

ACM 38100

10 September 2013

Sentence adjudged 16 December 2011 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 5 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon and Charles W. Gittins (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Captain Brian C. Mason; Gerald R. Bruce, Esquire; and Jeremy J. Grunert (Legal Intern).

Before

HELGET, PELOQUIN, and WEBER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of a military judge convicted the appellant, contrary to his pleas, of rape on divers occasions, in violation of Article 120, UCMJ,

10 U.S.C. § 920.[1] The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 5 years, and reduction to E-1.[2]

The appellant argues that the evidence is factually insufficient to affirm his conviction for rape and that the confinement portion of his sentence is inappropriately severe in light of his service record, his character, including the absence of a criminal record, and "his decorations [which] established a long track record of good citizenship in the Air Force." We disagree, and affirm the findings and sentence.

Background

The appellant met and began dating his now-ex-wife, AM, in November 2002 while both were attending technical training school at Goodfellow Air Force Base, Texas. Shortly after Christmas 2002, the appellant and AM spent a night together in a hotel where they engaged in consensual sexual intercourse. AM testified that the appellant raped her the next morning. She also stated he raped her again several weeks later. Despite these incidents, AM continued dating the appellant. In May 2003, she married the appellant because she was pregnant. In November 2003, their son was born. In the summer of 2005, AM moved to Japan with the appellant, despite having contemplated divorce. In May 2008, AM delivered their second son. In February 2009, while the appellant was deployed, AM left Japan to go live with her family in Illinois. In March 2009 they legally separated, and were divorced in April 2010. AM stated that she and the appellant continued to have consensual and non-consensual sex throughout their marriage.

AM never told anyone she had been raped until 2005 when she showed her mother a letter from the appellant in which he admitted raping her. Neither of them reported it to anyone else at that time. The next mention of her rape allegation occurred in April 2011 when AM's attorney cross-examined the appellant during a civil proceeding. The attorney had learned of the allegations from AM's boyfriend. AM's sister, who was an active duty Airman, then learned of and reported the rape allegations to the Air Force Office of Special Investigations (AFOSI). AFOSI's investigation led to the appellant's court-martial.

Additional facts necessary for the resolution of the assigned errors are contained in the discussion below.

[1] The military judge acquitted the appellant of a second specification alleging divers occasions of rape under Article 120, UCMJ, 10 U.S.C. § 920, as well as a single specification alleging communication of indecent language under Article 134, UCMJ, 10 U.S.C. § 934.

[2] The convening authority approved the sentence as adjudged, but deferred all of the mandatory forfeitures from 16 December 2011 until date of the action and waived all of the mandatory forfeitures for a period of six months, release from confinement, or expiration of term of service, whichever is sooner, for the benefit of appellant's dependent children.

Factual Sufficiency

The appellant avers that the evidence was factually insufficient to support his conviction for divers occasions of rape. He additionally argues that even if the evidence is found sufficient, he had an honest and reasonable mistaken belief that AM consented to the sex, and that the prosecution failed to disprove this mistake of fact. We disagree.

We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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 [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. Our 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).

At the time of the appellant's offenses, having been committed prior to 1 October 2007, a rape conviction under Article 120, UCMJ, required proof of two elements: (a) That the accused committed an act of sexual intercourse; and (b) That the act of sexual intercourse was done by force and without consent. *See Manual for Courts-Martial, United States* (*MCM*), A27-1, ¶ 45.b.(1) (2012 ed.).

There is no reasonable doubt that pre- and post-marital sexual intercourse occurred between the appellant and AM. The only questions are whether AM consented to the pre-marital activities at issue or whether the appellant caused the sexual intercourse by force.

The prosecution's sole witness on the divers rape charge was AM. The prosecution also presented the appellant's letter to AM in which he apologized for raping her, as well as the transcript of a civil proceeding in which the appellant admitted to one instance of pre-marital rape.

AM's testimony described the specific details of two instances of pre-marital nonconsensual intercourse. She also provided a general description of multiple incidents of nonconsensual intercourse during their marriage, at times when she was awake and other times when she was asleep.

AM testified that on the morning after their first consensual intercourse, AM told the appellant she didn't want to continue having sex until they got to know each other better. She testified that she felt they had "rushed into things," and that alcohol influenced her decision to engage in the intercourse. Afterwards, the appellant, returning from a shower, approached AM and dropped his towel. She said, "I don't want to have sex. I told you before that we rushed into it." He responded that, "It felt right, just go with it," and began kissing AM's neck and undoing her pants. She told the appellant to "stop and get away from [her]." The appellant then pulled her pants down, forced AM against the foot of the bed, held her down, and forced his penis inside her vagina from behind. AM stated that she "told him to stop throughout the whole time" and was "trying to push him." Afterwards, she asked him, "why [he] wouldn't take no for an answer?" He responded that he did not realize she didn't want to have sex. AM also testified that after their discussion, she decided to "give him another chance," and she and the appellant subsequently engaged in consensual intercourse during the following three-week period.

AM described a second incident in February 2003. She invited the appellant to stay the night at her military dorm room when her roommate was gone. They were "kissing and . . .touching each other, and fondling" in AM's bed. AM told the appellant that she did not want to have sex. The appellant said, "You know you want it," and began to remove AM's pants. AM said she could not stop the appellant from pulling her pants off, and the appellant refused to cease his advances despite AM's telling him to "stop," to "get off of [her]," and that "[she didn't] want to do this." AM "tried to push [the appellant] off" and "tried to keep [her] legs together," but he succeeded in penetrating her. AM was crying during this intercourse. The appellant later told her that he had not noticed.

AM stated that she tried to end the relationship after this second incident. However, she later learned she was pregnant and decided to marry the appellant.

AM said that after their son was born, she and the appellant engaged in both consensual and non-consensual intercourse. She estimated that nonconsensual encounters occurred twice a month and said they "usually started off when [they] were going to bed and he wanted to have sex, and [she] didn't. But he would get on top of [her] anyway. AM also described other times, "probably about four times a year on average," when the appellant would get on top of her while she was asleep and have forced intercourse with her.

AM said she did not report the incidents or leave the appellant because she was "embarrassed" and believed that no one would believe her allegations. However, AM told the appellant she intended to leave him while he was deployed overseas in 2005. She nevertheless willingly accompanied the appellant to Japan when he received

permanent change of station orders. She also willingly conceived a second child because she "thought that having another child would make [her] happy, and that [she] wouldn't focus on how miserable [she] was at times in [her] relationship."

The appellant claims this evidence fell short of establishing lack of consent. He avers that AM's admitted behaviors – that she didn't physically fight him off; that she never reported the incidents to anyone despite having been trained in sexual assault and on how to make restricted and unrestricted reports; that she continued to have consensual sex with the appellant despite her alleged rapes, to include willingly participating in the videotaping of some of their sexual encounters; and that she willingly conceived a second child after the fact – are inconsistent with non-consent and thus this Court should infer that she did consent. *See MCM*, A27-1, ¶ 45.c.(1)(b).

While recognizing that AM's behavior may have conflicted with her allegation of abuse in certain respects, we find there was sufficient evidence of her lack of consent. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986) (The evidence need not be free of all conflict for a rational factfinder to convict an appellant beyond a reasonable doubt.). A victim must "make [her] lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances." *MCM*, A27-1, ¶ 45.c.(1)(b). Proof that a victim physically resisted is not required to support a finding of lack of consent. *United States v. Bright*, 66 M.J. 359, 364 (C.A.A.F. 2008) (citations omitted). Indeed, a victim's resistance may "be manifested . . . in a number of [other] ways . . . ." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996), and it "need only be such as to make a want of consent and actual resistance reasonably manifest – having regard to her age, her strength, and the surrounding circumstances." *United States v. Henderson*, 15 C.M.R. 268, 273 (C.M.A. 1954). Here, AM manifested her lack of consent and resistance in multiple ways. She testified that she orally expressed her non-consent by telling him no, telling him to stop and to get off of her. She also physically expressed her non-consent by trying to push him away and by trying to keep her legs together, though she was unsuccessful because he was taller, heavier, and stronger than her; AM was 5'1" and weighed a little over 100 pounds at the time of their marriage, while the appellant was at least 5'8", and weighed at least 180 pounds.

We also find there was sufficient evidence of force in AM's testimony as well as the appellant's written admissions. *See Bright*, 66 M.J. at 363 (quoting *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (recognizing that though force and lack of consent are separate elements, "there may be circumstances in which the two elements are so closely intertwined that both elements may be proved by the same evidence"). The appellant's letter admits that he "forced sex on [her]" and that he "thought that sex, no matter how [he] got it would make [him] feel better" and that a part of him "knew [he] was hurting [her] all for [him]self." Further, AM testified that she tried to push the appellant away, that he held her down at her wrists and her waist, and that she tried to keep her legs closed to prevent his eventual penetration of her vagina.

Additionally, we find sufficient evidence of divers rape in the appellant's own admissions. In a civil proceeding, the appellant admitted to one instance of pre-marital rape in the following excerpted colloquy:

> Q: In that letter you apologized to your wife for raping her, don't you?
>
> A: I do.
>
> Q: And that happened, didn't it?
>
> A: When we were dating it did occur.
>
> Q: But it stopped once you got married?
>
> A: It stopped before we even got married. It stopped roughly after the time that we found out we were having a child together.
>
> Q: So, how many times did you rape her?
>
> A: I have no idea. According to her, several. Under my recollection, there was one time.
>
> Q: Just the one time?
>
> A: Yes.

Though he only admitted to one pre-marital rape incident at the hearing, his letter to AM references multiple incidents. In the letter, he not only admitted that "what [he] did to [her] was rape," he also apologized "for the horrible things [he] did to [her]you," and stated that, "I forced sex on another individual. . . . I never stopped for a long time because you would just let it happen sometimes. So I'd keep going for myself and my own pleasure. I didn't get pleasure out of hurting you. I never really thought to myself I was hurting you."

Furthermore, we also find that the appellant's admissions negate his assertions that his mistaken belief as to consent was either honest or reasonable. *See United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) (citation omitted) (mistake must be both honest and reasonable).

Having viewed the record with a fresh, impartial view, and making allowances for not having personally observed the witnesses, we have no difficulty concluding that the

appellant's guilt had been proven beyond a reasonable doubt. We find the evidence on this charge and specification to be factually sufficient. Article 66(c), UCMJ. [3]

Sentence Severity

The appellant next argues that his sentence is inappropriately severe. He asserts confinement for 2 years is more appropriate than the adjudged and approved 5 years. We disagree.

In conducting our de novo review of sentence appropriateness, *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 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. Our assessment considers "the particular appellant, the nature and seriousness of the offense[], the appellant's record of service, and all matters contained in the record of trial." *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); *See also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate but 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).

In our view, the appellant's actions are a clear departure from the expected standards of conduct in the military and his sentence was appropriate. For his crimes, the appellant faced a maximum sentence that included confinement for life. Though the Government argued that an appropriate sentence included confinement for 10 years, the military judge adjudged only half of that period. Further, the appellant sought clemency from the convening authority and was granted a deferral and waiver of the adjudged forfeitures. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses for which he was found guilty, we do not find the appellant's sentence inappropriately severe. We find that the approved sentence was clearly within the discretion of the convening authority and was appropriate in this case.

[3] Though not raised, we also find the appellant's conviction legally sufficient. *United States v. Reed*, 54 M.J. 37 (C.A.A.F. 2000). *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (citing *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court