UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BENJAMIN J. GIEM
United States Air Force

ACM 35277

21 May 2004

Sentence adjudged 14 June 2002 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Captain L. Martin Powell (argued), Colonel Beverly B. Knott, and Major Terry L. McElyea.

Appellate Counsel for the United States: Captain Stacey J. Vetter (argued), Colonel LeEllen Coacher, and Major John D. Douglas.

Before

BRESLIN, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial comprised of officer and enlisted members found the appellant guilty, contrary to his pleas, of forcible sodomy in violation of Article 125, UCMJ, 10 U.S.C. § 925, and indecent acts with another in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved was a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

The case is before this Court for mandatory review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant raises several allegations of error. He contends: (1) The evidence is not legally or factually sufficient to sustain the conviction for forcible sodomy; (2) It was plain error for the military judge to allow a psychiatrist to testify that

the victim was truthful; and (3) The appellant may not be lawfully convicted and punished for both forcible sodomy and the lesser included offense of indecent acts.[*] We find error and take corrective action.

Legal and Factual Sufficiency of the Evidence

The evidence at trial indicated that on 13 October 2001, the appellant attended a party at a house off base to mark an upcoming unit deployment. Senior Airman (SrA) LG, the girlfriend of one of the unit members, also attended. She knew who the appellant was, but had no interaction with him during the party. SrA LG consumed three or four beers over the course of the evening. The party continued into the early morning hours of 14 October 2001, and SrA LG became sleepy. They arranged for her to sleep on a futon sofa in the living room while the party continued in the kitchen and the rear of the house.

SrA LG testified that she awoke face down, with her legs and hips off the futon, and her jeans and undergarments pulled down below her knees. She said the appellant was behind her, between her legs, and that he was licking her "vaginal and anal area." She testified she confronted him and struck his head, and he fled. She was very upset. She ran to the back of the house and informed her boyfriend and others what had happened. The group pursued the appellant but he was already gone. They found the appellant's address, went to his apartment, and pounded on the door to gain entry, eventually splintering the door. They did not find the appellant. The victim called the local police, and gave a statement describing the incident.

The prosecution also called as a witness Mr. Ryan Bunkley, the appellant's neighbor in an apartment downstairs. Mr. Bunkley testified the appellant knocked on his door that morning, and showed him the damage to the appellant's apartment. The appellant asked Mr. Bunkley to tell anyone who asked that the appellant was with Mr. Bunkley between 0300 and 0430. The appellant then called the local police to report the break-in at his apartment.

The appellant contends the evidence is legally and factually insufficient to sustain his conviction for forcible sodomy. Specifically, he maintains the evidence does not prove an element of the offense of sodomy: penetration of the victim's genitalia. We agree.

Under Article 66(c), UCMJ, we may approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54

[*] We heard oral argument at Maxwell Air Force Base, Alabama as part of our Project Outreach Program.

M.J. 37, 41 (C.A.A.F. 2000). According to our superior court, 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," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

Article 125, UCMJ, 10 U.S.C. § 925, prohibits "unnatural carnal copulation" with another. The statute further provides that, "Penetration, however slight, is sufficient to complete the offense." *See United States v. Cox*, 18 M.J. 72, 73 (C.M.A. 1984); *United States v. Williams*, 25 M.J. 854, 855 (A.F.C.M.R. 1988). The sole evidence elicited from the victim was that the appellant licked her "vaginal and anal area." We find the evidence in this case both legally and factually insufficient to prove the required penetration. *United States v. Milliren*, 31 M.J. 664, 665-66 (A.F.C.M.R. 1990).

This does not end our analysis, however. Article 59(b), UCMJ, 10 U.S.C. § 859(b), provides that we "may approve or affirm . . . so much of the finding as includes a lesser included offense." In this case, the military judge also instructed the court members on the lesser included offense of attempted forcible sodomy, in violation of Article 80, UCMJ, 10 U.S.C. § 880. We considered carefully all the evidence in the case, and are convinced beyond a reasonable doubt that the appellant is guilty of attempted forcible sodomy. The appellant's arguments raising issues of voluntary intoxication and mistake of fact are unpersuasive. The finding of guilty to the Specification of Charge I, in violation of Article 125, UCMJ, is changed to a finding of guilty of attempted forcible sodomy, in violation of Article 80, UCMJ.

Expert Witness's Testimony Concerning Truthfulness

The prosecution also presented the testimony of Doctor Michael Breslow, a psychiatrist, who diagnosed the victim as suffering from post-traumatic stress disorder (PTSD). He explained the symptoms and how the victim met the criteria for the diagnosis. Trial defense counsel cross-examined the psychiatrist about whether he made his diagnosis by taking the victim's allegations at face value, rather than conducting his own investigation. The psychiatrist explained how he determined his diagnosis was reliable. Trial defense counsel made no objection to the expert witness' answers.

The appellant now maintains that, by responding to the trial defense counsel's question, the expert witness improperly commented on the truthfulness of the victim's testimony. The appellant argues that by allowing the expert witness to testify that he based his diagnosis upon the victim's claim, the court members could infer that the expert witness believed her. He contends such evidence was tantamount to "human lie-detector" testimony. He notes the trial defense counsel made no objection to the challenged testimony at trial, but argues the military judge committed "plain error" by not limiting the testimony or giving a curative instruction sua sponte. *United States v.*

Halford, 50 M.J. 402, 404 (C.A.A.F. 1999); *United States v. Harrison*, 31 M.J. 330, 332 (C.M.A. 1990); *United States v. Arruza*, 26 M.J. 234, 238 (C.M.A. 1988).

A properly qualified expert may testify during findings that a victim suffers from PTSD, where that evidence is relevant to an issue before the court-martial. *United States v. Lee*, 28 M.J. 52, 55 (C.M.A. 1989). During cross-examination, the opposing party may explore the basis for the expert's opinion, including the information and assumptions upon which the witness relies. *See* Mil. R. Evid. 705. The simple fact that a witness considered a prior statement of a victim does not convert an otherwise admissible expert opinion into "human lie-detector" testimony. The difference between what the expert said and what is impermissible was neatly summed up by Judge Cox in *United States v. Hill-Dunning*, 26 M.J. 260, 262 (C.M.A. 1988):

> The problem seems to be in drawing a distinction between the expert who has an opinion based upon a belief in the truthfulness of what another person has told him and the expert whose opinion is that the other person is truthful. This, however, is a distinction which can and must be drawn and recognized. Thus, the psychiatrist who comes into court is perfectly competent to testify as to the diagnosis and indeed may testify that the diagnosis is based upon the assumption that what the client has said is the truth. *See* Mil. R. Evid. 705. Yet, that same witness may not testify that it is his opinion that the client is truthful, absent appropriate foundation.

We find no error. The defense counsel's questions were aimed at exposing a weakness in the basis of the expert's opinion; specifically, that the expert relied upon what the victim told him, and not upon any independent investigation. The expert witness did not say, "I think she's telling the truth," or words to that effect. Instead, his response was narrowly limited to the challenge to the validity of his diagnostic process, and he explained what checks and balances he had available to make sure his diagnosis was based upon a proper foundation. Such testimony is not improper.

Multiplicity and Unreasonable Multiplication of Charges

As noted above, the appellant was charged with forcible sodomy upon the victim, and with committing an indecent act with the victim "by touching her vaginal area and buttocks with his hands." The defense made no motion at trial requesting dismissal of any specification, or objecting to the charges. The court-martial found him guilty as charged.

The appellant now claims it was "plain error," for the military judge to allow the appellant to be convicted of both charges. The appellant argues the offenses were multiplicious—specifically, that the indecent act offense was necessarily included within the charge of forcible sodomy, so that the conviction for both charges is multiple

punishment for the same act, in violation of the Double Jeopardy Clause of the United States Constitution. We do not agree.

The Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981). However, double jeopardy claims, including those founded in multiplicity, are waived if the defense counsel fails to make a timely motion to dismiss, unless they rise to the level of "plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997); Rule for Courts-Martial 907(b)(3)(B). To demonstrate "plain error" in such circumstances, the appellant must show the specifications were "facially duplicative," that is, factually the same. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). This is determined by reviewing the language of the specifications and "facts apparent on the face of the record." *Id.* at 24.

Both specifications concern the same victim and the same date, but one specification concerns an act of sodomy and the other an indecent touching with the appellant's hands. Furthermore, the evidence adduced at trial reveals that the charged acts are different—the forcible sodomy specification related to the appellant licking the victim with his tongue, while the indecent acts relate to the appellant touching her vaginal area and buttocks with his hands. Thus the charges are not "facially duplicative." The appellant has failed to show "plain error."

The appellant argues that the touching that formed the basis for the indecent acts offense may have been the force required to commit the act of forcible sodomy as charged. However, the evidence presented at trial does not demonstrate that the touching in question was necessary to commit the acts charged as forcible sodomy in this case.

The appellant argues in the alternative that charging both offenses constituted an unreasonable multiplication of charges. We do not agree. The evidence showed the appellant committed two separate offenses upon this sleeping victim. Charging the appellant with both does not constitute an unreasonable multiplication of charges.

Sentence Reassessment

Having disapproved the findings of guilt to the charge of forcible sodomy, but approving instead the lesser included offense of attempted forcible sodomy, we must reassess the sentence. Our superior court has determined that this Court may reassess sentences to correct error in certain circumstances. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), the Court summarized the required analysis:

> In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at

> least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id*.

Under the unique circumstances of this case, we find that we can reassess the sentence in accordance with the established criteria.

We note the maximum possible punishment for the offenses as charged included a dishonorable discharge and confinement for life. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to E-1. Had the appellant been convicted of the lesser offense as affirmed by this Court, the maximum possible punishment would have been a dishonorable discharge, confinement for 25 years, and reduction to E-1. The actual sentence to confinement is such a small fraction of either maximum period of confinement, we are convinced that a reduction in the maximum punishment would have had no impact on the sentencing authority.

Significantly, the evidence that formed the factual basis for the charges before the court-martial remained the same. Thus, even without the error, the court members would have sentenced the appellant based upon the same facts. We find the court members would have imposed the same sentence even absent the error. We are convinced beyond a reasonable doubt that, absent the error, the appellant's sentence would not have been less than the sentence originally approved.

Conclusion

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator