UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOB GOMEZ
United States Air Force

ACM S31305

30 October 2008

Sentence adjudged 09 February 2007 by SPCM convened at Spangdahlem Air Base, Germany. Military Judge: Gordon R. Hammock.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

In accordance with his pleas, a military judge found the appellant guilty of one charge and specification of failure to go, in violation of Article 86, UCMJ, 18 U.S.C. § 886. Contrary to his pleas, a special court-martial composed of officer and enlisted members found the appellant guilty of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 18 U.S.C. § 928.[1] The sentence consisted of a

---

[1] The appellant was charged with assault consummated by a battery for pushing and grabbing Airman First Class (A1C) JT; the members found the appellant guilty by excepting the pushing language. The appellant was also charged with a specification of assault consummated by a battery for striking A1C SH but was found not guilty of this specification.

bad-conduct discharge. The convening authority approved the findings and sentence without modification.

The appellant asks this Court to set aside the findings on Specification 2 of Charge II and the sentence, claiming the following errors: (1) the bad-conduct discharge is an excessively harsh approved sentence for failing to go and grabbing another airman around the throat and (2) the appellant acted in self-defense and the evidence is therefore legally and factually insufficient to sustain a finding of guilt to Specification 2 of Charge II. Finding no error, we affirm.

Background

During the evening of 30 November 2006, Airman First Class (A1C) SH went to the Spangdahlem Enlisted Club. While at the club, he talked to several girls, one of which was apparently the appellant's girlfriend. A1C SH went to the bathroom and the appellant confronted him about speaking to his girlfriend. In the bathroom, a fight ensued between A1C SH and the appellant, and the appellant punched A1C SH to the floor and began kicking A1C SH in the face.[2] Senior Airman (SrA) JT, another club patron, was in a bathroom stall during the fight and heard the ruckus. As he exited the stall, he saw the appellant kicking A1C SH in the face and intervened to halt the fight. As he pushed the appellant away from A1C SH, the appellant grabbed SrA JT around his throat and began choking him. An acquaintance of the appellant told the appellant to leave; the appellant released SrA JT and left the club. That same morning, the appellant was scheduled to work and failed to report to duty.

Discussion

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When considering sentence appropriateness, we should give "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (internal quotations omitted).

When conducting our review, we should also be mindful that Article 66(c), UCMJ, has a sentence appropriateness provision that is "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J.

[2] During trial, it was disputed as to who started the fight. The appellant claimed self-defense, and the members found the appellant not guilty of assaulting A1C SH.

501, 506 (Army Ct. Crim. App. 2001)). Our duty in this regard is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

While the appellant's offenses are serious, the gravamen offense is the assault consummated by a battery against SrA JT. We note that the appellant's commander has characterized his duty performance as less than satisfactory. We also note that this is not the appellant's first "run in with the law." In a relatively short career, he has received: (1) nonjudicial punishment for assaulting a law enforcement officer in the execution of his duties, for being drunk and disorderly, and for disobeying orders; (2) nonjudicial punishment for stealing from the Army and Air Force Exchange Service; (3) a letter of reprimand for assaulting a fellow airman; and (4) a letter of reprimand for willfully damaging government property. The appellant's poor duty performance and prior misconduct simply belies any notion of rehabilitative potential.

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 the appellant's sentence inappropriately severe. *See Baier*, 60 M.J. at 383-84.

Legal and Factual Sufficiency

The appellant asserts, in light of his claim of self-defense, that the evidence is legally and factually insufficient to support his finding of guilt to Specification 2 of Charge II. This issue is without merit. In accordance with Article 66(c), UCMJ, 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 (C.M.A. 1987)).

In resolving questions of legal sufficiency, we are "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 limited 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 a reasonable fact finder could have found all of the essential elements of the specification were proven beyond a reasonable doubt.

On this point we note that SrA JT testified that as he tried to stop the fight between A1C SH and the appellant, the appellant grabbed and choked him. SrA JT's testimony is

corroborated by photographs of the injuries he received from the appellant. Though trial defense counsel alluded to self-defense during his argument, there is scant, if any, evidence that the appellant's act of grabbing and choking SrA JT was in self-defense. Moreover, even if there were evidence of such, the trier of fact was reasonable to conclude that self-defense was inapplicable and that the appellant assaulted SrA JT. In short, we find the appellant's conviction to be legally sufficient.

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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; *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 find ourselves convinced beyond a reasonable doubt that the accused is guilty of the charges and specifications of which he was convicted.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court