UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JAMES M. GREEN
United States Air Force

ACM 37074

10 February 2009

Sentence adjudged 04 May 2007 by GCM convened at Edwards Air Force Base, California. Military Judge: Ronald A. Gregory.

Approved sentence: Dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

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

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officer members sitting as a general court-martial convicted him of one specification of sodomy with a child under 16 years of age, three specifications of assault consummated by a battery upon a child under 16 years of age, and two specifications of committing indecent acts with a child, in violation of

Articles 125, 128, and 134, UCMJ, 10 U.S.C. §§ 925, 928, 934.[1] The adjudged and approved sentence consists of a dishonorable discharge, four years confinement, total forfeitures of pay and allowances, a reduction to E-1, and a reprimand.

On appeal, the appellant asks this Court to set aside his findings of guilty and the sentence. The basis for his request is that he asserts: (1) Ms. SA, his trial defense counsel, was ineffective when she failed to review one of the alleged victim's psychiatric counseling records and (2) the evidence is legally and factually insufficient to support the findings of guilty. We disagree and affirm the findings and the sentence.

Background

In July 2004, CM, then the appellant's 13-year-old sister-in-law, began residing with her sister and the appellant. By all accounts, CM was a troubled child who had behavioral difficulties. In fact, her behavioral problems were so significant that her parents placed her in a juvenile behavioral center for two months. At the completion of CM's stay at the behavioral center, CM's parents sent her to live with her sister and the appellant. As alleged by CM, in July 2005, the appellant began a sexual relationship with her. According to CM, the relationship consisted of oral sodomy, indecent acts, and indecent liberties wherein the appellant masturbated in CM's presence and fondled CM's breasts.

During this same time period, the appellant also allegedly fondled the breast of LS, then a 13-year-old friend of CM, and assaulted CM by choking and striking her with his fist, hand, and a remote control. At trial, the primary evidence against the appellant was CM's and LS's testimony and testimony from a DNA analysis expert who testified that the appellant's semen was found at one of the locations of the alleged sexual acts.

Discussion

Ineffective Assistance of Counsel

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). Where there is a lapse in judgment or performance

[1] The appellant was charged with sodomy with a child under 16 years of age on divers occasions and indecent acts with a child on divers occasions, but the members found him guilty of committing the offenses on one occasion, and thus, made findings by exceptions and substitutions. The members also found the appellant not guilty of one specification of carnal knowledge, one specification of assault consummated by a battery upon a child under 16 years of age, two specifications of committing indecent acts with a child, one specification of taking indecent liberties with a child, and two specifications of communicating a threat.

alleged, we ask: (1) whether trial defense counsel's conduct was in fact deficient and, if so (2) whether counsel's deficient conduct prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). Counsel is presumed to be competent, and we will not second guess trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). "To make out a claim of ineffective assistance of counsel, the accused must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. 'In making [the competence] determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" *Id.* (quoting *Strickland*, 455 U.S. at 690). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* (quoting *Strickland*, 455 U.S. at 691).

"[A] particular decision not to investigate must be directly assessed for reasonableness in [light of] all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The test for prejudice on a claim of ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687.

The appellant submitted a post-trial affidavit wherein he states that he advised one of his trial defense counsel, Ms. SA, of CM's stay at a "locked-down psychiatric facility for troubled teenagers" and that Ms. SA was ineffective because she failed to review CM's psychiatric counseling records to determine if the records contained any information that would have been beneficial to his case. Appellate defense counsel asserts Ms. SA's failure precluded her from fully cross-examining CM.

The government submitted a post-trial affidavit from Ms. SA wherein she states: (1) the appellant never advised her that CM had stayed at a psychiatric facility; (2) she obtained all the information about CM and the facility in which CM resided from the appellant's wife; (3) the appellant's wife never referred to the "locked-down" facility as a psychiatric hospital; (4) she was under the impression that CM never received any psychiatric treatment nor was diagnosed with a mental health disorder; (5) and thus, she did not request CM's records from the "locked-down" facility.

The appellant's and Ms. SA's affidavits conflict over whether the appellant advised Ms. SA that CM had stayed at a psychiatric facility. When conflicting affidavits create a factual dispute, we usually cannot resolve it by relying on the affidavits alone without resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, a post-trial fact finding hearing is not required if, inter alia, "the facts alleged in the [appellant's] affidavit allege an error that would not result in relief even if any factual dispute were resolved in [the] appellant's favor." *Id.* at 248.

Such is the case here. We need not determine whether the appellant advised Ms. SA that CM had stayed at a psychiatric facility. Nor do we need to determine whether Ms. SA's failure to request CM's records rises to the level of deficient conduct. Assuming Ms. SA's conduct was deficient there was no prejudice to the appellant. First, there has been no showing that CM had any psychiatric records. The appellant offers mere conjecture on the existence of such records and levels post-trial claims of ineffectiveness because Ms. SA did not engage on a "fishing expedition" to exonerate him. Second, there has been no showing that CM's records, if they existed, contained information that trial defense counsel could have used to attack CM's credibility.

Lastly, there has been no showing that there is a reasonable probability that but for Ms. SA's alleged error the court-martial result would have been different. On this latter point we note that during a post-trial feedback session, the members advised counsel that they found the appellant guilty only on those specifications wherein CM's testimony was corroborated. Thus, even if records existed that would have allowed additional attacks on CM's credibility[2] it is reasonably probable that the court-martial result would have remained the same. Simply put, under the aforementioned facts we find no prejudice.

Legal and Factual Sufficiency

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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

"[I]n 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

[2] We note that Ms. SA effectively attacked CM's credibility by getting CM to admit that she had lied about the appellant striking her with his fists and about having sexual contact with the appellant.

(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, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted.

CM's testimony, as corroborated by LS's testimony, photographs of the appellant's buttocks and pubic region, and the DNA analysis expert's testimony, is legally sufficient to support the appellant's convictions on the crimes involving CM. Moreover, CM's testimony corroborates LS's testimony that the appellant grabbed her breast and is legally sufficient to support the appellant's conviction of committing an indecent act with LS. Such is true notwithstanding the fact that the members found the appellant not guilty of some of the offenses he was alleged to have committed with or against CM.

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." *Turner*, 25 M.J. 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). We have carefully considered the evidence under this standard and are 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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court