UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DERRIE K. HALE JR.
United States Air Force

ACM S30374

26 May 2005

Sentence adjudged 13 March 2003 by SPCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Michael E. Savage, and Captain C. Taylor Smith.

Before

ORR, GRANT, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Pursuant to his plea, the military judge found him guilty of willful dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Contrary to his plea, the military judge also found him guilty of aggravated assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928. His sentence included a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The military judge also recommended that the convening authority order the appellant into the Return to Duty Program. The

convening authority approved the adjudged sentence without acting on the military judge's recommendation.

The appellant appeals his conviction on two grounds. First, he contends that the evidence is not legally and factually sufficient to sustain his conviction for committing an aggravated assault upon Airman First Class (A1C) Schavass Hamilton. Second, he complains that he received ineffective assistance from his trial defense counsel.[1] For the reasons set out below, we find no merit to these assignments of error and affirm.

Background

On 23 January 2003, A1C Hamilton went to A1C Marzae Mukoko's dormitory room, which was on the second floor of the dormitory building they shared with the appellant. When he knocked on A1C Mukoko's door, the appellant opened the door with a bullet between his teeth. The appellant turned back towards A1C Mukoko, and in an angry tone said, "You better get your f****** boy," referring to A1C Hamilton. The appellant then stepped out into the hallway, and A1C Hamilton went inside. After the door closed, A1C Hamilton asked A1C Mukoko what was going on. A1C Mukoko told him not to worry about it. A1C Hamilton walked back out into the hallway to talk to the appellant. The appellant asked A1C Hamilton where his heart was, and A1C Hamilton played along, answering that he didn't have a heart. A1C Hamilton knew the appellant was angry because he took his glasses off, which he always did when he was angry. A1C Hamilton continued to ask the appellant whether there was something they needed to talk about. Finally, the appellant accepted A1C Hamilton's invitation to talk, but first said he needed to get his "two-way," which A1C Hamilton thought meant cell phone or pager. The appellant then went downstairs. A1C Hamilton returned to A1C Mukoko's room to wait for the appellant.

When the appellant returned to the second floor, he stood in the hallway near A1C Hamilton's room and called out for him. Both A1C Hamilton and A1C Mukoko heard "clicking" sounds in the hallway, which they believed to be made from a gun. A1C Mukoko looked out into the hallway, came back into the room, and then closed and locked the door. A1C Hamilton asked if the appellant had a gun and A1C Mukoko answered that he did. A1C Hamilton then went into the hallway with A1C Mukoko right behind him. At this point, A1C Hamilton didn't see a gun. He asked the appellant whether they needed to talk, to which the appellant replied that they did. They then began to walk to A1C Hamilton's room, with A1C Mukoko following behind.

Inside A1C Hamilton's room, the conversation between A1C Hamilton and the appellant continued. The appellant began to explain that he had a dream that someone he knew was trying to harm him, and he needed to know whether it was A1C Hamilton. He

[1] This issue is before us pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

said he didn't trust A1C Hamilton because A1C Hamilton was so "nice," and he was unaccustomed to other men being nice to him. He was going to give A1C Hamilton "one shot" to end any misunderstandings between them. A1C Hamilton testified that he believed "one shot" meant that A1C Hamilton was being given the opportunity to take one shot to kill the appellant. A1C Hamilton continued to try to talk to the appellant about whatever was bothering him, asking, "[W]hy did it have to come down to this. Why couldn't we talk before any of this happened?" The appellant told A1C Mukoko, who had entered the room behind them and was seated on the bed, to load the gun and give it to him. A1C Hamilton walked over to A1C Mukoko, took the gun, and winked at him to signal that he was not going to do anything. A1C Hamilton then put the gun in an overhead cabinet. He told the appellant that that was his "one shot" at him because he didn't mean him any harm.

Apparently dissatisfied, the appellant went to the cabinet and retrieved the gun. He then stated, "Let me show you how to do this." With the gun pointing towards the floor, the appellant worked the slide of the gun, cocking it. At this point, A1C Hamilton was afraid. He testified that he didn't know whether the appellant was going to give him another shot at the appellant, or whether he was going to be shot himself. The distance between the appellant and A1C Hamilton during this time was three to five feet.

After the appellant cocked the gun, he raised it to about waist level. Once his arm got "high enough," A1C Mukako grabbed his wrist and pulled it back towards the wall. A1C Mukoko took the gun from the appellant with minimum resistance. A1C Mukoko testified that, had the gun been fired, A1C Hamilton would most likely have been shot. A1C Mukako then unloaded the weapon, removing the round from the chamber. The appellant approached A1C Mukoko to get the gun back. A1C Mukoko testified that he put his arm up to stop the appellant's advance, while A1C Hamilton took the gun from behind A1C Mukoko's back. He testified that A1C Hamilton was shaking.

At this point, things became calm. The appellant asked A1C Hamilton to get him a bible from his car. As A1C Hamilton went downstairs to get it, he took the weapon and magazine with him, with the intention of locking them in his car. After returning with the bible, A1C Hamilton went to the appellant's room to collect the knife he knew was there, as well as a gun case and a box of shells.[2] He then secured all of these items in his car. When A1C Hamilton returned, he gave the bible to the appellant, and they all went to the appellant's room. A1C Hamilton later went to his work place, and then returned to the appellant's room again to play on the computer. He told no one of the incident. The next day he made his report to Security Forces, at the insistence of a family member.

[2] The accused had a duty to not possess guns or knives with blades greater than three inches in length in the dormitory, and his possession of these items form the basis of the appellant's plea of guilty to the dereliction of duty charge.

A1C Hamilton testified that the appellant explained his intentions later that night after A1C Hamilton brought him the bible. The appellant said that that he intended to kill A1C Hamilton, and that he "shed a tear" and said a prayer for A1C Hamilton on his way back to A1C Mukoko's room after retrieving his "two-way," as a means of saying goodbye. The appellant said that he would have shot A1C Hamilton had he been in his own room.

Discussion

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that this Court evaluate the evidence for legal and factual sufficiency before affirming the appellant's conviction. The test for legal sufficiency of the evidence is whether, considering all the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements of the offenses of the conviction beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency of the evidence is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of this Court are themselves convinced of an appellant's guilt beyond a reasonable doubt. *Id*. *See also United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002). For the reasons outlined below, we find the evidence in this case is legally and factually sufficient to support the findings.

The appellant was charged with committing an aggravated assault against A1C Hamilton by brandishing a dangerous weapon, specifically, a loaded handgun, in his presence. The appellant argues that the facts are insufficient to support the crime of aggravated assault because neither an offer-type nor an attempt-type of assault occurred.

Article 128, UCMJ, provides that any person subject to the Uniform Code of Military Justice who commits an assault with a dangerous weapon is guilty of aggravated assault. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 54a(1) (2002 ed.). The elements of aggravated assault with a dangerous weapon are:

> (a) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
>
> (b) That the accused did so with a certain weapon, means, or force;
>
> (c) That the attempt, offer, or bodily harm was done with unlawful force or violence;
>
> (d) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm; and

(e) That the weapon was a loaded firearm.

MCM, Part IV, ¶ 54b(4)(a).

The *Manual* further explains the difference between attempt-type assaults and offer-type assaults. An attempt-type assault is committed when one has a specific intent to inflict bodily harm, coupled with an overt act. *MCM*, Part IV, ¶ 54c(1)(b)(i). The overt act must amount to "more than mere preparation" and intend to "effect the intended bodily harm." *Id*. It can be committed without the victim being aware the assault was contemplated. An offer-type assault is "an unlawful demonstration of violence, either by an intentional or a by culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm." *Id*. at ¶ 54c(1)(b)(ii). Specific intent to inflict bodily harm is not required to affect an offer-type assault, but the victim must necessarily be aware of the assault.

The facts in the case sub judice clearly demonstrate an offer-type assault. This appellant was behaving in an angry fashion towards A1C Hamilton. From opening the door of A1C Mukoko's dormitory room with a bullet between his teeth, through the act itself, the appellant's behavior toward A1C Hamilton was hostile. A review of the testimony reveals a situation escalating in a violent fashion, with the disclosure of a dream in which the appellant perceives himself to be under attack by A1C Hamilton, followed ultimately with the demand to end what clearly is a one-sided misunderstanding with "one shot." The appellant would not yield to A1C Hamilton's plea to talk it through, and in an effort to end the tension, A1C Hamilton took the loaded weapon and put it away. But the appellant was not deterred, and after taking the gun from the cabinet, and ensuring a round was in the chamber, he began to raise the gun in the direction of A1C Hamilton. A1C Mukoko testified that, had the gun discharged, A1C Hamilton would have been shot. He acted on this observation and took the gun away. A1C Mukoko further testified that A1C Hamilton was shaking at that point. A1C Hamilton testified that he *was* afraid. At this point, all the elements of an offer-type aggravated assault had been established. While A1C Hamilton testified that he did not perceive the gun pointed directly at him, the testimony is clear that it was being raised at him from only three to five feet away, and A1C Mukoko stepped in to take it from the appellant. From these facts, we have no doubt that A1C Hamilton was in reasonable apprehension of receiving immediate bodily harm, and that the evidence is legally and factually sufficient to prove aggravated assault under this theory.

The appellant argues that the evidence is insufficient under this theory of assault because there was no display of violence. He argues that the gun was "never so much as pointed" at A1C Hamilton, and that "A1C Mukoko tried to make the incident sound much more eventful than it actually was." Further, he argues that A1C Hamilton had many opportunities to retreat but kept returning to the appellant's presence, and that "all parties were calm during the entire incident." Finally, the appellant points to A1C

Hamilton's behavior following the incident when he checked e-mail in the appellant's room and delayed reporting the incident.

We are not persuaded by these arguments. A1C Hamilton's behavior *following the incident,* after personally securing the weapons in his own vehicle, is irrelevant. We see A1C Hamilton's behavior as consistent in his efforts to resolve the conflict and establish himself as no threat to the appellant. The appellant has suggested no motivation on the part of A1C Hamilton to distort his report of the incident a day later, following the guidance from a family member. While the parties may not have been shouting or even raising their voices during the actual assault, we do not consider the environment to have been calm, but rather emotionally charged. And finally, while the appellant was not afforded the opportunity to point the gun directly at A1C Hamilton, we are convinced beyond a reasonable doubt that the appellant engaged in an unlawful display of violence towards A1C Hamilton, and A1C Hamilton's apprehension of immediate bodily harm was reasonable. We are, moreover, convinced that reasonable factfinders would have found these essential elements beyond a reasonable doubt.

In *United States v. Davis,* 47 M.J. 484, 486 (C.A.A.F. 1998),[3] our superior court observed that "[i]t is beyond cavil that, when a weapon is pointed at someone, that person normally will fear death or grievous bodily harm." Our reading of this record establishes that the appellant was in the process of aiming the gun directly at A1C Hamilton, and would have succeeded but for A1C Mukoko taking it away from him. In *United States v. Milton,* 46 M.J. 317 (C.A.A.F. 1997), our superior court concluded that the appellant's mere display of a gun tucked into his waistband during the course of an argument was sufficient to place the victim in fear of simple assault. In this case, as discussed above, the loaded weapon was in the process of being pointed at the victim during a hostile encounter. Consequently, we have no basis to disturb the findings under an offer-type assault theory in this case.

Likewise, we are satisfied that the facts in the record evidence an attempt-type aggravated assault. This theory requires specific intent to inflict bodily harm, coupled with an overt act. Specific intent can be inferred from the appellant's return to the second floor with the loaded gun, coupled with his admission to A1C Hamilton that he "shed a tear" for him because he intended to kill him. The appellant acted upon that intent, culminating in the performance of the unquestionably overt act of raising the weapon in the direction of A1C Hamilton. This final act goes well beyond "mere preparation," and tended to "effect the intended bodily harm." We find that all the elements of an attempt-type of aggravated assault are established beyond a reasonable doubt, and that reasonable factfinders would have found likewise.

[3] This case discusses the requirement that a weapon must be loaded for an offer-type aggravated assault charge. *See also MCM,* Part IV, ¶ 54c(4)(a)(ii).

The appellant argues that the evidence is insufficient under this theory because "nothing actually happened." This is similar to the argument made by the appellant in *United States v. Anzalone*, 41 M.J. 142 (C.M.A. 1994), in which the key issue under analysis was whether the acts taken by that appellant, quite similar to the acts in this case, amounted to more than mere preparation. In *Anzalone*, the appellant and the victim had argued, engaged in a physical altercation, then separated to return to their own tents, whereupon the "appellant retrieved his M16A2 rifle, pulled back the charging handle, chambered a round from the already-loaded magazine, and headed for the victim's tent." *Id.* at 143. While he was 20-50 yards from his intended victim, who was unaware of these developments, the appellant was stopped by two noncommissioned officers who asked for the weapon. The appellant gave it to them. He was charged with assault with a dangerous weapon. During the providence inquiry undertaken to consider the appellant's plea of guilty to this charge, the appellant admitted that he had done all he could do, short of accomplishing his intended crime, which was to do grievous bodily harm to his intended victim. *Id*. at 146. Our superior court, in holding that the appellant's plea of guilty to the attempt-type aggravated assault was provident because the appellant's acts had crossed the line between mere preparation and an overt act, stated, "There is no requirement under the law of attempts that the trip to the doorstep of the intended crime be completed in order for the attempt to have been committed." *Id. See also United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993). Likewise, we so find in this case.

The appellant also takes issue with the evidence establishing specific intent. While not disputing his own admissions that A1C Hamilton would have been killed had he been in his own room and that he shed a tear as a means of saying goodbye, the appellant still argues that the element of specific intent has not been met because there is no evidence of an intent to kill, and the threat was conditioned on finding A1C Hamilton in his own room. We disagree with the appellant's analysis. First, the charge is aggravated assault, and the only intent required is the intent to inflict grievous bodily harm. We are convinced the evidence supports such intent. Secondly, we are convinced the intent was formed before, or as, the appellant walked upstairs, unaware of A1C Hamilton's whereabouts. Moreover, the record establishes that the appellant was in the vicinity of A1C Hamilton's room, shouting for him to come into the hallway, and we find no evidence of the appellant abandoning his intent to inflict upon A1C Hamilton grievous bodily harm upon finding him elsewhere.

Finally, the appellant argues that the evidence is insufficient under either theory of aggravated assault because he did not "brandish" the weapon. Citing the dictionary, the appellant argues that brandish means "to shake or waive menacingly." He argues that the record reflects that he merely held the gun, keeping it pointed to the floor, although he acknowledges that A1C Mukoko testified that the gun was being raised toward A1C Hamilton.

We have already concluded that the record supports that the actions taken by the appellant were far more aggressive than merely holding the gun. The appellant took the gun from the cabinet after A1C Hamilton attempted to secure it; slid the mechanism to ensure a round of ammunition was in the chamber while commenting, "Let me show you how to do this," indicating frustration, if not aggravation; and then raised the gun to such a degree that A1C Hamilton could have been shot, before the gun was taken away from him. We think these actions *are* menacing. Accordingly, we find no merit to the appellant's arguments, and find the evidence was legally and factually sufficient to sustain his conviction for committing an aggravated assault.

We have also reviewed the record as to the appellant's ineffective assistance of counsel claim and find it to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

We note that the convening authority's action is silent on the matter of pretrial confinement credit, despite the fact that the military judge ordered the appellant be credited with 73 days of credit towards his confinement as a result of pretrial confinement. Of those days, 25 days were administrative credit awarded as a result of illegal pretrial punishment, specifically, his inability to wear rank during pretrial confinement. While we do not find prejudicial error, the action does not comply with the requirements set forth in Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.8.3 (26 Nov 2003). Specifically, when a military judge has directed that the appellant is to be credited for illegal pretrial confinement, it must be reflected in the action. *Id*.; Rule for Courts-Martial (R.C.M.) 1107(f)(4)(F). Since the action does not contain the required language, it must be corrected. R.C.M. 1107(g).

We also note that the Court-Martial Order does not contain the rank of the individual who signed on behalf of the commander. AFI 51-201, ¶ 10.1.8.4. While we do not find prejudice, this too must be corrected. *Id*. at ¶ 10.1.6.

Conclusion

Accordingly, we return the record of trial to The Judge Advocate General for remand to the convening authority to withdraw the action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court