UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic EDWARD J. HAMMOCK
United States Air Force

ACM 37094

28 July 2008

Sentence adjudged 11 May 2007 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge and confinement for 15 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Jason M. Kellhofer.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to his pleas, a general court-martial composed of officer and enlisted members found the appellant guilty of one charge and one specification of assault with a means likely to produce grievous bodily harm, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928.[1] The sentence included a bad-conduct discharge and

[1] The appellant was charged with aggravated assault by intentionally inflicting grievous bodily harm but was found guilty of the lesser-included offense of aggravated assault with dangerous means, use, or force likely to produce death or grievous bodily harm.

confinement for 15 months. The convening authority approved the findings and sentence without modification.

The appellant asks this Court to set aside the findings and sentence, claiming the following errors: (1) the military judge abused his discretion by denying the appellant's motion to suppress Airman (Amn) C's pretrial identification of appellant; (2) the evidence is legally and factually insufficient to sustain a finding of guilt to the charge and specification; and (3) the appellant's sentence is inappropriately severe.[2] Finding no error, we affirm.

Background

On 23 June 2006, Amn JB was at a local night club near Grand Forks Air Force Base, North Dakota. While there, Amn JB came to the aid of a fellow airman who was being assaulted. As it turned out, approximately 10-12 individuals began assaulting Amn JB. He was knocked unconscious, kicked in the head, and suffered multiple facial fractures. Several witnesses identified the appellant as one of Amn JB's assailants. At trial, the appellant unsuccessfully moved to suppress the witnesses' in-court identification of the appellant as Amn JB's assailant.

Discussion

Abuse of Discretion

The appellant avers the military judge abused his discretion by denying the appellant's motion to suppress one of the witness's, Amn C's, pretrial identification of the appellant. We disagree. We review a military judge's in-court identification ruling under an abuse of discretion standard. *United States v. Webb*, 38 M.J. 62, 67 (C.M.A. 1993). Our superior courts adopted a two-prong test for determining admissibility of eyewitness identification. *United States v. Rhodes*, 42 M.J 287, 290 (C.A.A.F. 1995); *United States v. Fors*, 10 M.J. 367 (C.M.A. 1981); *Webb*, 38 M.J. at 68; *See, e.g.*, *Manson v. Brathwaite*, 432 U.S. 98 (1977); *See, e.g.*, *Neil v. Biggers*, 409 U.S. 188 (1972); *See, e.g.*, *Stovall v. Denno,* 388 U.S. 293 (1967).

The first inquiry is whether the pretrial identification was unnecessarily suggestive? *Rhodes*, 42 M.J. at 290. In the case at hand, the military judge properly concluded, based on the evidence, that Amn C's pretrial identification was unnecessarily suggestive. However, that does not end the inquiry. An "unnecessarily suggestive" pretrial identification, a showup, does not preclude reliable in-court identification. *Id.* It is not enough merely to establish that a showup is suggestive. Due process is not

[2] All three issues are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

violated unless there is an "unnecessarily suggestive" pretrial identification that leads to a substantial likelihood of mistaken identify at the time of trial. *Id.*

With respect to the second inquiry, the following factors support a reliable identification: "opportunity to view" the actual perpetrator of the offense, *Brathwaite*, 432 U.S. at 114; *Biggers*, 409 U.S. at 199; "the witness' degree of attention," a short "length of time between the crime and the confrontation," *Id.*; *see Brathwaite*, 432 U.S. at 115; no discrepancy between offender's description and appellant, and little likelihood of other individuals in the area at the time of the offense matching the description given by the victim. *See Brathwaite*, 432 U.S. at 115.

The military judge applied the aforementioned test and determined: (1) that Amn C had seen the appellant on previous occasions before the assault, was approximately five feet away from the appellant at the time of the assault, and thus had an opportunity to view the appellant at the time of the assault; (2) Amn C was sufficiently focused on the appellant as he attacked Amn JB; (3) that there was a short period of time, approximately sixteen hours, between the crime and Amn C's confrontation; and (4) that Amn C and Amn JB had not given a prior description of the attacker and thus there was: (a) no discrepancy between the offender's description and the appellant nor (b) any great likelihood of other individuals in the area at the time of the offense matching the description given by the witnesses.

The military judge's findings of fact were thorough, detailed, and amply supported by the evidence. Additionally, with respect to the military judge's application of the law, de novo, we concur in his conclusion that while Amn C's pretrial identification was unnecessarily suggestive, such did not, given the test enunciated in *Brathwaite* and *Biggers*, lead to a substantial likelihood of mistaken identity at the time of trial. In short, we find no abuse of discretion.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to support his findings of guilt. This issue is without merit. In accordance with Article 66(c), UCMJ, 10 USC §866(c), 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 fact finder 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)).

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 beyond a reasonable doubt.

On this point we note that three witnesses (A1C MC, A1C AB, and A1C NH) testified that they saw the appellant stomp Amn JB in the head with his feet. Moreover, Amn JB testified that prosecution exhibits 1-3 accurately portray his physical condition approximately one hour after the assault. Finally, two witnesses (Dr. KT and Dr. NB) testified, either via a stipulation of expected testimony or via live, in-court testimony, that Amn JB suffered several factures of his facial bones. 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." *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; *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 charge and its specification.

Inappropriately Severe Sentence

The appellant avers his sentence to a bad-conduct discharge and 15 months confinement is inappropriately severe. In support he points to the numerous character letters attesting to his good character and the fact that his squadron commander characterized his service as excellent. Interestingly, the appellant fails to note that he had received a summary court-martial conviction for assault and battery approximately six months before his general court-martial.

Article 66(c), UCMJ, provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002). After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence, as approved by the convening authority, inappropriately severe.

Addendum to the Staff Judge Advocate's Recommendation

This Court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000). Though not raised as an issue on appeal, we note that in the addendum to the Staff Judge Advocate's Recommendation (SJAR), the staff judge advocate advised the convening authority to approve total forfeitures of pay and allowances. However, the members did not adjudge forfeitures and therefore the convening authority lacked the authority to adjudge total forfeitures. Therefore, the advice about approving total forfeitures of pay and allowances was erroneous. Having found error, we must determine whether it materially prejudiced the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

In reviewing claims of an inaccurate or erroneous SJAR, we have held "there must not only be error, there must also be prejudice to the rights of the accused." *United States v. Blodgett*, 20 M.J. 756, 758 (A.F.C.M.R. 1985). In determining whether the appellant was prejudiced by an erroneous addendum to the SJAR we must consider "whether the convening authority plausibly might have taken more favorable action had he or she been provided accurate or more complete information." *United States v. Alis*, 47 M.J. 817, 827 (A.F. Ct. Crim. App. 1998) (citing *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R. 1988). We note that the convening authority did not approve any forfeitures and thus did not follow the erroneous advice from his staff judge advocate. Moreover, we are convinced that the appellant was not prejudiced by the erroneous advice and the error was harmless.

Erroneous Promulgating Order

Finally we note that the promulgating order erroneously states that the sentence was adjudged by the military judge rather than by a panel of officer and enlisted members. Preparation of a corrected court-martial order, properly reflecting that the sentence was adjudged by officer and enlisted members is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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