UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Master Sergeant ROGER A. HESTAND
United States Air Force

ACM 34924

23 November 2004

Sentence adjudged 7 September 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Dishonorable discharge, confinement for 5 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Patricia A. McHugh, Major Antony B. Kolenc, and Mr. David P. Sheldon.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major Martin J. Hindel, and Major Shannon J. Kennedy.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of five specifications of committing indecent acts with a minor and one specification of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The general court-martial, consisting of officer members, sentenced the appellant to a dishonorable discharge, confinement for 9 years, and reduction to E-1. The convening authority reduced the amount of confinement to 5 years, but otherwise approved the sentence as adjudged. The

appellant has submitted five assignments of error: (1) The evidence is legally and factually insufficient; (2) The appellant received ineffective assistance of counsel; (3) The appellant's sentence is inappropriately severe; (4) The appellant's conviction was achieved through the use of perjured testimony; and (5) The military judge erred in not removing a member from the panel. These last two are submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

Background

The case for the prosecution consisted in large measure of the testimony of TAE, the then fifteen-year-old stepdaughter of the appellant. She stated that on several occasions the appellant touched and sucked upon her breasts and placed her hand upon his penis. According to TAE, the appellant also threatened to beat her if she told anyone about the sexual activity. The case also included a written statement provided by the appellant to the Air Force Office of Special Investigations (AFOSI). In this document, the appellant stated that on one occasion he permitted TAE to put her hand on his penis after which he "pinched her nipples and then lightly nibbled them." He stated that he did so in response to a question by TAE as to what caused a woman to become aroused. The prosecution also called other family members to corroborate parts of TAE's story, and the AFOSI agents concerning the facts and circumstances surrounding the taking of the statement.

The case for the defense included extensive cross-examination of TAE, with a view toward establishing a motive for her to have falsely accused the appellant. It also included the appellant's own testimony, in which he denied the allegations against him and insisted that he had provided the statement to the AFOSI not because it was true but rather to appease the agents.

Legal and Factual Sufficiency of the Evidence

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant'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)).

We have considered all matters properly submitted to the finder of fact in this case. We have paid special attention to the testimony of TAE, including her prior inconsistent statements as well as her expression of animosity toward the appellant due to the appellant's breakup with TAE's mother. Despite these matters, we find that her

testimony concerning the sexual misconduct and the threat held up under intense cross-examination, that it was detailed, and that it was inherently credible. In addition, her testimony was corroborated, in part, by that of other family members and both by the appellant's own written statement as well as oral statements he made to his commander and first sergeant.

We hold that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the appellant is guilty of the offenses. Accordingly, the specifications are legally sufficient. Furthermore, after weighing all the evidence admitted at trial and mindful of the fact that we have not heard the witnesses, this Court is convinced beyond a reasonable doubt that the appellant is guilty of the offenses.

Ineffective Assistance of Counsel

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). The test for ineffective assistance of counsel is three-pronged:

> (1) Are [the] appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions?";
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers?"; and
>
> (3) If defense counsel was ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)). *See also Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Garcia*, 59 M.J. 447 (C.A.A.F. 2004).

This assignment of error alleges that trial defense counsel was ineffective in the following ways: (1) failing to request the voluntariness instruction on findings; (2) failing to present evidence concerning the appellant's mental state; (3) failing to present expert testimony on false confessions; (4) failing to demonstrate that the appellant never told family advocacy that his alleged conduct with his stepdaughter was for "educational" purposes; and (5) failing to present a good military character defense.

We have evaluated this case in light of the criteria set forth in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We find that a substantial measure of the appellate filings are speculative in nature, especially concerning the proposed psychological evidence. Additionally, we find that, on the whole, the government does

not deny the facts alleged by the appellant—that the expert witness examined the appellant and concluded that he possesses traits consistent with the possibility of false confessions, that the trial defense counsel failed to request the voluntariness instruction, and that he did not put on evidence of good military character. Rather, the government denies the legal significance of such facts. We conclude that we can resolve this assignment of error based upon the record of trial and appellate filings without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Failure to Request the Voluntariness Instruction

Prior to the entry of pleas, the trial defense counsel moved the court to suppress the appellant's statement to AFOSI. The prosecution called the two agents who had conducted the interview. They testified as to the rights advisement and the facts and circumstances surrounding their questioning of the appellant. After hearing the evidence, the military judge denied the motion and admitted the statement.

In its case, the defense called the appellant to testify on his own behalf. He denied the alleged indecent acts and specifically denied the truth of his statement. He testified that on the day of his interview, he had had little sleep and was still upset from a previous day's argument with his son. He stated he had prior bad experiences with the AFOSI, which led him to believe that the agents were simply out to "make a case."

The appellant testified that the agents suggested to him that the wrongful contact with his stepdaughter might have been accidental or it might have been for "educational purposes." He stated that as the interview progressed, he became more angry at the agents and finally decided to make a statement cobbled together from pieces of information gleaned from their questioning. He stated he did so because he believed that, if he admitted to some sexual contact done for "educational purposes," he would have given the agents what they were looking for but would have avoided admitting criminal responsibility.

Twice prior to the announcement of findings, the military judge questioned the trial defense counsel as to whether he believed that the evidence adduced at trial impugned the voluntariness of the statement. Both times, defense counsel stated that he did not so believe. When the military judge subsequently asked if he should give the voluntariness instruction, the trial defense counsel replied, "The defense believes, based upon the evidence of the record, that the issue of voluntariness should not be sent to the jurors."

We have examined the entire record and appellate filings, with special attention to the trial defense counsel's explanation of his strategy and his statements to the panel during opening and findings. While lack of voluntariness can affect the credibility of a confession (*see United States v. Everett*, 41 M.J. 847, 853-54 (A.F.C.M.R. 1994)), the

tenor of the defense's case appears to have been that the appellant made the incriminating statement as result of a bad decision but not due to his will having been overborne.

Admittedly, the defense challenged the statement prior to trial. However, during their opening statement and findings argument, the defense repeatedly described the statement as "bogus," never as involuntary. Given the evidence as a whole, and taking into account the testimony of the two AFOSI agents, we conclude this was a reasonable trial strategy. In any event, the voluntariness instruction permits the military judge to instruct the panel on evidentiary factors which support the position of the defense, as well as those which suggest the opposite conclusion. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 4-1 (1 Apr 2001). A reasonable defense attorney might not have wished for an instruction which would have permitted the military judge to highlight evidence contrary to the defense position. All in all, we conclude that the evidence adduced at trial was such that this instruction, even if given, would not have led to a different result. *See Grigoruk*, 56 M.J. at 307.

Failure to Introduce Evidence of the Appellant's Mental State

In support of this aspect of the assignment of error, the appellant submitted a detailed affidavit by Dr. Jerry Brittain, a clinical psychologist who examined the appellant after his trial. The affidavit describes the results of the mental health evaluation which Dr. Brittain performed on the appellant. The conclusion of this evaluation was that the appellant is a passive and naïve individual who is strongly averse to conflict. Dr. Brittain opined that the appellant "could have had his will overborne by the fatigue, his inability to tolerate what he perceived as a hostile environment, and the tactics used by the interrogator." Dr. Brittain's affidavit goes on to say:

> If I had been retained prior to trial, I would have asked that the defense counsel interview the agents extensively on these matters and on their training. I would be most interested in asking them how they decided that he was "guilty" and what technique they then used to get his signed confession. I also would have insisted that the agents be questioned about these techniques in front of the panel members. Without such testimony and cross examination, the members were not able to put the interrogation into perspective, and, without testimony regarding [the appellant's] personality make-up, they were unable to put his actions into perspective either.

In his brief on appeal, counsel for the appellant states, "Dr. Brittain's testimony would have been relevant to the panel members as they evaluated the voluntariness of Appellant's statement to investigators and determined what weight to give that statement."

We note at the outset that trial defense counsel did in fact present evidence as to the mental state of the appellant, through the appellant's own testimony. The alleged deficiency is the absence of expert testimony as outlined in Dr. Brittain's affidavit. While testimony of this sort could have reinforced some aspects of the appellant's testimony, it would also have significant limitations. The crux of the case was whether the testimony of the victim and the statement of the appellant were true. In that regard, Dr. Brittain admitted early in his affidavit that he could not speak to the truth of a given confession, and he obviously was in no position to venture an opinion as to the psychological makeup of the victim. Additionally, although Dr. Brittain states that he would insist that the AFOSI agents be extensively cross-examined on their interrogation techniques, the record provides no basis to conclude that their answers to such questions would necessarily have undermined their own credibility. Finally, as stated above, trial defense counsel's presentation did not explicitly rest upon the involuntary nature of the confession, but rather that it was a "bogus" statement by someone who held the AFOSI agents in contempt and wanted to get them off his back. Dr. Brittain's testimony would have been less useful as part of such a strategy.

We find no basis in the record or in the appellate filings to conclude that the trial defense counsel gave actual consideration to utilizing expert testimony of the sort at issue here. We find that even if he did not, he employed reasonable strategy. He obviously realized that, even with the confession, the strength of the prosecution's case relied heavily upon the testimony of TAE. He devoted much of his trial time to attempting to undermine her credibility, both by highlighting her prior inconsistent statements and by emphasizing her animosity toward the appellant. Despite this, the members clearly found her believable, and there is nothing in Dr. Brittain's affidavit to prompt a different evaluation of her truthfulness. Therefore, even if the trial defense counsel did not consider the possibility of providing expert testimony regarding the appellant's mental state, and even if such failure were error, we conclude that there is no reasonable probability that there would have been a different result.

Failure to Present Expert Testimony on False Confessions

The appellant asserts that his trial defense counsel was ineffective in that he did not present expert testimony on false confessions. Admittedly, the appellant stated to the panel that his confession was not true. Furthermore, the affidavit of Dr. Brittain describes various psychological factors of the appellant which were "consistent with the literature and studies of situations which can lead someone to falsely confess to a crime." The appellant asserts that such testimony would probably have produced a different trial result.

We do not agree with the appellant. In the first place, as stated above, Dr. Brittain cannot give an actual opinion on the truth of the appellant's statement, only that his emotional makeup is consistent with false confession. In any event, the impact of such

testimony is in large measure a function of how credible the factfinder determines the victim to have been. The extent to which she is found believable diminishes the false confession defense proportionately. More to the point, however, even if he gave consideration to providing such evidence, a reasonable defense attorney might well have concluded that it was not admissible in light of *United States v. Griffin*, 50 M.J. 278 (C.A.A.F. 1999). Therefore, we conclude that not to have offered such evidence was reasonable. However, if it was error, we conclude that there is no reasonable probability that attempting to have done so would have produced a different result.

We have considered the remaining aspects of trial defense counsel's performance which the appellant asserts were deficient. We find the appellant's allegations to be without merit. In light of the above, we conclude that the trial defense counsel employed a reasonable strategy and that his level of advocacy did not fall measurably below the performance expected of fallible lawyers. *See Grigoruk,* 56 M.J. at 307.

Even if it did, however, we do not find prejudice. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)). Considering the record as a whole, we conclude that the trial outcome was reliable. Therefore, we hold that the trial defense counsel was not ineffective within the meaning of *Grigoruk* and *Strickland.*

Other Issues

We resolve the remaining issues adversely to the appellant. The approved sentence is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We find no basis to conclude that the AFOSI agent committed perjury or that the prosecution understood itself to be utilizing perjured testimony. *See United States v. Brickey*, 16 M.J. 258, 266 (C.M.A. 1983); *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). Although trial defense counsel initially raised this issue himself during the case, he later stated on the record that he was satisfied that no perjury occurred. This Court finds no reason to disagree. Finally, we hold that the military judge committed no error in his rulings on selection of members. *See* Rule for Courts-Martial 912(f)(4); *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997).

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, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court