UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant AARON J. JENNINGS
United States Air Force

ACM 38230

14 November 2013

Sentence adjudged 8 August 2012 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Joshua E. Kastenberg (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of $400.00 pay per month for 8 months, and reduction to E-3.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Captain Thomas J. Alford; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The military judge sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of $400.00 pay per month for 8 months, and reduction to E-3. The convening authority approved the

[1] The appellant was charged with the greater offense of aggravated sexual assault, victim substantially incapacitated, in violation of Article 120, UCMJ, 10 U.S.C. § 920.

adjudged sentence. On appeal the appellant asserts that the evidence supporting his conviction for abusive sexual contact is factually insufficient. We disagree.

Background

On 9 January 2012, the alleged victim, Ms. JP, moved in with her high school classmate, Staff Sergeant (SSgt) DN, who lived in Belleville, IL. She had recently earned a Master's degree in social work from Washington University in St. Louis, Missouri. At the time, SSgt DN was assigned to the 375th Security Forces Squadron, Scott Air Force Base, Illinois.

Ms. JP first met the appellant at his house on Wednesday, 11 January 2012, when she accompanied SSgt DN who was purchasing some furniture from the appellant. While there, Ms. JP observed pictures of the appellant's family to include his wife and son. Later when the appellant and SSgt DN were sitting in the basement drinking beer, SSgt DN went to the restroom at which point the appellant asked Ms. JP to show him her breasts. Ms. JP testified that she laughed it off and said, "No." According to Ms. JP, this comment was unprovoked as they had not been discussing sex, and she had not been flirting with him or wearing any suggestive clothing. When they went outside, the appellant called her "sugar tits." She did not reply to this comment. Later when they were loading furniture into SSgt DN's truck, the appellant decided to urinate into some weeds next to the truck. Simultaneously, he caressed the back of Ms. JP's leg while she was standing on the tailgate of the truck. After unloading the furniture back at SSgt DN's house, while alone in the kitchen, the appellant told Ms. JP that she "was not being a team player" or "team sport" and again asked her to show him her breasts. She jokingly replied, "Sunday, Sunday, Sunday," "just like the football announcers" to be funny. A party had been planned at SSgt DN's house for that coming Sunday.

The party started at approximately 1830. There were about 20-25 people in attendance. Ms. JP testified that from around 1100 to 1830, she drank approximately three to four beers while cleaning and getting ready for the party. She did not remember eating much before the party started. She remembered drinking three beers and three sips of other alcoholic drinks during the party, to include: "Apple Pie" (a mixture of Ever Clear and apple cider), "American Honey" (a brand of whiskey), and a third drink she did not recall. She also ate various snacks and some finger food.

At some point during the party, the appellant's other roommate, Senior Airman (SrA) ZS, passed out in a chair on the main floor of the house. While passed out, he was "antiqued," meaning covered with flour by others at the party. Ms. JP did not remember participating in this activity. However, others testified that they saw her dancing on SrA ZS's lap. SrA ZS eventually got up and went to the bathroom to clean off. Ms. JP decided to assist him. While SrA ZS was washing his face, the appellant entered the bathroom and proceeded to unzip his pants and expose his penis. Ms. JP put her hand

around the appellant's penis and stroked it two times, whereupon he guided her head down for her to perform oral sex. Ms. JP performed consensual fellatio for approximately a minute. She stopped because SrA ZS requested assistance with removing the flour from his eyes. SrA ZS testified that he did not witness any sexual activity in the bathroom because he was struggling to stay conscious. Ms. JP then took SrA ZS upstairs to her bedroom because it was the only room in the house that actually had a bed.

After putting SrA ZS to bed, Ms. JP went back downstairs to the party. This is the point at which she remembered drinking the "sips" of the other alcoholic drinks. However, despite other attendees' testimony, she did not remember trying to fight another girl at the party, drinking whiskey straight from the bottle, or going up SSgt DN's steep stairs to bed.

Ms. JP's next memory was waking up in her bed with a thrusting feeling in her vagina. She opened her eyes, sat up, and saw the appellant. She put her hands up and said "No" multiple times. The appellant replied, "What you don't like that?" She thought it felt like his fingers were in her vagina but she couldn't be certain. She did not remember what happened next. She believed she passed out from shock.

When she next awoke, Ms. JP found herself in bed with SrA ZS. They unsuccessfully attempted to have consensual intercourse. Later that morning, she woke up again and noticed vomit on her jeans, which were on the floor near her side of the bed. She remembered going into the bathroom and coughing. She observed blood coming from her vagina. Her vagina was so swollen that she could not insert a tampon. She was concerned because it was not time for her menstrual cycle. Ms. JP then proceeded downstairs to inform SSgt DN and SrA ZS.

In addition to finding vomit on the floor, Ms. JP found her room in disarray; there was sugar and pancake mix all over her room. She later learned this was due to a second antiquing that was done by the appellant, SrA JM, and a third person around midnight while she and SrA ZS were asleep.

Later that day, Ms. JP learned from SSgt DN's Facebook page that the appellant's face had been scratched at some point during the party. She spent the next few days attempting to find out what had happened and wondered if the sexual activity was consensual. However, at trial she was adamant she had not given consent. Ms. JP ultimately reported the incident to the Belleville Police Department on Wednesday, 18 January 2012.

Factual Sufficiency

The appellant alleges that the evidence supporting his conviction for abusive sexual contact is factually insufficient. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). 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). 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).

The elements of abusive sexual conduct, while the victim was substantially incapacitated, are as follows: (1) That the accused engaged in sexual contact with another person; and (2) That the other person was substantially incapacitated. *Manual for Courts-Martial, United States*, A28-1, ¶ 45.b.(8)(c) (2012 ed.).

In support of his position, the appellant claims that Ms. JP cannot be trusted because she had told three mutually inconsistent versions of her story, the evidence showed she consented and was not substantially incapacitated, and, even if we find she did not consent, there is substantial evidence of reasonable and honest mistake of fact as to consent. Although there were some inconsistencies in Ms. JP's various versions of what occurred, she had been consistent and adamant that when she awoke feeling a thrusting pain in her vaginal area, it was the appellant she saw. She told the appellant "No" several times, but instead of stopping, the appellant said, "What you don't like it?" Ms. JP had also been consistent that she noticed pain and discomfort in and around her vaginal area, along with some bleeding.

The appellant's argument that there was consent is without merit. The evidence shows Ms. JP was substantially incapacitated and therefore could not have provided consent. Ms. HM witnessed Ms. JP going to bed around 1100. She later heard someone comment that SrA ZS and Ms. JP were in bed together without any clothes on. Ms. HM also noticed the appellant go upstairs to use the restroom three to four times after Ms. JP had gone to bed, and she observed scratches and bleeding on his face and ear upon returning back downstairs. SrA JM likewise saw the appellant go upstairs while Ms. JP and SrA ZS were asleep, and also observed scratches on the appellant's face upon his return. Although Ms. JP was initially concerned she may have consented, we do not find this constitutes sufficient evidence that she did, in fact, consent.

The appellant also argues that insufficient evidence was offered to prove the second element. The appellant asserts that the evidence, particularly the testimony of several witnesses, showed Ms. JP was not drunk. He also attributes Ms. JP's lack of memory as not only a function of the alcohol she drank, but also due to the lapse of time (eight months) that had passed since the party. For the reasons set forth below, we find the appellant's position unpersuasive.

Ms. JP recalled drinking three to four beers before the party, plus three beers and three "sips" of other alcohol at the party. Additionally, several witnesses testified that Ms. JP appeared to be intoxicated at the party. SrA ZS testified he had previously seen Ms. JP intoxicated and it seemed that she was either at that point or beyond. SrA JM testified he observed Ms. JP drinking beer and saw her with a bottle of Wild Turkey (Ms. JP testified that she would have to be pretty drunk to drink from a bottle of Whiskey). He too felt that at some point Ms. JP was becoming intoxicated. SrA JM's spouse, Ms. HM, who was sober that night, testified that Ms. JP appeared to be intoxicated. She could get around but stumbled and slurred her words a little.

Furthermore, there was a substantial amount of additional evidence that shows Ms. JP was substantially incapacitated. SrA JM testified that when he went upstairs to check on SrA ZS, he saw Ms. JP and SrA ZS sleeping in the same bed. When he yelled at SrA ZS to wake-up, neither he nor Ms. JP responded. Ms. HM also saw Ms. JP and a female staff sergeant engage in an argument, which she felt was caused by alcohol. Ms. JP did not remember this argument. She also did not remember how pancake mix ended up spread all over her room, nor did she remember whether or not she scratched the appellant's face. Finally, Ms. JP did not know how vomit ended up next to her side of the bed and in her jeans.

Accordingly, we find the Government provided sufficient evidence to prove that Ms. JP was substantially incapacitated.

Finally, the appellant avers there is substantial evidence of reasonable mistake of fact as to consent. He claims that because Ms. JP flirted with and gave him fellatio earlier in the evening, what happened later that night was a natural follow-on to their earlier consensual activity. However, notwithstanding any prior sexual activity that may have occurred between Ms. JP and the appellant, the totality of the evidence presented in this case established that she was substantially incapacitated during the time of the alleged sexual encounter. Accordingly, there could not have been any reasonable mistake of fact as to whether or not Ms. JP consented.

Having paid particular attention to the matters raised by the appellant and making allowances for not having personally observed the witnesses, we find the evidence factually sufficient to support his conviction for abusive sexual contact. We are

convinced beyond a reasonable doubt that the appellant is guilty of the charge and specification of which he was convicted.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[2] Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

[2] The first paragraph of the Court-Martial Order (CMO) dated 2 December 2012, incorrectly identifies the appellant as an "Airman First Class." Accordingly, the Court orders the promulgation of a corrected CMO.