UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman STEVEN L. JONES
United States Air Force

ACM 36965

22 October 2008

Sentence adjudged 24 October 2006 by GCM convened at Incirlik Air Base, Turkey. Military Judge: Gordon R. Hammock.

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances for 15 months, and reduction to E-1.

Appellate Counsel for the Appellant: William E. Cassara, Esquire (civilian counsel) (argued), Lieutenant Colonel Mark R. Strickland, and Captain Lance J. Wood.

Appellate Counsel for the United States: Major Brendon K. Tukey (argued), Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Major Jeremy S. Weber.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was arraigned on charges of rape, forcible sodomy, purchasing alcohol for minors, dishonorable failure to maintain sufficient funds in his checking account, and failure to go to his place of duty. He pled not guilty to all the charges. He was found guilty of the charges with one significant exception. He was found not guilty of rape but guilty of the lesser included offense of indecent acts. A panel of officers sentenced the appellant to a bad-conduct discharge, reduction to E-1, forfeiture of all pay and allowances for 18 months, and confinement for 18 months. The convening authority

reduced the forfeitures and confinement to 15 months but otherwise approved the sentence as adjudged.[1]

The appellant raises five issues on appeal. First, he claims the forcible sodomy conviction must be set aside because the court members did not specify which of the two allegations of sodomy formed the basis for their findings, thus creating a fatally ambiguous verdict. Second, he argues that the conviction for indecent acts must be set aside because the instructions related to this offense, as a lesser included offense, were misleading and the ultimate findings represented a fatally significant variation to the charged misconduct. Third, he asserts that both indecent acts and sodomy convictions must be set aside because the judge erred in refusing to admit portions of AH's mental health records and erred in limiting the scope of the testimony of the defense's expert, a psychiatrist. Fourth, he alleges that the evidence is factually and legally insufficient to support the indecent acts, sodomy, and the bad checks convictions. Finally, he alleges his sentence must be set aside because he was denied effective assistance of counsel, guaranteed by the Sixth Amendment and Article 27, UCMJ, 10 U.S.C. § 827, during the sentencing phase of trial.

After hearing exceptional argument from both parties on the first three issues, this Court, for the reasons set forth below, finds no error and affirms.

Background[2]

The appellant was a 19-year-old security forces member assigned to Incirlik Air Base (AB), Turkey. During this assignment, he began dating a 17-year-old military dependent female. Over the course of several months of dating her, he became acquainted with several other 17-year-old military dependents on Incirlik AB.

When his girlfriend returned to the United States, the appellant, unhappy, called LN, a male military dependent and asked him if he wanted to get together. LN agreed. They then called some more military dependents. The gathering eventually consisted of the appellant and three 17-year-old military dependents: LN and two females. One of the female dependents, AH (the victim), knew the appellant but had not socialized with

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[1] We note that Lieutenant General RB referred this case to trial on 31 August 2006 and amended the convening order on 13 October 2006, in his capacity as Commander, Air Command Europe (AFEUR). He then took action in the case on 1 March 2007, in his capacity as Commander, Third Air Force (3rd AF). Both commands were authorized to convene General Courts-Martial. *See* Headquarters Air Force Special Order G-06-003, dated 8 November 2006. At the time of referral, Lieutenant General RB, as Commander, AFEUR was the General Courts-Martial Convening Authority (GCMCA) for the appellant's unit. On 1 December 2006, AFEUR was inactivated and Headquarters 3rd AF became the successor GCMCA for the appellant and his entire unit. The appellant raised no objection to the jurisdiction of the court at trial or on appeal. We too are satisfied that this court was properly constituted and had jurisdiction over both the offenses and the offender. *See United States v. Jette*, 25 M.J. 16 (C.M.A. 1987); *United States v. Allgood*, 41 M.J. 492 (C.A.A.F. 1995).

[2] The facts contained in this background are relevant to the indecent acts and sodomy charges.

him previously. Once the group formed, the decision was made to purchase some alcohol. The appellant, the only one old enough to buy alcohol, purchased two large beers for LN and a bottle of Crown Royal and Gatorade for himself and AH. The remaining female, NS, made it clear she was not interested in drinking.

Having secured the alcohol, the group proceeded to a vacant family base house. The house was vacant because LN's family had just moved from the vacant house to another base house. Because LN still had the key, the group was able to lawfully gain access and use the home as their party location. Once safely secreted in the vacant house, using minimal lighting, the group sat in the kitchen and talked. While the specifics are not relevant, it is clear that the discussion never turned to sexual matters and the appellant never made any sexual advances to AH other than possibly rubbing her leg for several minutes while the group talked. The appellant and AH drank Gatorade and Crown Royal that were mixed by NS. At one point, AH asked NS to put a little more alcohol in the drinks. In a matter of sixty to ninety minutes, the appellant and AH consumed seven to eight drinks amounting to approximately three-quarters of the bottle of Crown Royal.[3]

About this time, LN and NS elected to go outside to smoke a cigarette. Approximately 5 to 10 minutes after stepping outside the home, LN and NS heard a female moaning in a sexual manner and say the word "harder." Not interested in eavesdropping, the two proceeded to a nearby park. A short time later, AH called NS, crying and asking NS to return to the house. Upon returning, NS found the appellant kneeling between AH's legs with his boxers and T-shirt on. AH had on a top but was naked from the waist down. NS also heard AH tell the appellant to stop doing what he was doing. Shortly after NS' arrival, the appellant was separated from AH. It is undisputed that both AH and the appellant were significantly intoxicated during this period alone.

AH testified that the appellant forced himself on her, that he engaged in sexual intercourse, and that he sodomized her in two different manners. She testified that she told him repeatedly to stop and he did not. The appellant responded by suggesting, through cross-examination and testimony on the psychological profile of AH, that she consented and that her memory of events was distorted because of her psychological problems aggravated by her consumption of alcohol.

Sodomy Findings

For the first time on appeal, the appellant claims that the finding of guilty to the sodomy charge is defective because the members failed to specify which of the two alleged acts of sodomy formed the basis of their findings. It is undisputed that AH testified that the appellant had sodomized her in two different ways. It is also undisputed

[3] A 750ml bottle of Crown Royal.

that lab test results suggested that a substance most readily found in saliva was present on the appellant's penis. At the same time, a medical exam of AH, conducted within hours of the assault, failed to disclose any bodily trauma that supported claims of forcible sodomy.

Confronted with this evidence, and a charge of a single act of forcible sodomy, the military judge provided the panel with an additional instruction he entitled "Two Theories of Guilt." With no defense objections, the military judge stated the prosecution's two theories of forcible sodomy and then advised the members that in order to find the appellant guilty, "at least two thirds of the members . . . must be convinced of the accused's guilt beyond a reasonable doubt as to at least one of the government's theories of guilt. If two thirds . . . fail to agree on at least one of the government's theories of guilt, then your finding as to the Specification of Charge II must be not guilty . . . ." Upon completion of deliberations the panel returned a general verdict of guilty on the charge of forcible sodomy.

In holding against the appellant, we look no further than our superior court's recent holding in *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007). At trial, in *Brown*, the members were instructed that they could find the accused guilty of a lesser included offense of indecent acts on any one of three theories. Our superior court, in affirming a general verdict by the *Brown* court, stated, "It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." *Brown*, 65 M.J. at 359 (quoting *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987)).

In this case, the members were instructed that they must not only agree by a two-thirds majority that the appellant committed forcible sodomy, but they must also agree by two-thirds on the manner of the sodomy. As our superior court noted in *Brown*, "The proper question is, then, whether the military judge's instruction was correct." *Id.* at 358. Finding no error in the instruction and the verdict correct, we find no error in the panel's general verdict of guilty to the charge of sodomy.

Indecent Acts Findings

In his second assignment of error, the appellant argues that his conviction for indecent acts must fail for several reasons. First, he argues that an indecent act was not a lesser included offense of the rape charge. Second, he argues the military judge issued erroneous and misleading instructions on indecent acts as a lesser included offense. Third, he argues that the indecent acts finding was a fatal variance from the charged rape

offense. Finally, he contends that the acts themselves do not rise to the level of an indecent act as a matter of law.[4]

The appellant argues that an indecent act was not a lesser included offense to this rape charge, both legally and factually. We disagree. While we concede that the *Manual for Courts-Martial, United States* (2005 ed.) does not list indecent acts as a lesser included offense under rape, it has long been settled law, established by our superior court, that indecent acts can be a lesser included offense to a charge of rape. *See United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994). As for the question of whether it was raised by the evidence, our superior court, over the course of the last decade, has established a clear standard for evaluating whether sex acts may amount to an indecent act. In *United States v. Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999), our superior court concluded that sexual intercourse in a barracks room was "open and notorious" and thus indecent where it was "reasonably likely to be seen by others even though others" did not actually view the acts. *Izquierdo*, 51 M.J. at 423. More recently, in *United States v. Sims*, 57 M.J. 419 (C.A.A.F. 2002), the Court reaffirmed the standard set out in *Izquierdo*, but set aside a plea to indecent acts when the acts occurred in the appellant's own "private bedroom" and "neither party disrobed." *Sims*, 57 M.J. at 422. In *Sims*, the Court specifically relied on those two factors in distinguishing *Sims* from *Izquierdo*. *Id.* Considering the evidence at trial, we conclude an indecent act was a lesser included offense to the rape charge and it was reasonably raised by the evidence. The appellant essentially conceded he had sex with AH on the living room floor of a house in which he was a guest. It is also undisputed that two other dependents had simply stepped outside for a few minutes to smoke a cigarette. Clearly, he was on notice that the law would consider his conduct as potentially an indecent act if found to be consensual. Having concluded that indecent acts were legally and factually a valid lesser included offense, we can also reject the appellant's claim that the conviction amounted to a fatal variance for which he was not properly on notice.

Turning to the appellant's argument that the military judge's instructions were erroneous and misleading, it is well established that the military judge "has substantial discretionary power in deciding on the instructions to give," even over defense objections. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citations omitted). However, both the decision to give an instruction and the "substance of an instruction" are reviewed de novo. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999) (citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (C.A.A.F 1996)). With regard to when a panel must be instructed on lesser included offenses, our superior court has stated, "an appellate tribunal must independently evaluate the evidence to determine whether or not an accused has been deprived of his right to have the court-martial consider all reasonable alternatives of guilt." *United States v. Clark*, 48 C.M.R. 83, 87 (C.M.A. 1973) (citations omitted).

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[4] This final argument was raised for the first time at oral argument.

Having already concluded above that the evidence reasonably raised the offense of indecent acts, the only remaining issue is the instructions themselves. Looking to guidance from our superior court in *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005), we know that to determine if an act is criminally indecent we are to look at "all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act." *Rollins*, 61 M.J. at 344 (citations omitted). In this case, the military judge expressly advised the members that they must conclude that the act was "indecent" to find the appellant guilty. He then advised them that in deciding if the act was indecent they should consider:

> all evidence that bears on this issue, to include but not limited to: that the act of sexual intercourse is not, on its face an "indecent" act, unlike some other sexual acts; the age of the accused and [AH] and their relative proximity in ages; any previous conversation or dealing as between the accused and [AH]; their respective different statuses as a military member and dependent; the age, education and experience of the accused; your subjective assessment as to the level of consent involved by both parties; and whether the act was done in an open and notorious location such that other persons might reasonably view it.

At trial, the defense counsel objected to the instruction, claiming that the panel must conclude that the acts were done in an "open and notorious location," and that the other listed items were merely the factors they could consider in making that assessment. On appeal, the appellant argues that the judge created an "over-reaching 'catch-all' sex-offense" when he included factors such as "previous conversations or dealing" and "subjective assessment as to the level of consent." The appellant also argues, on appeal, that he was prejudiced by the findings worksheet in which the judge specified that the lesser included offense of indecent acts includes "engaging in sexual intercourse . . . in [a] vacant, unlocked, military family base quarters while two dependent minors were outside." The appellee, citing *Rollins*, responds by contending that the factors are precisely the factors to be considered in deciding if an act is itself indecent. As for the worksheet, the appellee points out that the worksheet simply describes the act in question and that the judge still properly advised the panel that they must conclude the act itself was indecent.

As we look to the instructions and the worksheet, we find no error. The military judge instructed the members that they "should consider all evidence that bears on the issue." He specified that the factors he listed were part of the evidence they should consider on the question. As for the worksheet, we think it properly specifies which act is the relevant conduct which may or may not constitute the lesser included offense of indecent acts. Regardless, the military judge highlighted to the members they could not find the appellant guilty unless they found the act, itself, "indecent." Therefore, we reject the appellant's claims regarding his conviction for indecent acts.

Exclusion of Evidence

At trial the appellant sought access to AH's mental health records in an effort to discredit her recollection of events via cross examination of AH and introduction of an expert witness' testimony as to her personality traits. After a lengthy hearing on the release of the records and the scope of the expert's testimony, the military judge ruled that he would release the records for review and he would permit the defense's expert witness to testify. In making the ruling, he specifically advised the defense he would allow their expert to testify that in his opinion AH has "several traits that point to the existence of a Borderline Personality Disorder" and that a potential aspect of having the disorder can be "an inability to correctly intake and relate events" and finally, "it is possible . . . [AH] misperceived what happened between the accused and her" on the night in question. After making his ruling the judge asked the defense counsel, "Does this ruling effectively give you the latitude and relief you sought?" To which the defense counsel replied, "Yes sir."

Despite the affirmation at trial, the appellant now claims that the military judge refused to admit a "substantial amount of [AH's] mental health evidence" and this exclusion of favorable evidence amounted to constitutional error. In support of this claim, the appellant argues that he should have been able to cross examine AH on some of the statements she made to her therapist. Acknowledging that Mil. R. Evid. 513 generally protects communications with a mental health therapist, the appellant argues that admissibility was constitutionally required pursuant an exception found to Mil. R. Evid. 513(d)(8).

The appellant cites *United States v. Dimberio*, 56 M.J. 20 (C.A.A.F. 2001), to support his argument that the military judge erred and denied his constitutional right to present a defense. The appellee responds by first arguing that the defense affirmatively waived any objection to the military judge's ruling when they told the military judge that they were satisfied with his ruling. The appellee argues that the appellant may only complain today if there is plain error. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). To show plain error, an appellant must establish an error which "must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (quoting *United States v. Young*, 470 U.S. 1, 16 n.14 (1985)). Finally, the appellee argues, even if there was error, the appellant was not denied his ability to present a defense, although the appellant's efforts may have been somewhat limited. *United States v. Carruthers*, 64 M.J. 340 (C.A.A.F 2007); *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007)

We begin by finding no error, plain or otherwise. The appellant's assertions on appeal simply do not withstand scrutiny when compared with the record. The appellant was able to put on exactly what he wanted at trial. He conceded this fact to the military

judge. As for the right to cross examine AH on any and all comments made to her mental healthcare provider, this evidence is inadmissible unless constitutionally required.

To amount to a constitutional right, the appellant is required to show that by excluding the evidence he was denied a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)) (internal quotations omitted). He was not denied this right. The appellant was permitted to fully cross examine AH on her conflicting versions of the sexual encounter. In addition, he was able to present expert testimony on why AH's personality disorder traits raised questions as to her accuracy and ability to recall these events. Thus, we conclude that the appellant was not denied the right to his defense of consent. As for the alternate claim that he was limited in his ability to present a defense, we need not decide this issue because we are satisfied that any exclusions did not have a substantial influence on the findings. To make such a conclusion we test for harmless error under Article 59(a), UCMJ, 10 U.S.C. § 859(a).

In testing for harmless error, we evaluate and weigh: (1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). "Using this evaluation [criteria], we will reverse only if we determine that the finder of fact would have been influenced by the evidence that was erroneously omitted." *United States v. Roberson*, 65 M.J. 43, 48 (C.A.A.F. 2007) (citations omitted).

In this case, we need only look to the third criterion, materiality of the evidence. When we look to the appellant's brief, we find a lack of specifics as to what additional evidence he would have sought to admit that was not already admitted. We reject assertions that general cross examination of AH on items from her mental health records would have been either relevant or material. The only substantive item that is specifically mentioned in the appellant's brief is a reference to a prior rape allegation by AH. Not only was this allegation made more than six years prior, and thus of little material value, but the military judge advised the defense at trial that he would permit the defense to ask AH about the allegation. Trial defense counsel did not ask at trial, presumably recognizing it was of little material value. Certainly he cannot complain now. Finding little to no additional material evidence, we are satisfied that the defense was not unfairly prejudiced by any exclusion that occurred.

Ineffective Assistance of Counsel

On appeal, via a post-trial affidavit, the appellant alleges that his defense counsel was ineffective for reading an unsworn statement to the panel during sentencing, which he believed contains admissions of guilt. He acknowledges that his attorney recommended that he make a statement to the panel in the hope of getting a lighter

sentence. He also acknowledges that his attorney advised him that the statement did not constitute an admission of guilt and that it would not hurt his chances on appeal. His complaint today is that he believes it did amount to an admission of guilt and that it is being used against him on appeal. He also alleges that he did not fully understand the significance of the statement at trial.

While his trial defense counsel has responded to the appellant's charge, we need not rely upon her response in addressing this question. When we look to the principles outlined in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), we believe the first and second principles control. The first principle provides that if an appellant makes a claim of error that would not warrant relief, even if factual disputes are resolved in the appellant's favor, we may reject the appellant's assertion of error on that basis. The second principle provides that if the appellant's assertions of fact consist of speculative or conclusory observations, we may reject the appellant's assertion of error on that basis.

Ineffective assistance of counsel claims are reviewed de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997)). 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). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must show deficient performance and prejudice. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002) (citing *Strickland*, 466 U.S. at 687). Counsel is presumed to be competent. *Id.* Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the trial defense counsel was actually deficient, and, if so, whether that deficiency 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 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).

When we look to the unsworn statement read by his attorney, we do not see admissions of guilt to the crimes charged. The appellant never disputed in findings that he spent the evening drinking with three dependents, that he engaged in sexual intercourse with one of those dependents, that she subsequently became distraught about that fact, and that he wrote numerous checks to the Base Exchange that were not honored on initial presentment. His unsworn statement simply says he has "no excuse for his actions," that he "made some poor decisions," he was "irresponsible," and he understands he must "pay for his mistakes." It also contains a full biographical profile of the appellant that presented him as a young man who will learn from this and become a better man. As we look to the unsworn statement, we simply see prudent admissions of making mistakes. None of them undermine his assertions on appeal that he did not commit the crimes alleged or that the judge erred in the conduct of the trial. In sum, we find the

appellant has not met his burden of either showing deficient performance or a reasonable probability of a different sentence without the statement. Therefore, his claim of ineffective assistance of counsel is denied.

Factual and Legal Sufficiency

Finally, the appellant alleges that the indecent acts, the sodomy, and the bad check convictions must all be set aside because they are factually and legal insufficient. We disagree.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all of the elements of the offense proven beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

Looking first to the indecent acts and the sodomy charges, we ourselves are satisfied that the convictions are factually and legally sound. It is undisputed that the appellant and AH engaged in sexual intercourse in the common area of an on-base house that did not belong to either of them while their companions, two 17-year-old military dependents, were near enough to overhear what the appellant and AH were doing. The appellant then engaged in sodomy with AH, despite her specific requests for him to stop. Much like the panel, we too are convinced, beyond a reasonable doubt, that she was an unwilling participant in the sodomy. With respect to the panel's verdict acquitting the appellant of the rape charge, we are satisfied that the panel gave the appellant the benefit of the doubt. This fact does not, however, undermine the sodomy and indecent acts conviction.

Finally, we turn to the bad check charges. Over the course of a two month period, the appellant wrote numerous checks totaling thousands of dollars. Most of these checks were rejected by his bank for insufficient funds when first presented. Many were also rejected a second time when presented. The appellant's claim that his conduct was not dishonorable is not credible. In light of the number, the frequency, and the amounts of the checks written, the dishonorable nature of his check writing is well established. This conclusion is further supported by the fact that the appellant still owed the Base Exchange money months after the checks were initially written and rejected because the appellant had insufficient funds in his account. We not only find the evidence legally

sufficient to sustain his conviction, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

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