UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DARRIN E. JONES, JR.
United States Air Force

ACM 37122

29 April 2009

Sentence adjudged 09 August 2007 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 42 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce and Major Jeremy S. Weber.

Before

FRANCIS, HEIMANN, and PLACKE
Appellate Military Judges

OPINION OF THE COURT

PLACKE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, in accordance with his pleas, of one specification of carnal knowledge with AJ, a child over the age of 12 but under the age of 16, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and one specification of sodomy with the same child, in violation of Article 125, UCMJ, 10 U.S.C. § 925. Contrary to his pleas, the military judge also convicted the appellant of one specification of carnal knowledge with JN, a child under the age of 12, also in violation of Article 120, UCMJ. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 42 months, and reduction to E-1. On appeal,

the appellant attacks the factual and legal sufficiency of his conviction for carnal knowledge with JN, and contends that his sentence is inappropriately severe.[1]

Factual Background

The appellant's maternal aunt and her three daughters, AJ, age 14, JS, age 13, and JN, age 11, lived in Fayetteville, North Carolina. Although the appellant had only limited prior contact with his aunt and cousins, he began spending considerable time with them in May 2007, shortly after arriving at nearby Pope Air Force Base. He lived with them from mid-June until his aunt kicked him out on 20 July 2007, after learning of his sexual relationships with AJ and JN.

The appellant's relationship with AJ involved multiple instances of intercourse and oral sex, most often in the guest bedroom he occupied. AJ agreed that the relationship was consensual and that the sexual activity was her idea as well as the appellant's. Although there was some dispute about exactly when the appellant learned AJ was 14, rather than at least 16 as he said he originally believed, he agreed that their relationship continued, and most of the sexual activity occurred, after he knew she was 14.

The appellant's sexual relationship with 11-year-old JN involved a single act of intercourse. His defense at trial was that, although the act occurred, he was mistaken as to the identity of his sexual partner. Specifically, he claimed that he fell asleep watching a movie on his laptop computer in the otherwise dark guest bedroom with JN, that he awoke to someone touching his penis, and, not fully awake and not yet having opened his eyes, he rolled over toward the person and immediately began to engage in intercourse, all the while believing the other person was AJ. He testified that something felt different as he began to penetrate her vagina, that he heard "stop, it hurts," realized it was JN, and immediately stopped. He estimated the penetration lasted 3 to 5 seconds.

The appellant established via the pediatrician who examined both girls that AJ and JN were very similar in height, weight, and Tanner Stage development. The appellant also offered evidence of the highly-sexualized atmosphere in the house. The appellant contended JN was very curious about sex, and the forensic psychiatrist he called during findings suggested there was sibling rivalry between JN and her older sister for the appellant's affections.

Although conceding that she had a crush on the appellant, and that he complied when she told him to stop because it hurt, JN testified that the brief intercourse with the appellant occurred while he was fully awake, and at his suggestion. The examining pediatrician found a transaction, or tear, in JN's apparently otherwise intact hymen. The

[1] Each assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

doctor testified that her finding was consistent with penetrating trauma, as described to her by JN, and that nothing else in JN's medical records would account for the injury.

The appellant never claimed he mistakenly believed JN was AJ when confronted by his cousins, his aunt, local authorities, or an Air Force Office of Special Investigations agent. Instead, as he admitted on cross-examination at trial, he repeatedly lied about various aspects of the entire matter, including initially denying that anything happened with JN, falsely minimizing the extent of his relationship with AJ, and unfairly portraying AJ as a sexual aggressor to whose advances he only finally, and reluctantly, acceded.

The military judge found the appellant guilty as charged. At the request of the defense, he also entered special findings pursuant to Rule for Courts-Martial (R.C.M.) 918(b). The military judge found that the appellant knew at the time of the intercourse that the victim was JN and that he did not mistakenly believe she was AJ. In light of those special findings, the military judge declined to rule on whether the appellant's claimed mistake of fact as to identity would constitute a defense to the charge of carnal knowledge with JN.

Factual and Legal Sufficiency, Special Findings, and Mistake of Fact

On appeal, the appellant attacks his conviction for carnal knowledge with JN on the grounds of both factual and legal sufficiency. He also claims that the military judge clearly erred by not ruling on the applicability of the defense of mistake of fact as to identity, and by entering special findings that rejected the factual basis for such a defense. Ultimately, all of the appellant's attacks on his conviction depend on his contention that he mistakenly believed JN was AJ. He argues this mistake of fact constitutes a defense to the charge of carnal knowledge with JN, thus resulting in a factual and legal deficiency as to his conviction of carnal knowledge with JN.

Generally, mistake of fact is only a defense when, "if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). Mistake as to age is only a defense to carnal knowledge when "the person with whom the accused had sexual intercourse was at least 12 years of age, and the accused reasonably believed the person was at least 16 years of age." R.C.M. 916(j)(2). The discussion to the rule further explains that, "if the victim is under 12 years of age, knowledge or belief as to age is immaterial." R.C.M. 916(j), Discussion. The appellant tries to sidestep both limitations by arguing he was mistaken as to his victim's identity. However, he does not claim that he believed JN was a female at least 16 years of age with whom he could lawfully engage in sexual intercourse; just that he believed 11-year-old JN was actually her 14-year-old sister, AJ. In any event, given our agreement with the military judge's special findings, we need not rule on whether the alleged mistake of fact would constitute a defense.

It does not appear that any military appellate court has directly addressed the standard of review for special findings under R.C.M. 918(b). However, guidance can be found with respect to appellate review of special findings under Fed. R. Crim. P. 23(c), which allows either party to request "specific findings" in bench trials. Under Fed. R. Crim. P. 23(c), special findings on an ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error. 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 10.04 (3d Ed. 1999). The military judge's special findings here go to the ultimate issue of guilt, and we will review them accordingly.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the appellant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and allowing for the fact that we did not personally see and hear the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We review legal and factual sufficiency de novo. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Our own review of the record convinces us that the evidence admitted at trial is both legally and factually sufficient to sustain the appellant's conviction for carnal knowledge with JN, as well as the military judge's special findings. Like the military judge, we are convinced beyond a reasonable doubt that the appellant knew at the time of the intercourse that his victim was JN and that he did not mistakenly believe she was AJ. In light of his special findings, we find that the military judge properly declined to rule on the issue of whether the appellant's claimed mistake of fact as to identity would, if believed, constitute a defense to the charge of carnal knowledge with JN.

Sentence Appropriateness

The appellant also contends that his sentence to a dishonorable discharge, confinement for 42 months, and reduction to E-1 is inappropriately severe. He reiterates his argument that he mistakenly believed JN was AJ, notes that the maximum term of confinement for carnal knowledge with a victim 12 years of age or older is confinement for 20 years rather than life, and cites his own youth and inexperience, his otherwise good character, and limited evidence of victim impact.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v.*

Snelling, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

The maximum sentence the appellant faced included a dishonorable discharge, confinement for life, and reduction to E-1. The appellant was young and apparently immature at the time of these offenses, the evidence regarding victim impact is relatively limited, and the appellant's very brief military record is otherwise satisfactory. However, the appellant took advantage of the situation in which he found himself and victimized two female cousins, one of whom was seven years younger than him. His adjudged and approved sentence of a dishonorable discharge, confinement for 42 months, and reduction to E-1 is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] 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

[2] Although not affecting the legal sufficiency of the findings or sentence, the court-martial order (CMO) erroneously states the appellant's rank as "Airman Basic" vice "Airman." We order the promulgation of a corrected CMO.