UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RYAN D. KOWALEWSKI
United States Air Force

ACM 36837

08 May 2008

Sentence adjudged 24 May 2006 by GCM convened at Kadena Air Base, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Anthony D. Ortiz (Argued), Lieutenant Colonel Mark R. Strickland, and Lieutenant Colonel Maria A. Fried.

Appellate Counsel for the United States: Captain Ryan N. Hoback (Argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of failure to go, three specifications of disobeying a superior officer, four specifications of dereliction of duty, one specification of false official statement, and two specifications of assault consummated by battery in violation of Articles 86, 90, 92, 107, and 128, UCMJ, 10 U.S.C. §§ 886, 890, 892, 907, 928. Contrary to his pleas, he was convicted of one specification of disobeying a general regulation, two specifications of assault

consummated by battery, one specification of kidnapping, one specification of intentionally injuring himself, and one specification of obstruction of justice in violation of Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, 934. His approved sentence consists of a bad-conduct discharge, 24 months confinement and reduction to E-1.[1]

Background

In November 2004, prior to arriving at his first permanent duty station, the appellant met MAS, who was 18 years old, while he was at tech training and was 20 years old. They got engaged approximately five weeks later. The appellant left for his first permanent duty station, Kadena Air Base, Okinawa, Japan, in January 2005. On 20 February 2005, MAS arrived in country, and they were married five days later.

Early in their marriage, there were difficulties, many involving alcohol. The triggering event appeared to be MAS sitting on another guy's lap in front of the appellant's friends. The relationship was volatile from then on. MAS went to the appellant's first sergeant in December 2005, and explained the treatment she was receiving.

On 8 February 2006, there was a heated discussion and MAS went up to her room. She heard a noise outside the door, went to open it, and found she could only open it a bit. The appellant had tied a dog leash to the door handle and secured it around another door handle. She was confined in the room for 30 - 45 minutes. She asked to be let out, banged on the door, and screamed. At one point, she stuck her leg out the opening, and the appellant pulled the leash taut and injured (bruised) MAS' shin. He told her everything was her fault, and he was going to make her watch him commit suicide. During a period of time when the door was shut tightly, MAS kept calling out to the appellant and received no answer. She wasn't sure if he was alive or not.

At some point in time, the appellant removed the leash from the door but did not inform MAS. Eventually, she found it unsecured. When she went out, she found the appellant cutting on himself. He told her she had to write the rest of his suicide note which he would dictate to her. He drew blood and smeared some on MAS' face saying "this is on you." She left, and two days later reported the entire situation. The two remained together until about 10 February 2006 when the appellant was placed in pretrial confinement.

Throughout the time leading up to trial, the appellant told MAS that everything was her fault, that she was a whiney immature little girl, that if she didn't testify they would stay together, and that he loved her. Additionally, he told A1C KNO, in reference

[1] The Convening Authority suspended 12 months of confinement for 12 months, and waived mandatory forfeitures.

to his wife, that he was playing the nice guy, just trying to make things blow over, and he would tell his wife he loved her here and there.

The appellant entered mixed pleas. The government went forward on the remaining charges. Contrary to his pleas, the appellant was found guilty of assaulting MAS, kidnapping her, intentionally injuring himself, and obstruction of justice by wrongfully endeavoring to influence the actions of MAS by intimidating her.[2] On appeal, the appellant raised four issues.[3]

Marital Privilege and Obstruction of Justice

The appellant was charged with obstruction of justice by wrongfully endeavoring to influence the actions of MAS (his spouse) by intimidating her by repeatedly blaming her for getting him into trouble, by telling her she was a whiny, little ***** for reporting him, by telling her if she testified he would go to jail and he would divorce her, but if he didn't go to jail they could stay together, and by repeatedly telling her he loved her. The trial defense counsel made a motion to exclude testimony involving the statements made by the appellant to his spouse, which were the basis of the obstruction charge, as they were protected by the marital privilege.

The military judge denied the motion. He stated,

> "[I]n this case, the accused's communications to his spouse are not only relevant to the kidnapping and assault charges to which the accused has plead [sic] not guilty, but they are also relevant to the obstruction of justice charge. Even though the obstruction of justice charge is not a crime against his spouse[4], the accused's statements should not be considered privileged under circumstances where the spouse victim testifies as she did in this case, that she believes the statements were insincere and manipulative in nature."

The military judge continued,

> "In summary, the court finds the communications the defense asserts to be privileged are relevant not only to the offenses the accused allegedly

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[2] Additionally, there was a finding, contrary to his pleas, of misusing a government computer by sending unauthorized personal and offensive emails to A1C KNO.

[3] Oral arguments were heard at Syracuse University College of Law on 15 April 2008 as part of this Court's Project Outreach Program. During oral argument, the appellant's counsel raised an additional issue – the legal and factual in-sufficiency of the obstruction charge. We find this issue to be without merit.

[4] We will leave for another day the question whether an obstruction of justice charge specifically naming a person's spouse and involving intimidation of said spouse is an offense against the spouse. We note this case differs from *United States v. Custis*, 65 M.J. 366 (C.A.A.F. 2007) which did not involve any crimes against the spouse of that appellant.

committed against his spouse, but also as to the obstruction of justice charge. And the obstruction of justice charge is so closely related to the offenses against the accused's spouse that the exceptions set for the in Military Rule of Evidence 504(c)(2)(A) apply."

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)); *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

A person may prevent "another from disclosing any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law." Mil. R. Evid. 504 (b)(1). A communication is confidential "if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons…" Mil. R. Evid. 504 (b)(2). "There is no privilege under subsection (a) or (b) in *proceedings* in which one spouse is charged with a crime against the person or property of other spouse…" Mil. R. Evid. 504 (c)(2)(A) (emphasis added). The question whether a conversation is privileged is a mixed question of law and fact. *United States v. Napoleon*, 46 M.J. 279, 284 (C.A.A.F. 1997).

The burden of establishing that a communication is a confidential marital communication that is entitled to protection under Mil. R. Evid. 504 is on the party claiming the privilege. *United States v. McCollum*, 58 M.J. 323, 336 (C.A.A.F. 2003). Once the "privilege" has been established, the burden shifts to the opposing party to overcome the presumption of "confidentiality". *Id.* Whether the military judge erred in admitting the statements "depends on (1) whether the appellant's statements were privileged under M.R.E. 504 (b)(1); and if so, (2) whether the exception contained in M.R.E. 504 (c)(2)(A) applies, making the statements admissible, nevertheless." *Id.* at 335.

Obstruction of justice has as its overriding concern the protection and sanctity of the administration of justice within our military system. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989).

"[T]he Rule [Mil. R. Evid. 504] thus recognizes society's overriding interest in prosecution of anti-marital offenses and the probability that a spouse may exercise sufficient control, psychological or otherwise, to be able to prevent the other spouse from testifying voluntarily." Drafter's Analysis, *Manual for Courts-Martial, United States (MCM)*, A22-40 (2005 ed.).

Although the crime of obstruction of justice is not per se a "crime against the person of the other spouse", the appellant was charged with numerous crimes against the person of his spouse (MAS). The *proceeding*[5] (emphasis added) included the offenses of kidnapping his spouse and committing assaults and batteries upon his spouse. Therefore the marital privilege did not exist under Mil. R. Evid. 504 (c)(2)(A). Further, the appellant communicated the substance of the communications under scrutiny with a third person, A1C KNO, so the statements were not confidential. *See* Mil. R. Evid. 504 (b)(2). And finally, the purpose of the privilege is to protect the sanctity of marriage and not to permit the appellant to exercise sufficient psychological control over his spouse and prevent her from testifying. The military judge did not abuse his discretion when he denied the appellant's motion to exclude the testimony of the appellant's spouse.

Legal and Factual Sufficiency – Kidnapping

At trial, the defense counsel made a motion under Rule for Courts-Martial 917, for a finding of not guilty as to the kidnapping specification. The military judge denied the motion and determined that the confinement of the appellant's spouse was "not merely incidental to the separate offenses of intentional self-injury, emotional maltreatment, or assault consummated by a battery."

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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 elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (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). In resolving questions of legal sufficiency, we must "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) (citations omitted). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The elements of kidnapping, Article 134, UCMJ are: 1) that the appellant seized, confined, inveigled, decoyed, or carried away a person; 2) that the appellant then held such person against the person's will; 3) that the appellant did so willfully and wrongfully; and 4) that, under the circumstances, the conduct of the appellant was to the prejudice of good order and discipline, or was of a nature to bring discredit upon the armed forces.

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[5] Both the litigated portion and the guilty plea phase of the court-martial involved crimes against the appellant's spouse.

There must be more than an "incidental" detention. A six-part test to determine if the asportation or detention was incidental to other offenses was developed in *United States v. Santistevan*, 22 M.J. 538, 543 (N.M.C.M.R. 1986) and subsequently adopted by our superior court in *United States v. Jeffress*, 28 M.J. 409, 413-14 (C.M.A. 1989); *United States v. Barnes*, 38 M.J. 72, 74 (C.M.A. 1993); and *United States v. Newbold*, 45 M.J. 109, 112-13 (C.A.A.F. 1996).

Whether an act constitutes kidnapping in a situation where a separate offense[6] is committed turns on balancing of 1) the occurrence of an unlawful confinement and a holding period; 2) the duration of the holding period; 3) whether the actions occurred during the commission of a separate offense; 4) the character of the separate offense(s) and whether the detention is inherent in the commission of that kind of offense; 5) whether the detention exceeded that inherent in the separate offense, and in the circumstances, evinced a voluntary and distinct intention to detain the victim beyond that necessary to commit the separate offense; and 6) the existence of any additional risk to the victim beyond that inherent in the commission of the separate offense. *Santistevan*, 22 M.J. at 543.

The kidnapping, detaining MAS in a room for 30 to 45 minutes, was not incidental to any other offenses. Each offense was separate and did not require any other offense to occur to complete it. Applying the test set forth in *Santistevan*, and reviewing the record of trial, we find, as did the military judge, the offense of kidnapping was not incidental to other offenses, the kidnapping offense is neither legally nor factually insufficient, and this issue is without merit.

Unreasonable Multiplicity – Assault and Battery[7] and Kidnapping

At trial, the appellant's defense counsel made a motion regarding multiplicity and numerous charges and specifications but it did not include those complained of in this appeal. Issues of unreasonable multiplication of offenses are reviewed for abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Issues of unreasonable multiplication of charges are waived if not raised by timely motion at trial. *United States v. Erby*, 46 M.J. 649, 652 (A.F. Ct. Crim. App. 1997). The appellant has waived this issue. Assuming arguendo that waiver does not apply, the charges are separate and distinct criminal acts and are not an unreasonable multiplication of charges under any theory.

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[6] Here the separate offenses would be the assault and battery committed when the appellant pulled the door closed on MAS' shin and the appellant's infliction of the self-injury.

[7] This assault and battery specifically involved the appellant shutting the door on MAS' shin.

Legal and Factual Sufficiency – Assault and Battery[8]

Applying the standards set forth above, the findings as to the assault consummated by battery specifications are clearly supported by the record and are factually and legally sufficient. We are convinced of the appellant's guilt, and find this issue to be without merit.

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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court

[8] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).