UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEPHEN A. LLOYD
United States Air Force

ACM 37220

29 May 2009

Sentence adjudged 13 March 2008 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Maura T. McGowan.

Approved sentence: Bad-conduct discharge, confinement for 1 year, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Captain Griffin S. Dunham, Captain Jennifer J. Raab, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Lieutenant Colonel Nurit Andersen, Major Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of three specifications of assault with a dangerous weapon, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The adjudged and approved sentence consists of a bad-conduct discharge, one year confinement, reduction to the grade of E-1, and a reprimand. On appeal, the appellant asks this Court to set aside his findings and sentence. The basis for his request is that he asserts: (1) the military judge abused her discretion by denying his request for a blood splatter expert consultant and (2) the

evidence is legally and factually insufficient to support his findings of guilt. Finding no prejudicial error, we affirm the findings and the sentence.

Background

During the evening hours and into the early morning hours of 27-28 October 2006, the appellant and SJ, a civilian friend, were having drinks at a local downtown bar. SJ bumped into Senior Airman (SrA) JS, another bar patron. SrA JS's friend, then-SrA CJ, confronted SJ with an obscene gesture and a fight ensued. The appellant came to SJ's defense, and SrA JS and another friend, SrA MG, came to SrA CJ's defense. A bouncer kicked the five out of the bar and after the mêlée was over SrA CJ, SrA JS, and SrA MG realized the appellant had stabbed them with a knife. The appellant and SJ left the bar in the appellant's truck, and while driving, the appellant confessed to stabbing the other three airmen. The injured airmen were transported to a local hospital, and while there, gave statements to local law enforcement officials. A few days later, SJ contacted local law enforcement officials who, in turn, put him in contact with Air Force Office of Special Investigations (AFOSI) agents. In talking to the AFOSI agents, SJ made a statement implicating the appellant in the knife attack.

On 28 January 2008, the appellant's trial defense counsel requested the convening authority appoint, at government expense, Mr. KI as an expert consultant in the field of bloodstain patterns. On 19 February 2008, the convening authority denied trial defense counsel's request for Mr. KI. However, the convening authority did provide Dr. NR, a professional colleague of Mr. KI, as a defense expert consultant. On 21 February 2008, trial defense counsel filed a motion to compel the production of Mr. KI or a suitable substitute as a defense expert consultant in the field of bloodstain patterns.

In her motion, trial defense counsel opined that Dr. NR, the defense expert consultant provided by the convening authority, was "not qualified to provide information or testify as to bloodstain patterns" and that the defense needs a bloodstain pattern expert consultant to "explore theories of the case that the government may not be pursuing . . . include[ing] exploring all possibilities as to how the blood came to be on the shirt [the appellant] was wearing at the time of the altercation." The military judge denied trial defense counsel's motion. In so doing, the military judge concluded that trial defense counsel failed to show there was a reasonable probability that a blood splatter expert would be of meaningful assistance to the defense.

Discussion

Military Judge's Denial of the Appellant's Motion for an Expert Consultant

"A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F.

2005) (citing *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001)). A military judge abuses her discretion when her findings of fact are clearly erroneous or her conclusions of law, reviewed de novo, are incorrect. *Id.* at 143-44.

An appellant "is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity." *Id.* (citing *Gunkle*, 55 M.J. at 31 (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986))). To show necessity, an appellant must show more than a "mere possibility of assistance from a requested expert", he must show that a "reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *Id.* (quoting *Gunkle*, 55 M.J. at 31 (quoting *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994))).

Courts apply a three-part test to determine whether expert assistance is necessary. "The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id.* (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996)). Here, we agree with the military judge that trial defense counsel failed to make the requisite showing of necessity. Trial defense counsel was on a fishing expedition to explore possible theories and failed to sufficiently demonstrate the need for a bloodstain pattern expert. The military judge's findings of fact are not clearly erroneous and her conclusions of law are not based on an incorrect view of the law. In short, she did not abuse her discretion in denying the appellant's motion for a bloodstain pattern expert.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). "[I]n resolving questions of legal sufficiency, we are bound to 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). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the specifications of which the appellant was convicted. On this point we

note the following legally supports the appellant's conviction: (1) testimony from SrA JS, SrA MG, and SrA CJ that someone stabbed them during their mêlée with the appellant and SJ; (2) SJ's testimony that shortly after the fight the appellant confessed to stabbing the three airmen; (3) photographs of the airmen's wounds; (4) a photograph of the blood stained t-shirt SrA JS was wearing when he was stabbed; (5) a stipulation of expected testimony wherein the parties agreed that DH, a lead biologist with the United States Army Criminal Investigation Laboratory, would testify that SrA CJ's blood was found on the shirt the appellant wore the night of the fight; and (6) surveillance videos depicting the fight.

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." *Turner*, 25 M.J. at 325. 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). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of these specifications.

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