UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER A. LORCH
United States Air Force

ACM 37032

11 August 2008

Sentence adjudged 24 April 2007 by GCM convened at Hill Air Force Base, Utah. Military Judge: Ronald Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: William E. Cassara, Esquire (civilian counsel - Argued), Lieutenant Colonel Mark R. Strickland, and Captain Tiaundra Sorrell.

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

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was found guilty of one specification of dereliction of duty, one specification of rape, and one specification of adultery in violation of Articles 92, 120, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 934. The approved sentence consists of a dishonorable discharge, confinement for two years, and reduction to E-1.

The issues on appeal are: 1) whether the military judge erred by admitting the appellant's audio taped confession that was obtained without a warning pursuant to

Article 31 (b), UCMJ, 10 U.S.C. § 831(b), and was thus involuntary under Mil. R. Evid. 304 and 305; and 2) whether the evidence was legally and factually sufficient to support the findings of guilty to rape where the alleged victim had a motive to fabricate and was not credible, where the alleged victim, although capable of manifesting a lack of consent, did not do so, and where the appellant held a reasonable and honest mistake as to the consent of the alleged victim.

Having carefully considered the record of trial, the submissions by counsel, and the oral arguments, we find no error and affirm.

Background

The appellant and Airman First Class (A1C) JD met while volunteering at a local haunted house in September 2006. After communicating by text messaging and telephone, they decided to get together with friends at Airman (Amn) Inman's apartment on 10 November 2006. The appellant, Amn Inman, Mrs. Inman, A1C JD, and DH were all together on Friday, 10 November 2006. They decided to go to a movie; after that, they returned to the Inmans off-base apartment[1]. Upon returning to the apartment, the group watched movies, including an adult pornography video which had been purchased by Amn Inman. Amn Inman and the appellant were drinking alcohol[2].

After watching the video, all decided to go to sleep – the Inmans in their room, DH on the couch, and the appellant and A1C JD on an air mattress in the living room.[3] The next morning, they all went out to breakfast, and then decided they should go swimming. The appellant and A1C JD returned to base to retrieve their swim suits. After swimming, that evening progressed much the same as the night before, except this time the appellant provided the adult video. Sometime during the adult video, A1C JD fell asleep on the air mattress. The others decided to turn the video off and go their separate ways – the Inmans to their bedroom, DH to the computer room, and the appellant to the air mattress.

Sometime thereafter, A1C JD woke up to find the appellant with his penis inside her. She froze and concentrated on "it ending". She never said no nor did she struggle. When the appellant got up to go to the bathroom as DH was entering the living room, A1C JD tried to tell DH what happened, but was too upset. She went and found Mrs. Inman and still couldn't explain. Finally, she was able to get her point across to Amn Inman who called the acting first sergeant and A1C JD's husband.[4]

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[1] A1C JD was living temporarily with the Inmans' while awaiting an apartment in the same complex. She did maintain a dorm room on base.

[2] The appellant indicates in his confession that DH was also drinking. DH was still in high school at the time.

[3] This was the same air mattress A1C JD was using as a bed while she stayed with the Inmans.

[4] A1C JD had only been married a month and her husband was still in New Orleans, finishing school.

A1C JD was transported to a local hospital and then to another facility for the rape protocol. The local authorities were notified, responded, and took statements which they provided to Detective Helm of the Clearview City Police Department. Detective Helm and Special Agent (SA) B, from the local Air Force Office of Special Investigations (OSI) Detachment, interviewed other witnesses that were at the facility. Detective Helm then interviewed A1C JD. At the conclusion of the interview, A1C JD said she would like to participate in a pretext call.

A1C JD went from the facility to the city police department. The pre-text call was accomplished at the police station where it could be tape-recorded. The tape recording failed. During the conversation, it was established that the appellant knew that A1C JD was married, he didn't use a condom or ejaculate, and he knew she was asleep. After this, Detective Helm directed SA B to have the appellant brought into the OSI office so that Detective Helm could interview him.

When the appellant arrived, SA B introduced himself and said he would be sitting in on the interview. Detective Helm asked the appellant if he knew why he was there, to which the appellant replied "I know exactly why I'm here" and "I probably made the worst mistake of my life last night." During the interview, SA B asked no questions of the appellant except requesting the appellant's ID card and phone number. At the conclusion of the interview, Detective Helm told the appellant he was under arrest for rape, that he would be transported downtown to the local jail, and that bail would have to be set and then posted before he would be released. The interview was recorded (and transcribed).

Admission of the Appellant's Taped Confession

At trial, the prosecution offered a copy of the appellant's audio-taped confession as Prosecution Exhibit 1 without objection from the defense counsel. A transcription of the confession was marked as Appellate Exhibit II.

Motions to suppress involuntary confessions are generally to be made before the submission of the pleas. Mil. R. Evid. 304(d)(2)(A). Failure to so move or object constitutes a waiver of the objection. *Id.* Hence this Court reviews this issue for plain error. *United States v. Gray*, 51 M.J. 1, 26 (C.A.A.F. 1999). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). When plain error is asserted, the appellant "bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993).

The issue is whether SA B or Detective Helm was required to inform the appellant of his Article 31(b), UCMJ, rights. Those rights are required to be given when a person

subject to the code is interrogating an accused. Article 31(b), UCMJ. A person acting as a knowing agent of a military unit or of a person subject to the code is considered a person "subject to the code". Mil. R. Evid. 305(b)(1). There are two instances when a civilian investigator is required to inform the appellant of his Article 31, UCMJ, rights, and those are when the scope and character of the cooperative efforts of the two investigations (civilian and military) merge, and when the investigator is working in furtherance of the military investigation. *United States v. Rodriguez*, 60 M.J. 239, 252 (C.A.A.F. 2004).

From reviewing the record, it is clear that the investigation was a civilian investigation and not a military investigation. Detective Helm was not working with or at the behest of the military, and was not required to inform the appellant of his Article 31 rights. Further, SA B was not required to inform the appellant of his rights, as SA B never interrogated the appellant. There was no error, plain or otherwise.

Assuming arguendo, that Article 31, UCMJ, rights were required, we find the *Miranda*[5] rights advisement given by Detective Helm, in conjunction with the discussion Detective Helm and the appellant had in regards to why he was at the police department, put the advisement in substantial compliance with the requirements of Article 31(b), UCMJ. "Advice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge." *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000) (citing *United States v. Davis*, 24 C.M.R. 6, 8 (C.MA. 1957). Informing an appellant of the nature of the offense of which he is suspected is the major difference between *Miranda* and Article 31(b), UCMJ. *United States v. Rogers*, 47 M.J. 135, 137 (C.A.A.F. 1997). The appellant was clearly aware of the reason for the interrogation, and Detective Helm ensured that the appellant knew why he was being interrogated.

In footnote 1 of the appellant's brief, the appellant requests that if we find the above error was not "plain and obvious", that we consider an additional assignment of error that, in the alternative, the appellant received ineffective assistance of counsel when the trial defense counsel failed to move to suppress the confession.

We review claims of ineffective assistance of counsel de novo, applying the two-part test enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). Under *Strickland*, the appellant bears the burden of establishing: 1) that the performance of his counsel was deficient; and 2) that he was prejudiced by that deficiency. *Strickland*, 466 U.S. at 687; *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997). Appellants who seek to meet this burden "must

[5] *Miranda v. Arizona*, 386 U.S. 436 (1966).

surmount a very high hurdle," due to a "'strong presumption' that counsel was competent." *United States v. Dobson*, 63 M.J. 1, 10 (C.A.A.F. 2006) (citing *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) and *United States v. Grigoruk*, 56 M.J. 304, 306-07 (C.A.A.F. 2002)). The appellant has failed to meet his burden establishing his counsel was ineffective and we decline to find ineffective assistance of counsel in this case.

Legal and Factual Sufficiency

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 factfinder could have found [proof of] all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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. We find this case to be both factually and legally sufficient, and are ourselves convinced of the appellant's guilt.

The findings and the 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 findings, and sentence, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court