UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSHUA D. LOYD
United States Air Force

ACM 36009

8 September 2006

Sentence adjudged 13 May 2004 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 14 years, and reduction to E-1.

Appellate Counsel for Appellant: Frank J. Spinner, Esq. (argued), Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Captain Daniel J. Breen (argued), Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

The appellant was convicted, contrary to his pleas, of two specifications of rape, one specification of indecent assault, and one specification of carnal knowledge, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. A military judge sitting as a general court-martial sentenced the appellant to a dishonorable discharge, confinement for 18 years, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provided for a dishonorable discharge, confinement for 14 years, and reduction to the grade of E-1. On appeal, the appellant

asserts (1) that the evidence is legally and factually insufficient to support the findings of guilty; and, (2) that his sentence is inappropriately severe.[1] After a careful review of the entire record, we find the appellant's assignments of error to be without merit and we affirm.

Legal and Factual Sufficiency

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). 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 appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The appellant's arguments in favor of finding the two rape convictions and the indecent assault conviction to be legally and factually insufficient are essentially the same. His argument centers on the proposition that the alleged victims were biased and had motives to misrepresent the truth, and therefore reasonable doubt exists as to his guilt. We conclude that there is sufficient competent evidence in the record of trial to support the court-martial's findings.

The appellant testified on the rape charges and admitted that he had engaged in sexual intercourse with both women, but claimed that they were both willing partners. During his direct testimony and cross-examination he admitted to telling investigators numerous lies and half-truths when questioned about the rape allegations. During cross-examination of the victims, trial defense counsel was able to point out inconsistencies in their testimony; however, both accusers were clear and unwavering on the essential elements of the offense of rape: the appellant engaged in sexual intercourse with them by force and without their consent.

The appellant also testified on the indecent assault charge and denied that it ever happened. The assault victim, a close personal friend of one of the rape victims, described the assault. During the course of her direct examination, the elements of the offense of indecent assault were brought forth and witnessed by the military judge. On cross-examination, her loyalty toward her friend and her failure to timely report the assault were also effectively brought to the military judge's attention.

The military judge heard the conflicting testimony and was able to observe the demeanor of the appellant and the witnesses on the stand. Despite the inconsistencies

[1] Oral argument was heard at Bolling Air Force Base, District of Columbia, on 10 May 2006.

raised during the course of the trial, the military judge found that the two rapes and the sexual assault occurred. Considering the evidence in the light most favorable to the government, we find that the military judge, as a "rational trier of fact" could have found the elements of the crime beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. Furthermore, after carefully weighing all the evidence and making allowances for not having personally observed the testimony of the appellant, the accusers, and the other witnesses, we find ourselves convinced of the appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Turner*, 25 M.J. at 325.

Turning to the specification of carnal knowledge with KM, we likewise find the appellant's conviction to be legally and factually sufficient. There was no dispute at trial, nor is there on appeal, that the appellant engaged in sexual intercourse with KM when she was 14 years old. The appellant's focus at trial and before this Court is that he had a reasonable belief that KM was at least 16 years old at the time of the sexual relationship. Article 120, UCMJ, provides an affirmative defense to the crime of carnal knowledge, stating:

> It is a defense . . . which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

The military judge was presented with evidence that KM regularly lied about her age and, in the past, she had presented herself to be at least 16 years old. Two witnesses testified that they were present when KM told the appellant that she was 17. KM testified that the subject of age came up only once during her relationship with the appellant. This occurred during a phone conversation, after the appellant and KM had engaged in sexual intercourse several times. KM testified that the appellant asked her how old she was, and that she told him she was 14. In response to examination by trial counsel, KM testified that she and the appellant had sex "probably like once" after she told him her real age. One defense witness, a male airman stationed at the same base as the appellant, testified that "[A] lot of military guys ask females from Clovis how old they are because a lot of them are under age, but they look older, or they'll have fake IDs." This same witness testified that KM told him she was 17, but he questioned her about it because he thought she was younger. Both counsel mentioned the mistake of fact defense in closing argument.

After a careful review of the record, we find the evidence legally and factually sufficient to support the specification of carnal knowledge with KM. First, we find that the elements of carnal knowledge were clearly proven by the government. Second, we find that KM's testimony stating that the appellant had sex with her at least once after she specifically told him she was 14, negates any claim of mistake of fact for at least one

instance of carnal knowledge. Third, as to the appellant's reasonable beliefs before he was specifically told KM's age, we believe the military judge was in the best position to determine whether the appellant carried his burden to prove mistake of fact by a preponderance of the evidence. As the trial counsel pointed out to the military judge in closing argument,

> [Y]ou saw the way she acted [referring to KM's testimony]. She acted like a little kid; a young teenager. And, remember, when this [referring to the sexual relationship] was going on, she was a year and a half younger.

Not having had the opportunity to observe KM testify, we are loath to second-guess the military judge's determination that the appellant did not carry his burden of proving he had a reasonable belief that KM was at least 16 years old at the time of the sexual relationship. We find the judge's finding of guilty to be reasonable, and are ourselves convinced beyond a reasonable doubt that the appellant is guilty of carnal knowledge with KM on divers occasions. Art 66(c), UCMJ; *Turner*, 25 M.J. at 325.

Sentence Appropriateness

The appellant asks that we find his sentence inappropriately severe. This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise 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 (C.M.A. 1988).

In claiming that his adjudged sentence is inappropriately severe, the appellant argues that a review of the entire record "reveals that appellant's sentence to a dishonorable discharge and fourteen years of confinement is not consistent with the offenses of which he was convicted." He cites the following factors in an attempt to support his argument: First, that the charges of rape and carnal knowledge were hotly contested. Second, that the appellant was 21 years old at the time of the offenses and had only a single letter of reprimand in his file. Third, that his clemency exhibits were "hardly reflective of a hardened criminal who deserved such a devastating sentence."

After reviewing the entire record ourselves, we disagree with the appellant's interpretation of what the record "reveals." In our opinion, it reveals a disturbed young man with a track record of callous, brutal, and degrading actions against women. A few months after marrying his pregnant girlfriend, he fondled a casual acquaintance in the parking lot of a club on Cannon Air Force Base and invited her to his car so he could "eat

her out." When he was rebuffed, he returned to the club, led his first victim into a men's bathroom stall, raped her, and ejaculated on her prior to casually returning to the dance floor as if nothing had happened. A few weeks after listening to his first victim describe her ordeal to an Article 32, UCMJ[2], investigating officer, and within days of the birth of his first child, the appellant sought out his second victim in her dorm room. Upon gaining entry he raped this fellow Airman, whom he knew was pregnant, pulled out and ejaculated on her. When he saw her crying after the rape, he said "whatever, you liked it." Between the two rapes he engaged in sexual relations with a 14-year-old child. His sentencing presentation gave no indication that he was at all aware of the seriousness of his crimes or was remorseful for his behavior. Instead, it focused on his responsibilities to his wife and newborn daughter – an ironic and offensive position to take, given his treatment of women during and shortly after his wife's pregnancy.

In conclusion, after reviewing the entire record, we find the appellant's sentence appropriate in light of the character of the offender and the seriousness of his offense. Article 66(c), UCMJ; *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

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.

Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[2] 10 U.S.C. § 832.