UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM L. MARR
United States Air Force

ACM 37397

11 May 2011

Sentence adjudged 12 December 2008 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Thomas Monheim.

Approved sentence: Dishonorable discharge, confinement for 7 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Jennifer J. Raab, Major Reggie D. Yager, Major David P. Bennett, and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted the appellant of one specification of abusive sexual contact and one specification of forcible sodomy in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925. The adjudged sentence consists of a dishonorable discharge, 7 years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the findings and sentence as adjudged,

with the exception of the reprimand. On appeal, the appellant raises three issues for our consideration: (1) whether the evidence is factually and legally insufficient to support the findings; (2) whether his sentence was inappropriately severe; and (3) whether his trial defense counsel were ineffective.[1] Having reviewed the record of trial, as well as briefs from both sides and accompanying documents, we find no error that materially prejudices a substantial right of the appellant and affirm.

Background

Appellant was the designated driver for a group of friends who were going out to a nightclub. Prior to leaving, several individuals attended a "pregaming"[2] party at the appellant's house. Among the guests was Senior Airman (SrA) MM, who was seen drinking vodka shots. At approximately 2230 hours, the appellant, SrA MM, and three or four others drove to the club. SrA MM consumed enough alcohol to be considered "fairly drunk" by one witness, SrA DS, and needed assistance to walk to the car. SrA MM testified that she was drinking vodka at the bar and was too drunk to drive herself home. She indicated that her intoxication level was approximately at a 9, on a scale of 1 to 10. The appellant drove SrA MM and SrA DS to his house and offered to let them sleep there. SrA MM and SrA DS accepted the offer and went into the appellant's room in the basement. SrA MM laid on the appellant's bed, while SrA DS went to sleep in a nearby chair. SrA MM was fully clothed at this time.

SrA MM testified that she fell asleep and then awoke when she "felt a penis on [her] back." She said she was then pushed onto her back and felt a hand being placed first on her vagina and then on her breasts. She testified that the appellant inserted his penis past her lips next, hitting her teeth, at which point she became fully alert and threw the appellant off her and onto the floor. She began to punch, kick, and yell and tried to grab the appellant's testicles. She denied initiating the sexual contact and said she only realized it was the appellant after she pushed him off. SrA MM stated the appellant seemed surprised and shocked, saying he was sorry and that "he thought [she] wanted it."

SrA DS testified that he was asleep on the appellant's couch and awoke when he heard SrA MM scream his name and call for assistance. SrA DS said he saw SrA MM on top of the appellant, kicking and yelling. He then heard the appellant say he was "sorry." SrA DS pulled SrA MM off the appellant and led her upstairs, as the appellant followed. Upon reaching the upper landing, SrA MM punched the appellant in the face one more time before she left. As SrA MM and SrA DS were walking to her car, SrA MM told SrA DS what had happened.

[1] Issues one and three were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Pregaming refers to drinking alcohol before going to a club in order not to have to spend as much money at the bar.

SrA MM reported the incident to the local police and participated in a pretext phone call with the appellant. During the call, the appellant indicated he thought SrA MM was awake when they were "spooning" on the bed and told her, "If I would have knew [sic] you were asleep or thought or anything at all or if you would have ever said no or stop or anything, believe me, I would not have ever done that to you. . . . I truly . . . did not mean to take advantage of you or try to or anything at all." In response to SrA MM's question "why did you stick your penis in my mouth?" appellant responded, "Because you had your hand on my penis."

Dr. JY, an expert in forensic psychology, testified for the defense. He discussed the affect alcohol could have on long and short term memories and the possibility that SrA MM experienced a blackout during the incident in the appellant's room. He explained that during a blackout, an individual may appear to be acting normally but may engage in behavior inconsistent with their character and have no memory of what occurred. In his opinion, Dr. JY believed SrA MM experienced a blackout while she was with the appellant.

Factual and Legal Sufficiency

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 factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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 *Turner*, 25 M.J. at 324). "[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).

To be convicted of "abusive sexual contact," members would have to be convinced by legal and competent evidence beyond a reasonable doubt that the following elements were met: (a) That the accused engaged in sexual contact with SrA MM; and

(b) That SrA MM was substantially incapacitated. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45(b)(8)(c)(i) (2008 ed.).

In order to be convicted of "forcible sodomy," members would have to be similarly convinced beyond a reasonable doubt that the following elements were met: (a) That the accused engaged in unnatural carnal copulation with SrA MM; and (b) That the act was done by force and without consent. *MCM*, Part IV, ¶ 51(b).

Appellant contends his conviction for abusive sexual contact and sodomy were neither factually nor legally sufficient because (1) SrA MM was not credible; (2) SrA MM could have "blacked out" and not remember that she had consented; and (3) the appellant's actions following the assault reasonably demonstrated his belief that SrA MM had consented. We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable factfinder could have found, beyond a reasonable doubt, all of the essential elements of the specifications in question.

Concerning the forcible sodomy allegation, we find SrA MM's testimony, coupled with SrA DS's testimony and the information contained within the pretext phone call, sufficiently supports the appellant's conviction. The appellant's claim that SrA MM may have experienced a blackout during the evening and not remembered consenting to the appellant's actions is not persuasive. While Dr. JY opined that such a blackout could have occurred, he also admitted that he could not, with any degree of medical certainty, conclude that SrA MM actually suffered such an episode. SrA MM's recounting of the incident convinces us that she was aware of what was taking place and did not consent. She accurately recollected the events from that evening which were in turn sufficiently corroborated by SrA DS who heard SrA MM scream and then saw SrA MM physically confront the appellant. Moreover, during the pretext phone call the appellant admitted to placing his penis in SrA MM's mouth. The appellant attempted to impugn SrA MM's credibility, but the trier-of-fact believed SrA MM's accounting of the event and believed she did not acquiesce to the appellant's conduct. We find no reason to substitute our judgment for theirs.

Finally, the appellant argues that his actions following the assault show he reasonably and honestly believed SrA MM consented. The military judge appropriately instructed the panel on the mistake of fact defense. Although the appellant believes differently, there is no evidence in the record to indicate the members did not follow the military judge's instructions. *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) ("Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions."). Again, we find no reason to disturb their decision.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). 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), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we 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).

The appellant was convicted of groping and forcibly sodomizing a non-consenting victim, which are violent offenses that are considered amongst the most serious crimes recognized by society.[3] We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) (citing *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997)). Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). Claims of ineffective assistance of counsel are reviewed by applying the two-prong test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Davis*, 60 M.J. at 473 (analyzing (1) whether the trial defense counsel's conduct was deficient and, if so, (2) whether the counsel's deficient conduct prejudiced the appellant). Our superior court has applied the *Strickland* test by answering three basic questions:

> (1) "Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?"; (2) If the allegations are true, "did the level of advocacy 'fall[ ] measurably below the performance . . . [ordinarily expected] of fallible lawyers?'"; and (3) "If ineffective assistance of counsel is found to exist, 'is . . . there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?'"

[3] The maximum sentence for forcible sodomy is confinement for life.

United States v. Miller, 63 M.J. 452, 456 (C.A.A.F. 2006) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)) (citations omitted) (interpolations in original).

The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *See United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001). The law presumes counsel to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *Garcia*, 59 M.J. at 450 (quoting *Strickland*, 466 U.S. at 689); *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). To prevail on a claim of ineffective assistance of counsel, the appellant "must rebut this presumption by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. . . . The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (internal citation omitted).

To support his claim, the appellant provided an affidavit asserting a litany of alleged errors made by his defense counsel, Major (Maj) AJ and Captain (Capt) HM. In particular, appellant claims his counsel failed to conduct adequate voir dire of the court-martial president about his potential knowledge of a government witness; failed to call a witness to testify regarding the appellant's whereabouts upon leaving the nightclub; failed to ask additional questions of the expert witness; failed to call witnesses he believes would have been helpful during the sentencing phase; failed to highlight areas favorable to the appellant during the sentencing argument; failed to prepare sufficiently for trial; and, that Maj AJ acted unprofessionally with opposing counsel during the trial.

Both Maj AJ and Capt HM provided affidavits discussing their involvement in the appellant's case and specifically addressing the appellant's assertions of error. Generally, evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the record as a whole compellingly demonstrates the improbability of the asserted facts or when the affidavit alleges an error that would not result in relief even if the factual dispute was resolved in the appellant's favor. *Id.* at 248. Such is the case here. The appellant's assertions are without merit.

A full review of the record clearly shows both Maj AJ and Capt HM acted within the prevailing norms expected of competent defense counsel. Their decisions were premised on sound tactical and/or strategic reasoning, designed to assist the appellant at

all stages of the trial. While it is not necessary to address each allegation raised by the appellant, we will comment on five of the points he has raised.

The appellant asserts his counsel's decision not to call Staff Sergeant (SSgt) JW to testify during findings was error. We disagree. When preparing for trial, a trial defense counsel must evaluate all the evidence in a court-martial and "determine the strategy that is most likely to be successful." *United States v. Fluellen*, 40 M.J. 96, 98 (C.A.A.F. 1994). Defense counsel must assess the credibility of a potential witness in evaluating the overall effect of their testimony at trial. Such a determination must include an assessment as to whether the witness may be subject to potential impeachment or provide corroboration of the prosecution's case. In appellant's situation, SSgt JW's testimony would not have assisted the appellant. Maj AJ states that the defense's case was premised on trying to show consent and mistake of fact. SSgt JW was intoxicated at the nightclub and did not see the appellant interact with SrA MM. His testimony would have highlighted the fact that the appellant and SrA MM did not engage in conduct that would indicate a romantic interest existed at the club that carried on to the appellant's apartment. The decision not to have SSgt JW testify was legally sound.

The appellant argues that his counsel's failure to call three character witnesses to testify during sentencing resulted in an overly harsh sentence. What appellant does not mention, somewhat understandably, is that had the witnesses testified, they would have been thoroughly cross-examined on the fact that the appellant had previously received nonjudicial punishment for displaying inappropriate pictures on a government computer and had twice been convicted in civilian court for indecent exposure. Maj AJ and Capt HM quite sensibly did not want to draw attention to these matters before the members by calling the witnesses to testify. They did, however, submit a lengthy sentencing package containing 17 character letters as well as letters of appreciation for the members' consideration.

For the same reason, we reject the appellant's assertion that Capt HM was ineffective during the sentencing argument by failing to "stress" that his Article 15 was for minor misconduct and the two civilian arrests were for "misdemeanors" unrelated to the charged offenses. Capt HM's declaration prudently points out that emphasizing the appellant's poor disciplinary record in an artificially bright light would result in a loss of credibility with the members, an outcome that would have only hurt the appellant's sentencing case. Attempting to claim that two convictions for sexual exposure constituted minor misconduct would have been disingenuous at best. The fact that the members sentenced the appellant to the upper range of trial counsel's recommendation (seven years), does not indicate the defense counsel's rationale to downplay the additional misconduct was unreasonable. As government appellant counsel points out, the question is not whether a particular tactic is successful, but "whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time."

United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998), *aff'd*, 52 M.J. 278 (C.A.A.F. 2000). We are convinced defense counsel's actions were sound.

Appellant states that his defense counsel were unprepared for the case. He does not provide any evidence to support his claim; rather, he points to his mother's affidavit in which she says Capt HM told her he "wished they had more time to prepare for the case, especially for the sentencing part." The appellant couples this statement with the fact he received seven years confinement, to contend "it was as though I was not even represented." In his affidavit, Capt HM denies telling the appellant's mother that he needed more time to prepare. He also states that he was fully prepared for trial. Likewise, Maj AJ declares that the trial defense team was "more than adequately prepared for this case." After a thorough review of the record of trial and accompanying documents, we are fully convinced both Maj AJ and Capt HM were sufficiently prepared for trial and adequately represented the appellant throughout the proceedings.

Finally, appellant complains that Maj AJ acted unprofessionally by joking with the prosecutor throughout the trial, making him "feel as though [his] defense counsel was not very concerned about the outcome of [his] case." The appellant's mother also states that she observed Maj AJ joking with the prosecutor and winking at him during the case. Maj AJ admits in her affidavit that she has known the prosecutor, Maj MS, for many years, but adamantly denies that her friendship in any way compromised her representation of the appellant. Indeed, she believes that it worked to the appellant's advantage because Maj MS warned her that he would call rebuttal witnesses during sentencing if the defense offered certain character evidence. By being forewarned, she was able to discuss the situation with Capt HM and the appellant prior to sentencing. While we were obviously not present during the trial proceedings and cannot judge the defense counsel's personal conduct, nothing in the record reflects that Maj AJ acted in a manner detrimental to the appellant's interest. That said, it bears repeating that all trial and defense counsel must vigilantly protect against the appearance of impropriety with opposing counsel to maintain the integrity of the court-martial process.

We find no basis to conclude that Maj AJ's or Capt HM's actions fell outside the prevailing norms expected of competent counsel, and we conclude the appellant has not been denied effective assistance of counsel.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of 786 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See United States v.*

Moreno, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[4] The Court notes that the Court-Martial Order (CMO) dated 11 March 2009, incorrectly includes the words "touching Senior Airman [M.R.M.]'s genitalia and groin with his hand" in the Specification of Charge II. In fact, the members specifically excepted this language in their findings. We order the promulgation of a corrected CMO.