UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ADAM M. MCALILEY
United States Air Force

ACM 35978

31 January 2006

Sentence adjudged 28 April 2004 by GCM convened at Whiteman Air Force Base, Missouri. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Major John N. Page III, and Major Karen L. Hecker.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Tracey L. Printer.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the two assignments of error,[1] and the government's response thereto. Finding no error, we affirm.

The appellant first contends that the evidence is legally and factually insufficient to sustain his conviction for indecent acts and indecent liberties with a person under the age of 16, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The test for legal

[1] The appellant's assignments of error were both submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324, 325 (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 324 (citing *Jackson v. Virginia*, 443 U.S. at 319). We conclude that there is sufficient competent evidence in the record of trial to support the court's findings. This includes the testimony of the victim, the testimony of the agents from the Air Force Office of Special Investigations, the stipulation of fact, and the written confession of the appellant. Taken together, there is credible and compelling evidence that the appellant not only committed the acts alleged, but had the intent to sexually arouse either himself, his wife, or the victim, as found by the military judge. We are convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The appellant next claims he received ineffective assistance of counsel, a claim we review de novo. *United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002). The test for ineffective assistance of counsel is (1) whether "counsel made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) whether the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We conclude that we can resolve this issue without ordering post-trial factfinding pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

The appellant contends that the trial defense counsel should have called certain family members to testify in his defense during the litigated portions of the findings phase. He claims that, based on their knowledge of the appellant and the victim, these individuals would have testified that the appellant's "conduct was not done for sexual purposes and that he was instead engaging in horseplay which, although inappropriate and unlawful, was not sexual." The appellant does not claim that any of these potential witnesses were actually present when the charged incidents occurred. Applying the *Strickland* test, we find that the trial defense counsel's decision not to call family members to testify that the appellant's act of inserting a sex toy into the anus of a 15-year-old boy "was not sexual," did not deny the appellant effective assistance of counsel. Thus, we find the appellant's second assignment of error to be without merit. *See Strickland*, 466 U.S. at 687.

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

ANGELA M. BRICE
Clerk of Court