UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant TIMOTHY V. MITCHELL
United States Air Force

ACM 37551

17 December 2010

Sentence adjudged 01 July 2009 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge, confinement for 1 year and 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Darrin K. Johns, Major Anthony D. Ortiz, and Captain Andrew J. Unsicker.

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

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

The appellant was tried before a general court-martial composed of officer members on two specifications of making false official statements, one specification of aggravated assault, two specifications of assault consummated by a battery, one specification of burglary, one specification of communicating a threat, and one specification of disorderly conduct in violation of Articles 107, 128, 129, and 134, UCMJ, 10 U.S.C. §§ 907, 928, 929, 934. The appellant entered mixed pleas, and the military judge accepted his pleas of guilty to one specification of making a false official statement, the lesser included offense of assault consummated by a battery under the

aggravated assault specification, and the lesser included offense of unlawful entry under the burglary charge. The members acquitted him of the two contested simple assault specifications as well as the disorderly conduct charge, convicted him in accordance with his pleas of unlawful entry, and convicted him contrary to his pleas of the remaining false official statement specification, the charged aggravated assault, and communicating a threat. The members sentenced the appellant to a bad-conduct discharge, confinement for one year and six months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant raises three issues on appeal: (1) Whether the two specifications of making false official statements are an unreasonable multiplication of the charges, (2) Whether the evidence is factually and legally sufficient to support the conviction of aggravated assault, and (3) Whether the bad-conduct discharge is inappropriately severe.[1] Finding no errors prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant and Senior Airman (SrA) MT had a stormy two-year romantic relationship which SrA MT finally ended in July 2008. A few days after the break-up, the appellant encountered SrA MT and Mr. BW at a local bar. After being threatened by the appellant, Mr. BW and SrA MT decided to leave. Later that night, the appellant used a key to gain access to SrA MT's home where he found Mr. BW and SrA MT asleep in her bed. He beat Mr. BW on the head with his fists so hard that Mr. BW had to be transported to the hospital. When later questioned by investigators concerning his activities that night, the appellant lied. The charges of which the appellant was convicted flow from these events.

Unreasonable Multiplication of Charges

The appellant moved at trial to merge for sentencing purposes the two specifications of making false official statements to investigators, and the military judge granted the motion. The appellant now argues on appeal that the specifications were an unreasonable multiplication of charges for findings purposes. We disagree.

In determining issues of multiplicity, we apply a five-part test which considers (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citing *United States v. Quiroz*, 55 M.J.

[1] All three issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

334, 338 (C.A.A.F. 2001)). Here, the appellant expressly limited his motion at trial to one of merger for sentencing. Second, the two specifications of making false official statements are distinct criminal acts for findings purposes: each involves a separate statement concerning the appellant's whereabouts on the night in question, and the appellant admitted one but not the other at trial. Third, these separate specifications simply describe rather than exaggerate the appellant's criminality. Fourth, given the military judge's merger of the two specifications for sentencing purposes, they certainly do not increase the appellant's punitive exposure. Fifth, charging the statements separately was a fair and reasonable exercise of prosecutorial discretion given the exigencies of proof in the context of the events on the night in question. We conclude, therefore, that the two specifications of making false official statements were not an unreasonable multiplication of charges.

Sufficiency of the Evidence to Support Conviction of Aggravated Assault

The appellant argues that the evidence is insufficient to support the findings of guilt on the charged aggravated assault of Mr. BW. In support of his argument, he cites the testimony of Mr. BW that he did not see who was assaulting him, that he did not sustain permanent brain damage, and that the evidence does not show specific intent to inflict grievous bodily harm. We find the evidence legally and factually sufficient to support the appellant's guilt of aggravated assault.

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, 324 (C.M.A. 1987)). "[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). 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. 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 first note, as appellant properly concedes, that specific intent to inflict grievous bodily harm may be proved by circumstantial evidence, including the extent of the injuries themselves. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶

54.c.(4)(b)(ii) (2008 ed.). Captain (Dr.) WH testified concerning the multiple head fractures sustained by Mr. BW as a result of the appellant's attack, some of which required surgery. Next, Mr. BW testified concerning the extent of his injuries and the necessary medical procedures including a nine and one-half hour surgery to install metal plates and wires in his head that limited him to a liquid diet for a month. That Mr. BW did not see the appellant attack him is obviously explained by the fact that he was asleep when the appellant struck. Concerning legal sufficiency, the medical evidence and the testimony of Mr. BW clearly show the reasonableness of the members' finding that the appellant committed the offense of aggravated assault. Having independently weighed the evidence ourselves, we are likewise convinced beyond a reasonable doubt that the appellant is guilty of aggravated assault.

Sentence Appropriateness

We review sentence appropriateness de novo. *See United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988)); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant argues that a bad-conduct discharge is inappropriately severe given his lengthy service and otherwise commendable service record. The appellant, however, was the primary actor in this tragedy which could have been averted had the appellant simply addressed his jealously and anger in a manner consistent with the positive leadership qualities that he displayed in performing his duties. Rather, the appellant chose to viciously attack a sleeping victim who had done nothing more than begin a relationship with his ex-girlfriend. Considering this particular appellant, the nature and seriousness of his offenses, the appellant's record of service, and all matters contained in the record of trial, we find that the sentence is appropriate.

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
Clerk of the Court