UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ABDULLAH O. MOHAMMAD
United States Air Force

ACM 37218

30 March 2009

Sentence adjudged 02 April 2008 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Gordon R. Hammock.

Approved sentence: Dishonorable discharge, confinement for 34 months, forfeiture of total pay and allowances for 34 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Michael T. Rakowski.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of one specification of rape and one specification of forcible sodomy, in violation of Articles 120 and 125, UCMJ, 10 U.S.C. §§ 920, 925. The approved sentence consists of a dishonorable discharge, confinement for 34 months, forfeiture of all pay and allowances for 34 months, and reduction to E-1.[1]

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[1] The convening authority suspended the adjudged forfeitures for a period of six months and waived the automatic forfeitures for a period of six months for the benefit of the appellant's spouse and dependent children.

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant's convictions for rape and forcible sodomy must be set aside because the evidence supporting the charges is legally and factually insufficient. Finding no error, we affirm.

Background

The evidence in this case consists primarily of the testimony of the victim, MS, a local German national who was 24 years old at the time. On or about 25 May 2007, the appellant met MS at a local discotheque in Germany and exchanged phone numbers with her. The following day, 26 May 2007, the appellant sent MS a text message inviting her to a barbeque at his house. MS agreed to attend so the appellant picked her up at her home and drove her to his house. When she arrived, the only people present were the appellant, MS, and the appellant's four-year-old daughter.

Upon arriving at the appellant's house, the appellant took his daughter upstairs and put her to bed. The appellant came back downstairs to the living room to find MS, and they started talking and listening to music. The appellant started to make advances toward MS by touching her hip and trying to kiss her. MS rebuffed the appellant's advances by pushing his hand away and telling him that it was too soon because she did not really know him yet. The appellant responded by saying, "Come on, come on."

At some point, the appellant's daughter called him so they went upstairs to check on her. Once upstairs, while the appellant tended to his daughter, MS started looking around and noticed the appellant had a very nice bed in his bedroom so she went into his room to look further. Shortly thereafter, the appellant came into the bedroom, and they eventually ended up sitting on the bed together.

While they were sitting on the bed, the appellant said something about a "blow job" but MS did not understand what that meant. The appellant then showed MS what he meant by putting his fingers in MS's mouth demonstrating oral sex. MS specifically told him no and pushed his hand away. The appellant persisted and continued to attempt to persuade MS to perform oral sex on him but she told him that she did not want to because it was too early.

MS tried to move away from the appellant, but the appellant responded by leaning over her with his body, grabbing both of her wrists, pushing her down on her back and sitting on her waist. MS told him to get off but the appellant kept saying, "A little bit, a little bit" referring to MS performing oral sex upon him. MS continued to say no and attempted to get free. The appellant, who was still on top of MS, began holding her wrists harder and at some point put his hand around MS's neck and started choking her.

At this point, MS became scared and decided to acquiesce. She felt she would have to do anything the appellant wanted her to do. The appellant then got off of MS and she started to perform oral sex on him. While MS did this, the appellant had his hands on her head. After a short time, MS stopped and told the appellant, "that's it, that was a little bit." The appellant replied that he "wanted more" and got on top of MS again.

The appellant started touching MS's vagina. She responded, "No, no, I have my period." When the appellant said he could not feel anything, MS told him she had a tampon in. The appellant then took off her pants and started to remove her tampon, but MS told him no and removed it herself. Although MS told the appellant, "I don't want this," the appellant ignored her and proceeded to grab a towel from the side of the bed and placed it under MS.

The appellant put on a condom at MS's request and then inserted his penis into her vagina. MS had tears in her eyes and repeatedly told the appellant she did not want to have sexual intercourse. The appellant continued until he climaxed. Afterwards, the appellant went into the bathroom while MS grabbed her clothes and got dressed.

After the appellant returned from the bathroom, they both went downstairs where the appellant commented, "I just wanted to see how far I could go." The appellant then took MS home. MS did not speak to the appellant the entire time they were in the car. When MS returned home, she took a shower, put her clothes in the laundry basket to be washed, and called her friend to report what had happened. The following day, the appellant sent MS a text message indicating that he wanted to see her again and that he was sorry that he was so mean to her. On 29 May 2007, three days after the incident, MS reported what had happened to the German polizei. She waited to report the incident because she had gone through a similar situation in the past and she was hesitant to go through it again. She finally decided that she did not want the appellant to get away with violating her.

Investigator GK from the German polizei in Heinsberg, Germany, testified that when MS reported the incident she was very "worked up." Investigator GK conducted an initial interview of MS, examined her cell phone, and wrote down the relevant text messages. However, Investigator GK took no further investigative steps because a few days later jurisdiction was turned over to the United States. Investigator GK did not have MS examined by a physician because three days had already passed. She also did not request MS's clothing because again it had been three days since the incident, the appellant used a condom, and MS was having her period.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction for both rape and sodomy. 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 fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 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 accused'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).

In this case, the elements for rape are: (1) that the appellant committed an act of sexual intercourse and (2) that the act of sexual intercourse was done by force and without consent. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.b.(1) (2005 ed.).[2] The elements of forcible sodomy are: (1) that the appellant engaged in unnatural carnal copulation with a certain other person and (2) that the act was done by force and without consent of the other person. *MCM*, Part IV, ¶ 51.b. The *Manual* defines force and lack of consent, as follows:

> Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

MCM, Part IV, ¶ 45.c.(1)(b).

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[2] The *Manual for Courts-Martial, United States*, was revised in 2008. This revision included substantial changes to the charge of rape under Article 120, UCMJ, 10 U.S.C. § 920.

Proof that a victim physically resisted is not needed to support a finding of lack of consent. *United States v. Bright*, 66 M.J. 359, 364 (C.A.A.F. 2008). Further, a victim's repeated verbal rejections may be enough to demonstrate a lack of consent beyond a reasonable doubt. *Id.*

We have carefully reviewed the evidence of record in this case. The evidence shows that the appellant first forced MS to perform oral sex on him and then raped her. The appellant used his physical strength and power to prevent MS from being able to escape. He sat on top of her, firmly held her wrists against her will, and choked her until she succumbed to his desires. The record clearly shows that MS resisted the appellant's sexual advances and repeatedly told him that she did not want to engage in the sexual activity. At no point did MS consent to either sodomy or sexual intercourse with the appellant, and she only acquiesced out of fear. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant raped MS and committed forcible sodomy with her. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced the appellant is guilty 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. 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, YA-02, DAF
Clerk of the Court