UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MICHAEL T. NICELY
United States Air Force

ACM 36730

15 August 2007

Sentence adjudged 8 February 2006 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Donald A. Plude (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 52 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Major Carrie E. Wolf.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

SOYBEL Judge:

This was a mixed plea case. The accused pled guilty to one specification of dereliction of duty, two specifications of wrongfully distributing cocaine, one specification each of wrongful use of cocaine, psilocybin, and methamphetamine, one specification of wrongful appropriation, three specifications of larceny, two specifications of making checks without sufficient funds, one specification of house breaking, one specification of wrongfully ingesting excess amounts of Coriciden tablets, and one specification of wrongfully distributing a prescription medication in violation of Articles 92, 112a, 121, 123a, 130, and 134, UCMJ, 10

U.S.C. §§ 892, 912a, 921, 923a, 930, 934. He pled not guilty to one specification of rape and one specification of indecent acts upon a female under the age of 16 years in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. He was found guilty of all of the above charges and specifications. His adjudged and approved sentence consisted of a dishonorable discharge, confinement for 52 months, forfeiture of all pay and allowances and reduction to E-1.

The appellant asserts two errors:

WHETHER APPELLANT'S CONVICTION FOR THE RAPE OF VHK IS FACTUALLY AND LEGALLY SUFFICIENT.

WHETHER APPELLANT'S CONVICTION FOR COMMISSION OF AN INDECENT ACT UPON CC IS FACTUALLY AND LEGALLY SUFFICIENT.

Finding the evidence is factually insufficient to affirm the conviction for rape, we set aside that conviction, affirm the conviction for indecent acts upon a female under the age of 16 years, and reassess the sentence.

Background Regarding the Rape

The appellant and his friend Airman (Amn) W, were students in training school at Sheppard Air Force Base (Sheppard). They met the accuser, Amn K, and her roommate, Amn G, while all four were students at Sheppard and living in the dorms on base. Because Amn K was underage and her roommate was not in a stage of her training that permitted the use of alcohol, the two women asked the appellant and Amn W to buy some for them.

The two males, along with Amn K, walked to the BX, bought liquor and brought it back to the female dormitory around 2000 hrs. Not allowed inside the dorm, the men passed the bottles of liquor to the woman through the open window of the dorm room. They made plans to return after the 2200 hrs bed check. When they returned, the two women let the men sneak into the room through the window. The two women had already started drinking. Airman K testified she was "[p]robably a little buzzed, but not drunk."

All four continued to drink; passing a tequila bottle around and chugging out of it. All four got drunk. After about an hour of drinking one of the women turned off the lights and the four paired off on each roommate's bed. The appellant went with Amn K and his friend, Amn W, went with her roommate Amn G.

It is undisputed that the appellant and Amn K had intercourse. The sole issue in the case was whether Amn K consented to having intercourse. The government's theory was that she was too intoxicated to consent. The defense presented a two prong defense; first, Amn K did consent or second, the appellant was under an honest and reasonable mistake of fact that Amn K was consenting at the time they were having sexual intercourse.

It is also undisputed that Amn K and the appellant's friend, Amn W, also had intercourse just minutes after the appellant and Amn K were done. There were four people in the room that evening. A synopsis of each of their testimony from the time they paired-off follows:

Airman K: She remembers sitting on her bed next to the appellant and seeing her roommate sitting on the other bed talking with Amn W. The next thing she remembers is waking-up, naked, the next morning. She also testified that it was possible when the appellant kissed her she kissed him back and it was also possible when she was having intercourse with him she wanted to have intercourse and consented to it.

Airman G: She remembers being drunk but not so drunk that she couldn't refuse Amn W's request to have intercourse with her. She also remembers being on her bed with Amn W and looking over to Amn K's bed and seeing Amn K and the appellant kissing. She also remembers seeing them have intercourse. Later on, while drifting in and out of sleep, she recalled waking up and seeing the appellant sitting on her bed getting dressed and seeing Amn W having intercourse with Amn K. Just after Amn W got into bed with Amn K, the appellant told Amn G he was leaving and went out through the window.

On cross-exam Amn G said the initial kissing between the appellant and Amn K was mutual and she saw Amn K and the appellant move towards each other to kiss and then maneuver so both could get onto the bed. She testified that Amn K was not passed out but was an active participant, during this stage. Later on, when she saw Amn K and the appellant engaging in sexual intercourse she heard Amn K vocalizing and never at any point was concerned about her mental condition or thought of Amn K as being passed out or being out of her faculties. According to Amn G's testimony, though Amn K was drunk, Amn G never saw her passed out and Amn K was in control of herself.

After the appellant and Amn K were finished, Amn G saw Amn K having intercourse with the appellant's roommate, Amn W. She testified there was nothing being forced nor did it seem like anything unusual was going on. Again, Amn K was vocalizing during this episode, as was Amn W. Amn G never had any concern regarding Amn K's condition that evening.

Airman W[1]**:** Airman W said he saw the appellant and Amn K kissing by the window but could only hear them once they were in Amn K's bed. He heard Amn K vocalizing and talking to the appellant while they were in bed.

Airman W asked Amn G to have intercourse with him but she declined. After the appellant and Amn K were done, Amn G told Amn W that "maybe [K] would want some because she's horny" so Amn W went over to Amn K's bed and laid across it. He said Amn K started kissing him and he returned the kiss. This quickly led to intercourse. He said that she was fully engaged in their sexual activity by pulling him down on her and speaking loudly. She appeared to be in full control of her faculties. He said she initiated a change of positions and verbalized sexually explicit words of encouragement to him during intercourse.

Airman W then testified that after a while Amn K became quiet and seemed to be passing out, so he stopped. He said there was no doubt in his mind that she was consenting before and during most of their intercourse because she was kissing him, and was moving in a way that indicated she wanted to have sex with him.[2]

Airman Nicely: The appellant did not testify. However, he made several statements to the OSI. In one of them he falsely told the investigating agent he had used a condom supplied by Amn K during the intercourse. In another statement he said he retrieved the condom from his wallet, not from Amn K, but didn't use it. Finally, in a third statement, he admitted that no condom was involved. He had just made that part up to try to make sure the OSI agent believed the intercourse was consensual. In all of his statements he maintained that the sexual activity between himself and Amn K was consensual.

An OSI agent testified about the appellant's stories concerning the use of a condom. The agent also said the appellant told him he did not ejaculate during his encounter with Amn K. The agent believed this was another false statement because Amn K became pregnant and DNA tests showed the appellant was the father. The agent also testified that the appellant guessed Amn K was drunker

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[1]The evidence concerning the sexual activity between Amn W and Amn K was admitted for two limited purposes on defense's motion under R.C.M. 412. First, as evidence of a mistake of fact as to Amn K's consent regarding intercourse with the appellant, and 2) to show she was capable of consenting at the time she had intercourse with the appellant. The defense's theory was since she was capable of consenting to having sex with Amn W just minutes after she had sex with the appellant; she was capable of being able to consent when she had sex with Amn Nicely.

[2] Airman W testified under a grant of immunity and was not prosecuted for anything related to these facts. He was, however, verbally counseled concerning under age drinking and entering the female dorm.

than him and vomited at some point that evening. When she was done vomiting she put a mint in her mouth.

Analysis

Under Article 66 of the U.C.M.J. this Court must review this case for legal and factual sufficiency. "The test for legal sufficiency requires courts to review the evidence in the light most favorable to the government. If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

In addition, this court must be independently convinced the appellant is guilty. *United States v. Boland*, 1 M.J. 241 (C.M.A. 1975). The test for factual sufficiency is whether "weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

We are not convinced. There is simply not enough evidence in the record for this Court to be convinced of the accused's guilt beyond a reasonable doubt.

To find the appellant guilty of rape under the facts of this case, we must be convinced that either Amn K did not consent or she was incapable of consenting because of her state of intoxication. All the evidence shows that although she was intoxicated, she was fully engaged and participating in the sexual relations with the appellant. There was no evidence presented that she was passed out during intercourse with the appellant and no one in that room saw her in a state of being incapable of consent regarding her activity with him. In fact, the evidence tends to support the opposite conclusion; that she was a consenting and willing participant in the sexual relations with the appellant. A lack of memory does not always equate to a lack of consent. Amn K herself admits that she could have consented but does not remember. Because there is reasonable doubt that the appellant raped Amn K, we set aside the finding of guilt regarding that charge and specification.

Background Concerning the Indecent Acts Specification

The appellant first met CC (age 15) briefly at the pool of a Casino in Biloxi Mississippi. The next day they met again at the pool and engaged in a longer conversation. CC's mother saw them talking and noticed the appellant's tattoos. Believing he had to be at least 18 years old to get a tattoo, she went up to both of them and said he was too old for her daughter; that she was 15 and "jailbait" and

her daughter better stay away from the appellant. She was standing about three feet away from the appellant and said it "loud and clear."

The next evening the appellant and CC snuck away from the hotel and went to the appellant's room on base where after kissing her, he tried to put his hand up her shirt and tried to unzip her jeans. Although she kissed him back, she stopped him from going any further by blocking his hands with her hand. The appellant made no more attempts and soon fell asleep.

Analysis

The appellant argues the government failed to present evidence on an essential element of the offense; that the victim "was not the spouse of the accused." Article 134, UCMJ. Although trial counsel never asked the victim outright whether she was married to the appellant or presented any direct evidence on the matter, circumstantially it was plainly evident the two were not married. They had just met the day before the incident and the reaction of CC's mother at the pool is sufficient to establish the two were not married.

Concerning the appellant's argument that there was insufficient proof that he knew the appellant was under the age of 16 and that the acts may not have been indecent because of that fact, we find CC's mother's comment by the pool provided him with the requisite knowledge. There was sufficient evidence for the military judge to find that the appellant knew his acts were committed with a child under the age of 16 years. Likewise, there was sufficient evidence presented to support the finding that the acts were, in fact, indecent. *See United States v. Strode*, 43 M.J. 29 (C.A.A.F. 1995); *United States v. Zachery*, 61 M.J. 438 (C.A.A.F. 2006).

Sentence reassessment

Before attempting to reassess a sentence, however, we must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the penalty landscape" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003) (citing *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000)). We are confident that we can reassess the sentence in accordance with the above authority.

Because of appellant's conviction of rape the maximum sentence exposure he was facing was confinement for life without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances and reduction to E-1. Removing that from the sentencing equation he was still subject to approximately

75 years or more of confinement with all other punishments remaining the same. He was sentenced to 52 months of confinement, a dishonorable discharge, forfeiture of all pay and allowances and reduction to E-l. We find that without the conviction for rape the sentence adjudged for the remaining charges and specifications would have been at least 36 months of confinement, a dishonorable discharge, forfeiture of all pay and allowances and reduction to E-l.

Conclusion

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of Court