UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHARLIE PARKER JR.
United States Air Force

ACM 37071

19 February 2009

Sentence adjudged 14 February 2007 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Lance J. Wood, and Captain Michael A. Burnat.

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

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

HEIMANN, Senior Judge:

The appellant was convicted, contrary to his pleas, of rape and unlawful entry, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. A military judge sitting alone as a general court-martial sentenced the appellant to a dishonorable discharge, confinement for six years, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts: (1) his trial defense counsel were ineffective at trial because of various tactical decisions;[1] (2) the evidence is legally and factually insufficient to sustain his convictions; and (3) the military judge erred in admitting an admission by the appellant that he had previously been involved in an incident of going through a window and committing a sexual assault.[2] For the reasons set out below, we find no error, and therefore, affirm the findings and sentence.

Background

The appellant and the victim, Staff Sergeant (SSgt) BW, were assigned to Osan Air Base, Republic of Korea. They met for the first time in early March 2006 when they happened to meet at SSgt BW's duty section. They talked briefly but made no plans to get together, and SSgt BW did not remember the appellant's name after this conversation. They next met about a month later when SSgt BW was walking home from an evening of drinking. At some point in the 10 minute walk to her dorm room, she encountered the appellant. They talked, and she invited him to her room with the expressed admonition that she did not want anything to occur. Despite the admonition, they kissed and he attempted to reach up her shirt. After ignoring a request that he not do that, he tried again. At this point, SSgt BW asked the appellant to leave. He agreed, but told SSgt BW that he would be back the next day to talk. When he returned the next day, SSgt BW ignored his knocks at her door and waited for him to leave.[3]

One week later, SSgt BW began her Friday night with a group of friends. The appellant was not included in the group. During the evening, which began about 2100 hours and ended at 0040 hours, SSgt BW consumed a total of six beers and shared two "ammo bowls" of Kool Aid and Soju with her friends.[4] Returning to the installation, she had a friend walk her to her room. The friend later testified that SSgt BW was drunk but was able to walk back to the installation on her own, without assistance. When her friend left her at her room, he waited until he heard her door lock before he departed.

At some point between approximately 0100 hours and 0630 hours, the appellant, also intoxicated, went to SSgt BW's room. Finding her door secure, he opened her first floor window and entered the room in the hopes of having sex with SSgt BW. When questioned about the events, the appellant made several significant admissions in his written statement to investigators. Specifically, he acknowledged that SSgt BW did not respond when he entered the room through the window. He admitted that during his sexual contacts with SSgt BW, "she did not recognize who I was because she was either

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[1] The appellant's brief raises four separate claims of ineffective assistance. We address them below as a group.

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

[3] The appellant told investigators that he and Staff Sergeant (SSgt) BW had consensual sexual intercourse during this encounter.

[4] An "ammo bowl" is a large drink shared by a group. Soju is a clear, unregulated, distilled alcoholic beverage manufactured in Korea.

half asleep or intoxicated or both." He also admitted that he "only continued with sex because I thought at some point that she would know who I was or by me visiting her later that day." He also told the investigators, "[d]uring sex I believe that she thought I was really someone else." Finally, he admitted, "I do think that she was intoxicated after looking back at why she could not remember."

In his defense, the appellant told investigators, in the same statement, that he had sex with SSgt BW the week prior and thus he thought she would be interested in doing so again. He also said that she responded to his sexual acts, she was not unconscious, and she went to the restroom twice during the course of the encounter. Finally, he told investigators "not once did she ask who I was as to appear surprised" and "[n]or did she exit the room when she went to the bathroom."

SSgt BW testified that the first thing she remembers after returning to her dorm room was waking to find the appellant engaging in sexual intercourse with her. She said he finished, went to the bathroom, commented that she had "worn him out," got dressed, and left through the door. She said she had no other recollections of them engaging in sex. She testified that she laid there "[j]ust trying to figure out if I let him in, how he got in my room." SSgt BW then went to a friend's room on the third floor to report what happened. The friend testified that when SSgt BW arrived, she was "[s]haking. Physically shaking, sobbing, crying, tears streaming down her face. Visibly upset."

Ineffective Assistance of Counsel

In July 2008, the appellant submitted two affidavits to this Court in support of his claims that his military trial defense counsel were ineffective in their representation. In the first, he advised the Court that his counsel failed to interview Technical Sergeant (TSgt) VJ. The appellant claims TSgt VJ told him that SSgt BW told TSgt VJ that she was not raped by the appellant. The appellant asserts he told his counsel this information, and his counsel failed to interview TSgt VJ. The second affidavit is from an acquaintance of the appellant, TSgt WF. It says that the week prior to the rape TSgt WF saw the appellant wearing the same clothing on Saturday morning that he saw him in on Friday night. When questioned by TSgt WF, the appellant told TSgt WF that he had sex with SSgt BW the previous night.

Relying on the affidavits discussed above and on the record of trial, the appellant alleges that his counsel were ineffective in three distinct ways. First, he claims the failure to call an expert witness to discuss the ramifications of extensive alcohol consumption on the issue of mistaken consent and the distinction between "passing out" and blacking out," was ineffective. Second, he claims the failure to call TSgt VJ was ineffective and finally, he claims the failure to call TSgt WF was ineffective. We examine each of these claims.

The question of whether an appellant received ineffective assistance of counsel is a question of law which we review 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)). Our starting point in conducting such a review is the Supreme Court's seminal decision in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court announced a two-prong test for analyzing ineffective assistance claims, stating:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, *the defendant must show* that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, *the defendant must show* that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Unless a defendant makes both showings*, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687 (emphasis added).

In addition to placing the burden of showing ineffectiveness on the appellant, the Court went on to emphasize that defense counsel are due a highly deferential review of their performance at trial, enjoying a strong presumption of effective assistance. Specifically, the Court stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is, the defendant must overcome the presumption* that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citations and quotations omitted) (emphasis added). Finally, we are also mindful of the longstanding ethical obligation of the defense counsel "to conduct a

prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987) (quoting AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function*, Standard 4-4.1 (2d ed. 1979)).

Analysis

The appellant's first claim centers on the fact that the defense team did not put their expert on the stand. Prior to trial, the defense requested and was granted, at government expense, the services of a forensic psychologist with experience in alcohol blackouts and memory loss. In their undisputed affidavit, trial defense counsel indicate that the expert reviewed the reports of investigation, participated in interviews of relevant witnesses, and reviewed the appellant's statement to investigators prior to trial. As a result of his investigation, the expert advised the defense team that his expert conclusion was that SSgt BW was passed out and not blacked out when the appellant went to her room on the evening in question. There being no assertion to the contrary, and based upon our conclusion that such an assessment is completely consistent with the testimony presented at the trial, we find no deficient performance on the part of counsel for failing to call the expert.

Second, the appellant claims the failure to call TSgt VJ was ineffective. We find this claim of ineffective assistance fails because the appellant has failed to carry his burden of showing that TSgt VJ would have even made the alleged statement. He offers only his assertion that TSgt VJ was told something by SSgt BW. He has provided no affidavit from TSgt VJ. Assuming this is true, the testimony would be admissible for impeachment purposes only and not for its truth. Mil. R. Evid. 613(b); *United States v. Taylor*, 44 M.J. 475, 479-80 (C.A.A.F. 1996). Considering the probable inadmissibility of this testimony, combined with the testimony of the victim herself, we conclude that the appellant has failed to even meet his burden of establishing the truth of such a comment.

Third, the appellant claims that his counsel's failure to call TSgt WF was ineffective. He alleges that TSgt WF would have corroborated his claim that he had sex with the victim the week prior to the alleged rape. The appellant asserts this testimony would have also undermined SSgt BW's credibility because she asserted that they only kissed the week prior. In assessing this claim, we find the defense counsel's affidavit totally useless. Despite a direct order from the Court, neither counsel indicated whether they interviewed TSgt WF. Their broad conclusory statements that they did not think TSgt WF's testimony would have been helpful simply side-steps the question. Thus, for purposes of this issue, we have assumed that TSgt WF would have testified as he stated in his affidavit and that he was never interviewed by the defense counsel. But, this does not end the analysis. When we consider all the testimony in this case, to include the appellant's numerous admissions, we are satisfied that even if this testimony had been

presented, it would not have impacted the findings. Thus, finding no prejudice, there is no viable claim of ineffective assistance on this issue.

Legal and Factual Sufficiency of the Evidence

The appellant asks that we find the evidence to be legally and factually insufficient to support his conviction of both rape and unlawful entry because the evidence does not establish, beyond a reasonable doubt, that SSgt BW did not consent to both his entry into her room or the subsequent sexual conduct. We find his assertion of error to be without merit.

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) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). 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 (C.M.A. 1987)). In 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) (citations omitted). 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) (citations omitted).

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).

To prove the offense of rape, the prosecution was required to establish that the appellant committed an act of sexual intercourse by force and without the consent of SSgt BW. In determining whether the second element is proven, "[c]onsent . . . may not be inferred . . . 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." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.c.(1)(b) (2005 ed.). To prove the offense of unlawful entry, the prosecution was required to establish that the appellant's entry into the victim's room was "made without the consent of any person authorized to consent to entry or without other lawful authority." *Id.*, Part IV, ¶ 111.c.

In this case, we need look no further than the appellant's written statement to the investigators. It clearly establishes that SSgt BW was in no condition to consent to either the appellant's entry into her room or the subsequent sexual intercourse. The appellant would have us focus on arguably inconsistent conduct by the victim when she acknowledged that she became aware that she was engaged in sexual intercourse. This is not the question. By the appellant's own admission, SSgt BW did not acknowledge him when he entered her room through the window and she was unable to resist him at the time he first penetrated her because of a lack of mental or physical facilities. These facts are fatal to his claim of legal and factual insufficiency of the charges. As such, we reject the appellant's claim of legal and factual insufficiency as to both charges and specifications.

Admissibility of Evidence

The appellant contends that the military judge erred when he allowed an investigator to testify that the appellant admitted he had previously been in "trouble before for going through a window in an alleged sexual assault."[5] The appellant made the admission to the investigator when he was being questioned about his involvement with SSgt BW. The military judge found the testimony admissible, citing Mil. R. Evid. 404(b), to show consciousness of guilt on the part of the accused on the issue of whether appellant actually entered the victim's window. In making this ruling, the military judge found it significant that it was the appellant who raised the issue in the course of the interview.

We review the military judge's decision on whether to admit or exclude the evidence under an abuse of discretion standard. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003) (citing *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000)). The test for admissibility of uncharged acts is "whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the fact finder infer that he is guilty, as charged, because he is predisposed to commit similar offenses." *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989) (citing *United States v. Hansom*, 17 C.M.R. 208, 226 n.4 (C.M.A. 1954)); *see also United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998); *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997). "Mil. R. Evid. 404(b), like its federal rule counterpart, is one of inclusion. . . . The nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense." *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000) (citations omitted), *overruled on other grounds by United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003).

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[5] Appellant had been court-martialed in 1997 for a variety of offenses. The military judge expressly excluded evidence of the conviction itself and any evidence of the facts surrounding the prior court-martial.

We find no error in the admission of this testimony. The military judge properly limited the testimony to only his comment regarding a prior charge of misconduct related to unlawful entry through a window. Like the military judge, we too find this admission to be an indication of consciousness of guilt on the part of the appellant and therefore admissible under Mil. R. Evid. 404(b).

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.

Judge THOMPSON did not participate.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court