UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class COREY L. PAYTON
United States Air Force

ACM 37824

17 June 2013

Sentence adjudged 1 October 2010 by GCM convened at Aviano Air Base, Italy. Military Judge: Mark L. Allred.

Approved Sentence: Bad-conduct discharge, confinement for 11 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz; Captain Robert D. Stuart; and William E. Cassara, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

At a general court-martial, the appellant was convicted, contrary to his pleas, of rape and adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934.[1] A panel of officer and enlisted members sentenced him to a bad-conduct discharge, confinement for 1 year, and reduction to E-1. During the clemency phase, the convening authority disapproved and dismissed the adultery specification, approving only so much

[1] The appellant was acquitted of a second specification of rape, as wells as a forcible sodomy specification, both involving another woman.

of the sentence as provides for a bad-conduct discharge, confinement for 11 months, and reduction to E-1.

On appeal, the appellant contends the evidence is factually and legally insufficient to prove his guilt of rape. In a supplemental assignment of errors, the appellant also contends that his bad-conduct discharge should be set aside due to unreasonable appellate delay.[2]

Background

While socializing with friends on 7 February 2009, Senior Airman (SrA) NB met the appellant at the enlisted club on Aviano Air Base, Italy. The two, along with other friends, then visited two civilian bars and later returned to base. While in the back seats of the car, the appellant and SrA NB began "making out."

When they reached the dormitory area, the appellant and SrA NB went to her dormitory room. After SrA NB changed into shorts and a shirt in the bathroom, the two resumed "making out" and then began engaging in sexual intercourse. During that activity, she began to feel uncomfortable, realizing she did not really know him. She told him to stop, left the bed, and began putting on her clothes while the appellant went into the bathroom. Feeling awkward, SrA NB began apologizing to the appellant, saying she was sorry and not comfortable with the situation. He responded from the bathroom that she was making him feel like he had been raping her.

SrA NB laid back down on the bed and the appellant approached her and tried to pull down her shorts. She laughingly told him "no." He again said she was making him feel uncomfortable and then tried again to pull her shorts down. SrA NB became upset and frustrated. Turning around to face him, she said "no, I don't want to have sex." After that, the appellant successfully pulled down her shorts and when SrA NB turned to look at him, she thought he looked very angry and she became afraid. He pushed her face down, pulled her arm behind her back, and penetrated her. She unsuccessfully tried to push herself up several times, but he kept pushing her back down. SrA NB testified that she was really scared and wanted to leave but thought he would do something even worse if she tried to physically fight him off. The appellant eventually ejaculated on her back.

SrA NB put on her clothes and went into the kitchen. The appellant said he was going to tell her something that would make her angry, and then he said he was married and had a baby. When SrA NB said she did not believe him, he told her to check his pants and there she found his wedding ring. She was shocked and angry when she

[2] The other supplemental issue raised regarding the language of the dismissed adultery specification is moot.

learned this, as she would not have engaged in consensual sex with him if she had known. He told her she could receive nonjudicial punishment for her actions with him.

SrA NB testified that, by that point, she was not sure what to do. She did not want to go to her friends' room, as they had earlier warned her to stay away from the appellant. She felt ashamed for letting the appellant into her room and blamed herself for having initially had consensual sex with him. Just wanting the night to be over, she went to sleep with the appellant in her room. The next morning, he was gone and SrA NB felt a little sore in her vaginal area and she had red marks and cuts on her neck, which she believed came from the appellant having his arm around it.

Later that morning, another Airman asked if something was wrong and she told him she had gone out drinking and had engaged in sexual intercourse with a married man. A few days later, she communicated what had happened to an Airman stationed in the United States in whom she had a romantic interest. He became upset with her for putting herself in that situation by drinking with the appellant and letting him into her room. When she said she was not going to report it, he said he never wanted to talk to her again.

A few days later, she told a female friend that she had engaged in sex with a married man and that he had refused to stop when she said "no." SrA NB was very upset and was crying. This female Airman encouraged her to report the incident and SrA NB then informed her supervisor about what had happened, crying so hard she was having difficulty communicating. Although she said she did not want to officially report the incident, the supervisor said she had to meet with the Sexual Assault Response Coordinator and agents from the Air Force Office of Special Investigations (AFOSI) because she had made an unrestricted report of sexual assault.

In sworn written statements she made to AFOSI and the legal office, SrA NB stated she did not feel she was raped or assaulted, and she did not include some of the details about the appellant's actions that she later testified about in court. At trial, she explained she had downplayed the events because she did not want her commander to be disappointed in her and because she was blaming herself for what happened, including not physically resisting him.

The appellant was charged with causing SrA NB to engage in sexual intercourse "by using strength, sufficient that she could not avoid or escape the sexual conduct." He was also charged with committing adultery with SrA NB on that same occasion. He was convicted of both specifications, but the convening authority dismissed the adultery

specification because the military judge failed to instruct the panel that one element of the offense was that the appellant was married.[3]

Factual and Legal Sufficiency

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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.'" *Turner*, 25 M.J. at 324, *as quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[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) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

As he did at trial, the appellant argues the evidence is insufficient to find him guilty of rape because it reveals SrA NB consented to the sexual intercourse that occurred on 7 February 2009. In the alternative, he argues that, even if she did not consent, he honestly believed she was consenting and this belief was reasonable under the circumstances. He focuses on her multiple pretrial statements that indicated she did not believe she had been raped, her inconsistent statements at trial as compared to her pretrial statements, her behavior on the night in question, and her motivations for falsely escalating her allegations to a claim of sexual assault.

Having weighed the evidence in the record of trial, with allowances for not having personally observed the witnesses, including SrA NB, we are personally convinced of the

[3] Because the convening authority did not approve the finding of guilt to adultery, the appellant's claim that the adultery charge failed to state an offense because it did not allege the terminal element is moot.

appellant's guilt beyond a reasonable doubt. Similarly, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.

Post-Trial Processing Delays

Our superior court has established guidelines that trigger a presumption of unreasonable delay in certain circumstances, including where appellate review is not completed within 18 months of docketing. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Furthermore, Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers the service courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

The appellant's case was docked with this Court on 21 January 2011. His counsel filed his brief assigning errors on 18 January 2012, and the Government's response was filed on 15 March 2012. Through a supplemental assignment of error, filed on 24 September 2012, the appellant contends his bad-conduct discharge should be set aside due to unreasonable delay in this Court's issuance of its decision in his case. Having considered the totality of the circumstances and the entire record, we conclude that such relief is not warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *Tardif*, 57 M.J. at 224.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court