UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ANTHONY L.W. PEACOCK
United States Air Force

ACM 38043 (recon)

23 July 2013

Sentence adjudged 27 August 2011 by GCM convened at Royal Air Force Mildenhall, United Kingdom. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge and confinement for 2 months.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL[1]
Appellate Military Judges

PER CURIAM:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his plea, the appellant was found guilty of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928.[2] The members sentenced the appellant to a bad-conduct discharge, confinement for three months, and reduction to E-1. The convening authority approved

[1] Upon our own motion, this Court vacated the previous decision in this case for reconsideration before a properly constituted panel. Our decision today reaffirms our earlier decision.

[2] The appellant was acquitted of two additional specifications of assault consummated by a battery under Article 128, UCMJ, 10 U.S.C. § 928; seven specifications of sexual assault under Article 120, UCMJ, 10 U.S.C. § 920; and one specification of sodomy under Article 125, UCMJ, 10 U.S.C. § 925.

only so much of the sentence that called for a bad-conduct discharge and confinement for two months.

On appeal, the appellant argues (1) that the evidence is legally and factually insufficient to support his conviction for assault consummated by a battery, and (2) that his sentence is inappropriately severe. Finding no error, we affirm.

Background

The appellant and his wife, SP, were married in November 2010. Shortly after their marriage began, the appellant and SP started having marital problems. On 22 January 2011, while visiting the appellant's supervisor, MM, and his wife, the appellant and SP had an argument. The appellant left, and SP spent the night at MM's home.

The next day, on 23 January 2011, the appellant returned to MM's home, where the argument continued. They eventually went outside so that the appellant could give SP a set of keys to their house, which were in his car. According to SP, the appellant became "very aggressive." She remembered pointing her finger at him and telling him to "just stop." She testified that he then grabbed her arms and shoulder area and told her not to point her finger at him. SP said the appellant grabbed her as she tried to get away, turned her around, and punched her with a closed fist on the left side of her face. She testified that she continued to try to get away, but the appellant turned her around and slapped her on the right side of her face.[3] SP then "hit him in his nose" as she tried to get him off of her. SP stated that she got away and:

> [I] walk[ed] swiftly towards the gate to get inside to where people could see. I remember [the appellant] grabbing me around my neck [and] shoulder area with one arm and the other one around my waist. At first he tried to pull me back and I was trying to walk forward.

She further testified, "I remember I got to the gate door and then he started [to] forcibly walk with me and I was scared. I was scared that I was going to hit the glass sliding door. I was scared that was his intention. And at that time [MM] had come out."

MM testified that he was inside his house when the appellant and SP began arguing. Once he became aware of the argument, MM went outside, where he saw "[the appellant] with his hands up and his right arm was up by her right shoulder and the left arm was by the left side of her torso. With her jacket [he] could not see [the appellant's] actual hands whether they were on or grabbing or anything like that. [He] just saw the

[3] The appellant was charged with unlawfully slapping SP on the face with his hand, and unlawfully punching her in the side of the head with his fist, both in violation of Article 128, UCMJ. As noted earlier, the members found the appellant not guilty of these two specifications.

way [the appellant's] arms were up." MM also testified that the appellant was not "repeatedly shoving" but was moving SP "toward [the inside of] our yard. And she was leaning back as if she was trying to walk in the opposite direction, but the way she was being moved you could tell it wasn't of her own accord."

MM took SP to the emergency room, where the treating physician noted that SP had some "tenderness on the back of her neck."

Legal and Factual Sufficiency of the Evidence

The appellant argues that Specification 2 of the Charge is legally and factually insufficient to support his conviction for assault consummated by a battery. We disagree.

Under 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. 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In resolving legal-sufficiency questions, "[we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). *See also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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 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).

We find the evidence legally and factually sufficient to support the appellant's conviction of assault consummated by a battery, as set forth in Specification 2 of the Charge. The elements of that offense are (1) that the accused did bodily harm to a certain person, and (2) that the bodily harm was done with unlawful force or violence. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 54.b.(2) (2012 ed.). "Bodily harm" is any offensive touching of another, however slight. *MCM*, Part IV, ¶ 54.c.(1)(a). "Unlawful force or violence" is physical force used "without legal justification or excuse and without the lawful consent of the person affected." *Id*.

The evidence shows the appellant did bodily harm to SP with unlawful force or violence. He applied force to SP with no apparent legal justification or excuse, and there is no evidence to show that SP consented to the offensive touching. SP testified that, after the appellant punched and slapped her, she hit him in the nose, got away from him and "walk[ed] swiftly towards the gate to get inside to where people could see." At that point, the appellant grabbed her around her "neck [and] shoulder area with one arm and the other one around [her] waist." The evidence also shows that the appellant "tried to pull [SP] back" as she was "trying to walk forward." At one point, the appellant started to "forcibly walk" SP such that she was scared she was going to hit the sliding glass door. MM corroborates SP's testimony to the extent that he witnessed the appellant "with his hands up and his right arm was up by [SP's] right shoulder and the left arm was by the left side of her torso." He also witnessed the appellant moving SP "toward [the inside of] our yard. And she was leaning back as if she was trying to walk in the opposite direction, but the way she was being moved you could tell it wasn't of her own accord."

We have two additional observations about the evidence. First, the military judge instructed the members on the concept of self-defense. The members apparently concluded that self-defense did not apply to this slice of the altercation and argument between the appellant and SP. We agree. The facts show that, after SP and the appellant punched and slapped each other, SP had disengaged and walked swiftly away from the appellant. Thus, when the appellant grabbed SP from behind, there is nothing in the record to suggest that she was about to inflict bodily harm on the appellant.

Second, the military judge also instructed the members about witness credibility, the character of the appellant, and the character of witnesses for peacefulness and untruthfulness. The record shows that the defense vigorously attacked the credibility of SP and MM. For example, the record shows that SP and MM were "romantically involved" at the time of the appellant's court-martial, and both had initially lied to authorities about the nature of their relationship. Additionally, the defense presented evidence that the appellant was a peaceful person and evidence that SP was neither a peaceful nor a truthful person. MM's wife also submitted an affidavit attesting that MM was not a truthful person. The members heard the testimony, personally observed the witnesses, and were properly instructed on how to evaluate witness credibility and believability. The evidence need not be free of all conflict for a rational fact finder to convict an appellant beyond a reasonable doubt. As occurred in this case, the members may believe "one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). *See also United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Considering the evidence in the light most favorable to the prosecution and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

Sentence Severity

This Court reviews sentence appropriateness de novo. *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 offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

We have given individualized consideration to this particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all other matters contained in the record of trial. In this case, when the appellant assaulted his wife, he deviated from the standards of conduct expected of Airmen. Moreover, the record shows that the appellant had received five letters of reprimand and counseling during his nearly three years of military service. Additionally, the convening authority considered the appellant's clemency submissions and reduced his sentence to confinement by one month and disapproved the reduction in rank. Under these circumstances, we find that the approved sentence was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Article 66(c), UCMJ; *United States v.*

[4] The Action of the convening authority incorrectly refers to the appellant as "AIRMAN FIRST ANTHONY L.W. PEACOCK," rather than "AIRMAN FIRST CLASS." Additionally, the Action of the convening authority does not approve the adjudged reduction to the grade of E-1. Therefore, the last line of the Action incorrectly states, in part, "upon completion of the sentence to confinement, AIRMAN BASIC PEACOCK will be required…to take leave pending completion of appellate review." The last line of the Action should refer to the appellant as "AIRMAN FIRST CLASS PEACOCK" because the convening authority did not approve the reduction in rank. To correct these clerical errors, we direct the convening authority to withdraw the original Action and substitute a correct Action. Rule for Courts-Martial (R.C.M.) 1107(g). We also direct publication of a corrected promulgating order. R.C.M. 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (25 October 2012).

Reed, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court