UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant PHILIP L. PEREZ
United States Air Force

ACM 35616

26 April 2005

Sentence adjudged 14 March 2003 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Jack L. Anderson.

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel William B. Smith.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

We have examined the record of trial, the assignments of error, and the government's reply thereto. The appellant was convicted, among other things, of making a false statement to Lieutenant Colonel (Lt Col) Rory D. Adams and Major David M. Doe, in violation of Article 133, UCMJ, 10 U.S.C. § 933.[1] The appellant claims that this conviction is legally and factually insufficient as to Lt Col Adams.

[1] The specification alleged that the appellant stated, "You may have heard rumors that I am having an inappropriate relationship with an airman; those rumors are entirely false."

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The government's evidence established that the appellant, an officer, had engaged in a sexual relationship with a female airman, Airman First Class (A1C) JG. During the presentation of the government's case on findings, Lt Col Adams testified as follows:

> A: [The appellant] mentioned that he was taking [A1C JG] to the gym and she didn't have a car, something to that effect. And people were talking about that being inappropriate because the fact that there could be favoritism applied from him to the airman. Also there was an incident that occurred in the squadron where he was alone after hours and someone walked in. The appearance was bad.
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> . . . .
>
> Q: Did he indicate anything about the truth of the rumors?
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> A: I'm a little fuzzy as to what his response was, but towards the end of that first conversation, I said, "[Lieutenant Perez], is there any truth to these rumors?" At least, I felt that he indicated to me that they were not true. I think it was a physical gesture such as a head nod, but he may have said, no, they're not true. It could have been both. I think it was both, but I'm not sure.

On cross-examination, the trial defense counsel questioned Lt Col Adams' memory:

> Q: Is it accurate to say that you do not specifically recall whether or not Lieutenant Perez told you that the rumors were not true?
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> A: That is correct.
>
> . . . .

> Q: With regards to the conversation, you indicated that you do not remember any verbal statements expressly coming out of that conversation in terms of denying these rumors?
>
> A: I can't say that. It was clear to me that he indicated that they were not true. Now, whether or not that was through a physical, or a verbal, or a combination of the two—I was comfortable that he denied them.
>
> . . . .
>
> Q: Sir, do you remember the quote from Lieutenant Perez as being, "You may have heard rumors that I am having an inappropriate relationship with an airman. Those rumors are entirely false?"
>
> A: I've never heard that statement.

We have examined the record of trial, paying close attention to the entire testimony of Lt Col Adams. We find that, during the conversation referenced in that testimony, the appellant acknowledged that there were rumors or perceptions that he and A1C JG were having an inappropriate relationship. Furthermore, we find that the appellant conveyed to Lt Col Adams, through physical or verbal means, or a combination of both, that there was no truth to these rumors. We conclude that this communication was to the same effect as the words stated in the specification. Given the manner in which the offense was charged,[2] we conclude that the government was not required to prove precisely the words set forth in the specification. *See United States v. Woltmann*, 22 C.M.R. 737, 738-39 (C.G.C.M.R. 1956) (accused spoke words to the effect of those alleged, thus no fatal variance between the pleadings and the proof). *See generally United States v. Allen*, 50 M.J. 84 (C.A.A.F. 1999). We hold that the conviction is both legally and factually sufficient.

The appellant has also asserted that the sentence, which consisted solely of a dismissal, is inappropriate.[3] We hold that the sentence adjudged and approved is not inappropriately severe. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

[2] The specification as charged stated "or words to that effect."
[3] This issue was raised pursuant to *United States v. Grosefon*, 12 M.J. 431 (C.M.A. 1982).

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, 10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court