UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant CHARLES D. PETTY
United States Air Force

ACM 37297

24 November 2009

Sentence adjudged 16 July 2008 by GCM convened at Patrick Air Force Base, Florida. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, Major David P. Bennett, Captain Marla J. Gillman, and William E. Cassara, Esquire (civilian counsel).

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

JACKSON, THOMPSON, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Judge:

A general court-martial composed of military judge alone convicted the appellant, an Air Force recruiter, of five specifications of violating a lawful general regulation by making sexual advances toward Air Force applicants RS, CB, AO, AL, and AH, and one specification of adultery with AH, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The appellant pled guilty to the specification involving RS but litigated the others. The convening authority approved the adjudged sentence of reduction to E-1,

confinement for 10 months, and a bad-conduct discharge.[1] On appeal the appellant challenges: (1) the factual sufficiency of his conviction on the four litigated general regulation violations and the litigated adultery offense; (2) the admission in findings of various e-mails sent to AH; (3) the exclusion of defense sentencing evidence; and (4) the appropriateness of the sentence.

Background

While still in high school, AH went to an Air Force recruiting office where she met with the appellant to discuss the Air Force Delayed Enlistment Program. AH joined the program, and shortly thereafter, the appellant began flirting with her and eventually asked her to have sex with him. AH and the appellant had sexual intercourse on three occasions. The appellant also recruited RS, CB, AO, and AL. He made various inappropriate sexual remarks and sexual advances toward them during the recruiting process.

Sufficiency of the Evidence

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). "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, 324 (C.M.A. 1987)). "[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). 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 ourselves are] 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).

In attacking the factual sufficiency of the evidence to support his conviction, the appellant now raises the same matters previously raised at trial by highlighting potential inconsistencies in the victims' testimony and their failure to immediately report the

[1] The convening authority waived mandatory forfeitures until the earlier of six months, release from confinement, or expiration of term of service pursuant to Article 58b(b), UCMJ, 10 U.S.C. § 858b(b).

incidents. Applying the above standards to the facts of this case, we find the evidence legally and factually sufficient to support the appellant's conviction.

AH unequivocally testified that she and the appellant had sexual intercourse on three occasions, one of which occurred in the presence of her friend, who testified that she witnessed the appellant have sexual intercourse with AH. CB, AO, AL, and AH each described, in detail, the appellant's various sexual advances toward them during the recruiting process. We have carefully considered the evidence, paying particular attention to the matters raised by appellant, and are convinced beyond a reasonable doubt that the appellant is guilty of the charges and specifications of which he was convicted.

Admission of E-mails

The military judge admitted over defense objection 10 e-mail messages from the appellant to AH. On appeal the appellant renews his argument that admission of these e-mail messages violates the completeness requirement of Mil. R. Evid. 106, claiming that the messages provide a misleading "limited snapshot" of his interaction with AH.

The 10 e-mails span a period of six months and range in subject matter from the trivial to the sexually explicit. A representative from MySpace testified concerning the chronological context of the subject e-mails. The e-mail document explicitly discussing sexual relations between the appellant and AH contains both the initial communication from AH as well as the appellant's reply.

A military judge's ruling on admissibility of evidence is reviewed for abuse of discretion and will not be overturned on appeal "absent a clear abuse of discretion." *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F.1997) (quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A.1986)). When admission of only portions of a document could create a misleading impression, the proponent may be compelled to offer such other portions as "ought in fairness to be considered contemporaneously with it." Mil. R. Evid. 106; *United States v. Rodriguez*, 56 M.J. 336 (C.A.A.F. 2002).

The multiple e-mails admitted in this case span a lengthy period, are placed in proper chronological context, and, in the e-mail most probative of sexual activity, show the messages of both AH and the appellant. The e-mail correspondence admitted at trial neither misleads nor distorts. We find that the military judge did not abuse her discretion by admitting the subject e-mails over the defense objection based on completeness.[2]

[2] The appellant asserts on appeal that admission of these e-mail messages was also "highly prejudicial." Perhaps they are, but they are not unfairly so. Mil. R. Evid. 403.

Exclusion of Defense Sentencing Evidence

First, the appellant argues that the military judge improperly excluded testimony of specific instances of good conduct during sentencing. This is without merit. The witness had already stated the specific instances before the trial counsel objected, thus placing the information before the court. After the objection and the military judge's query on whether the evidence was admissible, the defense counsel agreed to move on before any ruling on the objection. The trial counsel did not reengage. Under these circumstances, the potential issue is waived. *See generally United States v. Campos*, 67 M.J. 330, 332-33 (C.A.A.F. 2009) (finding waiver where the defense counsel did not object to the stipulation of expected testimony or the substance of the testimony).

Second, the appellant argues that the military judge improperly excluded portions of a defense character letter. Again, however, the record does not support the appellant's characterization of the evidence. The military judge did not exclude the relevant portion as an improper retention recommendation but explicitly stated that she *would* give it proper weight without considering it an improper comment on retention. *United States v. Griggs*, 61 M.J. 402 (C.A.A.F. 2005).

Third, during the defense sentencing testimony of the appellant's former supervisor, the military judge sustained the trial counsel's objection to the following question: "And if given the opportunity, would you keep [the appellant] in your [Military Personnel Flight (MPF)] for the foreseeable future?" Although no basis is stated for either the objection or the ruling and the defense counsel did not respond at all, the context clearly shows that the trial counsel and the military judge viewed the question as seeking an impermissible opinion on retention.

While recognizing that an opinion on retention may cross the line into an impermissible recommendation on the appropriateness of a punitive discharge, we find that the answer sought by the defense counsel in this case does not do so. Rather than expressly seeking an impermissible opinion on the appropriateness of a punitive discharge, the question essentially asks whether the witness would want to continue serving with the appellant. Such testimony is permissible. Rule for Courts-Martial 1001(c); *Griggs*, 61 M.J. 402.

We now test whether the error in excluding this testimony substantially influenced the adjudged sentence. *Griggs*, 61 M.J. at 410 (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F.2001) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946))). The qualitative nature of the excluded evidence is minimal. The witness had only known the appellant for about four months in a supervisory capacity after the appellant was assigned to the MPF. He testified without objection as to the appellant's good duty performance and military bearing. Numerous character letters by those who had known the appellant much longer praised the appellant's professionalism and urged leniency. Placing the

excluded testimony in the context of the overall sentencing case and the offenses for which the appellant was sentenced in this military judge alone trial, we find that the exclusion of one witness' opinion on whether the appellant should be returned to duty did not materially prejudice the substantial rights of the appellant.

Sentence Appropriateness

The appellant asserts that his sentence, which includes a bad-conduct discharge, is inappropriately severe. 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 offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *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, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant faced a maximum sentence that included confinement for 11 years and a dishonorable discharge. Despite his lengthy service and prior good duty performance, the appellant chose to abuse his position as an Air Force recruiter by making sexual advances toward five recruits and engaging in sexual intercourse with one. RS, the victim in the specification to which the appellant pled guilty, described how the appellant's sexual advances toward her in the recruiting office made her feel ashamed and embarrassed. RS also testified that the appellant's conduct discouraged her from entering the Air Force because she assumed most recruiters are "obscene." Chief Master Sergeant DS from the Air Force Recruiting Service testified as to the negative impact of the appellant's conduct on the Air Force recruiting effort in area high schools, describing how his conduct had caused a loss of confidence and trust that would be difficult to rebuild. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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.

OFFICIAL

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