UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SARDARIUS J. PUGH
United States Air Force

ACM 37038

10 February 2009

Sentence adjudged 02 March 2007 by GCM convened at Hurlburt Field, Florida. Military Judge: Stephen Woody.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Mary T. Hall, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Captain Ryan N. Hoback, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted of two specifications of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The approved sentence consists of a bad-conduct discharge, confinement for one year, total forfeitures, and reduction to E-1.

The issues on appeal are: whether the military judge erred by denying the defense motion to compel the government to produce unredacted documents pertaining to the appellant's polygraph and post-polygraph interrogation by Special Agent (SA) C on 31 Jul 2006; whether the military judge erred by denying the defense motion to suppress the appellant's "letter of apology" provided to SA C on 31 July 2006 in a post-polygraph

interrogation; whether the evidence is legally and factually insufficient as to the findings that the appellant raped Airman Basic (AB) SCM and Staff Sergeant (SSgt) CMB; and whether the members impeached their findings and expressed residual doubt by awarding a sentence which included confinement for only one year for two rapes.[1] Finding no prejudicial error, we affirm.

Background

On or about 3 July 2006, in an effort to introduce AB SCM[2] to people at Hurlburt Field, Florida, a friend invited her over to her house. At this gathering, AB SCM met the appellant. As AB SCM was leaving for the evening, the appellant walked her out to her car and attempted to kiss her on the lips. AB SCM turned her head so the kiss landed on her check. The next night similar events occurred. On 5 July 2006, AB SCM went to her friend's house to use the internet. While there, after text messaging back and forth, she was joined by the appellant.[3] As the evening progressed, AB SCM found herself very tired and in need of a nap before she drove back to her dormitory on Eglin Air Force Base, Florida. She lay down on the couch, facing the back of the couch and went to sleep. The appellant moved to the couch at some point. AB SCM awoke to the pain of him penetrating her vagina with his penis. Later, the appellant sent a text message to AB SCM apologizing. She reported the incident the next day.

On 6 July 2006, after reporting the incident and at the request of the Air Force Office of Special Investigations (AFOSI), AB SCM made a pre-text phone call to the appellant. The appellant claimed he used his fingers only, he was wearing a condom, and when she said "no" it ended. She also showed AFOSI the text message.

The appellant participated in a polygraph examination and a post-polygraph interview on 31 July 2006. The first series of questions were inconclusive so a second series of questions were done and deception was indicated. The appellant initially denied that AB SCM was asleep, but eventually acknowledged she was. The agent asked the appellant to write a letter of apology as a way of making amends. The appellant complied, and in it stated that AB SCM was asleep. He wrote, "I want you to know that I know what I did was nonconsensual and that I will never let my smaller head think for me again."

During a background check on the appellant, AFOSI discovered that a similar complaint was filed in 2002. The complainant was SSgt CMB who was, as it turned out, currently stationed at Tyndall Air Force Base, Florida.

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[1] The appellant raised the last issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Airman Basic (AB) SCM had just recently arrived at her first duty station.
[3] AB SCM had checked with her friend to get permission to have the appellant over.

SSgt CMB was contacted and interviewed. She explained that in July 2002, while stationed in Guam, there were typhoons threatening the area so the base was without utilities and a number of folks decided to stay at a local hotel.[4] At the hotel there was drinking and card playing. SSgt CMB admitted she was flirtatious with the appellant and others but with no one in particular. She even danced on a table. There may have been a lap dance or two, at least according to the appellant and his friend.

Eventually, SSgt CMB went to bed.[5] She awoke three times to touching by the appellant and each time she told him to stop. The third time, she awoke to him inserting his penis into her. She reported the incident, but the case never went to trial.

In September 2006, at the request of AFOSI, SSgt CMB made a call to the appellant telling him she had been contacted in regard to the current investigation.[6] The appellant told SSgt CMB, "Yes what I did to you that was rape, I was wrong, but I didn't do it to this female." Also, in his statement written on 11 July 2002, the appellant stated, "I thought I was going to wake her up by arousing her, but she didn't."

Compelling Discovery

"An appellate court reviews a military judge's decision on a request for discovery for abuse of discretion." *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (citing *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999)). The government shall permit the defense to inspect any "papers, documents . . . or copies . . . thereof" which are in the government's possession and which may be "material to the preparation of the defense." Rule for Courts-Martial (R.C.M.) 701 (a)(2)(A). A military judge's determination of materiality is a question of law which we review de novo. *Roberts,* 59 M.J. at 326. If we determine the evidence was relevant to the preparation of the defense, we must then determine the effect of the erroneous nondisclosure. *Id.*

The government provided the defense with the pertinent questions asked by the polygrapher, and the defense had access to the polygrapher. The government did not provide the information the Special Agent considered "tradecraft".[7]

After reviewing the evidence, including the testimony of the appellant, the military judge denied the defense motion for discovery. Specifically, the military judge found the defense had failed to meet its burden of establishing necessity for the production of the requested evidence pursuant to Article 46, UCMJ, 10 U.S.C. § 846, and R.C.M. 701 and 703.

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[4] The hotel's utilities were still working.
[5] She knew she would be sharing the bed as there were only two rooms and more people than beds.
[6] Staff Sergeant CMB called the appellant in reference to the investigation involving AB SCM.
[7] Specifically, the government did not provide the non-relevant questions and the order, series, charts, and techniques employed.

Having reviewed the record of trial, the appellant's testimony, and the military judge's findings and conclusions, we find the military judge did not abuse his discretion when he denied the defense motion to compel discovery. Further, we find, as did the military judge, that the requested discovery information was not material or relevant to the preparation of the defense.[8]

Admission of the Appellant's Apology

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

In addition to analyzing this issue under the standards set out above, we review the voluntariness of a confession de novo. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). "Whether the confession is voluntary requires examining the 'totality of all the surrounding circumstanced–both the characteristics of the accused and the details of the interrogation.'" *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

The military judge made extensive findings, which are supported by the record, and conclusions of law. The military judge did not abuse his discretion when he admitted the "letter of apology" written by the appellant on 31 July 2006 as a voluntary confession.

Legal and Factual Sufficiency

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In resolving questions of legal sufficiency, we must "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). 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 [appellant's] guilt beyond a

[8] Although the Assignment of Errors raises the question of whether the military judge applied the wrong standard in his decision when he discussed the common law privilege of protecting tradecraft, specifically in his written findings and conclusions, we decline to address the issue as the military judge properly found the evidence was not material or relevant.

reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We are convinced of the appellant's guilt, and find these issues to be without merit.

Impeachment of the Verdict

We have considered the last issue raised by the appellant and find it to be without merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Timely Post-Trial Processing

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court