UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JEFFREY M. ROBLES
United States Air Force

ACM 36744

30 July 2007

Sentence adjudged 23 March 2006 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Gordon R. Hammock (sitting alone).

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

SCHOLZ, JACOBSON, AND THOMPSON
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

The appellant was tried at RAF Lakenheath by a general court-martial composed of a military judge. Contrary to his pleas, the appellant was found guilty of forcible sodomy and indecent assault in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925, 934. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 13 months, and reduction to E-1. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 10 months, and reduction to E-1.

On appeal, the appellant asserts the evidence is legally and factually insufficient to support his conviction for sodomy. We have examined the record of trial, the assignments of error, and the government's response. We find error and take corrective action.

Legal and Factual Sufficiency of the Evidence

The evidence at trial indicated that on 23 September 2005 the appellant attended a party at a house he shared with the victim, Senior Airman (SrA) A, and another female airman, SrA M. The appellant and SrA A had known each other since 2001 when they met in technical school. Their relationship was purely platonic, and they had never dated nor engaged in any sexual activities. During the party SrA A consumed several alcoholic beverages and at one point in the evening she began to feel intoxicated. SrA A ultimately went to her room to go to bed.

SrA A testified that she had fallen asleep, only to be awoken by the appellant. SrA A testified that she did not open her eyes or respond to the appellant. SrA A stated that the appellant pushed up her bra and began to fondle her breasts, and that she was shocked and could not move. SrA A further testified that the appellant put his fingers "inside" her vagina, and then put his face between her legs. She said she felt the appellant's tongue on her vagina, and that the appellant took her left hand and put it on his penis.

The appellant was interviewed by the Air Force Office of Special Investigations (OSI) on 24 September 2005 and he provided a written statement. In his statement the appellant admitted to fondling SrA A's breasts, putting her hand on his penis, rubbing her vagina, and inserting his finger inside her. He also stated that he "went down on her" but did not remember the details of performing "oral sex" on SrA A.

The appellant contends the evidence is legally and factually insufficient to sustain his conviction for forcible sodomy. Specifically, he maintains the evidence does not prove an element of the offense of sodomy: penetration of the victim's genitalia. We agree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we may approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). According to our superior court, 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," the court is "convinced of the accused'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)).

Article 125, UCMJ, 10 U.S.C. § 925, prohibits "unnatural carnal copulation" with another. The statute further provides that, "Penetration, however slight, is sufficient to complete the offense." *See United States v. Cox*, 18 M.J. 72, 73 (C.M.A. 1984); *United States v. Williams*, 25 M.J. 854, 855 (A.F.C.M.R. 1988). The government in this case urges us to look at the context of the evidence and infer that penetration occurred. *See, e.g.*, *United States v. Ruppel*, 45 M.J. 578, 587 (A.F. Ct. Crim. App. 1997); *United States v. Green*, 52 M.J. 803, 805 (N.M. Ct. Crim. App. 2000). In the present case, however, we must focus on the precise testimony from SrA A, and not rely on inferences from either the circumstances or from the appellant's admission that he had "oral sex" with SrA A.

The sole evidence elicited from the victim was that she felt the appellant's tongue "on" her vagina. This contrasts with her testimony that the appellant put his fingers "in" her vagina. The specific wording creates an ambiguity that could have been cleared up at trial, but was not. We find the evidence in this case both legally and factually insufficient to prove the required penetration. *United States v. Milliren*, 31 M.J. 664, 665-66 (A.F.C.M.R. 1990).

This finding does not end our analysis, however. Article 59(b), UCMJ, 10 U.S.C. § 859(b), provides that we "may approve or affirm . . . so much of the finding as includes a lesser included offense." In this case, the military judge and the trial defense counsel both acknowledged that the lesser included offense of attempted forcible sodomy, in violation of Article 80, UCMJ, 10 U.S.C. § 880, was a possibility in the case. We considered carefully all the evidence in the case, and are convinced beyond a reasonable doubt that the appellant is guilty of attempted forcible sodomy. The finding of guilty to the Specification of Charge I, in violation of Article 125, UCMJ, is changed to a finding of guilty of attempted forcible sodomy, in violation of Article 80, UCMJ.

Sentence Reassessment

Having disapproved the findings of guilt to the charge of forcible sodomy, but approving instead the lesser included offense of attempted forcible sodomy, we must reassess the sentence. Our superior court has determined that this Court may reassess sentences to correct error in certain circumstances, pursuant to the analysis set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006) and *United States v. Sales,* 22 M.J. 305 (C.M.A. 1988). Under the circumstances of

this case, we find that we can reassess the sentence in accordance with the established criteria.

The maximum possible punishment for the offenses as charged included a dishonorable discharge and confinement for life. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 13 months, and reduction to E-1. Had the appellant been convicted of the lesser offense as affirmed by this Court, the maximum possible punishment would have been a dishonorable discharge, confinement for 25 years, and reduction to E-1. The actual sentence to confinement is such a small fraction of either maximum period of confinement, we are convinced that a reduction in the maximum punishment would have had no impact on the sentencing authority.

Significantly, the evidence that formed the factual basis for the charges before the court-martial remained the same. Thus, even without the error, the military judge would have sentenced the appellant based upon the same facts. We find the military judge would have imposed the same sentence even absent the error. We are convinced beyond a reasonable doubt that, absent the error, the appellant's sentence would not have been less than the sentence originally approved. Further, after reviewing the entire record, we find the sentence, as approved by the convening authority, appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *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).

Conclusion

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator