UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant COONEY S. SARRACINO, JR.
United States Air Force

ACM 37952

30 July 2013

Sentence adjudged 11 March 2011 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: J. Wesley Moore; W. Shane Cohen (arraignment).

Approved Sentence: Dishonorable discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Jonathan D. Wasden; Major Tyson D. Kindness; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

STONE, ORR, and WEBER
Appellate Military Judges

OPINION OF THE COURT

WEBER, Judge:

Contrary to his pleas, the appellant was convicted by a panel of officer members at a general court-martial of three specifications of violating Article 120, UCMJ, 10 U.S.C. § 920, involving sexual conduct with JSM, an 18-year-old friend of the family. Specifically, the appellant was convicted of indecent conduct in fondling JSM's breasts, aggravated sexual assault in penetrating JSM's vulva with his penis by causing bodily harm, and abusive sexual contact in fondling JSM's breasts with his hands by causing

bodily harm. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 2 years, and reduction to the grade of E-1.

The appellant raises six issues on appeal: 1) Whether his conviction is legally and factually sufficient; 2) Whether Specifications 1 and 4 of Charge I represent an unreasonable multiplication of charges;[1] 3) Whether the military judge erred in instructing that the interpersonal history between the appellant and JSM could be considered on the issues of force, bodily harm, consent, and mistake of fact as to consent; 4) Whether the wing commander created unlawful command influence by asking for more senior members in the court member pool and by testifying at the appellant's court-martial; 5) Whether the members were improperly denied access to evidence they requested; and 6) Whether Mil. R. Evid. 412 is an unconstitutional restriction on the appellant's right to present evidence in his defense.[2]

Background

At the time of the primary event that led to the court-martial, the appellant was a 46-year-old technical sergeant who had been in the Air Force for 22 years. The victim, JSM, had just turned 18 two weeks before the event. She was a long-time friend of the appellant and his family, and she considered the appellant to be a father figure of sorts.

On the evening of 6 February 2009, at the appellant's suggestion, JSM came by the appellant's house after she finished working in order to pick up a DVD the appellant had for her. The appellant's 18-year-old daughter was home, along with a few of her friends and the appellant. While there, JSM asked to use the appellant's laptop in order to view her MySpace page. The appellant consented to this, and moved the laptop to the kitchen counter. At some point, the appellant's daughter and her friends left, leaving only the appellant and JSM in the house.

While JSM was using the laptop, the appellant came over to the counter and stood behind JSM, grabbing her waist and/or thighs. He reached under her shirt and fondled one or both of her breasts. He then began to rub his groin against JSM's backside in a "humping" motion. After a minute or so of this, he removed both of their pants and underwear and continued "humping" her with his bare genitals against JSM's backside. JSM testified that as the appellant continued, he attempted to vaginally penetrate her with his penis from behind. While he did not fully vaginally penetrate her, JSM testified that he did penetrate her outer labia before ejaculating on her and her clothes.

[1] The appellant actually alleged an unreasonable multiplication of charges concerning Specification 1 of Charge I and Specification 2 of Charge II. This appears to be a mistake on the appellant's part, as he was acquitted of Charge II and its specifications. The substance of his argument indicates the appellant clearly meant to reference Specifications 1 and 4 of Charge I.

[2] The fourth, fifth, and sixth issues were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

JSM left the house quickly after this occurred. Later that evening, she reported the incident to her fiancé over the phone, who encouraged her to report it to a mutual friend in person. She promptly did so, and also reported it to her mother at that time. After speaking with her father, a police officer in a neighboring state, she filed a report with the local police. A sexual assault examination was performed, which failed to find any bruising on JSM's waist or thighs, but did find some bruising and abrasions in and around her genital area.

JSM's report denied any sexual contact between her and the appellant before 6 February 2009. When asked, she also denied performing oral sex on the appellant during the incident in question. However, in December 2009, JSM came forward with information that the appellant had been molesting her for several years, to include repeatedly fondling her breasts, digitally penetrating her, and having her perform oral sex on him. She also stated that the appellant instructed her to perform oral sex on him twice during the incident on 6 February 2009, and that she complied. The Government added charges and specifications covering the earlier alleged abuse, but at trial, the appellant was only convicted of acts that took place on 6 February 2009.

Further facts relevant to each alleged error are discussed below.

Legal and Factual Sufficiency

The appellant asks this Court to set aside the findings of guilt as to Charge I and its specifications because the evidence is not factually or legally sufficient to support his conviction. Specifically, he argues that JSM's account of the events that evening is not credible, and that JSM consented to the sexual activity that took place.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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.'" *Turner*, 25 M.J. at

324, *quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[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) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The elements of the offense of indecent acts of the version of Article 120, UCMJ, then in existence were:

(1) That the accused engaged in certain conduct; and

(2) That the conduct was indecent conduct.

See Manual for Courts-Martial, United States (*MCM*), A28-9 (2012 ed.).

The elements of the offense of aggravated sexual assault of the version of Article 120, UCMJ, then in existence were:

(1) That the accused caused another person, who is of any age, to engage in a sexual act; and

(2) That the accused did so by causing bodily harm to another person.

See id. at A28-6.

The elements of the offense of abusive sexual contact of the version of Article 120, UCMJ, then in existence were:

(1) That the accused engaged in sexual contact with another person; or

(2) That the accused caused sexual contact with or by another person; and

(3) That the accused did so by causing bodily harm to another person.

See id. at A28-8.

With respect to Specifications 3 and 4 of Charge I, the appellant argues that these findings of guilty are legally and factually insufficient because of JSM's lack of credibility and because the evidence indicates she consented to sexual activity with the

appellant on 6 February 2009.[3] We disagree. While we recognize that JSM's testimony often conflicted with her previous statements in certain respects, there is no reasonable doubt that sexual acts occurred on 6 February 2009 between the appellant and JSM. The only questions are whether JSM consented to these activities or whether the appellant caused the sexual acts through causing bodily injury. The appellant's account is essentially that JSM, an 18-year-old virgin engaged to be married and who just came from her job at a pizza restaurant still in her uniform, spontaneously consented to being groped and "humped" from behind by her 46-year-old married godfather while he held onto her waist as she stood over the kitchen counter. JSM's account of that evening is far more believable, even given her difficulties testifying consistently as to certain details. We have no difficulty concluding that the appellant's guilt as to these two specifications has been proven beyond a reasonable doubt. Moreover, we find the appellant's conviction as to these two specifications legally sufficient.

As to Specification 1 of Charge I, however, we hold that this guilty finding is legally insufficient. The Government charged the appellant with fondling JSM's breast on divers occasions between on or about 1 November 2008 and on or about 6 February 2009. However, the members excepted language concerning divers occasions, finding him guilty of a single indecent act on or about 6 February 2009. While the Government did not specifically allege or argue how the appellant's conduct in fondling JSM's breasts was indecent, a reading of the entire record indicates that the Government proceeded on a theory that the appellant's pattern of conduct was open and notorious in that many of the incidents took place in open areas of the house when other people were home. On appeal, the Government likewise asserts that the conduct alleged in Specification 1 is indecent because it was open and notorious.

Indecent conduct is defined as "that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave the morals with respect to sexual relations." *See MCM*, A28-4. While normally private consensual sexual activity is not punishable as an indecent act, such conduct may become punishable if certain aggravating circumstances are present. *United States v. Snyder*, 4 C.M.R. 15, 19 (C.M.A. 1952). The most common such aggravating circumstance is that the sexual activity is "open and notorious," defined as an act performed "in such a place and under such circumstances that it is reasonably likely to be seen by others." *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999). Our superior court has held that engaging in a sexual act in a shared barracks room separated by a hung bedroom sheet was "open and notorious" conduct. *Id.* In another "close case" guilty plea, our superior court held that sexual touching in a private bedroom with the door closed but unlocked while a party occurred outside the room did not constitute "open and notorious" conduct. *United States v. Sims*, 57 M.J.

[3] The appellant frames his allegation of error as legal and factual insufficiency, but in essence, he only argues that the conviction is factually insufficient.

419 (C.A.A.F. 2002). In determining if sexual acts are performed openly and notoriously, reviewing courts must "look not only to the location of the act itself, but also to the attendant circumstances surrounding their commission." *Izquierdo*, 51 M.J. at 423.

Here, there are simply no facts on the record to conclude that anyone else was reasonably likely to observe the appellant as he fondled JSM's breasts. The two were alone in the appellant's home, as the appellant's daughter and her friends had departed. The Government presented no evidence indicating that anyone else was expected to return home anytime soon. While the Government did demonstrate that the act occurred in an open area viewable from other locations throughout the home, there was no indication whether the home's doors were locked or whether anyone entering the home would be able to immediately view the area in question. Once the members struck the language about the acts occurring on divers occasions, there was no basis to conclude that the appellant's acts on this one occasion were "open and notorious." We therefore find the appellant's conviction on this Specification legally insufficient.[4] This action renders moot the appellant's allegation of unreasonable multiplication of charges.

Military Judge's Instructions

Before closing arguments, the military judge discussed his proposed instructions with trial and defense counsel. Trial counsel requested that the military judge instruct the members on "the constructive force principle that is something generally used with parents" and that "that may be raised fairly by the relationship between [the appellant and JSM] as long as it is a parental type relationship." The military judge indicated he would consider a "hybrid" type of instruction along these lines. Trial defense counsel then objected to such instruction, citing concerns that the appellant was not in a disciplinary role over JSM such as to be able to employ constructive force. After considering the matter, the military judge offered to give the following instruction: "You may also consider the interpersonal history between [the appellant and JSM] to the extent you believe it informs your decision on the issues of force, bodily harm, consent, or mistake of fact as to consent." Trial defense counsel then expressed concern that this instruction would impermissibly expand the definition of "force" and would negate the spillover instruction by allowing the members to consider evidence of the appellant's earlier

[4] While not raised by either party, we note that it is also possible for private consensual acts to be indecent when there is a familial relationship between the actors. *United States v. Wheeler*, 40 M.J. 242 (C.M.A. 1994); *United States v. Aaron*, 54 M.J. 538 (A.F. Ct. Crim. App. 2000). The Government did not assert at trial that the relationship between the appellant and JSM rendered the conduct indecent, and the parties have not asserted as such on appeal. In this context, we decline to extend this theory of indecency to the immediate situation where the appellant was not JSM's father. While JSM did testify that she considered the appellant to be a "father figure," she also testified that she spoke regularly with her biological father and saw him during the summer, the appellant did not discipline her, she generally saw the appellant only about once a week, and their relationship was largely built on topics such as movies, music, and video games. At most, the appellant could be characterized as JSM's godfather and family friend. The appellant's act of fondling JSM on 6 February 2009 was hardly a moral act, but absent the element of causing bodily force (which is present in Specification 4), it is not "grossly vulgar, obscene, and repugnant to common propriety" in the way that intra-familial sexual acts would be.

charged misconduct against him concerning the events of 6 February 2009. The military judge noted trial defense counsel's concern and observed that he would listen to trial counsel's argument closely to ensure trial counsel did not impermissibly use this instruction.

Whether a panel was properly instructed is a question of law that we review de novo. *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013). The military judge has an independent duty to determine and deliver appropriate instructions. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). "'[T]he military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.'" *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990) (quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)).

We find no error in the military judge's brief, common-sense, neutral instruction concerning the relevance of the interpersonal history between the appellant and JSM. The military judge instructed the members briefly on the obvious: that in considering what actions amount to force, bodily harm, consent, and mistake of fact as to consent, the previous interaction between the two actors is a relevant consideration. It stands to reason that the previous relationship between two people has some bearing as to whether certain conduct amounts to force, bodily harm, consent, and mistake of fact as to consent, as these matters can be quite contextual. The judge's instruction did not approach a full parental compulsion instruction, and he did not even instruct the members as to what specific relevance they were to ascribe to any interpersonal history between the appellant and JSM. The military judge repeatedly instructed the members on the proper definition of "force," "bodily harm," "consent," and "mistake of fact as to consent." When trial counsel attempted to use the military judge's instruction to argue that the appellant had trained JSM that she could not escape his hands on her hips, the military judge immediately intervened, advising the members that he said no such thing, and that they should read his instructions as they appeared and not read anything else into the instructions. After trial counsel's argument, the military judge then re-read to the members the correct definition of force. The military judge's actions were not in error.

Moreover, the two concerns trial defense counsel raised about the instruction – improperly expanding the definition of force and negating the spillover instruction – did not play out at trial. To the contrary, the appellant was acquitted of any specification requiring proof of use of force, and he was acquitted of any charge or specification regarding events before 6 February 2009. Thus, any possible error in the military judge's instruction was non-prejudicial.

Unlawful Command Influence

During *voir dire*, a member disclosed that he had volunteered to be in the court-martial member "pool" after a Status of Discipline briefing in which the wing commander expressed some surprise or disappointment at the result of a discharge board and reminded attendees to nominate their most qualified members, including themselves. Based largely on this, the military judge excused all members who recalled attending this briefing. After an unrelated issue caused the panel to drop below quorum early in the presentation of the Government's case-in-chief, counsel for both sides and the military judge questioned each replacement member about their attendance at this Status of Discipline briefing. The parties agreed to excuse any member who had been in attendance at this briefing, resulting in the excusal of any member who may have heard the wing commander's remarks. Based on this arrangement, trial defense counsel agreed that there was no longer any concern of unlawful command influence.

We agree with the appellant's trial defense counsel that the steps taken by the military judge alleviated any possible concern about either actual or apparent unlawful command influence in this case. We also reject the appellant's contention that the testimony of the wing commander and the staff judge advocate concerning an issue regarding nomination of replacement members created any concern of unlawful command influence in this case. The wing commander and staff judge advocate were properly called to address an issue trial defense counsel raised, and they testified outside the presence of the members.

Members' Access to Evidence

At the conclusion of both parties' presentation of evidence, the members asked for two pieces of evidence: 1) any previous statements JSM made in connection with the charged offenses; and 2) any records of phone calls between the appellant and JSM on the evening of 6 February 2009. Trial counsel expressed support for providing the members with the first piece of evidence, but trial defense counsel affirmatively objected to providing the statements, citing Mil. R. Evid. 403 concerns. After reviewing the statements, the military judge conducted a balancing test under Mil. R. Evid. 403 and found that any probative value was substantially outweighed by the risk of confusion and unfair prejudice. As to the phone records, the military judge expressed a desire to instruct the members that the records were not reasonably available and would not be provided. Counsel for both sides agreed with this approach.

We find no error in the military judge's decision – and the position of the appellant's own trial defense counsel – to refrain from providing this evidence to the members. Concerning JSM's previous statements, the military judge did exactly what trial defense counsel urged him to do, rendering any possible error by the military judge invited and, therefore, not a basis for relief. *See United States v. Raya*, 45 M.J.

251, 254 (C.A.A.F. 1996) ("Invited error does not provide a basis for relief."). In addition, the military judge specifically found that the danger of unfair prejudice and confusion presented by the statements substantially outweighed any probative value they contained. A military judge's decision to admit or exclude evidence under Mil. R. Evid. 403 is entitled to wide deference. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). We decline to disturb the military judge's decision.

Concerning the phone records, again, trial defense counsel agreed with the military judge's suggested approach of informing the members that the records were not reasonably available. The appellant has offered no reason to doubt the military judge's assessment that the records were not reasonably available, and we find no error in his ruling on this matter.

Constitutionality of Mil. R. Evid. 412

The appellant contends that he was aware of evidence of JSM's sexual promiscuity but chose not to offer the evidence at trial due to Mil. R. Evid. 412. He asserts that the evidentiary rule which limits his ability to present evidence of the victim's sexual behavior is unconstitutional because it hinders his constitutional right to present a defense. We disagree. Assuming the appellant possessed evidence to present concerning JSM, Mil. R. Evid. 412 specifically contains an exception to the exclusionary rule for "evidence the exclusion of which would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Our superior court has consistently upheld the constitutionality of the rule against facial challenges. *See*, *e.g.*, *United States v. Gaddis*, 70 M.J. 248 (holding that the Mil. R. Evid. 412 balancing test is neither arbitrary nor disproportionate to a legitimate purpose, and therefore is not facially unconstitutional). In addition, the appellant chose not to seek the introduction of any Mil. R. Evid. 412 evidence, leaving him no room to argue that the Rule is unconstitutional as applied to him. This allegation of error is without merit.

Reassessment

Having found the indecent act specification legally insufficient, we must consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Id*. at 308. Under this standard, we determine that we can discern the effect of the error and will reassess the sentence on the basis of the error noted, the

entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

We have no difficulty concluding that the court members would have imposed the same sentence as that adjudged had the appellant not been convicted of Specification 1 of Charge I. Notably, the military judge merged Specifications 1 and 4 of Charge I for sentencing, meaning the sentencing landscape is not changed at all by our dismissal of Specification 1. In addition, even if the appellant had never been charged with an indecent act, the fact that he fondled JSM's breast on 6 February 2009 would have still been before the panel, since he was also convicted of abusive sexual contact for this same conduct. Moreover, the indecent act specification was the least serious of the three specifications of which he was convicted in terms of maximum punishment, and carried with it no element of bodily injury. Under the circumstances of this case, we are convinced that, absent this error, the panel would have imposed and the convening authority would have approved the same sentence. Additionally, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, his record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See 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 find that the adjudged and approved sentence was appropriate in this case and was not inappropriately severe.

Court-Martial Order

While not raised as an issue on appeal, we note that the court-martial order (CMO) is deficient in four respects. First, it states that the appellant was found guilty of Specification 2 of Charge I when he was in fact acquitted of this Specification. Second, it states that the appellant was found guilty of the lesser-included offense of "Abusive Sexual Conduct" when he was in fact found guilty of abusive sexual *contact*. Third, it incorrectly states he was sentenced by a panel that included enlisted members when in fact the panel was composed of officer members only. Finally, the appellant's unit of assignment is listed as "Air Force Element Reconnaissance Office," while the Action and other documents in the record of trial indicate that his actual unit of assignment was "Air Force Element *National* Reconnaissance Office." We order the promulgation of a corrected CMO.

Conclusion

The finding of guilt as to Specification 1 of Charge I is set aside and dismissed. The remaining findings and sentence, following reassessment, are correct in law and fact,

and no error prejudicial to the substantial rights of the appellant occurred.[5] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Moreover, we find that the delay in this case does not render the appellant's sentence inappropriate under Article 66(c), UCMJ. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).