UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSE A. SOSA
United States Air Force

ACM 37153

31 March 2009

Sentence adjudged 12 October 2007 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Jennifer A. Whittier.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Nurit Anderson, and Major Jeremy S. Weber.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of one specification of carnal knowledge with a child under 16 years of age and two specifications of assault consummated by a battery, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928.[1] The adjudged and approved

[1] In all, the appellant was arraigned on one specification of carnal knowledge, three specifications of aggravated assault, nine specifications of assault consummated by a battery, and one specification of engaging in conduct prejudicial to good order and discipline or service discrediting. After arraignment, the military judge: (1) granted a defense motion for a finding of not guilty on the greater offense of two of the aggravated assaults; (2) merged one of the remaining lesser-included offenses of assault consummated by a battery with another assault consummated by a battery specification; and (3) merged several of the assault consummated by a battery specifications.

sentence consists of a bad-conduct discharge, 6 months confinement, total forfeitures of pay and allowances, and reduction to the grade of E-1. On appeal, the appellant asserts that: (1) the military judge abused her discretion by denying his motion to suppress his confessions and derivative evidence, and (2) in light of the victim's inconsistent statements and motive to lie, the evidence is legally and factually insufficient to support his finding of guilt on the carnal knowledge specification. We disagree and affirm the findings and the sentence.

Background

On 8 January 2007, the appellant returned from leave a day late. The morning the appellant returned, Technical Sergeant (TSgt) JJ, then a staff sergeant and the appellant's supervisor, verbally counseled the appellant for returning late. Later that same day, TSgt JJ visited the appellant at his work place to continue the counseling session. As TSgt JJ approached the appellant, the appellant asked TSgt JJ if they could talk. TSgt JJ replied in the affirmative, and the appellant told TSgt JJ that he, the appellant, had "messed up" when he was on leave.

TSgt JJ asked the appellant what he had done, and the appellant replied he had sex with someone not his wife. TSgt JJ asked the appellant if he needed a counselor or wanted to talk to a Catholic priest. The appellant informed TSgt JJ that the individual with whom the appellant had sex was young. TSgt JJ asked the appellant what he meant by young, and the appellant informed TSgt JJ that she was 15 years old and still in high school. TSgt JJ asked the appellant if he was feeling suicidal or homicidal and asked the appellant if he needed anything, to which the appellant replied "no." TSgt JJ informed the appellant that he, TSgt JJ, was going to seek additional guidance from their chain of command and terminated the conversation. At no time during the conversation did TSgt JJ advise the appellant of his rights under Article 31, UCMJ, 10 U.S.C. § 831.

The next day, TSgt JJ and his first sergeant escorted the appellant to the offices of the Air Force Office of Special Investigations (AFOSI). After a proper rights advisement, the appellant waived his rights and verbally confessed to having sex with SS, his 15-year-old step-cousin. Based on the appellant's confession, AFOSI agents contacted and interviewed GS, SS's mother, and SS. GS called the appellant and asked him if he had had sexual intercourse with SS; the appellant confessed that he did. At trial, the appellant unsuccessfully moved to suppress his confessions, GS's testimony, and SS's testimony.

At trial, TSgt JJ, Special Agent (SA) JH, and GS testified the appellant confessed to having sexual intercourse with SS. SS testified she first met the appellant in December 2005, and they kissed, flirted, and fondled one another. She also testified they had sexual intercourse twice in June 2006, three times in July 2006, and once in December 2006.

Discussion

Admissibility of the Appellant's Confessions and Derivative Evidence

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). With respect to a military judge's ruling on a motion to suppress evidence on the grounds that rights advisements were not given, a military judge abuses her discretion when her findings of fact are clearly erroneous or her conclusions of law, reviewed de novo, are incorrect. *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000); *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). Moreover, under such a standard "we consider the evidence in the light most favorable to the prevailing party." *United States v. Rodriguez*, 60 M.J. 239, 246-47 (C.A.A.F. 2004) (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)) (internal quotations omitted). Finally, our superior court has long held that Article 31(b), UCMJ, applies only to the questioning of a suspect or an accused pursuant to "an official law enforcement or disciplinary investigation or inquiry." *Swift*, 53 M.J. at 446; *see also United States v. Moses*, 45 M.J. 132, 136 (C.A.A.F. 1996).

In the case sub judice, the military judge made detailed findings of fact and conclusions of law after extensive testimony and written briefs and argument from counsel. The military judge's findings of fact are clear, supported by the evidence, and not clearly erroneous. The facts and circumstances surrounding TSgt JJ's conversation with the appellant convince us that TSgt JJ was motivated to assist the appellant with his problems, which were sua sponte revealed by the appellant. TSgt JJ had no reason to suspect the appellant of a crime and thus was not obliged to advise the appellant of his Article 31, UCMJ, rights. Additionally, the military judge's conclusions of law are correct. Simply put, the military judge did not abuse her discretion in ruling that the appellant's confession to TSgt JJ and evidence derived therefrom was admissible.

Moreover, assuming *arguendo* the military judge erred in admitting TSgt JJ's testimony and derivative evidence, any error would be harmless, because the appellant's confession to the AFOSI agents was, under the totality of circumstances, voluntary and admissible. Where an earlier confession is "involuntary" only because the accused has not been properly warned of his Article 31, UCMJ, rights, the voluntariness of a subsequent confession is determined by the totality of the circumstances. *United States v. Cuento*, 60 M.J. 106, 109 (C.A.A.F. 2004); *United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991). The earlier, unwarned statement is a factor in this total picture, but it does not presumptively taint a subsequent confession. *Cuento*, 60 M.J. at 109. With respect to the appellant's AFOSI confession, we note that the appellant: (1) was a security forces member, and thus, was well aware of his Article 31, UCMJ, rights; (2) demonstrated a willingness to discuss how he "messed up"; and (3) was not subjected to coercion, duress, or unlawful inducement. Further, AFOSI did not initiate contact with

the appellant. Finally, it is significant that TSgt JJ received the earlier, unwarned statement from the appellant, and AFOSI agents, not TSgt JJ, took his subsequent statement. *Id.* Thus his confession to the AFOSI agents, after a proper rights advisement and waiver, was voluntary, even in the absence of a cleansing statement. Additionally, his AFOSI confession being voluntary, the derivative evidence was likewise admissible.

Legal and Factual Sufficiency

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 (C.M.A. 1987)). In 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).

We have considered the evidence produced at trial in the light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the questioned specification. We note the following legally supports the appellant's conviction: (1) TSgt JJ's testimony that the appellant confessed to having sex with a 15-year-old girl; (2) SA JH's testimony that the appellant confessed to having sex with a 15-year-old girl; (3) GS' testimony that the appellant confessed to having sex with her 15-year-old daughter; and (4) SS's testimony that she and the appellant had sexual intercourse twice in June 2006, three times in July 2006, and once in December 2006. The fact that SS *may have been* inconsistent in her recounting of the events is of little legal consequence in that the military judge instructed the members on this fact and the members decided to give more credence to SS's testimony than the appellant's assertion that SS was inconsistent in her recounting of events.[2]

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 accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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.

[2] During his closing argument, the trial defense counsel highlighted inconsistencies in SS's testimony, as shown during the cross-examination of SS and other witnesses.

223, 224-25 (C.M.A. 1973). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this specification.

Erroneous Promulgating Order

Finally, we note that the promulgating order erroneously fails to list all of the specifications on which the appellant was arraigned and the proper disposition of those specifications. On 14 January 2008, the government promulgated the initial court-martial results and action. The guidance in existence required the initial promulgating order to include at least a summary of the charges and specifications on which the accused was arraigned. Rule for Courts-Martial 1114(c); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 10.8.2.2 (21 Dec 2007). Specifically, we note the promulgating order makes no reference to the military judge's granting of the defense counsel's motion for a finding of not guilty on two of the aggravated assault specifications. Nor does the order make reference to the merger of the assault consummated by a battery specifications. Preparation of a corrected court-martial order, properly reflecting the specifications upon which the appellant was arraigned and the proper disposition of those specifications, is hereby directed. *United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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