UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant JAMES T. SPENCER III
United States Air Force

ACM 37922

11 July 2013

Sentence adjudged 3 December 2010 by GCM convened at Los Angeles Air Force Base, California. Military Judge: W. Shane Cohen (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 42 months, reduction to E-3, and a reprimand.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

Contrary to his pleas, a general court-martial composed of a military judge sitting alone convicted the appellant of one specification of aggravated sexual assault and one specification of abusive sexual contact with a child who had attained the age of 12 years, but had not attained the age of 16 years, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged sentence consisted of a dishonorable discharge, confinement for 42

months, reduction to the grade of E-3, and a reprimand. The convening authority approved the sentence as adjudged[1].

The appellant raised three issues for our consideration: (1) Whether the evidence is legally and factually sufficient to convict him of the specifications of aggravated sexual assault and abusive sexual contact; (2) Whether the appellant is entitled to meaningful relief for post-trial processing delay; and (3) Whether the appellant received ineffective assistance of counsel.[2] Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant lived with his wife, Mrs. JS, his daughter, JS, and his 14-year-old step-daughter, GN. During the evening of 22 July 2009, the appellant exercised with his step-daughter GN as part of their nightly ritual. Near the end of their exercise session, GN held the appellant's ankles as he did sit-ups. After exercising, the appellant took a shower and went to bed while GN stayed up watching movies in her bedroom. GN testified that at approximately 4:00 a.m. she fell asleep on her bed wearing a pair of shorts, a T-shirt, two socks, a bra, and underwear. She woke up around 7:30 a.m. after feeling a sharp pain in her neck. GN further testified that when she opened her eyes, she saw the appellant looking at her face, approximately four to six inches away. She "felt something inside" of her vagina and noticed that the appellant's hand was on her breast. She then felt the appellant's penis "slide out" of her vagina. Realizing that she was waking up, the appellant took a pair of GN's shorts to cover himself and left her bedroom wearing only a tan work shirt.

A few minutes later, the appellant came back into her bedroom wearing a tan colored work shirt and a pair of jeans. The appellant apologized and asked GN, whether she was willing to "keep it between [them]." GN told the appellant to call her mother at work**.** He did so, but Mrs. JS was away from her desk. Mrs. JS testified that she called the appellant back minutes later, and he said, "I need you to come home, there's been a family emergency." Not knowing the details of the emergency, Mrs. JS rushed home and arrived between 15 and 20 minutes later. As she walked into the house, the appellant told her that he loved her and the girls, but that he had "made a mistake" and was "going to turn [himself] in." When Mrs. JS asked the appellant about the mistake, the appellant told her GN wanted to talk to her. As Mrs. JS went into GN's bedroom she saw GN crying. GN told her mother that "daddy touched me." After a brief discussion, Mrs. JS understood that the appellant had touched GN inappropriately. She stormed out of GN's bedroom and asked the appellant to explain his actions. The appellant apologized again and said he was going to turn himself in. At this point their daughter, JS, came out of her

[1] The Convening Authority deferred the reduction to in grade until the date of the action and waived all of the mandatory forfeitures for a period of 6 months for the benefit of the appellant's spouse and dependent children.
[2] This issue was raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

bedroom and asked her mother why she was hitting the appellant. Mrs. JS told JS to go and talk to her sister GN. The appellant was now on the phone telling someone that he was going to come up there and turn himself in. Mrs. JS went back into GN's bedroom to talk to her daughters. When she came out of the bedroom a few minutes later, the appellant had left the house.

The appellant dialed 9-1-1 and told Ms. Carly Ann Fisher, the dispatcher for the Signal Hill, California, police department that he needed to be picked up. When Ms. Fisher asked for additional information, the appellant told her, "Well, I mean I did it, so I talked to a lawyer . . . ." Police Officer Steven Noble responded to the appellant's home and interviewed GN. She told Officer Noble the appellant touched her breasts, but she did not know whether there was penile penetration. Later that day, Ms. Robin Shaw, a sexual-assault nurse examiner interviewed GN and gave GN a forensic medical examination. GN told Ms. Shaw that the appellant touched her breast but she did not know whether he had penetrated her vagina with his penis. Ms Shaw also medically examined the appellant. In her forensic medical report, Ms. Shaw reported "no findings" of injury or secretions to GN's head, neck, mouth, or face. As part of her examinations, Ms. Shaw collected Deoxyribonucleic Acid (DNA) samples from GN and the appellant. She sent the samples to the U.S. Army Criminal Investigation Laboratory (USACIL) for testing.

Ms. Diana Williams, a forensic DNA examiner at USACIL tested the samples. She testified that during the course of her testing of the samples, she found a mixture of DNA profiles of at least two individuals. Specifically, some of the DNA found on GN's right breast, left breast, neck, vulva, and inside the crotch of GN's underwear matched the appellant's DNA profile. Additionally, GN was "included as a possible contributor" to the minor DNA profile obtained from the appellant's penile shaft and from his pubic hair swabs. On cross-examination Ms. Williams acknowledged that it was possible for individuals to transfer DNA "without any contact ever occurring." She gave specific examples such as using the same towels, washing clothes together, or lying in the same bed. Ms. Williams also stated that she did not find any semen or sperm on GN's samples, and all of the testing profiles attributed to the appellant came from skin samples.

Legal and Factual Sufficiency

In his first assignment of error, the appellant argues the evidence is factually insufficient to prove beyond a reasonable doubt that (1) he penetrated GN's vagina with his penis and; 2) he touched GN's breast with his hand. We disagree.

We review issues of factual 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 observed the witnesses, [we] are [ourselves] 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). 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 appellant gives multiple reasons why he believes the evidence is insufficient to support his conviction. Primarily, he cites the improbability and contradictory nature of GN's statements. He also claims his statements on the recording of the 9-1-1 call did not amount to a confession or an admission of guilt. Moreover, he claims that given the possibility of incidental transfer of DNA between members who live in the same house, the DNA evidence is not conclusive proof that he touched GN inappropriately.

During the trial GN testified that she told law enforcement personnel and medical providers on multiple occasions that she did not know whether or not penile penetration occurred. GN said she previously denied penile penetration "[b]ecause [she] was scared." We believe that Mrs. JS's testimony, the appellant's actions, the timing and content of the 9-1-1 call, and the DNA test results corroborate GN's testimony. After carefully reviewing the evidence in this case and making allowances for not having observed the witnesses, we find the evidence legally and factually sufficient to prove the appellant's guilt beyond a reasonable doubt.

Post Trial Processing Delay

The appellant claims that his due process right to timely post-trial processing was violated when it took 140 days from the date of sentencing to the convening authority's action in this case. He is asking for meaningful relief (140 days reduction in term of confinement) as envisioned by *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). In conducting this review, we follow our superior court's guidance by using 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." *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). We apply a presumption of unreasonable delay when the convening authority's action is not completed within 120 days of announcement of the sentence, thereby triggering the *Barker* four-factor analysis. *Id*. at 142.

When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each *Barker* factor. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006).

The appellant's court-martial concluded on 3 December 2010, and the convening authority took action on 22 April 2011. Due to personnel and administrative issues, the 610-page record of trial was not completed until 28 January 2011, 56 days after the court-martial concluded. The counsels' review of the transcript was completed on 15 February 2011, 75 days after trial. The military judge authenticated the record of trial on 16 February 2011, and the convening authority took action on 22 April 2011, 140 days after trial. The post-trial processing time period includes the 22 days the appellant's counsel took to submit clemency matters. While error, we find the 20-day delay prior to the convening authority's action was not excessive, and granting relief under *Tardif* is not warranted.

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 due to this delay was harmless beyond a reasonable doubt and find that no relief is warranted.

Assistance of Counsel

The appellant contends his trial defense counsel were ineffective because they elected not to call a defense expert during findings and did not introduce evidence that civilian authorities declined to prosecute him for the charged offenses. We disagree.

We review de novo claims of ineffective assistance of counsel. To establish ineffective assistance of counsel, the appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). The appellant must establish that the "representation amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 690). In evaluating counsels' performance under the first *Strickland* prong, appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688-89. Counsel is presumed to be competent, and we will not second-guess a trial defense counsel's strategic or tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J.

447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

The appellant asserts that his counsel should have called Dr. Younggren, a clinical and Forensic Psychologist to testify during the findings portion of the trial that the multiple interviews possibly contaminated GN's memory and the fact that a witness's memory changes over time. In his post-trial affidavit, he also asserts that his counsel never explained why they did not have Dr. Younggren testify until sentencing. In separate declarations submitted pursuant to this Court's Order, trial defense counsel describe the difficult choices they faced while defending the appellant. Both counsel recalled explaining their rationale for reserving Dr. Younggren's testimony for possible sentencing proceedings to the appellant. Specifically, they were concerned that if Dr. Younggren testified during the findings portion of the trial, he would lose his confidentiality to the matters he discussed with the appellant. In short, they believed the risk outweighed the benefit because his testimony would have undermined the defense's theory of the case. Additionally, they believed Dr. Younggren's testimony would be less effective in sentencing if he testified during the findings portion and the appellant was still found guilty.

Consistent with their in-court declaration, we find that the trial defense counsel had tactical reasons for not calling Dr. Younggren to testify in findings. Their decision was reasonable, and we will not second-guess them. *See Morgan*, 37 M.J. at 410.

The appellant also alleges that his counsel were ineffective for failing to offer evidence that local authorities had declined to prosecute him. He contends that the local District Attorney decided not to prosecute him due to a lack of evidence. Nevertheless, his command decided to prefer charges against him. In their affidavits, his trial defense counsel stated they told him on multiple occasions that the local District Attorney decided not to file charges at this time, but deferred prosecutorial jurisdiction to the United States Air Force. As result, the local District Attorney's assessment of his case was inadmissible at trial and would not be beneficial during the sentencing portion of the trial.

Normally, when conflicting affidavits create a factual dispute, we cannot resolve it by relying on the affidavits alone; rather, we must resort to a post-trial fact finding hearing. *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, we can resolve allegations of ineffective assistance of counsel without resorting to a post-trial evidentiary hearing when, inter alia, the alleged errors would not warrant relief even if the factual dispute were resolved in the appellant's favor. *Id.* at 248. Such is the case here. Because the appellant's commander could have preferred charges against him irrespective of the local District Attorney's decision, the appellant's claim would not warrant relief even if we resolved this factual dispute in his favor. The trial defense counsel's tactical decision not to seek the admission of evidence they considered

inadmissible was reasonable. In short, the appellant's trial defense counsel were not ineffective.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[3] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] 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)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).