UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER L. STITELY
United States Air Force

ACM 37039

23 April 2008

Sentence adjudged 16 March 2007 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Steven J. Ehlenbeck (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta Gray.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by general court-martial of one specification each of sodomy of S.M., a female between ages 12 and 16, of committing indecent acts upon S.M., of taking indecent liberties with S.M., and of producing child pornography, in violation of Articles 125 and 134, UCMJ, 10 U.S.C. §§ 925 and 934. Contrary to his pleas, he was also convicted of assault and communicating indecent language, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928 and 934. The adjudged and approved sentence consists of a dishonorable discharge, 10 years confinement, and reduction to E-1.

The appellant asserts the evidence is legally and factually insufficient to support his conviction of the assault and indecent language offenses and that his sentence is inappropriately severe. Finding no error, we affirm.

Background

The appellant resided on Charleston Air Force Base with his wife and two step-daughters, S.M. and A.M. As their step-father, the appellant exercised parental control and discipline over the girls. They in turn considered him to be, and called him, their "dad." At the time of the charged offenses, S.M. was 14 and A.M. was 17 years old.

Sometime during the fall of 2005, the appellant twice approached A.M. while the two were alone in the house and asked her if she wanted to learn about sex. A.M. testified that the first time, the appellant asked her if she wanted him to "teach [her] how to have sex" and said he "would prefer [that A.M.] learn from him than from a stranger." She turned him down. He approached her again about a month later, asking "if [she] was sure" her answer to learning about sex from him was still "no." She again declined his offer. The appellant asked A.M. not to tell her mother about the conversations.

Sometime between September 2005 and January or February 2006, the appellant approached S.M. with the same offer. S.M. was more amenable, and over the next 3-4 months the appellant had four sexual encounters with her. As he had with A.M., the appellant asked S.M. not to tell her mother.

During their first sexual encounter, under the guise of teaching her about masturbation, the appellant had S.M., who was naked, sit between his legs with her back to him. He then reached around her, held her hand and guided her fingers up her vagina to her clitoris. While holding S.M.'s hand, the appellant manipulated her fingers to rub her vagina and clitoris for approximately 2-3 minutes before stopping.

During their second encounter, the appellant took a series of sexually explicit photographs of S.M. The photographs started with S.M. modeling some favorite clothes, then moved into progressively more provocative poses, with her losing items of clothing along the way until she was completely nude. The nude shots are many and varied, lewdly exposing her genitalia in numerous poses. With S.M.'s help, the appellant also took nude shots of himself, some alone and some with S.M., including some with her hands on and stroking his penis. One shot, the final of 86 pictures introduced by the government at trial, shows both of them naked, with him laying on a couch and her sitting on/straddling him in a pose simulating intercourse. After taking the pictures, the appellant sat down at his computer with S.M. and reviewed the pictures, allowing S.M. to delete ones she didn't like.

The third encounter involved demonstrations of oral sex. The appellant showed S.M. a video clip on his computer of a woman performing oral sex on a man. He then proceeded to perform oral sex on S.M. As she lay on her bed naked, he knelt on the floor and licked her vagina and clitoris for about 5 minutes, stopping when, in his words, "she got shaky and obviously uncomfortable."

The fourth encounter involved more masturbation by the appellant of S.M., and by her of him. According to the appellant, he was laying in bed one night watching TV when S.M. came in to say good night. The appellant asked S.M. about her masturbatory activities, and S.M. responded that she was masturbating but did not know if she was doing it correctly. The appellant then placed his hand into her underwear and manipulated her vagina and clitoris for 5-8 minutes. He then placed her hand on his erect penis, and had her stroke his penis for about a minute.

The appellant's offenses came to light on 4 September 2006 after S.M. told her best friend what the appellant had been doing to her. Her friend told her mother, Mrs. P.W., who called Security Forces.

Mrs. P.W. was a neighbor and friend of the appellant and his family. At the time she called the Security Forces, she knew A.M. was no longer comfortable living with the appellant and had previously been talking with A.M. about possibly moving in with Mrs. P.W.'s family. After notifying Security Forces, Mrs. P.W. called A.M. and told her that if she was going to move out, it was a good time to do so, as the police were on the way.

The call to A.M. came in while the family was playing a board game, and they all took a break while A.M. talked. After the call, A.M. went to her room, quickly packed up some essentials, and headed for the door, saying that she knew it was not a good time, but she was moving out. Not surprisingly, A.M.'s parents were shocked by this abrupt announcement. Her mother told her she was not going anywhere, and ordered her to sit back down and talk about it. A.M. remained standing. The appellant said, "Do you want me to make you sit down and talk?" A.M. hesitated momentarily but then ran toward the door as fast as she could. The appellant moved to stop her. A.M. had one foot out the door on the ground when the appellant reached her, grabbed her by the hair and pulled her back in, where she ended up in a sitting position on the floor, several feet from the door.

Legal and Factual Sufficiency

This Court reviews claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. 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 elements of the contested

crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla,* 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

We first consider the appellant's challenge to the assault charge. Within the context of this case, the government was required to prove beyond a reasonable doubt that the appellant did bodily harm to A.M. by grabbing and yanking her hair and that he did so with unlawful force and violence. *Manual for Courts-Martial (MCM)*, United States, Part IV, ¶ 54.a (2005 ed.). The first element is not in question. Both A.M. and S.M. testified that the appellant grabbed A.M.'s hair when she tried to leave the house on 4 September 2006 and used it to pull her back inside and force her to sit on the floor. Oral admissions by the appellant and a written confession confirmed that he did so. However, the appellant asserts that his actions were not unlawful, in that he was engaged in legitimate parental discipline.

The parental discipline defense holds that corporal punishment of a child by a parent is not unlawful if: 1) it is "for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of . . . misconduct"; and 2) "the force used [is not] unreasonable or excessive. Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 5-16 (15 Sep 2002); *see also United States v. Rivera*, 54 M.J. 489 (C.A.A.F. 2001). With regard to the second element, the force is excessive or unreasonable if "designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation." D.A. Pam. 27-9, ¶ 5-16; *United States v. Robertson*, 36 M.J. 190, 191 (C.M.A. 1992). Once it is raised, the government must refute the defense by proof beyond a reasonable doubt. *Rivera*, 54 M.J. at 490.

The appellant's actions clearly satisfy the first prong of the parental discipline defense. The evidence of record indicates that when the appellant grabbed A.M.'s hair and pulled her back inside, he was trying to prevent misconduct, i.e., trying to keep his then 17 year-old step-daughter from running away from home. No evidence was presented at trial to suggest that he had any other purpose.

The government did however present evidence that the force used to prevent A.M.'s departure was excessive or unreasonable. A.M. testified that when the appellant grabbed her by the hair, she already had one foot out the door on the ground. He used enough force to pull her back inside and force her into a sitting position on the floor, where she then slid about a foot. Staged photographs introduced by the defense at trial to downplay the extent of the force used actually show the opposite. It is evident from the photographs that A.M. is not a small person and that she ended up a considerable distance

from the door. Further, according to A.M., the appellant pulled so hard that he yanked out a ball of her hair that fit in the palm of her hand, causing her "extreme pain" that lasted about 15 minutes. Mrs. P.W., who arrived shortly thereafter, confirmed that A.M. had a "big handful of hair" that had been pulled out. A.M. also testified that her pain was aggravated by the fact that she was extremely "tender headed", a condition that everyone in the family, including the appellant, knew about.

Other testimony tended to downplay the extent of A.M.'s injury. However, the testimony of A.M. and Mrs. P.W. was sufficient for a rational trier of fact to find beyond a reasonable doubt that the appellant used excessive force in pulling A.M. back into the house by her hair, that the parental discipline defense therefore did not apply, and that the appellant was guilty of the charged assault. Further, we ourselves are convinced of the appellant's guilt.

In reaching this finding, we note, but are unpersuaded by, the appellant's argument that the hair pulling caused no blood loss or lasting injury. There is no *per se* rule requiring loss of blood or other serious injury before finding that any given parental disciplinary action is excessive. As our superior court has aptly noted, "[a] rule that requires physical evidence of injury invites one blow too many." *Rivera*, 54 M.J. at 492.

Turning to the indecent language offense, we again find no error. The focus of this charge is the appellant's two offers to teach A.M. how to have sex, as further detailed above. The appellant does not dispute that the conversations occurred, but asserts that the language was not indecent and was neither service discrediting nor prejudicial to good order and discipline. Rather, he was simply engaging in a normal parent/child sex-education type discussion.

"'Indecent' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards." *MCM*, Part IV, ¶ 89.c. Words do not have to be indecent per se to constitute an offense. Depending on the context in which they are used, even words which are themselves innocuous can be indecent. *United States v. Coleman*, 48 M.J. 420, 423 (C.A.A.F. 1998) (citing *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994)). The test is whether the language at issue was calculated, i.e., intended or planned, by an accused to corrupt morals or incite libidinous thoughts. *United States v. Brinson,* 49 M.J. 360, 364 (C.A.A.F. 1998) (citation omitted). In making this determination, the trier of fact must look to the entire record to determine the circumstances under which the language was used. *Id.*

In this case, A.M. testified that the two were alone in the house when appellant approached her and offered to "teach [her] how to have sex," and that he specifically

asked her not to tell her mother about the conversation. The fact that the appellant waited until they were alone to raise the issue and then cautioned A.M. not to tell her mother suggests that he intended something far less innocent than a normal sex education talk. Further, the true intent of his invitation becomes ominously clear when examined in light of his abuse of S.M. shortly thereafter. It is evident from the appellant's confession that he used the same approaches with both girls. He approached both while they were alone in the house, spoke to both about intercourse, masturbation, and oral sex, and asked both not to tell their mother about the conversations. The difference is that S.M. fell into the appellant's trap, leading to the abuse that followed. Given these circumstances, there is sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that the appellant's invitation to A.M. was calculated to bring about the same result, and that the communication was therefore indecent. The evidence and nature of the offense also provides a sufficient basis for the military judge's further determination, implicit in his findings of guilty, that such conduct was either prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. Further, we ourselves are convinced the appellant is guilty of the challenged offense.

Sentence Appropriateness

The appellant asserts that the portion of his sentence that includes a dishonorable discharge and 10 years confinement is too harsh. He stresses both his military record and the testimony of a defense forensic psychologist, who opined, inter alia, that the appellant had excellent rehabilitation potential, was a low recidivism risk, and had no personality disorders.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Having done so, we find the appellant's adjudged and approved sentence fair, just, and appropriate.

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