UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain DEVERY L. TAYLOR
United States Air Force

ACM 37065

12 March 2009

Sentence adjudged 28 February 2007 by GCM convened at Eglin Air Force Base, Florida. Military Judge: W. Thomas Cumbie.

Approved sentence: Dismissal, confinement for 50 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Michael A. Burnat, and Mary T. Hall, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officers sitting as a general court-martial convicted him of two specifications of attempted forcible sodomy, four specifications of forcible sodomy, two specifications of kidnapping,[1] and one specification of unlawful entry, in violation of Articles 80, 125, and 134, UCMJ, 10

[1] The military judge granted a motion for a finding of not guilty on another kidnapping specification.

U.S.C. §§ 880, 925, 934. The adjudged and approved sentence consists of a dismissal, fifty years confinement, and total forfeitures of pay and allowances.

On appeal the appellant asks the Court to set aside the findings and the sentence. The basis for his request is that he opines: (1) the military judge erred by permitting the government to introduce evidence of and argue that date-rape drugs may have been administered to the alleged victims; (2) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he kidnapped and forcibly sodomized EB; (3) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he attempted to forcibly sodomized WC; (4) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he attempted to forcibly sodomized JS; (5) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he unlawfully entered the bedroom of DR and committed forcible sodomy on him; (6) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he committed forcible sodomy on KK; (7) the evidence is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt that he kidnapped and committed forcible sodomy on JR; (8) an approved sentence which includes confinement for fifty years is inappropriately severe; (9) the military judge erred by failing to suppress, sua sponte, the digital video disc of the appellant's interrogation because the agents conducting the interrogation repeatedly violated his rights, primarily to press him to identify a third person whom the agents thought must have assisted him in getting EB into his car; (10) Special Agent KM, the lead case agent, should have been sequestered prior to her testifying on the merits; and (11) the military judge erred by admitting the photographs of homosexual activity found on the appellant's laptop computer and by permitting the agent who conducted the forensic analysis on the appellant's laptop computer to testify that many similar images were found on the appellant's laptop computer.[2]

Finding prejudicial error, we: (1) set aside the findings of guilty on Additional Charge I and its specification; (2) affirm the findings on the remaining charges and specifications; and (3) reassess the sentence.

Background

Between 1 April 2004 and 23 March 2006, the appellant forcibly and anally sodomized or attempted to anally sodomize five men. The appellant's modus operandi with three of the victims was to befriend the individuals at a local bar, purchase alcoholic drinks for them, transport them back to his residence, prevent them from leaving his

[2] Issues 9-11 are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

residence, and forcibly sodomize them once they had "blacked out."[3] On one occasion, the appellant purchased a beer for one of his victims, got the victim back to the appellant's residence, lay on top of the victim, and unsuccessfully attempted to remove the victim's pants. On yet another occasion, after plying a victim with alcohol, the appellant broke into the victim's room and anally sodomized him as the victim slept.

On 29 March 2006, agents with the Air Force Office of Special Investigations (AFOSI) searched[4] the appellant's residence and seized his laptop computer. A later analysis of the appellant's computer revealed that the appellant had on his computer nude photographs of one of the victims. On that same day, and again on 23 May 2006, AFOSI agents interviewed the appellant. At trial, the government moved to admit the nude photographs and portions of the appellant's AFOSI interviews. The military judge admitted the photographs and portions of the appellant's AFOSI interviews.

Admission of Date-Rape Evidence

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *United States v. Larson,* 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). If the military judge performs a Mil. R. Evid. 403 balancing test, a test with which he has wide discretion, we will not overturn his decision unless the decision is a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). We consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. at 246-47.

In the case at hand, the military judge made extensive findings of fact and conclusions of law. He found the gamma hydroxybutyric acid (GHB) testimony relevant to help explain why JR, WC, and DR (some of the victims) felt the effects they claimed after consuming a relatively small amount of alcohol and found the testimony highly probative of the victims' credibility. He also found that any danger of unfair prejudice by the testimony could be mitigated by an effective cross-examination and a properly crafted instruction. The military judge properly conducted a Mil. R. Evid. 403 balancing test, his findings of fact are not clearly erroneous, and we concur with his conclusions that the GHB testimony was relevant to help explain JR's, WC's, and DR's testimony. In short,

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[3] The victims' testimony strongly suggested that the appellant placed gamma hydroxybutyric acid (GHB), commonly known as a date-rape drug, in their drinks but there was no evidence that the appellant possessed GHB. At trial, the appellant moved to suppress evidence that GHB might have been available in his neighborhood.

[4] The agents' search was done pursuant to a search warrant.

the military judge did not abuse his discretion in admitting the GHB evidence and allowing argument on such.

Legal and Factual Sufficiency

For ease of analysis, we will address issues 2-7 jointly. In accordance with Article 66(c), UCMJ, 10 USC § 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). 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).

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. 223, 224-25 (C.M.A. 1973).

Kidnapping and Forcible Sodomy of EB

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of these specifications beyond a reasonable doubt. On this point, we note that EB testified that on the night in question he had consumed approximately ten alcoholic drinks at a local bar and was drunk when he met the appellant. He also testified that he went to another bar with the appellant and at the bar the appellant bought him a mixed drink. Additionally he testified that the next morning he woke up in his hotel room with his anus open, his buttocks bruised, rug burns on his penis, and a sore head and wrists.

About the incident, EB testified: (1) he remembers the appellant told him that they were at the appellant's place; (2) he was unconscious and awoke nude with something penetrating his anus; (3) he tried to leave and struggled but was unable. As he struggled, he heard someone say "Here we go" and another person say "Grab him" and that someone grabbed him and held him by his wrists; (4) he remembered breaking away, running outside, and collapsing; (5) someone brought him back inside, sat him on an

ottoman, and anally sodomized him; (6) after the incident someone said "Clean him up;" and (7) someone drove him back to his hotel.

EB also testified he did not consent to being sodomized, that he went to the emergency room, and that the photographs depicted in Prosecution Exhibit 8 are of him. Lastly, the appellant testified that EB consented to the sodomy. The members were well within their discretion to give EB's testimony more credence than the appellant's testimony. We find that a reasonable fact finder, considering the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, that the appellant kidnapped and forcibly sodomized EB. Moreover, we have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of these charges and specifications.

Attempted Forcible Sodomy of WC

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of this specification beyond a reasonable doubt. The evidence adduced on this specification consisted of WC's testimony. WC testified that: (1) the appellant invited him to attend a party at a local club and that he accepted; (2) at the party the appellant gave him a beer and that after consuming the beer he felt like he was in a dream and was feeling bad; (3) the appellant drove him to another club; (4) the next thing he remembered was waking up face down in an unknown bed with someone on top of him attempting to pull his pants down; (5) he held onto his pants, got out of bed, and noticed that his pants were undone; and (7) he asked the appellant to take him home, the appellant stated "No troubles," and took him home. WC also testified that he did not consent to someone pulling his pants down or laying on top of him.

We are convinced that the aforementioned evidence, when considered in a light most favorable to the prosecution, sufficiently supports a finding by a reasonable fact finder that the appellant attempted to forcibly sodomize WC. Of note are the appellant's acts of lying on top of WC and attempting to remove WC's trousers as WC struggled. These facts are overt acts from which a reasonable fact finder could conclude, circumstantially or otherwise, the appellant had an intent to forcibly sodomize WC.

Additionally, a reasonable fact finder could conclude that the overt acts would have tended to effect the commission of the forcible sodomy of WC. Moreover, the fact that the appellant abandoned his efforts after he was unsuccessful is of little legal consequence because his abandonment, coming on the heels of WC's resistance, is no defense. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 4.c.4. (2005 ed.). The evidence legally supports the appellant's conviction. Lastly, we have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this charge and specification.

Attempted Forcible Sodomy of JS

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could not have found all of the essential elements of this specification beyond a reasonable doubt. The evidence on this specification consisted of JS's testimony. JS testified that: (1) he was at a local bar and the appellant invited him to the appellant's residence; (2) he accepted the appellant's invitation and accompanied the appellant back to his residence; (3) upon arriving at the appellant's residence, the appellant brought him two drinks, and he drank them; (4) soon afterwards he became sick and "blacked out;" (5) when he came to, everything was dark, he had his hands on the appellant's arms and asked the appellant what he was attempting to do to him; and (6) he ran out of the appellant's residence and called 911 for assistance.

The aforementioned evidence, when considered in a light most favorable to the prosecution, does not sufficiently support a finding by a reasonable fact finder that the appellant attempted to forcibly sodomize JS. What is lacking is a sufficient overt act indicative of an intent on the part of the appellant to forcibly sodomize JS. Moreover, the appellant's acts of plying JS with alcohol and turning off the lights are at worst mere acts of preparation. Finally, we have carefully considered the evidence and are not convinced beyond a reasonable doubt that the appellant is guilty of this charge and specification.

Unlawful Entry and Forcible Sodomy of DR

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of these specifications beyond a reasonable doubt. DR testified that: (1) on the night in question, he had a party at his house, which the appellant attended; (2) throughout the night the appellant brought drinks to him and his friend; (3) as a result of drinking, he "blacked out;" (4) when he came to he told the appellant that he could spend the night in an adjacent bedroom; (5) he, DR, went to his bedroom, locked the door, and fell asleep; (6) he next remembered having a dream as if he was having sex, reaching back toward his buttocks, and someone slapping his hand; (7) he woke up and realized the appellant was anally sodomizing him; (8) he asked the appellant why he would break down the door and demanded the appellant leave; (9) the appellant left; and (10) he did not consent to the appellant sodomizing him.

Additionally, the government introduced a photograph of DR's bedroom door jam, Prosecution Exhibit 1, and the members could reasonably conclude from the exhibit that the appellant had broken into DR's bedroom. We find that a reasonable fact finder, considering the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, that the appellant unlawfully entered DR's bedroom and forcibly sodomized him. Finally, we have carefully considered the evidence and are

convinced beyond a reasonable doubt that the appellant is guilty of these charges and specifications.

Forcible Sodomy of KK

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of this specification beyond a reasonable doubt. We note that KK testified: (1) on the day in question, he and the appellant rented a hotel room together in Pensacola, Florida; (2) they went out drinking and he, KK, got drunk; (3) the next morning he, KK, woke up and his pants were unbuttoned and his anus was hurting; (4) the appellant was the only person he was with that night, and he did not consent to anyone unbuttoning his pants or having contact with his anus; and (5) that the photographs depicted in Prosecution Exhibit 2 are of him, and he did not consent to the photographs being taken.

Ms. JM, a computer forensic analysis expert, testified that the photographs depicted in Prosecution Exhibit 2 were seized from the appellant's laptop computer. The appellant told a remarkably different story. He testified that he and KK rented a hotel room together in the gay district in New Orleans and that the sex they had was consensual. He also testified that the photographs depicted in Prosecution Exhibit 2 were of KK but that KK knew he took the pictures.

We find that a reasonable fact finder, considering the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, that the appellant forcibly sodomized KK. The members were well within their discretion to believe KK's testimony over the appellant's testimony. Additionally, we have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this charge and specification.

Kidnapping and Forcible Sodomy of JR

We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found all of the essential elements of these specifications beyond a reasonable doubt. On this point we note that JR testified that: (1) on the night in question he was at a local bar with friends when the appellant arrived; (2) the appellant bought him a shot of alcohol, and shortly after consuming the alcohol he became sick; (3) he left with the appellant and remembered waking up confused in the appellant's residence; (4) the appellant placed his penis into his, JR's, mouth; (5) on several occasions the appellant attempted to anally sodomize him, and he told the appellant to stop; (6) after the fifth attempt at anal sodomy, the appellant was successful in anally sodomizing him; (7) that he fell asleep and upon waking regained strength and left; and (8) he did not consent to the appellant sodomizing him.

The appellant testified that he had sex with JR on the night in question and that he never forced himself onto or raped JR. We find that a reasonable fact finder, considering the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, that the appellant kidnapped and forcibly sodomized JR. The members were well within their discretion to believe JR's testimony over the appellant's testimony. Additionally, we have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of these charges and specifications.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial. *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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

The appellant is a sexual predator who brutally sodomized four victims, attempted to forcibly sodomize another victim, kidnapped two of his victims, and broke down the bedroom door of another victim. His crimes rank among the most heinous crimes recognized by society and severely compromises his standing as an officer, military member, and member of society. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes fifty years of confinement, inappropriately severe.

Suppression of the Appellant's Interrogation

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *United States v. Larson,* 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). We consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. at 246-47.

Failure to timely object to the admission of evidence waives any later claim of error in the absence of plain error. Mil. R. Evid. 103(a), (d); *Datz*, 61 M.J. at 42. The appellant bears the burden of demonstrating that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Hays*, 62 M.J. 158, 166 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). At trial, the appellant failed to object to the admission of his interrogation; thus, the issue is waived absent plain error. The appellant has failed to show that: (1) the military judge erred by admitting the appellant's interrogation; (2) any error in the admission of his interrogation was plain; and (3) any error materially prejudiced a substantial right. Accordingly, the military judge did not abuse his discretion in admitting the appellant's statements.

Failure to Sequester a Government Witness

The appellant avers the military judge erred by not sua sponte sequestering Special Agent KM. We disagree. Sequestration of witnesses is a matter within the sound discretion of the military judge. *United States v. Roth*, 52 M.J. 187, 190 (C.A.A.F. 1999). We review a military judge's ruling regarding the sequestration of witnesses for abuse of discretion. *Id.* Additionally, failure of a party to request sequestration of a witness constitutes waiver absent plain error. We note that at trial neither side requested the sequestration of Special Agent KM. Thus the appellant's new found complaint is waived absent plain error.

The military judge did not err by failing to sequester Special Agent KM. Moreover assuming error, the appellant has failed to show the error was plain and to show as a result thereof he was prejudiced. Put simply, the military judge did not abuse his discretion in not sequestering Special Agent KM.

Admission of Photographs Seized from the Appellant's Computer

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *Datz*, 61 M.J. at 42; *Gilbride*, 56 M.J. at 430 (citing *Ayala*, 43 M.J. at 298). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly-erroneous standard and conclusions of law de novo. *Larson,* 66 M.J. at 215; *Rodriguez*, 60 M.J. at 246. If the military judge performs a Mil. R. Evid. 403 balancing test, a test with which he has wide discretion, we will not overturn his decision unless the decision is a clear abuse of discretion. *Manns*, 54 M.J. at 166; *Rust*, 41 M.J. at 478. Finally, we consider the evidence in the light most favorable to the prevailing party. *Rodriguez*, 60 M.J. at 246-47.

In the case sub judice, the military judge made extensive findings of fact and conclusions of law. He found the photographs to be relevant to show the appellant's motive for committing the charged offenses and as circumstantial evidence that the

appellant committed the charged offenses. He also found that any danger of unfair prejudice by the admission of the photographs could be lessened by a properly crafted instruction. The military judge properly conducted a Mil. R. Evid. 403 balancing test, his findings of fact are not clearly erroneous, and we concur with his conclusions that the photographs were relevant to show the appellant's motive for committing the charged offenses and as circumstantial evidence that the appellant committed the charged offenses. In short, the military judge did not abuse his discretion in admitting the photographs.

Sentence Reassessment and Appropriateness

Because we modified the findings, we must next consider whether we can reassess the sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" and we may reassess the sentence accordingly. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the penalty landscape" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). "[I]f the error at trial was of constitutional magnitude, then [we] must be satisfied beyond a reasonable doubt that its reassessment cured the error." *Moffeit*, 63 M.J. at 41 (citing *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)).

We are confident that we can reassess the sentence in accordance with the above authority. Setting aside Additional Charge I and its specification does not change the maximum punishment the appellant faced. Without the respective charge and specification the appellant still faced a dismissal, confinement for life without the possibility of parole, and total forfeitures of pay and allowances. Hardly can it be said that the sentencing landscape changed. Moreover, the gravamen offenses of multiple forcible sodomies still remain. After careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Additional Charge I and its specification, the members would have rendered a sentence of no less than that adjudged at trial. We are further satisfied that, in the absence of Additional Charge I and its specification, the convening authority would have approved a sentence no less than that approved.

Conclusion

The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no additional 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 findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court