UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KELLY D. VILLEROY
United States Air Force

ACM 36574

20 July 2007

Sentence adjudged 30 November 2005 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Christopher Santoro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Imelda L. Paredes, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

ZANOTTI, Judge:

In accordance with his pleas, the appellant was convicted of destruction of military property, assault consummated by a battery, assault with an unloaded firearm, negligently discharging a firearm, and unlawful entry in violation of Articles 108, 128, and 134, UCMJ, 10 U.S.C. §§ 908, 928, 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority later approved a sentence consisting of a bad-conduct discharge, confinement for 18 months, and reduction to the grade of E-1.

The appellant asserts that his plea of guilty to assault with an unloaded firearm should be set aside as improvident because the military judge accepted the plea with an unresolved conflict between the victim's testimony and the appellant's statements. We disagree and affirm.

Background

The appellant and TE were roommates, sharing an off-base residence in Niceville, Florida. On the evening of 7 May 2005, they invited Airman First Class (A1C) Alford, a female, A1C Bronson-Tibbs and Airman (Amn) Prather, both male, to their home for a social gathering. During the evening, TE and the appellant argued about a compliment TE paid to Amn Prather. A few hours later, the guests departed. TE went into a room designated as her home office, where she shut the door. This upset the appellant. He punched through the door before engaging in a verbal and then physical altercation with TE. During the altercation, the appellant grabbed TE by the arms and threw her around.

Meanwhile, A1C Alford and A1C Bronson-Tibbs were still outside the residence. After hearing TE scream, they went back inside, where they found the appellant about to further batter TE. A1C Bronson-Tibbs separated the two and calmed the appellant. He then escorted TE out of the home with A1C Alford and took them both to A1C Alford's on base residence. As they were driving away, TE and the two airmen heard the appellant fire five to nine rounds from his .45 caliber semiautomatic handgun which he was firing in his backyard. He later admitted to firing an entire magazine of eight rounds.

Throughout the next series of events, during which the appellant made three trips to A1C Alford's home, the appellant and TE spoke on the telephone. It is not clear from the record, but it does not appear that these conversations were hostile in nature. However, TE refused to disclose her location, and she refused to return home. During the appellant's first two trips to A1C Alford's residence, the women, though inside, did not respond to his knocks. On the third visit, the appellant kicked in the exterior door and entered A1C Alford's home. He proceeded to the bedroom, and, finding that door locked, punched through it to enter. The women were on the bed inside attempting to call Security Forces with a cell phone that would not produce a signal.

The appellant asked TE to leave with him, but she refused. At this point, the appellant pulled TE off the bed, causing her to fall. As these events transpired, the appellant held the gun near TE's face. He then pulled her into the hallway. She continued to refuse to go with him until he finally left without her. A1C Alford called 911, and Security Forces stopped the appellant before he left the base.

During the providence inquiry, the military judge advised the appellant of the elements of the offense at issue - simple assault with an unloaded weapon. The military judge explained that "an 'offer to do bodily harm' is an intentional or a culpably

negligent act which forseeably causes another to reasonably believe that force will be immediately applied to his or her person." *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judge's Benchbook* (15 Sep 2002).

When asked to explain in his own words what he had done which convinced him that he was guilty, the appellant replied:

> **ACC: Sir, when I came into the room, I grabbed her off of the bed, and the whole time that I was in the room I had my gun in my right hand, and I was talking with my hands, and I was telling her to come with me. I was telling her that she needed to leave with me. And I felt that what I did was in a very threatening manner.**
>
> **MJ: Was threatening or was not threatening?**
>
> **ACC: It was, Sir. And when she—when she fell to the floor, I had knelt down beside her at that time, and my gun was—remained in my hand and it was in the vicinity of her face—of her head, and I was still talking to her, telling her to come with me. And I believe that that's what I did wrong, Sir."**

When the military judge asked whether TE had done anything to make the appellant think she was afraid of him, the appellant replied:

> **ACC: Sir, I saw her face and I seen (sic) that what I did frightened her and I seen (sic) that she was afraid, and that's why I left the residence. But prior to that, no.**

Later in the inquiry, the appellant described the scene in more detail. He told the military judge that he grabbed TE as soon as he walked into the bedroom, and she fell to the floor. As she lay there on her back, the appellant squatted near the left side of her head. He held his gun in his right hand, which he waived around, very close to TE's head, while talking with his hands. After hearing the appellant's full description of the events, the military judge accepted the appellant's plea to simple assault with an unloaded firearm.

During the sentencing phase of the trial, the trial defense counsel solicited testimony from TE that she hoped to have a romantic relationship with the appellant. In response to a question as to whether she feared for her safety after the events of 7 and 8 May, TE replied that she did not. When asked why not, she replied: "I never fear for my safety regarding him. He has always been a good person. . . . I've never feared from

him—for my life from him, even with the events of May 7th or the 8th of 2005." She then recommended leniency. Trial counsel cross-examined her, but she continued to deny being frightened for her life. She denied any recollection of making written statements for the Air Force Office of Special Investigations in which she stated that she was frightened. She also denied telling the appellant that he was scaring her. Substantive evidence of the prior inconsistent statements was not offered.

The military judge explored this matter with counsel and reopened the inquiry with the appellant, at which point the appellant stated a number of things acknowledging that his actions would tend to cause a reasonable person to fear for his life. The appellant also stated:

> **ACC: "Sir, she was—she was not surprised. She was scared. She looked scared. And I realized what I was doing and how it affected her and it just—it just sent a feeling inside of me where I just had to leave. I felt terrible."**

The military judge continued to probe. He asked the appellant how long he had known TE - 1.5 years. He asked whether the appellant had witnessed her being frightened before, to which the answer was—"Not that—not that way, Sir." The judge explored whether the appellant thought a reasonable person would be afraid of the appellant in similar circumstances, to which the appellant said yes. The military judge explored whether it would be reasonable for TE to be afraid, her statements to the contrary notwithstanding, and the appellant agreed that it would be reasonable, admitting that he, himself, "would have been afraid and anybody else would have, too." Finally, the military judge asked:

> **MJ: And at least at some point her behavior convinced you that night that she was, in fact, afraid?**
>
> **ACC: Yes, Sir. She looked scared, Sir.**

After this inquiry, the military judge stated that he was satisfied that the plea remained provident.[1]

The appellant argues before us that because TE testified that she was not fearful of the appellant, there is an inconsistency between the evidence and the appellant's statements. The appellant argues that the inconsistency was not adequately resolved because TE's testimony was unrebutted. Accordingly, the appellant argues that this is a substantial basis to set aside the plea. We disagree and affirm.

---

[1] The appellant also relies on *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002), to argue that the plea must be set aside because the appellant merely agreed with the military judge's legal conclusions, and accordingly, there was insufficient factual basis for the plea. We disagree.

We find this Court's opinion in *United States v. Marcy*, 62 M.J. 611 (A.F. Ct. Crim. App. 2005), to be dispositive. In *Marcy*, the appellant admitted to the elements of knowing and wrongful possession of images depicting minors engaged in sexually explicit conduct, in violation of Article 134, UCMJ. *Id.* at 612. The military judge accepted his plea. *Id.* During the sentencing case, the prosecution called two witnesses, DW and KF, who testified about prior statements made by the appellant which were self-serving minimizations of the photographs, and the appellant argued that his plea was not provident because the military judge failed to reopen the *Care* inquiry. *Id.*; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). The *Marcy* opinion outlined the history of the providence inquiry, noting *United States v. Care* as the leading case for the rule that the appellant must unequivocally admit his guilt and provide a factual basis for his plea. *Marcy,* 62 M.J. at 613 (discussing *Care*, 40 C.M.A. at 253). This authority dates back to the Articles of War, remaining substantially unchanged as Article 45, UCMJ, 10 U.S.C. § 845. *Id.* The opinion notes that Article 45,[2] UCMJ, and the appellate decisions interpreting it have focused on the accused's statements that are inconsistent with the plea, rather than matters produced by trial counsel. *Id.* at 614. The Court concluded, "Here, nothing said or offered by the appellant was in any way problematic. It was the trial counsel, not the appellant, who called DW and KF; and the testimony in question came on direct examination, not cross." *Id.* (citations omitted).

We hold that in this case, even though the testimony at issue was produced by the defense counsel in mitigation,[3] the matter raised is not inconsistent so as to render the plea improvident. Although the statement was literally inconsistent with the appellant's admissions, it was, in fact, rebutted by the appellant himself during the subsequent examination by the military judge, in which the appellant narrated his response and provided the factual basis for his plea, consistent with his original providence inquiry. Moreover, we have examined the entire record to determine whether the military judge abused his discretion in accepting the plea.[4] *Id.* at 614 (citing *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002)); *see also United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996). We conclude that he did not.

Once the military judge accepts an appellant's plea as provident and enters findings thereon, the appellant must establish that a substantial conflict exists between the

[2] Article 45(a), UCMJ, provides: "If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty."

[3] The defense theory on mitigation was that TE, the victim, was recommending leniency after having placed the charged incidents in context of the relationship overall. TE wished to further develop a romantic relationship with the appellant, which was called to the Court's attention as an example of bias impacting her credibility.

[4] During the military judge's discussion with counsel as to whether the providence of the plea was called into question, the trial counsel referenced Prosecution Exhibit 5, the appellant's sworn statement made on 8 May 05, in which he acknowledged that he had frightened TE.

record and the appellant's pleas in order for the pleas to be found improvident. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991). The mere possibility of a defense is inadequate. *Marcy,* 62 M.J. at 613 (citing *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F. 1996)). We have reviewed the entire record and hold that no substantial basis exists to question the plea in law or fact. The facts, as brought out in the stipulation of fact and by the appellant himself, convince us that the offense of simple assault was complete. *See United States v. Smith,* 15 C.M.R. 41, 45 (C.M.A. 1954).

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, 10 U.S.C § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator