UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant O'MARSHARIF K. WALKER
United States Air Force

ACM S31788

30 March 2011

Sentence adjudged 15 December 2009 by SPCM convened at Al Udeid Air Base, Qatar. Military Judge: William E. Orr, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Frank R. Levi, and Major Darrin K. Johns.

Appellate Counsel for the United States: Colonel Don M. Christensen, Major Charles G. Warren, Captain Scott C. Jansen, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

OPINION OF THE COURT

GREGORY, Senior Judge:

Before a special court-martial composed of military judge alone, the appellant entered mixed pleas of (1) guilty to one specification of committing indecent acts on divers occasions by surreptitiously viewing the genitalia of others while they were showering and (2) not guilty to one specification of indecent exposure in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge rejected the appellant's plea to indecent acts but accepted a modified plea of guilty to attempted indecent acts in violation of Article 80, UCMJ, 10 U.S.C. § 880. The government went forward on the

greater offense as well as the indecent exposure specification. The military judge found the appellant guilty of attempted indecent acts in accordance with his plea and guilty of indecent exposure contrary to his plea. He sentenced the appellant to a bad-conduct discharge, confinement for six months, and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge, confinement for four months, and reduction to E-1. The appellant argues that the evidence does not support the finding of guilty of indecent exposure. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

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, 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). 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." *Turner*, 25 M.J. at 325. 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). With these standards in mind we turn to the evidence in this case.

The appellant confessed to law enforcement investigators that to relieve sexual frustration in the deployed environment at Al Udeid Air Base, Qatar, he used a mirror to watch other Airmen shower. On one of those occasions, the victim, Staff Sergeant (SSgt) TM, saw "a black hand with a mirror come over my shower." He screamed, grabbed his towel, put on his shorts, and checked all the shower stalls for the perpetrator. Of five occupied shower stalls, only one had a black male. SSgt TM waited in the sink area for the individual to exit the shower stalls. When the appellant approached, SSgt TM asked if he had a mirror he could borrow. The appellant replied, "No, you can check my bag if you want." SSgt TM searched the bag and a toiletry kit but found no mirror. The appellant then pulled the waistband of his shorts out about four to five inches and said, "You can check here if you want." SSgt TM testified that he was only "a sink away" from the appellant and could see that the appellant was not wearing underwear under his shorts but averted his gaze so as not to see the appellant's exposed genitalia. During argument on findings, the military judge clarified with counsel that the issue is not

whether the victim actually saw the genitalia of the perpetrator but whether the victim *could* have done so.[1]

The appellant argues that the evidence is legally and factually insufficient to support his conviction of indecent exposure, focusing his argument on the requirement that the exposure be indecent. Here, he claims, the exposure occurred in a male shower facility where "communal male nudity is expected and not considered indecent." As appellant correctly notes, the surrounding circumstances must be considered in determining whether certain conduct is indecent. *United States v. Graham*, 54 M.J. 605, 610 (N.M. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 266 (C.A.A.F. 2002). Here, when confronted by an Airman who the appellant had just tried to see naked in the shower in order to relieve his sexual frustrations, the appellant exposed his genital area to the Airman and offered him a look. Contrary to the appellant's argument, this is not a case of unclothed persons simply passing one another in a common shower facility. Rather, the circumstances clearly show that, motivated by sexual desire, the appellant deliberately exposed himself to a targeted victim in a manner that was vulgar, obscene, and repugnant to common propriety or was, in a word, indecent.[2] Viewed in the light most favorable to the prosecution, the evidence is legally sufficient to support the findings of guilt. We also find the evidence factually sufficient: having considered the evidence in the record with particular attention to issues highlighted by the appellant, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The approved findings and the 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).

[1] Indecent exposure requires that the exposure occur in a place where it could "reasonably be expected to be viewed." *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(n) (2008 ed.); *United States v. Griggs*, 51 M.J. 418, 420 (C.A.A.F. 1999) (evidence is sufficient to sustain conviction of indecent exposure where victim averted her gaze so as not to see perpetrator's genitalia but perpetrator positioned his body so that genitalia could be seen).

[2] Indecent conduct is "that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45.a.(t)(12).

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court