UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAMES A. PRICE
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200800011
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 June 2007.
Military Judge: LtCol Christopher Greer, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Col S.G. Williams, USMCR.
For Appellant: LT Gregory Manz, JAGC, USN.
For Appellee: LT Duke Kim, JAGC, USN.

15 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his plea, by a military judge sitting as a general court-martial, of indecent acts with another, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was convicted, contrary to his plea, of taking indecent liberties with a person under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a reduction in pay grade to E-1, forfeiture of all pay and allowances, 5 years confinement, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant alleges two assignments of error, claiming that: (1) the military judge abused his discretion when he accepted appellant's plea to indecent acts where the consensual acts occurred in a private bathroom with no third parties present; and (2) the evidence was neither factually nor legally sufficient to sustain a conviction for indecent liberties with a child. After considering the record of trial, the appellant's sole assignment of error, and the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Improvident Plea

A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Carr*, 65 M.J. 39, 40-41 (C.A.A.F. 2007)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The proper standard of review for the providence of a guilty plea is abuse of discretion, where the issue is whether a factual basis exists to support the plea. *United States v. Holmes*, 65 M.J. 684, 687 (N.M.Ct.Crim.App. 2007).

The appellant pled guilty to committing indecent acts with AB, a mentally handicapped 16-year-old friend of his 13-year-old stepdaughter. The appellant admitted that after his family and AB went swimming at the beach, they returned to his on base quarters. While AB was in the master bathroom upstairs taking a shower, the appellant entered the bathroom and saw her naked. Record at 91. The appellant told AB to be quiet and went back downstairs. He later returned, undressed, and entered the bathroom to find AB still there. The appellant admitted fondling AB's breast and her vagina while he masturbated to ejaculation. *Id.* at 93. The appellant admitted that there were two doors to the bathroom, one of which was open to the master bedroom he shared with his wife, and another to the outer hallway which was closed but not locked. *Id.* at 93-94. The appellant admitted during his providence inquiry that his acts with AB were indecent because other people could have walked in on him and AB in the bathroom, or seen them together through the open door. *Id.* at 95.

The Government went forward on the greater offense of indecent assault and AB testified consistent with the appellant's providence inquiry.[1] AB's mother testified that AB has learning and physical disabilities such that she is enrolled in special education classes taught at a second grade level. She also socializes with children younger than her age. Record at 107-09. The offense occurred on 3 July 2006, two days after her 16th birthday on 1 July 2006. *Id.*, Charge Sheet.

[1] The appellant was acquitted of the greater offense of indecent assault of AB. *Id.* at 430.

The appellant contends that under *United States v. Sims,* 57 M.J. 419 (C.A.A.F. 2002), his plea to indecent acts with AB is improvident because his sexual activity with her was "not performed in an open and notorious manner." Appellant's Brief and Assignments of Error of 3 Mar 2008 at 7. We disagree.

Our superior court has held that sexual acts committed "in such a place and under such circumstances that it is reasonably likely to be seen by others even though others do not actually view the acts" are sufficient to commit the offense of indecent acts under Article 134, UCMJ. *United States v. Izquierdo,* 51 M.J. 421, 423 (C.A.A.F. 1999)(quoting *United States v. Berry,* 20 C.M.R. 325, 330 (C.M.A. 1956)). Moreover, in determining if the sexual acts are performed open and notoriously, the attendant circumstances are considered as well as the location. *Id.*

In this case, we are satisfied that the sexual acts were performed in such a place and under such circumstances that it was reasonably likely to be seen by others. Moreover, it is evident from the record that these sexual acts did not take place between two similarly-situated adults; AB had mentally diminished capacity, was a friend of the appellant's stepdaughter, and was under the care and control of appellant at the time of this incident. The appellant was married and his wife and step-daughter were present in the house at the time, as well as other young children. Unlike the facts in *Sims,* we do not consider this to be a close case given the age and discretion disparity between the appellant and AB, the presence of the appellant's wife and other children on the premises, the fact that the appellant and AB were completely disrobed during the sexual act, and that the bathroom door was open to the appellant's bedroom that he shared with his wife. 57 M.J. at 422.

From our review of the record, we see no substantial basis in law and fact for questioning the appellant's plea to indecent acts with AB, nor do we find the military judge abused his discretion in accepting it. This assignment of error is without merit.

Factual and Legal Insufficiency

The facts surrounding the appellant's second assignment of error occurred the day before the incident with AB, and involved another friend of his stepdaughter. At the time of the offense, TB was 12 years old when she spent the night at the appellant's house. With the appellant's wife's permission, TB laid down on the bed in the master bedroom on her side, facing the bathroom with the light on. At the time, TB was wearing loose fitting pajama bottoms, underwear, and a shirt.

TB testified she heard somebody come upstairs and lay down beside her in the bed. Feeling an itch, TB scratched her shoulder with her other hand. She then felt the person behind her begin to lightly scratch her shoulder for her. She then felt

the hand move down her back towards her waistline. Record at 244. The person caught their fingers on her pajama bottoms and "pulled them down a little bit," approximately two inches below her waistline. *Id.* at 245. TB then began to move away from the person because she "didn't feel comfortable." *Id.* at 246. The person then began to pick her up when she heard the appellant's wife call out "James, come down here" and the person left. *Id.* at 246-47. TB then went back into the appellant's stepdaughter's bedroom and got into bed. Shortly thereafter, the appellant came into the bedroom and said, "[TB] would you like to come back into my room?" *Id.* at 250-51.

In a statement to the Naval Criminal Investigative Service (NCIS), the appellant admitted the above events and that he was the person in the bedroom with TB. Prosecution Exhibit 3 at 2. The appellant asserted that he was trying to move TB after she fell asleep in his bed, and that "the back portion of her pants slid down exposing her underwear." *Id.*

The appellant alleges that his conviction for indecent liberties with TB is factually and legally insufficient. Specifically, the appellant claims that the testimony of TB and his confession to NCIS, taken in conjunction with evidence of TB's untruthful character, are insufficient to prove any intent by the appellant to gratify his lust and sexual desires.

This court may not affirm the findings and sentence of a court-martial unless we find them to be both factually and legally sufficient. *United States v. Beatty,* 64 M.J. 456, 458 (C.A.A.F. 2007)(citing Art. 66(c), UCMJ). Our standard of review for both legal and factual sufficiency is *de novo*. *Id.* at 459 (citing *United States v. Najera,* 52 M.J. 247, 249 (C.A.A.F. 2000)). The test for legal sufficiency 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. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id.* at 325.

Under the circumstances of this case, we reject the appellant's contention that his behavior with TB was innocent. In a light most favorable to the prosecution, a reasonable factfinder could find the appellant's acts were committed in his effort to sexually molest a 12-year-old girl. Weighing all the evidence in the record of trial, we too are convinced of the appellant's guilt beyond a reasonable doubt. Having reviewed the record of trial *de novo,* we are convinced that the appellant's conviction for indecent liberties with TB is both legally and factually sufficient, and we conclude that this assignment of error lacks merit. *Beatty,* 64 M.J. at 459.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court