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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEPHEN H. MINUGH
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200330
GENERAL COURT-MARTIAL

Sentence Adjudged: 28 March 2012.
Military Judge: LtCol Stephen F. Keane, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.
For Appellant: LT Jared A. Hernandez, JAGC, USN.
For Appellee: Maj Crista D. Kraics, USMC.

14 March 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of violating a lawful order and one specification of indecent liberties with a child, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The military judge sentenced the appellant to confinement for 13 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence.

The appellant raises five errors on appeal:[1] (1) the evidence is factually and legally insufficient to affirm the appellant's conviction for Charge II; (2) the military judge erred when he failed to dismiss Charge II under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), when the Government failed to produce evidence that the appellant possessed the requisite intent; (3) the military judge erred when he found the charge of indecent act a lesser included offense of indecent liberty with a child; (4) the military judge abused his discretion when he failed to exclude the appellant's statement of 10 June 2011 and all subsequent statements; and (5) the evidence is factually and legally insufficient to affirm the appellant's conviction for Specification 2 of Charge I. As a preliminary matter, we find the third and fifth assignments of error without merit as the military judge did not convict the appellant of a lesser included offense of indecent act,[2] and the military judge found the appellant not guilty of Specification 2 of Charge I.

After considering the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant and his wife lived in base housing with their two daughters: AM (the 3-year-old victim in this case) and a younger child. The younger daughter was upstairs in her room sleeping. AM was still awake with the appellant and his wife who were in the living room of their home drinking several

[1] All five assignments of error were submitted pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[2] The military judge (MJ) stated that he would consider indecent acts as a lesser included offense of indecent liberties with a child only if he found the appellant "Not Guilty" of indecent liberties with a child. Record at 381. The MJ found the appellant "Guilty" of indecent liberties with a child. *Id.* at 403. After announcing sentence, the MJ further stated, "I'll note for the record, although I found beyond a reasonable doubt that the specification – the Sole Specification of Charge II, indecent liberties with a child, was met, if appellate courts find that it was not an indecent liberty – indecent acts—a violation of indecent acts should have been found instead. That would have not – that would not have altered the sentence in this case as the gravamen of the offense would have remained the same."

glasses of wine. Sometime between 2300 and 2330 on the evening of 9 June 2011, the appellant's wife asked him to take AM upstairs to bed to see if he could get her to fall asleep. When the appellant went upstairs, the wife went outside to smoke a cigarette and then came back into the house checking her cell phone for text messages. When the wife realized that the appellant had been upstairs a while, she decided to check up on him. When she arrived at AM's bedroom door, she noticed something unusual; the door was shut and the light inside the room was much brighter than usual. She opened the door, saw her daughter lying on the bed with her pants and pull-ups off, and the appellant sitting on the side of the bed with his pants down. He was fully erect. Record at 292. The appellant immediately shut the door on his wife so that she could not see what he was doing, and when she attempted to get into her daughter's bedroom (to the point of putting a hole in the door), the appellant continued to prevent her from entering. After obtaining access to her daughter, the appellant's wife contacted law enforcement personnel immediately after contacting her mother for advice. Record at 295-96.

During an interview with Naval Criminal Investigative Service (NCIS) agents on 10 June 2011, the appellant admitted that he touched his penis, developed an erection, and masturbated in his daughter's presence. PE 3 at 3. During a follow-on interview with NCIS on 18 July 2011, the appellant provided an additional statement, adding that his daughter was curious and asked him several times what he was doing. PE 4 at 2. He responded by reaching back and touching her stomach, and then resumed the act of masturbation. *Id*. The trial defense counsel moved to suppress these two statements, but the military judge denied the motions. Record at 182.

Additional facts relevant to the particular assignments of error are developed below. As the first and second assignments of error both address Charge II, we will analyze them together and then discuss the fourth assignment with regard to the voluntariness of the appellant's statements.

Factual and Legal Sufficiency of Charge II

The appellant challenges the sufficiency of the indecent liberties with a child conviction (Charge II) on two grounds: that the evidence is factually and legally insufficient to affirm the appellant's conviction for Charge II and that the military judge erred when he failed to dismiss Charge II under R.C.M. 917.

We conduct *de novo* review for legal and factual sufficiency. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. When reviewing for legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id.* at 325.

In order to obtain a conviction for indecent liberties with a child, the prosecution must show that the accused committed a certain indecent act in the physical presence of a child (under 16 years of age), and that the accused committed the act with the intent to arouse, appeal to, or gratify the sexual desires of the accused, the victim, or both. MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(10). On the basis of the record before us and considering the evidence in the light most favorable to the Government, a reasonable fact finder could have found all the essential elements of the charged offense beyond a reasonable doubt. The appellant admits that he masturbated with the intent to arouse himself while sitting on his 3-year-old daughter's bed with her next to him. PE 3 at 3. He further admits that while he was masturbating with the light on, AM was awake and inquired several times as to what he was doing, and at least one time asked him "if [he] was humping," associating it with intimate acts she observed in the past between the appellant and his wife. PE 7 at 167; PE 4 at 2. In this case, AM was "curious" enough to cause the appellant to place his left hand "on her stomach near her belly button and [tell] her not to worry about what was going on and that she needed to go to sleep." PE 4 at 2. The appellant states, "she may have been able to see what I was doing which was why she was so curious." *Id.* He even discloses that he may have "looked back a couple of times to see if [AM] was trying to, you know, be nosey." PE 7 at 173.

The appellant exposed and rubbed his penis in the presence of AM enough for her to question what he was doing. Further, when the appellant's wife opened the bedroom door, he "panicked and basically just shut the door" on her. PE 7 at 191. He was both scared and angry that his wife had caught him in the act of masturbating with his daughter in the bed. After weighing all

the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we are ourselves convinced that the appellant is guilty beyond a reasonable doubt of indecent liberties with a child. Thus, the military judge did not err when he denied the trial defense counsel's motion to dismiss Charge II under R.C.M. 917.

Voluntariness of Appellant's Statements

The appellant avers that the military judge abused his discretion when he failed to exclude the appellant's "involuntary statement of 10 June 2011 and all further statements thereafter." Appellant's Brief of 24 Oct 2012 at 2. The appellant argues "that his statement to NCIS of June 10, 2012 should have been suppressed because he had only two hours of sleep prior." *Id.* at 3.

We review a military judge's denial of a motion to suppress a confession for an abuse of discretion. *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009). We will not disturb a military judge's findings of fact unless they are clearly erroneous or unsupported by the record. *Id.* (citing *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)). We review *de novo* any conclusions of law supporting the suppression ruling, including the voluntariness of the confession. *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005).

"The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996). The burden is on the Government to prove by a preponderance of the evidence that the confession was voluntary. *Id*. In determining whether a defendant's will was overborne in a particular case, the court examines the totality of the circumstances, including both the characteristics of the appellant and the details of the interrogation. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Factors to be taken into account may include the appellant's age, his education, his intelligence, advice given to the appellant concerning his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. *Id*.

In reviewing the totality of the circumstances, we hold that the military judge did not abuse his discretion because the appellant's confession was voluntary, and thus admissible under

Article 31(d), UCMJ. The appellant was a 25-year-old noncommissioned officer with almost six years of service in the Marine Corps at the time of the challenged interviews. He was a decorated combat veteran with three combat deployments. PE 7 at 45-46. Advised of his Article 31(b), UCMJ, rights, the appellant willingly and knowingly signed a form indicating he understood those rights and elected to waive his right to remain silent on 10 June 2011 and again on 18 July 2011. The 10 June 2011 interrogation was videotaped. While it lasted approximately 5 hours and 45 minutes, the interrogation was conversational in nature.[3] Record at 78. During both interrogations, the appellant was afforded several restroom and cigarette breaks, and had a lengthy break to eat a full fast-food meal. There were several other opportunities for the appellant to take a smoke and restroom break, but he declined and at one point stated, "The sooner the better. Get it over with." PE 7 at 2, 10, 140-41, 182; Record at 78.

At trial, the appellant moved to have his 10 June 2011 statement to NCIS suppressed because of prior intoxication. The military judge concluded that "[a]lthough the accused had been drinking alcohol the previous evening, the accused did not appear to be intoxicated in the videotape." Record at 184. Now, on appeal, the appellant avers that his statements should be suppressed because he was tired. When the appellant told the investigators that he was tired because he only received two hours of sleep, he assured them he was "good" when asked if he was up to talking to them. PE 7 at 2.

Based on the totality of the circumstances, we conclude that the military judge did not abuse his discretion when he denied the appellant's motion to suppress his statements to criminal investigators. The military judge's conclusions that the appellant's statements were voluntary find ample support in the record. Even assuming the appellant had only two hours of sleep the night prior to the first interview, our independent review of the videotape, Prosecution Exhibit 5, and the record supports a conclusion that the appellant's statements were "the product of an essentially free and unconstrained choice" by the appellant. *Bubonics*, 45 M.J. at 95.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

[3] The appellant first admitted that he was masturbating in his daughter's bed with his daughter next to him 3 1/2 hours into the interview. PE 7 at 157.

For the Court

R.H. TROIDL
Clerk of Court