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

Before
E.E. GEISER, J.R. PERLAK, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DONALD L. E. KIVEL
STOREKEEPER SECOND CLASS (E-5), U.S. NAVY

NMCCA 200800638
GENERAL COURT-MARTIAL

Sentence Adjudged: 2 May 2008.
Military Judge: CDR Lewis T. Booker, JAGC, USN.
Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR C.D. Jung, JAGC, USN (7 Aug 2008); LCDR B.T. Bowlin, JAGC, USN (Addendum 20 Aug 2008); CDR Frank T. Katz, JAGC, USN (14 Jul 2009).
For Appellant: David C. Watson, Esq.; Capt S. Babu Kaza, USMC; Lt Sarah Harris, JAGC, USN.
For Appellee: LT Timothy H. Delgado, JAGC, USN.

22 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Chief Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of indecent acts with a female under 16 years of age, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The approved sentence was confinement for two years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

On appeal, the appellant raises four assignments of error. First, the appellant asserts that the evidence was legally and factually insufficient to support the court's findings. Second, the appellant avers that the military judge erred when he denied a defense motion to compel production of the victim's father to testify at trial. Third, the appellant argues that the military judge further erred when he permitted the Government to introduce the appellant's sworn statement to investigators into evidence. Finally, the appellant asserts that even if the first three alleged errors do not individually rise to a level supporting relief, taken together, the cumulative effect of those errors was prejudicial to the fundamental fairness of the trial.

We have carefully examined the record of trial and the pleadings of the parties. 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Procedural Background

The appellant was sentenced on 2 May 2008. The convening authority (CA) initially acted on the case on 20 August 2008. The record was docketed with this court on 09 February 2009, but was returned to the Judge Advocate General on 9 June 2009 for remand to the CA to resolve an ambiguity in the CA's Action or to conduct new post-trial processing. On 17 September 2009, new post-trial processing had been accomplished and the record was redocketed with this court.

Factual Background

During the summer and late fall of 2004, the appellant was stationed in Bremerton, Washington onboard USS CARL VINSON (CVN 70). The appellant, his wife and three children lived in on-base housing at Naval Base Kitsap, Bremerton.

The appellant and his family first met and began to socialize with the 11-year-old victim's family in the summer of 2004. They initially met through Petty Officer Arena, a shipmate and friend of the appellant who, at the time, was dating the victim's divorced mother. These get-togethers would often include dinner and a trip to the indoor swimming pool located near the appellant's housing unit at Naval Base Kitsap, Bremerton. The victim, in particular, enjoyed swimming in the pool. The victim's family consisted of her mother and a younger brother. The victim also has a sister living with her father, and a step-sister and step-brother from her mother's second marriage living with their father.

In August, 2004, the appellant's family moved back to Ohio and the victim's mother stopped seeing Petty Officer Arena. Following the break-up, the victim's mother began drinking more frequently and spending long periods of time alone in her room.

She testified that she was becoming more withdrawn and more dependent on and argumentative with the victim, who was forced to assume greater responsibility for her younger sibling. Record at 550. The appellant continued to socialize with the victim's mother and family. The appellant would play with the children and spend a lot of time with them. The victim testified that she began to think of the appellant "kind of like a dad." Record at 611.

On two occasions between September and November 2004, the victim was allowed to spend the night alone at the appellant's on-base housing in order to facilitate use of the housing-area swimming pool. The victim's mother testified that she trusted the appellant and that she approved of the arrangement. It was during these overnight visits that the appellant committed the indecent acts on the then 11-year-old girl. In December 2004, the appellant left the area when his ship transited to Norfolk, Virginia.

Within days of the indecent acts, the victim disclosed the facts to her younger brother who testified to that effect at trial. She did not tell her mother, testifying that given all the contemporaneous animosity, she didn't think her mother would believe her. A little more than two years later, in February 2006, the victim disclosed to her cousin that someone had molested her. Record at 647, 792. That disclosure led to an investigation and the instant court-martial.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

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. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

The appellant asserts that the evidence was legally and factually insufficient to find him guilty beyond a reasonable doubt because there was no physical evidence of the attacks and the testimony of the Government's only factual witness was "unreliable as it was inconsistent" and that the date of trial was far removed in time from the charged indecent acts. The appellant also notes that the testimony of the victim's mother and brother regarding the victim's character for truthfulness was insufficient to "buttress" the victim's testimony.

There are five elements to the offense of indecent acts with a child: (1) that the accused committed a certain act upon or with the body of a certain person; (2) that the person was under 16 years of age and not the spouse of the accused; (3) that the act of the accused was indecent; (4) that the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 87(b)(1).

The appellant acknowledges that the victim testified that he inserted his finger into her vagina on one occasion and that he inserted his tongue into her vagina on a second occasion. He further admits that the victim testified that the two incidents occurred during the charged time periods. Further, the appellant does not dispute the victim's age or marital status, and does not contest the members' conclusion that the charged acts, if committed, were indecent and prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The appellant's focus is on whether there was sufficient evidence to prove beyond a reasonable doubt that the charged acts actually occurred.

The gravamen of the appellant's argument is that the victim made inconsistent statements regarding who had committed the charged acts. In one instance, the appellant asserts that the victim stated that "the boys did it"[1] and in another instance the victim was reported to have said that her mother's current boyfriend "Mike" committed the indecent acts. In each instance, the appellant acknowledges that the victim denied making any such statements.

While there does appear to be some evidence suggesting that, during the years following the charged acts, the victim was thought by family members to have made inconsistent reports regarding who committed the acts, we note the victim's younger brother testified that mere days after the incidents she told him that the appellant indecently touched her. Record at 754.

We agree with the appellant that the Government's case stands on the testimony and the credibility of the victim. We note in this regard that reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd,* 64 M.J. 348 (C.A.A.F. 2007). Members are free to believe one witness and disbelieve another and to even believe one portion of a particular witnesses' testimony but not to believe another

[1] "The boys" refers to two minors with troubled backgrounds who were taken into the household for a time before they were removed for being too violent towards the family's children.

portion. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999). In cases such as this, where witness credibility plays such a central role, we are particularly loath to second-guess the findings of court members who had the advantage of being able to personally see and hear the witnesses. *United States v. Johnson*, 30 M.J. 930, 934 (A.C.M.R. 1990). Having carefully reviewed the record, we find that the victim's testimony at trial was substantially consistent, appropriately detailed, and withstood a vigorous cross-examination.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, 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. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Witness Production

The appellant's second assignment of error alleges that the military judge erred when he denied defense counsel's request to compel production of the victim's father to testify at trial. The appellant asserts that her father would have testified about the "unusual family dynamic" between the victim and her mother and among the victim's mother and other family members. In this regard, the appellant indicates that her father would have testified that the victim's mother filed false Child Services Reports against him. Further, the appellant avers that the witness would have testified to the factual circumstances surrounding the victim finally coming forward with the allegations against the appellant. The appellant asserts that this testimony was "both relevant and necessary" to challenge the victim's personal credibility and that such testimony was "not cumulative" because, the victim's father was the only adult who could testify to the above matters.

The standard of review for rulings denying the production of witnesses is abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). An appellate court will not set aside a military judge's denial of a witness unless it has a "definite and firm conviction" that the military judge committed "a clear error of judgment." *Id.* at 126 (citation and internal quotation marks omitted). After taking evidence on the defense motion to compel, the military judge denied the motion noting that the victim's father was not a factual witness regarding the charged conduct and that those portions of his testimony offered to impeach the victim would likely be hearsay and/or cumulative. Record at 289.

Having reviewed the record and the pleadings, we find that much of the proffered testimony was based on second and third

hand information passed to the victim's father by others who ostensibly spoke with the victim. For example, the appellant's statement to NCIS reflects that on one occasion his "mother told me that (victim) told her cousin . . . that [the victim's mother's] current boyfriend . . . touched her." He went on to concede that his mother "didn't talk to (victim) about the incident." In one instance when the witness held a direct conversation with the victim, the victim initially said no one touched her but then later acknowledged that "Don" had been the one who touched her. Appellate Exhibit XXIX. In view of the tenuous nature of this prospective testimony, we do not find the military judge abused his discretion in this instance.

Admission of Appellant's Statement

As part of its investigation into the charged offenses, investigators from the Naval Criminal Investigative Service (NCIS) interviewed the appellant. A proper rights advisement was executed and the appellant agreed to make a statement. In his statement, the appellant acknowledged giving the victim massages on four different occasions to include massaging "all her muscles, including her back and her chest." Prosecution Exhibit 10 at 1. Prior to trial, the defense filed a motion to suppress PE 10 as "irrelevant" because it did not pertain to any of the charged conduct and that it was unduly prejudicial because it could be interpreted to portray the appellant as a "bad man."

The standard of review for a military judge's decision under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) is abuse of discretion. *United States v. Merz*, 50 M.J. 850, 852 (N.M.Ct.Crim.App. 1999). In the instant court-martial, the military judge denied the defense suppression motion noting that the charged offenses include a specific intent element to which the challenged statement was relevant. We agree that the evidence is relevant to the appellant's intent. An adult male giving multiple massages to an 11-year-old girl to include her chest area could reasonably be interpreted to reflect a prurient interest in the child in question. The military judge further opined that any potential prejudice raised by the statement could be mitigated by the defense on cross-examination. Record at 345. Again, we agree with the military judge's assessment. The defense was fully able to explore the circumstances surrounding the conduct to mitigate potential unfair prejudice. We do not find the military judge abused his discretion in this instance.

Conclusion

The appellant's remaining assignment of error is without merit. The findings and approved sentence are affirmed.

Judge PERLAK and Judge CARBERRY concur

For the Court

R.H. TROIDL
Clerk of Court