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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

BOBBY R. SHERMAN, JR.
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 200800480
GENERAL COURT-MARTIAL

Sentence Adjudged: 22 February 2008.
Military Judge: LtCol Christopher Greer, USMC.
Convening Authority: Commander, 2d Marine Logistics Group, U.S. Marine Corps Forces Command, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.L. Gruter, USMC.
For Appellant: Maj Brian Jackson, USMC.
For Appellee: LCDR Christopher Burris, JAGC, USN; Capt Geoffrey S. Shows, USMC.

16 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of violating a lawful general order, two specifications of indecent language, and three specifications of indecent assault, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The approved sentence was reduction to pay grade E-3 and a bad-conduct discharge.

The appellant raises two assignments of error. First, he asserts that the evidence was legally insufficient to support each of his two indecent language specifications. Second, he

avers that a sentence including a bad-conduct discharge was inappropriate. After considering the record of trial, the appellant's brief and assignments of error, and the Government's answer, we conclude that the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

The appellant was the noncommissioned officer in charge of a portion of a storage warehouse where two junior female Marines, Lance Corporal (LCpl) [M] and LCpl [O], also worked. Both lance corporals testified that the appellant routinely sought them both out to discuss matters unrelated to their duties. These conversations often involved the appellant making sexual comments and advances. Specifically, the appellant commented on the size of LCpl M's breasts and the fact that he liked the way LCpl O "licked her lips." While holding up his wallet he also asked if she was going to dance on her desk for him. Both LCpl M and LCpl O testified that similar comments occurred on a regular basis and that the comments made them uncomfortable.

On appeal, the appellant acknowledges that unwelcome verbal conduct of a sexual nature constitutes sexual harassment if the conduct creates an intimidating, hostile, or offensive working environment. He argues, however, that such language is not necessarily "indecent" as that term is used in the specifications at issue.[1]

Indecent language consists of words which are "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thoughts." *United States v. Hullett*, 40 M.J. 189, 191 (C.A.A.F. 1994)(quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 89c). Determining 'whether language satisfies this definition requires evaluating "whether the particular language is calculated to corrupt morals or excite libidinous thoughts.'" *United States v. Brinson*, 49 M.J. 360, 364 (C.A.A.F. 1998)(quoting *United States v. French*, 31 M.J. 57, 60 (C.M.A. 1990)).

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[1] The elements of indecent language are:

> (1) That the accused orally or in writing communicated to another person certain language;
> (2) *That such language was indecent*; and,
> (3) 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, ¶ 89b (emphasis added).

Words that are not, *per se*, indecent can nevertheless meet this definition when considered within the context in which they were uttered. *Hullett*, 40 M.J. at 191; *United States v. Caver*, 41 M.J. 556, 559-60 (N.M.Ct.Crim.App. 1994). Indecency "depends on a number of factors, including but not limited to fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and the probable effect of the communication . . . ." *Hullett*, 40 M.J. at 191 (internal quotation marks and citation omitted). The relevant "community standard" for measuring indecency is that of the military community as a whole and not of the individual unit. *Id.*

In *Hullett,* the Court of Appeals for the Armed Forces held that language uttered by a sergeant first class to a specialist to the effect that, "if I gave him a chance he'd make my eyes roll in the back of my head and my toes curl under," was not indecent under a legal sufficiency standard. 40 M.J. at 190. The court stated that, "even construing the language in the light most favorable to the prosecution and assuming *arguendo* that it was a request for sexual intercourse, it still falls short of being indecent language." *Id.* at 192.

We note, however, that the fact pattern in *Hullett* involved a command where "sexual banter and bragging were common among both male and female soldiers." *Hullett*, 40 M.J. at 190. There was no such evidence in the case at bar. Further, while the court in *Hullett* held that it is not a "per se violation of the military community standards ... for an adult male to suggest to an adult female that they have a sexual relationship," the Court nonetheless observed that such a suggestion may be "rendered indecent by the nature of the sexual act suggested." *Id.* at 191-92. In the instant case, the appellant's comment on the size of one victim's breasts and his query, while holding up his wallet, to the second victim whether she would dance on her desk for him were clearly rendered indecent by the nature of the sexual comments.

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 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. 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.

Although not raised by the appellant, we note that the indecent language articulated in the two specifications under Charge II was a significant contributing factor to the creation

of the intimidating work environment punished under Charge I (violating a lawful general order). We find, therefore, that the indecent language specifications under Charge II are multiplicious for sentencing with the creation of a hostile and intimidating work environment asserted in Charge I.

We have reassessed the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We are satisfied that the members would have adjudged a sentence of a bad-conduct discharge and reduction to pay grade E-3 even if the members not had these two indecent language specifications before them for sentencing purposes.

Sentence Appropriateness

Sentence appropriateness "involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). This requires an "'individualized consideration' of the particular accused on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Applying this framework, we find that the appellant's sentence, including reduction in pay grade to E-3 and a bad-conduct discharge, is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005).

Conclusion

The findings and the approved sentence are affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court