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U.S. Air Force Court of Criminal Appeals.

UNITED STATES

v.

Senior Airman James A.

RESHKE, United States Air Force.

ACM 36680.

Sentence Adjudged 14 Jan. 2006.
20 July 2007.

Sentence adjudged 14 January 2006 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: David F. Brash.
Approved sentence: Dishonorable discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E–1.
Appellate Counsel for Appellant: James D. Culp (argued), Lieutenant Colonel Mark R. Strickland, Captain Christopher L. Ferretti, and Gary Myers.

Appellate Counsel for the United States: Captain Jamie L. Mendelson (argued), Colonel Gerald R. Bruce, and Major Nurit Anderson.

Before FRANCIS, Senior Judge, SOYBEL, and BRAND, Appellate Military Judges.

OPINION OF THE COURT

FRANCIS, Senior Judge:

***1** Contrary to his plea, a general court-martial composed of officer members convicted the appellant of one specification of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to the grade of E–1.

The appellant raises two allegations of error: 1) The military judge erred in admitting propensity evidence under Mil. R. Evid. 413; and 2) The evidence is legally and factually insufficient to support his conviction. On 18 May 2007, we heard oral argument on both issues. Finding no error, we affirm.

Military Rule of Evidence 413

The appellant was charged with indecently assaulting Airman First Class (A1C) JP in January 2005. The military judge, over trial defense counsel's objection, admitted evidence under Mil. R. Evid. 413, that the appellant sexually assaulted Staff Sergeant (SSgt) CD in September 2003. The appellant contends the admission of such evidence, primarily in the form of testimony by SSgt CD, constituted prejudicial error.

In sexual assault cases, evidence of uncharged past sexual assaults by the same accused "is admissible and may be considered for its bearing on any matter to which it is relevant." Mil. R. Evid. 413(a). This includes admission for purposes of demonstrating the accused's propensity to commit the charged offenses. United States v. Parker, 59 M.J. 195, 198 (C.A.A.F.2003); United States v. Wright, 53 M.J. 476, 480 (C.A.A.F.2000).

Before admitting evidence under Mil. R. Evid. 413, a military judge must make three threshold determinations: 1) That the accused is charged with an offense of sexual assault within the meaning of Mil. R. Evid. 413(d); 2) That the proffered evidence is evidence that the accused committed another offense of sexual assault within the meaning of Mil. R. Evid. 413(d); and, 3) That the proffered evidence is logically relevant under Mil. R. Evid. 401 and 402. *United States v. Berry,* 61 M.J. 91, 95 (C.A.A.F.2005) (citing *Wright,* 53 M.J. at 482).

If the evidence meets these threshold requirements, the military judge must then apply the balancing test of Mil. R. Evid. 403 to determine whether the evidence is legally relevant, i.e., whether its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." Berry, 61 M.J. at 95. "In conducting the [Mil. R. Evid.] 403 balancing test, a military judge should consider the following factors: the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties." Id.; United States v. Bailey, 55 M.J. 38 (C.A.A.F.2001).

There is no question the alleged assault of A1C JP qualifies as a sexual assault within the meaning of Mil. R. Evid. 413. However, the appellant asserts the alleged prior assault on SSgt CD was not a "sexual assault" within the meaning of that

rule and that, in any event, was so dissimilar that it was not logically relevant to the charged offense. The appellant also asserts that even if the alleged assault of SSgt CD qualified as a "sexual assault" and was logically relevant, it should have been excluded under Mil. R. Evid. 403.

***2** "We review the military judge's ruling on the admissibility of evidence under an abuse of discretion standard." United States v. Dewrell, 55 M.J. 131, 137 (C.A.A.F.2001). *See also Bailey,* 55 M.J. at 38; *United States v. Bare,* 63 M.J. 707 (A.F.Ct.Crim.App.2006). "If the military judge makes findings of fact, we review the findings under a clearly erroneous standard of review. We review conclusions of law de novo." *Bare,* 63 M.J. at 710 (quoting *United States v. Springer,* 58 M.J. 164, 167 (C.A.A.F.2003)). Here, the military judge, prior to admitting the contested evidence, conducted an extensive evidentiary hearing, made detailed findings of fact, and thoroughly explained his balancing analysis on the record. "When the judge does not articulate the balancing analysis on the record, we give the evidentiary ruling less deference than we do where, as in this case, the balancing analysis is fully articulated on the record." *Bailey,* 55 M.J. at 41.

SSgt CD provided the primary evidence of the appellant's alleged prior sexual assault. She testified the appellant assaulted her when they were both stationed at Spangdahlem Air Base, Germany. According to SSgt CD, she was friends with the appellant, but they were not romantically involved. One evening in September 2003, SSgt CD was watching television in the dorm day room with the appellant and several other male airmen. The appellant and the others were drinking. SSgt CD does not know how much the appellant had to drink, but believes he was intoxicated because she smelled alcohol on his breath and noticed that his eyes were red. When the male airmen started getting too rowdy for her taste, SSgt CD left and went back to her room.

At her room, SSgt CD locked the door and laid on her bed, reading a magazine and listening to music. After a while, the appellant came by. She recognized his voice, considered him a friend, and let him in. After they talked for a short time, the appellant leaned in and tried to kiss her. She backed away, asking what he was doing, since he knew she was seeing someone else. The appellant said: "He's not here—you deserve better", and leaned in again trying to kiss her. At that point, she got mad and kicked him out of her room, locking the door behind him.

After the appellant left, SSgt CD returned to her bed to again read and listen to music. Sometime thereafter a different friend stopped by to check on her. When he left, she did not re-lock the door, but returned to her reading. She was face down on the bed, propped up on her elbows, and facing away from the door. Suddenly, someone grabbed her from behind, holding her wrists, and pinning down her legs through pressure on the back of her calves. At first she though it was her other friend messing around. However, when the person holding her told her to "be quiet", she realized it was not her other friend, became frightened and started to struggle. She was able to throw her attacker off her to the floor, and saw it was the appellant. She asked him: "What the f* * * are you doing?" He got up, told her again to be quiet, grabbed her jaw and pushed her back onto the bed, again grabbing her wrists and pinning her down. She started kicking, was able to get in a blow to the groin and knocked him off again, telling him to "get the f* * * out of my room." This time she was successful and he left. She noticed he had to unlock the door to get out. She knows she did not lock the door after her other friend left, so believes the appellant must have locked it when he entered the room. The appellant ultimately received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for his assault of SSgt CD. The specification for that action alleged only assault, not a sexual assault.

***3** Considering the appellant's alleged conduct toward SSgt CD as a whole, the military judge concluded that such conduct, if it occurred, qualified as a sexual assault offense within the meaning of Mil. R. Evid. 413. We agree.

Mil. R. Evid. 413(d) defines "offenses of sexual assault" to include:

> (1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;
> (2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;
> (3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;
> (4) (Omitted); or
> (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Given SSgt CD's description of the appellant's alleged assault, Mil. R. Evid. 413(d)(2)-(3) clearly do not apply, as there was no genital or anal contact. However, we agree with the

military judge's assessment that the actions described by SSgt CD qualify as an attempt to engage in the type of sexual contact addressed in those sections, thereby triggering Mil. R. Evid. 413(d)(5). The totality of the appellant's alleged conduct toward SSgt CD, both shortly before and during the attack, evidences intent to engage in forced sexual contact and a substantial movement toward doing so. According to SSgt CD, the appellant twice tried to kiss her and, when reminded she was already seeing someone else, said she "deserved better". After being rebuffed, he shortly thereafter re-entered her room without her knowledge, locked the door behind him, pinned her down on the bed from behind and, when she resisted, told her to be quiet. He continued the attack even after she successfully threw him off, again grabbing her and throwing her back onto the bed. Only after she managed to kick him in the groin did he finally abandon the attack. To find, as the appellant suggests, that such conduct, if it occurred, does not amount to an attempted sexual assault within the meaning of Mil. R. Evid. 413 would require that we ignore reality and turn a blind eye to the ways of the world. We decline to do so.

We are also not persuaded by the fact that the nonjudicial punishment action the appellant received for his alleged attack on SSgt CD was not charged as an indecent assault. The commander's characterization of the appellant's conduct in the nonjudicial punishment action could have been driven by a wide variety of legitimate reasons and is in any event not controlling with respect to a later evaluation of the same conduct within the context of Mil. R. Evid. 413.

***4** The military judge also correctly found that the appellant's alleged assault of SSgt CD was sufficiently similar to the charged sexual assault of A1C JP to make it logically relevant, in that it shows the propensity of the appellant to commit the charged offense. Berry, 61 M.J. at 95. Both assaults occurred in the victim's dorm room, after the appellant had been drinking. Further, both victims were female airmen who had no prior romantic relationship with the appellant, but considered him a friend. Finally, on both occasions the appellant was rough, using force against the alleged victims. He forcibly pinned SSgt CD down from behind, then grabbed her jaw and pushed her back on the bed when she attempted to get up. Similarly, he persisted in trying to pull down A1C JP's pants despite her protestations, pulled away a blanket when she tried to cover herself, and forcibly inserted his fingers into her vagina.

Having determined the proffered evidence met the prerequisites for admission, the military judge performed an extensive balancing test under Mil. R. Evid. 403, applying the factors set forth by our superior court in *Wright,* and detailing his analysis in the record. The military judge found that although it was a close case and some of the factors individually weighed against admission, the probative value of proffered evidence, on balance, was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

There is no doubt that evidence of the alleged prior assault of SSgt CD to some extent resulted in a potentially distracting mini-trial. The credibility of SSgt CD was very much in issue. As a result, her testimony, and that of witnesses called by the defense to attack her credibility, consumed a significant amount of time. Further, as noted by the military judge, the strength of proof of the prior act hinged on the credibility of SSgt CD, as she was the lone witness to that alleged conduct. However, the dangers posed by these two factors did not substantially outweigh the probative value of the evidence of the alleged prior act. SSgt CD's testimony, if deemed credible by the members, provided substantial propensity evidence, especially considering that the two alleged acts occurred less than 16 months apart and involved significant similarities.

We also note the military judge provided detailed instructions to the members concerning consideration of SSgt CD's testimony and the alleged prior act. They included extensive instructions addressing the evidence related to SSgt CD's credibility, or lack thereof, and an appropriate limiting instruction on proper consideration of the propensity evidence. *See* United States v. Schroder, No. 06–0657/AF, (C.A.A.F. 31 May 2007).

Having considered SSgt CD's testimony under the standards set forth in *Wright* and the instructions issued by the military judge limiting the purposes for which such testimony could be considered, we find no abuse of discretion in its admission.

Legal and Factual Sufficiency

***5** In his second assignment of error, the appellant claims the evidence was legally and factually insufficient to support his conviction.

We review the appellant's claim of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); United States v. Washington, 57 M.J. 394, 399

(C.A.A.F.2002). 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 contested crimes beyond a reasonable doubt. *Jackson v.* Virginia, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); United States v. Quintanilla, 56 M.J. 37, 82 (C.A.A.F.2001); United States v. Turner, 25 M.J. 324 (C.M.A.1987). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325. Both standards are met here.

A1C JP and the appellant both worked in the same duty section. According to A1C JP, the two were friends, but had no existing romantic relationship. A1C JP testified that on the afternoon of 7 January 2005, they went to the base club with several others in their unit for a retirement ceremony. After the ceremony, a group of them, including A1C JP and the appellant, stayed at the club and started drinking. A1C JP had 12–14 drinks over the course of the evening. A1C JP testified the appellant was drinking also, but she did not know if he was drunk. When the group finally called it quits, A1C JP left with the appellant and another female friend to walk home. The friend lived closest to the club, so they went to her house first. On the way, all three were horsing around with each other, walking with arms linked as in the movie "The Wizard of Oz", stumbling, and at times walking on their knees or "Army crawling" on their elbows through the grass. The appellant and A1C JP stayed at their friend's house for a while, talking, joking around and wrestling with each other and the friend.

Sometime later in the evening, A1C JP and the appellant left their friend's house and continued on to the dorm. At the dorm, the appellant accompanied A1C JP to her room. After they talked and joked for a bit, the appellant suddenly turned out the lights and pushed A1C JP onto the bed. At first A1C JP laughed, because she thought the appellant was still horsing around. However, when he tried to forcibly remove her pants, she no longer found it funny. She resisted and told him to stop. He did not, but kept trying to pull her pants down. A1C JP testified the next thing she remembers is waking up to find her clothes off and the appellant digitally penetrating her vagina and anus. She again told him to stop. After a short while, he did stop, and removed his hand. She pulled up a blanket to cover herself and told him to get out. The appellant did not leave, but lay down beside her on the bed. After a brief period, he pulled off the blanket and "jammed" or "jabbed" his fingers into her vagina again. She continued to resist and tell him "no" and he finally left.

A1C JP's testimony was supported in part by the testimony of the "Sexual Assault Nurse Examiner" who examined her two days after the incident. The nurse testified that when she examined A1C JP's cervix, she found a slight abrasion consistent with digital penetration. She took a picture of the abrasion and it was introduced at trial, along with her explanation of it.

***6** The testimony of A1C JP and the nurse who examined her, viewed in the light most favorable to the prosecution and within the context of the evidence admitted at trial, provided a sufficient basis for a rational trier of fact to conclude beyond a reasonable doubt that the appellant indecently assaulted A1C JP as charged. Further, we ourselves are convinced beyond a reasonable doubt that the appellant is in fact guilty.

Conclusion

We conclude the approved findings and 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). Accordingly, the approved findings and sentence are

AFFIRMED.

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