IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **E.E. GEISER** **F.D. MITCHELL**

UNITED STATES

v.

MICHAEL A. BARSIC
Aviation Ordnanceman Airman (E-3), U. S. Navy

NMCCA 200400830 Decided 28 November 2006

Sentence adjudged 19 December 2003. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LCDR JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
LT TYQUILI R. BOOKER, JAGC, USN, Appellate Government Counsel

MITCHELL Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of unauthorized absence; and, contrary to his pleas, of bigamy, indecent assault, and indecent exposure, in violation of Articles 86 and 134, Uniform Code of Military Justice, 10 U.S.C. § 886 and 934. The appellant was sentenced to a dishonorable discharge, confinement for 4 years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant asserts three assignments of error. The first and second assigned errors contend that the evidence is factually and legally insufficient to support a conviction for bigamy, indecent assault or indecent exposure. The appellant's final assignment of error avers that a sentence including a dishonorable discharge and four years confinement is inappropriately severe.

We have examined the record of trial, the three assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Factual and Legal Sufficiency

In his first assignment of error, the appellant contends that the Government failed to prove beyond a reasonable doubt that his bigamy was not the result of an honest and reasonable mistaken belief that his first marriage had been legally dissolved. In his second assignment of error, the appellant asserts that the evidence was factually and legally insufficient to support convictions for indecent assault and indecent exposure. We disagree on both points and decline to grant relief.

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.

1. Bigamy (Specification 1 of Charge III)

Conviction of bigamy[1] requires proof beyond a reasonable doubt:

(1) That the appellant had a living lawful spouse,

(2) That while having such spouse the accused wrongfully married another person; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 65(b).

armed forces or was of a nature to bring discredit upon the armed forces.

The appellant was married to his first wife, Mrs. Kimberly Barsic, on 14 February 1994, in Midland, Texas. The appellant joined the Navy in December 1994. Mrs. Barsic initially remained in Texas but eventually moved with the appellant when he was stationed in San Diego. She remained there with him for approximately two and a half months and then she returned to Midland, Texas. Mrs. Barsic testified that in February or March 1997, she realized things with her husband were not going to improve and both she and appellant filed for a divorce. Record at 119.

The divorce proceeding was delayed when Mrs. Barsic became pregnant in 1997. According to the evidence, although the appellant wasn't the father of the child, the state of Texas will not grant a divorce if the wife is pregnant. Record at 119. Mrs. Barsic gave birth to a daughter on 29 April 1998.

Mr. Paul Williams was the appellant's lawyer for the intended divorce from Kimberly Barsic. He testified that, to his knowledge, no formal divorce decree was ever issued in that case. Mr. Williams did note, however, that he forwarded a "prospective" divorce decree to the appellant which included several blank spaces which the appellant signed and returned to him. Record at 145-47 and Defense Exhibit B. The witness acknowledged that he has been sanctioned on several occasions by the Texas Bar for failing to communicate adequately with clients, but thereafter declined to answer questions relating to his specific conversations with the appellant citing to Texas Bar Rules relating to "attorney/client confidentiality." There is no evidence in the record of trial that the appellant was ever informed by Mr. Williams or anyone else that his divorce was final.

On 17 July 1999, the appellant met Ms. Jennifer Russo in Pensacola, Florida. Ms. Russo and the appellant began dating and she subsequently moved to San Diego in 2000 to be with him. During the courtship, the appellant told Ms. Russo that he had been married before but was divorced in 1998. The appellant additionally showed her a document from the Navy ostensibly indicating that he was divorced. Record at 75 and 76. They were married on 14 March 2001 and a child was born to the couple on 28 August 2001. Ms. Russo ultimately discovered that the appellant was still married when she found a document in a box of papers captioned, "In the matter of the Marriage of Kimberly

Latrice Barsic and minor child Michael Ray Barsic, September 28th, 2001." Record at 93.

Appellant contends that the Government did not prove beyond a reasonable doubt that he did not have an honest and reasonable belief that he was legally divorced from Kimberly Barsic. He supports this argument, in part, by asking the court to infer that, because Ms. Russo had an honest and reasonable belief that he was divorced, so did he. Given that Ms. Russo's beliefs were based entirely on the appellant's assurances and a document generated with information provided by the appellant, we decline to make such an inference. The appellant indicates in his brief that he showed Ms. Russo a divorce decree and she therefore believed that appellant was divorced. That is a mischaracterization of the evidence presented at trial. The only document mentioned in Ms. Russo's testimony was the one appellant showed her from the Navy. Ms. Russo did in fact testify that she thought the appellant was divorced. When asked on cross-examination by the Defense, "You knew this because he showed you a divorce decree, correct?" Her response was, "He showed me a paper. . ." Record at 93. Additionally, there is no evidence from the record to show that the appellant shared with Ms. Russo the fact that he visited his lawyer in January 2001 (three months prior to their marriage) and received a document from him concerning his still pending divorce proceedings (DE B). This was the document she ultimately discovered reflecting that he was still married.

Additionally, the record contains a "certificate of marriage" indicating that the appellant married Ms. Russo on March 14, 2001 (PE 2). This certificate reflects that this was the "first marriage" for the appellant. This information provided by the appellant was clearly false and reveals that the County of San Diego marriage certificate was fraudulently obtained by the appellant. Further, the appellant signed an accompanying affidavit attesting that the provided information was true.

In order to prevail on his assignment of error, the appellant must show not only that he had an honest belief his marriage to Kimberly Barsic had been legally dissolved prior to his marriage to Ms. Russo, but also that he had "taken such steps as would have been taken by a reasonable man, under the circumstances, to determine the validity of that honest belief... before relying thereon in such a serious setting as the present one." *United States v. Bateman*, 23 C.M.R. 312, 314 (C.M.A. 1957)(quoting *United States* v McCluskey, 20 C.M.R. 261(C.M.A.

1955)). The appellant's reliance on a single, undated, unsealed and unsigned document from his attorney, which included numerous blank areas to be filled in was not sufficient to meet a standard of reasonableness. Considering all of these circumstances, the appellant's conduct was clearly both prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Based on the entire record of trial, we conclude that the evidence demonstrates beyond a reasonable doubt that the appellant did not have an honest and reasonable belief that his marriage to Kimberly Barsic had been legally dissolved. We further find that a reasonable finder of fact could have found each of the elements of Specification 1 of Charge III beyond a reasonable doubt. Taking into account the fact that we did not see and hear the witnesses, we too are convinced beyond a reasonable doubt that the appellant is guilty of Specification 1 of Charge III.

2. Indecent assault and indecent exposure. (Specifications 2 and 3 of Charge III).

Conviction of indecent assault[2] requires proof beyond a reasonable doubt:

(1) That the appellant assaulted a certain person not the spouse of the appellant in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the appellant; and

(3) That, under the circumstances, the conduct of the appellant 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.[3]

Conviction of indecent exposure[4] requires proof beyond a reasonable doubt:

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[2] MCM, Part IV, ¶ 63(b).

[3] The Military Judges Bench Book, Dept. of the Army Pamphlet 27-9 (Ch.1, 30 Jan 1998) further elaborates on these elements and breaks them up into into seven separate elements.

[4] MCM, Part IV, ¶ 90(b).

(1) That the appellant exposed a certain part of his body to public view in an indecent manner;[5]

(2) That the exposure was willful[6] and wrongful; 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.

The appellant's sister, Mrs. Brockington, testified that in January 2001, the appellant was staying at her home in Midland, Texas. She stated that the appellant called her into the living room and when she arrived, she found the appellant ". . .sitting like Indian style on the couch completely naked, masturbating and watching pornography on the TV." Record at 157. After a brief conversation in which Mrs. Brockington tried to explain to the appellant that his actions were wrong, he propositioned her twice offering her $50.00 and later $100.00 if she would let appellant rub his penis on her. She continued to try to convince her brother that this wrong, but to no avail. Mrs. Brockington testified that she then went to her room, read part of a book and fell asleep. She was awakened at approximately 0300 when she felt the appellant's finger being inserted into her vagina. She saw the appellant with his left hand on her vagina and his right hand on his penis masturbating himself. Mrs. Brockington ordered the appellant to leave her home, which he did. She did not call the police, her mother, girlfriends or anyone else that night. She did tell her husband about the incident when he called from out of town later that morning.

The appellant contends that the convictions for indecent exposure and indecent assault are factually and legally insufficient due to inconsistencies in the Government's evidence. We have no difficulty concluding the evidence is legally sufficient to support the convictions for indecent exposure and indecent assault and that a reasonable finder of fact could have found the appellant guilty beyond a reasonable doubt of Specifications 2 and 3 of Charge III.

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[5] MCM, Part IV, ¶ 90(c). Indecent signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

[6] MCM, Part IV, ¶ 88(c). Willful means an intentional exposure to public view.

The test for factual sufficiency is more favorable to the accused. It requires this court to be convinced beyond a reasonable doubt, after making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325; *see also* Art. 66(c) UCMJ. Proof beyond a reasonable doubt does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J 506 (A.F.C.M.R. 1984)). The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. See *United States v. Washington* 57 M.J. 394, 399 (C.A.A.F. 2002).

The appellant relies on minor differences in the testimony of witnesses to support his contention. It should be noted that the events these witnesses were asked to recall happened two years prior to trial and that the differences in their recollections related to inconsequential matters.

We are convinced beyond a reasonable doubt that the appellant exposed his penis to Mrs. Brockington and masturbated in front of her. We further find beyond a reasonable doubt that the appellant committed an indecent assault upon his sister by placing his fingers into her vagina. Taking into account that we did not see and hear the witnesses, we are convinced beyond a reasonable doubt that the appellant is guilty of Specifications 2 and 3 of Charge III.

Appropriateness of Sentence

In his third and final assignment of error, the appellant asserts that his sentence is inappropriately severe and requests that we approve only a bad-conduct discharge and two years confinement. We decline to grant relief.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets what he deserves." *Unites States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'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, 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)).

The appellant was convicted of bigamy; being in an unauthorized absence status from 15 January 2003 until apprehended on 20 August 2003; and, indecent assault and indecent exposure involving his sister. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling,* 14 M.J. at 268.

Conclusion

The approved findings and sentence are affirmed.

Chief Judge ROLPH and Senior Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court