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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Leonard Y. DURAN
Hull Maintenance Technician Second Class (E-5), U.S. Navy

NMCCA 200000781 Decided 22 June 2005

Sentence adjudged 6 January 2000. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
JOSEPH W. KASTL, Civilian Appellate Counsel
LT. R.S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel
LT C.J. GRAMICCIONI, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of indecent acts and liberties with a child, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 3 years, and reduction to pay grade E-1, recommending that the convening authority suspend all confinement in excess of 27 months contingent upon the appellant's successful treatment as a sexual offender. The military judge also recommended that the convening authority defer and waive automatic forfeitures. The convening authority approved the sentence as adjudged. There was no pretrial agreement.

We have carefully considered the record of trial, the appellant’s assignments of error contending that the evidence is legally and factually insufficient, and that he was denied effective assistance of counsel (submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)). We have also

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

Sufficiency of Evidence -- Indecent Acts

In his first assignment of error, the appellant contends that the Government failed to prove beyond a reasonable doubt that he committed indecent acts upon "KK" because her testimony was unreliable and uncorroborated. The appellant avers that this court should disapprove the findings of guilty to the Charge and its sole specification. We decline to do so.

The appellant was charged with and found guilty of indecent acts and liberties with a child on one occasion in April 1999. The evidence of indecent acts consists of KK's trial testimony that she knew the appellant because his wife provided care to KK's ailing grandmother. KK stated that she occasionally went to the appellant's home to play with his 2-year old grandson. It was on one such visit that the indecent acts occurred when KK slept at the appellant's residence. KK testified that she took a shower and then went to bed after watching television. As she slept, the appellant entered the bedroom and put her hand on his erect penis. KK pretended to be asleep and pulled her hand away. Record at 162. The appellant again placed her hand on his penis, and KK rolled onto her side. The appellant then pushed KK over and rubbed outside and inside her "private" area. He then "poked" her vagina with his finger. *Id.* at 163-64. She heard a "bang" and the appellant left the room, returning 5-10 seconds later to ask her "what's wrong." *Id. at 166.* At the time of the incident, KK was age 9 and not married to the appellant.

KK further testified that she did not yell when the appellant touched her or report his misconduct immediately thereafter because she was afraid of the appellant. Record at 167. On the day following the incident, however, KK went to church with the appellant and played basketball with him. *Id.* at 169. She explained her continued contact with the appellant, stating that she felt "stuck" at the appellant's home. *Id.* at 167. Later, the appellant invited her to return the following weekend, but she "made up excuses" not to do so. KK further testified that she was afraid that the appellant "would do something even worse to [her]." *Id.* at 170.

Afterwards, KK confided in her girlfriend as to what had happened at the appellant's home, and her girlfriend told KK that she would tell her parents if KK did not. KK then told her older brother (and later, her school guidance counselor) what had occurred with the appellant. Record at 172.

To support its case, the Government also called Special Agent "M" from the Naval Criminal Investigative Service (NCIS).

Special Agent M testified that he observed KK's interview with local child protective service (CPS) personnel and subsequently set up, and recorded, a phone conversation between KK and the appellant. Although the appellant did not admit culpability during the phone conversation, the appellant did ask KK if she had already told her mom what had happened. He also suggested that KK only talk about it in front of him and his wife. *Id.* at 215, 241.

Mrs. "AK", the victim's step-mother, testified that KK's older brother told her that she needed to speak to KK but didn't indicate why. Initially, KK did not want to talk to Mrs. AK but then told her what had happened. KK appeared "very upset" as she related the incident. Record at 223-24. However, Mrs. AK conceded that KK had lied in the past and had continued lying to cover up her lie. *Id.* at 229.

The defense vigorously cross-examined KK and sought to discredit her by highlighting inconsistencies in her testimony concerning details of the incident. These inconsistencies included KK's initial statement to CPS in which vaginal penetration is not discussed, as well as how the appellant and KK were clothed and positioned at the time of the incident.

The defense also presented evidence on the merits by calling the appellant's wife, "Mrs. SD," who testified that she had been employed by KK's family until the alleged incident. She testified that she is a light sleeper and knows when the appellant gets up and gets back into their bed. On the night of the incident, Mrs. SD testified that the appellant never left their bed. Record at 251-52. On the next day, she testified that everyone got up at about 8 a.m. and went to church. Mrs. SD didn't notice anything unusual about KK. *Id.* at 256-58. She also testified that KK disliked the appellant because he disapproved of KK's brother and her brother's friends. *Id.* at 263, 275-6.

The appellant took the stand in his own defense and testified that the alleged incident never happened. The appellant further testified that he occasionally disciplined KK and her brother when they gave his wife (Mrs. SD) a hard time. Record at 300. He described KK as "hard-headed" and manipulative. He also described a confrontation he had with KK's brother's friends because he heard them talking about drugs.

In recounting the events on the night of the alleged incident, the appellant stated that KK went to bed first. He asserted that he never got out of bed that evening after KK went to sleep. Record 304. The next morning, he noticed no change in KK's personality, and they spent the day playing basketball, as they had done many times before. *Id.* at 305.

The appellant next explained his phone conversation with KK that was recorded by NCIS. He testified that he had been working

the night before the call and was tired. He further testified that he was both "surprised" and "concerned" when he received the call. He explained that he wanted to talk to KK about the allegations with her parents and his wife present. Record at 311-12. He adamantly denied touching KK inappropriately, "[a]s God as my witness." *Id.* at 312. Finally, the appellant admitted he had received nonjudicial punishment for fraud, explaining that he didn't know his divorce was final while he continued to receive housing allowances. On cross-examination, the appellant also admitted that he previously had money problems and had written checks that bounced.

The elements of the appellant's offense are as follows:

> (1) That the accused committed a certain act upon or with the body of a certain person;
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> (2) That the person was under 16 years of age and not the spouse of the accused;
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> (3) That the act of the accused was indecent;
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> (4) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, 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 (1998 ed.), Part IV, ¶ 87b(1).

We begin by noting that "[t]he 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,' [this] court 'is convinced of the [appellant's] guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)); *see* Art. 66(c), UCMJ. Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). Our task here is to determine whether KK's testimony and its corroborating evidence were sufficient to convict the appellant.

We have carefully considered the evidence presented at trial, keeping in mind that the fact-finder saw and heard all the witnesses. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant's allegations regarding KK's credibility and possible motive to fabricate were

fully developed at trial and ably argued before the trial court. After careful review of the record, we find that KK's testimony was credible and partially corroborated by the other evidence adduced at trial. We further find that the appellant's acts were both prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. We have no difficulty concluding that a reasonable fact-finder could find the appellant guilty of indecent acts and liberties with a child. We conclude that the evidence presented was both legally and factually sufficient to sustain the appellant's conviction. We are also convinced beyond a reasonable doubt of the appellant's guilt. We, therefore, decline to grant the requested relief.

Effective Assistance of Counsel

The appellant also asserts that he was denied the effective assistance of counsel because his trial defense team was deficient in several aspects of their investigation and trial strategy.[1] We find no deficient performance by counsel.

The U.S. Supreme Court has articulated two prongs that an appellate court must find before concluding that relief is required for ineffective assistance of counsel -- deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id*. This Constitutional standard applies equally to military cases. *See United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). The Strickland two-part test applies to guilty pleas and sentencing hearings that may have been undermined by ineffective assistance of counsel. *See United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000)(citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)). In order to show ineffective assistance, however, an appellant must surmount a very high hurdle. *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). Here, the appellant falls short of the mark.

Trial defense counsel have a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary. *See United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002); *United States v. Brownfield*, 52

[1] The appellant cites 24 areas of concern regarding the performance of his trial defense counsel team and raises "20 Disturbing Questions" in a 27-page affidavit dated 21 Feb 2001. In this affidavit, the appellant alludes to his defense team's inexperience, purported lack of a trial strategy or "solid trial plan," no real investigation," his inadequate preparation for cross-examination, their imprudent forum election advice, and other performance shortfalls. As discussed further above, we find no merit in these complaints.

M.J. 40, 42 (C.A.A.F. 1999). We do not look at the success of a trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. *See United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001).

Here, the appellant's assertions of ineffective assistance of counsel constitute nothing more than bare allegations concerning counsels' perceived omissions, supported only by his own self-serving affidavit. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). We will not presume that counsel did not investigate or research potential avenues of defense, particularly where the appellant indicated his satisfaction with counsel several times during the proceedings. As to the issue of forum election, the appellant himself chose trial by military judge alone after being appropriately informed of his forum election rights by the military judge. As to the issue of lack of trial plan, it is abundantly clear from the record that the trial defense team aggressively pursued a strategy designed to discredit the Government's complaining witness and undermine her accusations of abuse. As to the decision to call or not call certain witnesses, those decisions are tactical decisions within the professional judgment of the counsel that we will not "second guess" absent compelling circumstances. As to the issue of preparation of the appellant for cross-examination, the appellant's testimony was clear and ably presented. That he did not have "all the answers" to hard questions posed by the Government counsel is more likely a product of the crucible of cross-examination rather than inadequate preparation by his own counsel. Finally, we note that the appellant's trial defense team presented a strong case on the merits, especially in challenging the Government's evidence and in obtaining a judicial view of the crime scene to place the evidence in proper context, as well as in providing significant extenuation and mitigation evidence, resulting in a sentence to confinement considerably less than the statutory maximum punishment.

Simply put, we find that the appellant's numerous contentions of ineffective assistance of counsel are nothing more than "buyer's remorse" arising from his subsequent conviction and punishment rather than deficiencies of criminal defense representation. Thus, we hold that the appellant has not met his burden in demonstrating ineffective assistance of counsel and decline to grant relief on this basis.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court