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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Brian K. RICHARDSON
Aviation Maintenance Administrationman First Class (E-6), U.S. Navy

NMCCA 200001149 Decided 22 February 2005

Sentence adjudged 5 February 2000. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Great Lakes, IL.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT CHRISTOPHER J. HAJEC, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of violation of a general regulation proscribing sexual harassment (two specifications), violation of a lawful order, false official statement (three specifications), indecent assault (three specifications) and indecent exposure. The appellant's offenses violated Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. A general court-martial composed of officer and enlisted members sentenced the appellant to confinement for 90 days, reduction to pay grade E-1 and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant asserts the following errors: (1) military judge failed to sever some of the charges; (2) legal and factual insufficiency of evidence for charges involving Seaman Recruit (SR) C; (3) unreasonable multiplication of charges relative to orders violations, indecent exposure and assaults; (4) unreasonable multiplication of charges relative to a general order/regulation and a local order; and (5) sentence inappropriateness.

We have carefully considered the record of trial, the assignments of error, and the Government's response. Except as noted below, 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 was committed. Articles 59(a) and 66(c), UCMJ.

Background

The appellant was charged with a number of offenses against four alleged victims: SR C, SR V, SR B, and Mr. T. SR C and SR V are both female. SR B is male. Each of the three alleged active duty victims was a recruit undergoing basic training and was subject to the appellant's control in his duties as a Recruit Division Commander. Mr. T was a civilian contractor doing work in a building where the appellant was also working.

Severance of Charges

The appellant asserts that the military judge committed prejudicial error by failing to sever some of the charges. Specifically, he contends that the military judge erroneously denied a motion that sought to split the charges into three separate trials: one trial for charges involving SR C and SR V, one trial for SR B, and one trial for charges involving Mr. T. We disagree.

We review a military judge's decision denying a motion to sever for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999); *United States v. Evans*, 55 M.J. 732, 744 (N.M.Ct.Crim.App. 2001). Our superior court has summarized the law on severance of charges:

> The military justice system encourages the joinder of all known offenses at one trial ([RULE FOR COURTS-MARTIAL 601(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.)]), and permits a motion for "severance of offenses ... only to prevent manifest injustice." R.C.M. 906(b)(10). "In general, 'an abuse of discretion will be found only where the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal.'" *United States v. Duncan*, 53 M.J. 494, 497-98 ([C.A.A.F.] 2000), quoting *United States v. Alexander* 135 F.3d 470, 477 (7th Cir.), cert. denied, 525 U.S. 855, 142 L. Ed. 2d 110, 119 S. Ct. 136 (1998).
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> To determine whether a military judge has failed to prevent a manifest injustice and denied an appellant a fair trial, we apply the three-prong test

found in *United States v. Southworth*, 50 M.J. 74, 76 ([C.A.A.F.] 1999).

United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002). The three-prong test from *Southworth* is: (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover. *Southworth*, 56 M.J. at 464-65.

Assuming, without deciding, that evidence of one offense against SR C, for example, would not be admissible proof of charges against SR B, we conclude that the other two factors clearly weigh in favor of the military judge's ruling. The military judge gave the standard "spillover" instruction from the Military Judge's Benchbook without objection from the defense team:

> Spill-over. Now, each offense must stand on its own, and you must keep the evidence of each offense separate. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt. Proof of one offense carries with it no inference the accused is guilty of any other offenses. The number of offenses charged has absolutely no bearing on whether the accused committed a particular offense or any offense.

Record at 916; *See* Department of the Army Pamphlet 27-9 at 859 (30 Jan 1998). We presume that the members followed that instruction in their deliberations, as they promised they would do during voir dire. *See United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000).

We also note that, in determining whether the findings reflect an impermissible crossover, the defense team expertly oriented the members to the dangers of spillover during voir dire. Moreover, the trial counsel clearly warned the members against spillover during his argument on findings.[1] Finally, and most significantly, the members acquitted the appellant of all charges relative to SR V, thus indicating that they understood and applied the military judge's spillover instruction, as well as all other relevant instructions.

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[1] "Now, let me ask you to promise do not take these cases and jumble them together. They are separate cases, four separate cases and four separate events. Do not think for one minute just because one happened, the other one must have occurred. That is improper. Take each one case and judge it for what it is worth. The judge is going to instruct you it's called spillover; follow it. And the Government is very secure that you will find him guilty of everything because the Government has provided enough evidence for each individual charge, each individual event on its own. They can stand alone." Record at 849.

We hold that the military judge did not abuse his discretion in denying the motion to sever. Accordingly, the assignment of error is without merit.

Sufficiency of Evidence

The appellant asserts that the evidence is legally and factually insufficient as to sexual harassment, indecent assault and indecent exposure involving SR C. We disagree.

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> under Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

We hold that, except as noted below, a reasonable factfinder could have found, beyond a reasonable doubt, that the appellant committed each of the charged offenses. Moreover, upon careful consideration of the evidence, as excepted, we are convinced beyond a reasonable doubt that the appellant is guilty of those offenses.

While we conclude that the evidence of the appellant's offenses involving SR C is legally and factually sufficient, we conclude that some exceptions are necessary. Based on our examination of the evidence of record, the appellant exposed himself to SR C on one occasion, not on divers occasions, as charged in Specification 3 of Charge III. Also, we note that the members found the appellant guilty, as charged, of "failing to refrain from touching female recruits in a sexual manner and using language of a sexual nature toward female recruits" under Specification 4 of Charge I. Charge Sheet. Based on our examination of the evidence of the record, and considering the findings acquitting the appellant of the charges relative to SR V, we conclude that there is insufficient evidence to support the quoted references to female *recruits* in the plural. There is sufficient evidence to support a finding of guilty relative to *a female recruit* in the singular, namely, SR C. Accordingly, we will provide relief below.

Sentence Severity

The appellant argues that a dishonorable discharge is inappropriately severe, particularly given the punishment of only 90 days of confinement. We disagree.

As a first class petty officer, and as a Recruit Division Commander, the appellant held a special position of trust and confidence. On several occasions, he violated that trust. His victims were male and female, military and civilian. Taken as a whole, we regard his offenses in this case as extremely serious and patently dishonorable.

We have also considered the appellant's exemplary record of prior service, including many laudatory evaluations, commendations and awards. We are particularly impressed with the fact that a petty officer of about 12 years of active duty was awarded the Navy-Marine Corps Achievement Medal on five occasions.

We do not know why the members awarded a dishonorable discharge and only 90 days of confinement. Moreover, the appellant has not persuaded us that such a combination of punishments raises the issue of sentence inappropriateness as to the punitive discharge. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. In Specification 4 of Charge I, we except the words "female recruits" in line 11 and line 12 and substitute therefor "a female recruit" in both places. In Specification 3 of Charge III, we except the words "on divers

occasions." The excepted language in these specifications is set aside and dismissed. The findings as to those specifications, as excepted and substituted, are affirmed. The findings of all other charges and specifications are affirmed.

Given our modifications of the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). As reassessed, we conclude that the sentence is both appropriate and no greater than that which would have been imposed if the errors had not been committed. Accordingly, the sentence, as approved by the convening authority, is affirmed.

Judge HEALEY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court