IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Private First Class (E-3)
WILLIS A. GRANT
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE ON SPECIFIED ISSUE

Docket No. ARMY 20200645

Tried at Fort Stewart, Georgia, on 19 March, and 6 August 2019 and 14 January, and 12–13 November 2020 before a general court-martial convened by Commander, Fort Hood, Colonel David H. Robertson and Christopher E. Martin, and Lieutenant Colonel Trevor I. Barna, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR SPECIFICATION 3 OF CHARGE II.

PANEL NO. 3

Statement of the Case

The case was docketed with this court on 19 July 2021. (Referral and Designation of Counsel). Appellant filed his initial brief on 6 February 2021. The government filed its brief on 4 April 2022, and appellant replied on 11 April 2022. This court ordered additional briefing on the specified issue on 17 May 2022. *United States v. Grant*, Army 20200645 (Army Ct. Crim. App. 17 May 2022) (order).

Statement of Facts

Appellant and his wife, [redacted] lived in separate states after appellant threatened to kill her and her dogs.[1] (R. at 172–73). However, [redacted] agreed to visit appellant at Fort Stewart, Georgia, when appellant received orders to deploy to South Korea in February 2018. (R. at 175–76). At the time, appellant shared a "pretty big" four-bedroom house with Sergeant [SGT] BG, a soldier from appellant's unit. (R. at 261, 263). Appellant's room was located "all the way in the back of the hallway," approximately twenty feet away from SGT BG's bedroom, which was located in the middle of the hall. (R. at 261). A full-sized bathroom comprised of a toilet, shower, and "solid walls" separated appellant's bedroom from SGT BG's bedroom. (R. at 262).

[1] [redacted] lived in Missouri, and appellant was stationed at Fort Stewart, Georgia. (R. at 173, 175).

Appellant, DP, [redacted] and her daughter returned to appellant's shared home after spending the day out for lunch and a movie.[2] (R. at 180). While KG's daughter and DP played video games in the next room, [redacted] spoke with appellant in his room.[3] (R. at 180). During their conversation, appellant "smacked [redacted] so hard that [she] fell off the bed." (R. at 181). [redacted] was so startled by the unprovoked blow that she screamed. (R. at 181). [redacted] speculated that appellant did not continue his assault because of her scream and the presence of others in the home. (R. at 181).

Specified Issue

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR SPECIFICATION 3 OF CHARGE II.

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

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[2] Although [redacted] only referred to the witness by his last name, the witness's full name is DP. (R. at 218). The preliminary hearing officer's report, which was not a part of the Record of Trial, indicates that DP was a Private at the time of the assault. (Preliminary Hearing Officer's Report, p. 3).

[3] The record does not reflect the distance between appellant's bedroom and the video game room, nor does the record indicate the volume of the video games or whether the doors to any of the rooms were closed during the assault.

Law

The standard for legal sufficiency 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." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citation omitted). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996) (citation omitted).

"The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses," this court is convinced of appellant's guilt beyond a reasonable doubt. *United States v. Craion*, 64 M.J. 531, 534 (Army Ct. Crim. App. 2006) (citing *Turner*, 25 M.J. at 325). "In sum, to sustain appellant's conviction, [this court] must find that the government has proven all essential elements and, taken together as a whole, the parcels of proof credibly and coherently demonstrate that appellant is guilty beyond a reasonable doubt." *United States v. Gilchrist*, 61 M.J. 785, 793 (Army

Ct. Crim. App. 2005). Proof beyond a reasonable doubt does not require that the evidence be free from all conflict. *United States v. Trigueros*, 69 M.J. 604, 612 (Army Ct. Crim. App. 2010) (quoting *United States v. Rankin*, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006)).

This court has explained that where "witness credibility plays a critical role in the outcome of trial this Court should hesitate to second-guess the trial court's findings." *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). This court, sitting en banc, explained, "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); see also *United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012) (affirming where the findings turned on witness credibility).

Argument

A. Appellant's conviction for Specification 3 of Charge II was legally insufficient.

The evidence establishes, beyond a reasonable doubt, that appellant committed an assault consummated by battery when he "smacked" [redacted] because he "(a) . . . did bodily harm to a certain person; and (b) [t]hat the bodily harm was done with unlawful force or violence." 10 U.S.C. § 928; *Manual for Courts-*

Martial, United States (2016 ed.) [*MCM*], pt. IV, ¶54b.(2). However, the government charged the misconduct as:

> In that [appellant] U.S. Army, did, at or near Fort Stewart, GA, between on or about 1 February 2018 and on or about 19 February 2018, unlawfully *push [redacted] in the torso with his hands* and slap [redacted] *on the face with his hand*.

(Charge Sheet) (emphasis added).

"[O]nce that charging decision was made, [the government] was bound to abide by it." *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019). The evidence does not specify where appellant's "smack" landed on KG's person—only that a "smack" occurred. Thus, the evidence is legally insufficient to prove beyond a reasonable doubt that appellant both pushed [redacted] on her torso with his hands and slapped her face with his hand. Additionally, while this court can affirm a lesser included offense on appeal, Article 59(b), UCMJ, this court cannot affirm a finding of guilt based on a broader theory than what was charged at trial. *English*, 79 M.J. at 120. Here, affirming only the "smack"—absent a means or location—would be a broader theory than what was charged. Accordingly, this court should dismiss Specification 3 of Charge II.[4]

[4] This court need not analyze whether appellant's conviction for Specification 3 of Charge II was factually sufficient as appellee concedes that the conviction was legally insufficient based upon the wording of the specification and the evidence adduced at trial.

B. This court should affirm the adjudged sentence.

Nevertheless, this court can reassess and affirm appellant's adjudged sentence. To determine when sentence reassessment is appropriate after findings are set aside, courts consider: (1) dramatic changes in the penalty landscape; (2) whether sentencing was by military judge or panel; (3) whether the remaining offenses capture the gravamen of the criminal conduct and whether the same aggravating circumstances remain admissible as to the remaining offenses; and (4) whether the remaining offenses are of the type the judges of the court should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial. *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013).

If this court dismissed Specification 3 of Charge II, the maximum penalty landscape would only change from thirty-four years and six months of confinement to thirty-fours years of confinement. *MCM*, App'x 12. Additionally, the military judge sentenced appellant to well below the maximum sentence to confinement: three years and a dishonorable discharge. (R. at 391; Statement of Trial Results). Appellant would remain convicted of the gravamen of his offenses: one specification of sexual assault, two specifications of assault consummated by battery, and one specification of wrongfully communicating a threat. (Statement of Trial Results). These offenses are well within the "experience and familiarity" of

this court to reliably determine an appropriate sentence. *Winckelman*, 73 M.J. at 15–16. Consequently, this court can be certain appellant would have received at three years' confinement and a dishonorable discharge, and this court should affirm appellant's sentence.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the sentence.

[redacted]
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CERTIFICATE OF SERVICE, U.S. v. GRANT (20200645)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 8th day of June, 2022.

[redacted]
Senior Paralegal Specialist
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