UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SQUIRES, CASIDA, and TRANT
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant JAIRAJ ARJOON
United States Army, Appellant

ARMY 9700995

1st Cavalry Division
L.S. Merck and K. H. Hodges, Military Judges

For Appellant: Colonel John T. Phelps II, JA; Colonel Adele H. Odegard, JA; Captain Kirsten V. Campbell-Brunson, JA (on brief).

For Appellee: Colonel Russell S. Estey, JA; Lieutenant Colonel Eugene R. Milhizer, JA; Captain Mary E. Braisted, JA (on brief).

17 September 1999

MEMORANDUM OPINION

TRANT, Judge:

Contrary to his pleas, appellant was convicted by a general court-martial composed of officer and enlisted members of willfully disobeying a superior commissioned officer, willfully disobeying the lawful order of a noncommissioned officer, forcible sodomy, assault consummated by a battery, aggravated assault, committing indecent acts and taking indecent liberties with a child, communicating a threat, and obstructing justice, in violation of Articles 90, 91, 125, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 891, 925, 928 and 934 [hereinafter UCMJ]. The convening authority approved the adjudged sentence to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to Private E1. Appellant was credited with seventy-four days of confinement against the sentence to confinement.

This case is before the court for automatic review under Article 66, UCMJ. Appellant's assignment of error, that the military judge abused his discretion by failing to declare a mistrial, is without merit.

Although not raised by appellant, we do, however, have some concern with the factual sufficiency of the forcible sodomy conviction. The victim of the alleged forcible sodomy, appellant's step-daughter, E.K., was eight to nine years old at the time of the offense and thirteen years old at the time of trial. She testified that on nine to ten occasions between June 1993 and January 1994 appellant molested her, i.e., he pulled down her pants and started "licking her privates" despite her protestations to stop. When asked what she meant by "privates," E.K. stated, "He would just lick me down there [indicating her groin area]." Later in the direct examination, trial counsel returned to this issue, and the following colloquy ensued:

Q: When your stepdad was touching you, where was his mouth?

A: Between my legs.

Q: How do you know that?

A: Because I would sometimes look at him and tell him to stop.

Q: What was he doing with his mouth?

A: Licking between my legs. He had my legs spread apart.

Q: Would you hold your legs apart or would he hold them for you?

A: He'd hold them for me. I would try to close them, but he would keep holding them.

On cross-examination, the defense counsel further explored this issue with the following colloquy:

Q: Now, [trial counsel] asked you about how he licked your private.

A: Yes.

Q: Would he lick your private on the outside?

A: No.

Q: Okay. He never licked your private on the outside?

A: Not that I remember.

. . . .

Q: [E.K.], would his tongue ever go inside your private?

A: No.

After laying the foundation for E.K.'s prior sworn statement to a Criminal Investigation Command agent, the defense counsel continued with the following colloquy:

Q: Can you read this highlighted portion here that I kind of circled?

A: "Did he ever penetrate you with his fingers or anything else?"

Q: And, what was your answer?

A: "No, just with his tongue."

Q: So, today, you're saying it was only on the outside, is that right?

A: Yes.

No further evidence or testimony was offered by either party on this issue.

This court will affirm only those findings of guilty that it finds to be correct in law and fact. *See* UCMJ art. 66(c). The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond reasonable doubt. *See United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The offense of forcible sodomy requires penetration, however slight. *See* UCMJ, art. 125. This case is analogous to *United States v. Cobia*, ARMY 9601645 (Army Ct. Crim App. 25 Aug. 1998)(unpub.), wherein the evidence showed only that Staff Sergeant Cobia either "kissed" or "licked" his stepdaughter's vagina and the victim appeared to have used the term "vagina" to refer to the entire female sex organ. Therein, this court found the evidence of penetration to be insufficient. The instant case is distinguishable from *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988), *United States v. Tu*, 30 M.J. 587 (A.C.M.R. 1990), and *United States v. Ruppel*, 45 M.J. 578 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 247 (1998), all of which involved sodomy with children under sixteen years of age. In *Williams*, the evidence showed that Captain Williams licked his stepdaughter's clitoris (the innermost of a female's external genital organs), thus establishing the penetration required for a sodomy. Private First Class (PFC) Tu admitted to performing "oral sex" upon his victim by "kissing and licking the [victim's] vagina." Our court found

that "[t]he term 'oral sex' is synonymous with those acts which constitute oral sodomy, fellatio and cunnilingus," and that PFC Tu's admission supported a consummated act of sodomy. *See Tu*, 30 M.J. at 590 (citing *United States v. Yates*, 24 M.J. 114, 117 (C.M.A. 1987)). Finally, in *Ruppel*, the Air Force court found penetration where the evidence showed that the appellant placed his "mouth" on the victim's "private parts" and she put her "mouth" on appellant's penis.

In this case, E.K.'s trial testimony denied any penetration, in spite of her earlier out of court statement indicating penetration by appellant's tongue, ironically brought forth by the defense counsel, not the trial counsel. While "licking" does not refute the notion of penetration, *see United States v. Cox*, 18 M.J. 72 (C.M.A. 1984), it is not enough to establish proof of penetration under the facts of this case, *see United States v. Deland*, 16 M.J. 889 (A.C.M.R. 1983), *aff'd in part and rev'd in part on other grounds*, 22 M.J. 70 (C.M.A.), *cert. denied* 479 U.S. 856 (1986). However, as in *Cobia*, we do find the evidence sufficient to establish appellant's guilt beyond reasonable doubt of the lesser included offense of attempted forcible sodomy on his stepdaughter.

We have considered the errors personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and find them to be without merit.

The court affirms only so much of the findings of Charge IV and its Specification as finds the appellant committed attempted forcible sodomy in violation of Article 80, UCMJ. The remaining findings of guilty are affirmed. Reassessing the sentence in light of the error noted and the entire record, and applying the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the court affirms the sentence.

Senior Judge SQUIRES and Judge CASIDA concur.

FOR THE COURT:

JOSEPH A. NEURAUTER
Clerk of Court