UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, HERRING, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant NOEL G. AGUIAR-PEREZ
United States Army, Appellant

ARMY 20140715

Headquarters, I Corps
Andrew J. Glass, Military Judge (arraignment)
Jeffery D. Lippert, Military Judge (trial)
Colonel Randall J. Bagwell, Staff Judge Advocate

For Appellant: Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Payum Doroodian, JA (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Major Andres Vazquez Jr., JA; Captain Michael A. Gold, JA (on supplemental brief); Major Andres Vazquez Jr., JA; Captain Michael A. Gold, JA (on reply brief).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Daniel D. Derner, JA; Captain Vincent S. Scalfani, JA (on brief); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Melissa Dasgupta Smith, JA; Captain Vincent S. Scalfani, JA (on supplemental brief).

31 October 2016

SUMMARY DISPOSITION

HERRING, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of violating a lawful general order, seven specifications of cruelty and maltreatment, four specifications of abusive sexual contact, one specification of assault consummated by battery, and one specification of communicating a threat, in violation of Articles 92, 93, 120, 128, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 920, 928, 934 (2012) [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 350 days, and reduction to the grade of E-1.

This case is before us for review pursuant to Article 66, UCMJ. Appellant raises four allegation of errors, two of which merit discussion, and one of which merits relief. We have also considered those matters 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.

LAW AND DISCUSSION

A. Insufficiency of the Communicating a Threat Specification

The government charged appellant with wrongfully communicating to Private First Class (PFC)[*] LH a threat by stating, "if you open your mouth, your career will go downhill," and "if you open your mouth and say anything, you will regret it." We do not have to reach the issue of whether these statements constitute threats, because we hold Specification 2 of Charge V is factually and legally insufficient.

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test 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, 324 (C.M.A. 1987) (internal citations omitted); *see also United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, we are "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). The 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

During direct examination, SPC LH and the trial counsel had the following exchange regarding the communicating a threat specification:

> Q: And did you report this incident?
>
> A: No, ma'am, I did not.
>
> Q: Why not?
>
> A: Because I was just an E-1 and I didn't—I was embarrassed, and I didn't want to go through it.

[*] At the time of trial she had been promoted to Specialist (SPC).

> Q: Did the accused ever say anything to you that reinforce your view of your rank?
>
> A: He would just remind me out of the blue sometimes, that I was a private and no one believes privates.
>
> [. . .]
>
> Q: So you indicated that he told you that you were a f**king private, did he ever say anything else? Was he supportive of your career, or did he say anything else?
>
> A: He asked a couple times what did I want to do with my career, so I had explained to him that I wanted to drop a Green to Gold packet for mortuary science, and he would just explain to me that the packet had to go through him first, so I would want to watch myself if I wanted that to happen.

There is no further evidence of appellant stating to SPC LF: if you open your mouth, your career will go downhill," and "if you open your mouth and say anything, you will regret it." The record is devoid of any evidence of appellant communicating a threat to SPC LH. Specification 2 of Charge V is therefore factually and legally insufficient. Accordingly, we will provide relief in our decretal paragraph.

B. Military Rule of Evidence 413

Appellant cites *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016) to assert the military judge abused his discretion by granting the government's motion to use charged offenses for Military Rule of Evidence [Mil. R. Evid.] 413 purposes with respect to Charge I. The government charged appellant with six Article 120, UCMJ, specifications involving three different soldiers. The military judge found all six specifications were proven by a preponderance of evidence. However, he convicted appellant of only three specifications as charged and one specification with exceptions. He found appellant not guilty of Specifications 5 and 6 of Charge I.

This case is far different than *Hills* as appellant elected to be tried by a military judge sitting alone. *See*, *United States v. Hukill*, Army 20140939, 2016 CCA LEXIS 505, (Army Ct. Crim. App. 16 Aug. 2016). We do not share appellant's concern that his "presumption of innocence" was somehow eroded by the military judge's consideration of propensity evidence.

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). We are satisfied his view on the admissibility of propensity evidence under Mil. R. Evid. 413 was harmless beyond a reasonable doubt. This conclusion is supported by the fact that the military judge found appellant not guilty of two of the specifications. We find no risk the military judge would apply an impermissibly low standard of proof concerning both the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt. Simply put, we find nothing in the record to suggest the military judge did not hold the government to its burden of proving appellant's guilt beyond a reasonable doubt, or that the military judge applied a lesser standard in adjudicating the charges against the appellant.

CONCLUSION

Specification 2 of Charge V and Charge V are set aside and DISMISSED. The remaining findings of guilty are AFFIRMED. We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We are confident that based on the entire record and appellant's course of conduct, the military judge would have imposed a sentence of at least that which was adjudged, and accordingly we AFFIRM the sentence.

All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his sentence set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c), and 75(a).

Senior Judge CAMPANELLA and Judge PENLAND concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court