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(AFCMR)
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U.S. Air Force Court of Military Review.

UNITED STATES
v.
Senior Airman Michael C. WALKER,
FRXXX–XX–XXXX

No. ACM 29757.
July 6, 1993.

Before O'HAIR, SNYDER and GRUNICK, Appellate Military Judges

OPINION OF THE COURT

GRUNICK

***1** Appellant was convicted of attempted aggravated assault by engaging in unprotected sexual intercourse with an unsuspecting female airman and violating a "safe sex" order issued because of his positive Human Immunodeficiency Virus (HIV) identification, violations of Articles 80 and 90, UCMJ. The approved sentence includes a dishonorable discharge, 3 years confinement, forfeiture of $200 pay per month for 3 years, and reduction to E–1. While we find no prejudicial error and affirm, a discussion of some of the 5 assigned errors is appropriate.

Appellant was a 27–year–old married security policeman who was identified as being HIV positive in 1989. His commander issued a "safe sex" order requiring him to inform potential sexual partners of his HIV status and to use appropriate barrier protection, to include condoms. During the Memorial Day weekend of 1991, following an evening of drinking with friends, appellant invited Airman H to his dormitory room. Once inside the room, appellant and Airman H engaged in vaginal sexual intercourse at least twice during the remainder of the evening. Prior to their sexual relations he did not inform her of his HIV status and he failed to wear a condom during intercourse.

Pursuant to his pleas, appellant was found guilty of disobeying his commander's "safe sex" order. Appellant stipulated to his conduct but contested he was not guilty of aggravated assault as a result of the unprotected sexual intercourse. Trial defense counsel asserted there was no evidence appellant's body fluids contained the HIV virus, or that ejaculation occurred during intercourse with Airman H. Neither appellant nor the victim, Airman H, testified during the findings portion of the trial. The military judge found him guilty of attempted aggravated assault. Appellate defense counsel now contend the evidence is both factually and legally insufficient to support this finding of guilty to the lesser offense.

Under Article 66(c), UCMJ, we have the duty to review the record of trial to determine the legal and factual sufficiency of the evidence. "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 (C.M.A.1987) (citing *Jackson v. Virginia,* 443 U.S. 307 (1979)). The test for factual sufficiency is "whether, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner,* 25 M.J. at 325.

The government took the correct approach under the Code, charging aggravated assault, where HIV is the means alleged as likely to produce death or grievous bodily harm. *United States v. Johnson,* 30 M.J. 53 (C.M.A.1990). They also specifically pleaded semen, which carries HIV, as the method of transmission. *See Johnson* at note 5. When trial defense counsel pointed to the absence of evidence establishing the transmission of semen, the military judge found appellant guilty of attempted assault under Article 80, UCMJ. An attempt charge "includes an intent to commit a particular offense and the commission of an act not amounting to completion of the offense but constituting more than preparation for its perpetration." *United States v. Marshall,* 18 U.S.C.M.A. 426, 40 C.M.R. 138, 141 (C.M.A.1969). Although the military judge could have found appellant guilty of attempted aggravated assault under Article 128, his finding under Article 80 was not inappropriate.

***2** Appellate defense counsel's assertion that appellant only tested positive for HIV antibodies and not the virus is without merit. Testimony at trial established that when someone tests positive for HIV they are considered infectious. When a person becomes infected with HIV, the body eventually manufacturers antibodies. It is these antibodies that blood tests detect. The presence of

HIV antibodies from a blood test is evidence of the presence of the virus.

There is ample evidence in the record to support the trial court's determination appellant committed the offense of attempted aggravated assault. We have independently evaluated the evidence and are convinced beyond a reasonable doubt of appellant's guilt.

Appellant also complains Major George, a public health officer, testified beyond the scope of his expertise. The military judge considered his expert opinion as it pertained to the area of HIV transmission and prevention. Mil. R. Evid. 702 allows "[a]nyone who has substantive knowledge in a field beyond the ken of the average court member" to be qualified as an expert witness. It is clear from our review of the record, this witness' testimony was helpful to the factfinder and did not stray beyond the permissible scope of his expertise. *United States v. Nelson,* 25 M.J. 110 at 112 (C.M.A.1987), *cert. denied,* 484 U.S. 1061 (1988). We conclude the military judge ruled correctly.

The appellant contends he was denied due process and equal protection since his trial and intermediate appellate judges do not enjoy fixed terms. That issue was recently resolved adversely to the appellant's position in *United States v. Graf,* 35 M.J. 450 (C.M.A.1992). The Appointments Clause violations also asserted by appellant are without merit. *United States v. Weiss,* 36 M.J. 224 (C.M.A.1992), *cert. granted,* —— U.S. —— (1993).

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings and sentence are AFFIRMED.

O'HAIR, S.J. and SNYDER, J., concur.