

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Roddrick L. CARTER
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200601139

Decided 23 May 2007

Sentence adjudged 22 September 2004. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Air Ground Task Force Training Command, MCAGCC, Twentynine Palms, CA.

LT S.C. REYES, JAGC, USN, Appellate Defense Counsel
LT JANELLE LOKEY, JAGC, USN, Appellate Defense Counsel
Capt GEOFFREY SHOWS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, following the entry of mixed pleas, of conspiracy to commit larceny, two specifications of larceny, assault consummated by a battery,¹ three specifications of burglary, unlawful entry, indecent language, and theft of cell phone services in violation of Articles 81, 121, 128, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 921, 928, 929, and 934. The appellant was sentenced to confinement for 63 months, reduction to paygrade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

¹ This offense was originally charged as indecent acts with a child in violation of Article 134, UCMJ, however, the military judge found the appellant guilty, contrary to his pleas, of the lesser included offense of assault consummated by a battery in violation of Article 128, UCMJ. Record at 275.

We have reviewed the record of trial, the appellant's three assignments of error claiming: (1) the military judge erred by not suppressing part of the appellant's confession; (2) the evidence is factually and legally insufficient to support a finding of guilt as to Specification 1 under Charge V (assault consummated by a battery); and, (3) post-trial delay; and the Government's response. Although we do not find merit in the raised assignments of error, we conclude that the evidence is neither legally nor factually sufficient to support a finding of guilt to Specification 3 under Charge V (indecent language). We will take corrective action in our decretal paragraph. Otherwise, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant attended a social gathering in base housing during the evening hours of 31 August until approximately 0230 on 1 September 2003. During this social event, the appellant would disappear for 30 minutes at a time to break into other base housing units. All burglaries occurred between 2400 and 0200. The burglaries were discovered by 0300, but no suspects were identified until law enforcement personnel received automatic teller machine (ATM) photos of two men trying to use an ATM card that had been stolen during the burglaries. The appellant was one of those two men.

Gunnery Sergeant (GySgt) F, a detective assigned to the Criminal Investigations Division (CID), asked the appellant to come to CID for questioning. There, GySgt F advised the appellant of his rights and informed him that he was suspected of burglary, larceny, and conspiracy. The appellant agreed to waive his rights and speak with GySgt F. During the one-hour interrogation, the appellant provided detailed information about each residence he entered, including what he did in each residence. However, when describing what occurred in an upstairs bedroom in one of the residences, the appellant's body language changed and all he would say was that he entered the room and saw a baby's crib.

GySgt F moved on with the interrogation into the burglary of other dwellings, and then asked another detective, Sergeant (Sgt) O, to take over the interrogation in hopes of getting the appellant to describe what happened in the upstairs bedroom. GySgt F suspected that the appellant did something to the baby,

but was without any factual information to support that belief. Within 10 minutes of changing interrogators, the appellant admitted that he rubbed the baby's stomach, ran his hand under the baby's diaper, and inserted his finger into the baby's vagina. The baby was 15 months old at the time.

GySgt F then amended the rights waiver form to include "sexual assault" as an offense, orally informed the appellant of that change, and had the appellant initial the change. GySgt F asked the appellant if he remembered the rights as they were previously described, and the appellant stated that he did. A cleansing warning, however, was not given. The appellant subsequently signed a detailed written confession containing the information concerning what he did to the baby.

Article 31(b), UCMJ

For his first assignment of error, the appellant claims the military judge erred by not suppressing that portion of his confession relating to contact with the baby. Specifically, the appellant claims that he was not informed that sexual assault would be a subject of the interrogation before he waived his rights. Appellant's Brief of 13 Nov 2006 at 7. We disagree.

"When there is a motion to suppress a statement on the ground that rights' warnings were not given, [this Court] reviews the military judge's findings of fact on a clearly-erroneous standard, and . . . conclusions of law de novo." *United States v. Brisbane*, 63 M.J. 106, 110 (C.A.A.F. 2006)(quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)(citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)(internal quotation marks omitted)). "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)(citations omitted).

The military judge made 48 separate findings of fact based on the evidence admitted on the motion to suppress. We find that those findings are supported by the record, are not clearly erroneous, and we adopt them as our own. See Appellate Exhibit XXI. Specifically, the military judge found the following:

gg. GySgt F[] advised the accused that he was suspected of burglary, larceny, and conspiracy. The focus of the investigation was to be the events of 31 August and 1 September 2003. The questioning was to relate to [the appellant's]

interaction with the [victim's] quarters and the [victim's] property. Initially, GySgt F[] did not suspect [the appellant] of an indecent assault or "sex crime" against [the child].

hh. Prior to any questioning, GySgt F[] informed the [appellant] of his rights under Article 31(b), Miranda. . . . He used a pre-printed "Military Suspect's Acknowledgement and Waiver of Rights" form (page 1, AE-XIII). . . . GySgt F[] initially wrote that the accused was suspected of burglary, larceny, and conspiracy. . . .

. . . .

ll. During the initial interview the [appellant] admitted going to [the child's] bedroom. GySgt F[] then interpreted the [appellant's] body language to mean that the [appellant] did not want to go into more detail regarding his actions in [the child's] bedroom. GySgt F[] then decided to "skip" what occurred in [the child's] bedroom and continued with the interview.

mm. . . . At this time GySgt F[] had a reasonable suspicion that the [appellant] committed some type of assault on [the child] on 1 September.

nn. GySgt F[] asked CID investigator Sgt O[], for assistance. Sgt O[] has specialized training in sexual crimes against minors gained during his service with the Las Vegas, Nevada Police Department.

oo. GySgt F[] told Sgt. [sic] O[] that he had a reasonable suspicion that the [appellant] committed some type of assault on [the child].²

pp. That upon forming a reasonable suspicion that the [appellant] committed some type of assault on [the child], neither GySgt F[] nor Sgt O[]

² "Whether a person is a suspect is an objective question that is answered by considering all the facts and circumstances at the time of the interview to determine whether the military questioner believed or reasonably should have believed that the servicemember committed an offense." *Brisbane*, 63 M.J. at 113 (quoting *Swift*, 53 M.J. at 446(internal quotation marks omitted)).

notified [the appellant] that he was suspected of an assault and/or a sexual assault.

qq. That Sgt O[] used the interrogation technique of trickery to get the [appellant] to confess to inserting his right index finger into the vagina of [the child].³

. . . .

ss. At 1709 on 25 November 2003 the [appellant] was notified by GySgt F[] that [the appellant] was also suspected of a "Sexual Assault." The [appellant] acknowledged this by placing his signature on page 1 of AE XIII.

Id. We will apply the law to these facts.

Article 31(b), UCMJ, reads:

No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense *without first informing him of the nature of the accusation* and advising him that he does not have to make any statement regarding *the offense of which he is accused or suspected* and that any statement made by him may be used as evidence against him in a trial by court-martial.

(Emphasis added). See also MILITARY RULE OF EVIDENCE 305(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) (A confession is involuntary if the interrogator is required to give warnings under Article 31, UCMJ, and does not inform "the accused or suspect of the nature of the accusation.").

The issue before us is not whether GySgt F was subject to the UCMJ or whether he was obligated to provide the required warnings to the appellant. Rather, we "must decide if the omission of the offense[] of [sexual assault] in the rights' advisement was inconsistent with the applicable rights warning requirements." *United States v. Simpson*, 54 M.J. 281, 284 (C.A.A.F. 2000) (citing *United States v. Rogers*, 47 M.J. 135 (C.A.A.F. 1997)).

³ Sergeant (Sgt) O told the appellant that the appellant's DNA and fingerprints were found inside the child's vagina.

The Article 31(b), UCMJ, requirement that a suspect be informed of the nature of the accusation against him does not require a statement of the exact offense suspected. See *Simpson*, 54 M.J. at 284 ("It is not necessary that an accused or suspect be advised of each and every possible charge under investigation, nor that the advice include the most serious or any lesser-included charges being investigated."); *United States v. Rice*, 29 C.M.R. 340, 342 (C.M.A. 1960) (The purpose of informing a suspect of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved); *United States v. Davis*, 24 C.M.R. 6, 8 (C.M.A. 1957) (Partial warnings, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy the Article 31, UCMJ, requirement). The suspect need only be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event. *Simpson*, 54 M.J. at 284.

Among the possible factors to be considered in determining whether the nature-of-the-accusation requirement has been satisfied are whether the conduct is part of a continuous sequence of events, [citation omitted], whether the conduct was within the frame of reference supplied by the warnings, [citation omitted], or whether the interrogator had previous knowledge of the unwarned offenses, [citation omitted].

Id. Whether the warning given complies with the requirements of Article 31(b), UCMJ, and MIL. R. EVID. 305 is determined by "considering the precise wording of the warning in the context 'of the surrounding circumstances and the manifest knowledge of the accused....'" *Rogers*, 47 M.J. at 137 (quoting *Davis* 24 C.M.R. at 8). See also *United States v. O'Brien*, 11 C.M.R. 105 (C.M.A. 1953) (holding that the accused was sufficiently aware of the purpose of the investigation, even though he was never told he was suspected of killing his wife).

The rights waiver form, Appellate Exhibit XIII, orients the appellant to burglary, larceny, and conspiracy. GySgt F explained to the appellant that a burglary requires the entry into a dwelling at nighttime with the intent to commit an offense, not just a larceny, inside that dwelling.⁴ The appellant then stated he understood what a burglary was as described by GySgt F. Record at 57. GySgt F then oriented the

⁴ Specifically, burglary requires the specific intent to commit an offense prescribed in Articles 118 through 128, except 123a. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 55b(3).

appellant to the evening of 31 August 2003, and stated that he wanted to know how the appellant came into possession of the stolen ATM card. *Id.* at 61. At this point, the appellant was oriented to the burglaries committed in base housing on 31 August and 1 September 2003, and the offenses committed inside the burglarized dwellings. The appellant's acts that night were "part of a continuous sequence of events," the contact with the child was "within the frame of reference supplied by the warnings," and GySgt F had no more than a reasonable suspicion that the appellant touched the child before questions were asked on that topic. See *Simpson*, 54 M.J. at 284.

Under these circumstances, we conclude that the initial rights warning given to the appellant by GySgt F was sufficient to comply with the Article 31(b), UCMJ, mandate that a suspect be informed of the nature of the accusation prior to questioning. We therefore conclude that the appellant's statements were voluntary, and that the military judge did not abuse his discretion in denying the appellant's motion to suppress.⁵

Post-Trial Delay

In his third assignment of error, the appellant alleges excessive post-trial delay consisting of 688 days from date of sentencing until docketing with this court. The appellant, however, does not allege, and we do not find, prejudice flowing from this delay. Nevertheless, in light of the length of the delay the appellant urges that we presume prejudice or, in the alternative, that we utilize our powers under Article 66(c), UCMJ, and set aside the remaining confinement and upgrade the dishonorable discharge. We do not find a due process violation, and conclude that the delay does not affect the sentence that should be approved.

Our superior court has held that we may dispose of a due process issue by "assuming error and proceeding directly to the conclusion that any error was harmless." *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). In this case, we do not find prejudice and, therefore, conclude that any error was harmless beyond a reasonable doubt. In making this

⁵ We have considered the appellant's second assignment of error claiming the evidence is factually and legally insufficient to support the guilty finding of assault consummated by a battery on the child. The appellant argues that his confession, minus his admissions to touching the child, was not sufficient to support the guilty finding. Having determined that the entire confession was admissible, and considering all the corroborating evidence, we conclude that the evidence is both factually and legally sufficient to support the guilty finding of assault consummated by a battery.

determination we have considered, chief among other factors, that the appellant, as well as this court, are unable to ascertain facts in the record that support even the most modest claim of prejudice.

We also find that the delay does not affect the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc). In making this determination, we have considered the severe nature of the appellant's misconduct, which included multiple acts of base housing burglaries while occupants were sleeping therein, larcenies therein, and an assault consummated by a battery on a 15-month-old child sleeping in her crib committed during one of the burglaries.

Indecent Language

We note that the appellant was charged with and found guilty of communicating indecent language, to wit: "Stupid Bitch," to CL on divers occasions on 1 September 2003. Charge Sheet; Record at 275. We do not believe that the words spoken, in the context in which they were used, are sufficient to establish indecent language.

We must first determine if the specification is sufficient to state an offense. "A specification must expressly or by fair implication allege all the elements of an offense. Specifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990)(citing *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990)). Defective specifications are viewed with maximum liberality when an accused pleads guilty to the offense and only challenges the specification for the first time on appeal. *Bryant*, 30 M.J. at 73. In those cases, the appellant must demonstrate that the charge was "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)(quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965))(internal quotation marks omitted). However, when a specification is challenged before trial and an accused ultimately pleads not guilty, reviewing courts have not viewed the charges so liberally. *United States v. Hudson*, 39 M.J. 958, 962 (N.M.C.M.R. 1994)(citing *Bryant*, 30 M.J. at 73).

Here, the appellant did not specifically move to dismiss Specification 3 under Charge V; however, he did plead not guilty to that specification and moved, pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), for a finding of not guilty, arguing that the alleged language was not legally indecent. Record at 253. This case falls into an "undescribed middle ground" because the appellant did not move to dismiss the specification, but he pled not guilty and challenged the evidence prior to findings. *Hudson*, 39 M.J. at 962.

Whether we view the sufficiency of the specification critically or with maximum liberality, we are not convinced beyond a reasonable doubt that the language was indecent, which is one of the elements of the offense of communicating indecent language. MCM, Part IV, ¶ 89b. By pleading not guilty, the appellant was challenging the Government to prove that the language was indecent. Language is indecent if it is "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards." *Id.*, ¶ 89c.

"Whether or not specific language is 'indecent' for purposes of this offense is a question of fact and largely depends on the context in which it is uttered." *United States v. Caver*, 41 M.J. 556, 559 (N.M.Ct.Crim.App. 1994)(footnote omitted). Thus, profanity-laced language uttered by an accused while being apprehended and handcuffed, but which clearly had no sexual connotations, was not deemed "indecent." *United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998). On the other hand, an adult male's request to climb into bed with his 15-year-old step-daughter was held to be indecent under the circumstances. *French*, 31 M.J. at 60 (C.M.A. 1990). In *United States v. Dudding*, 34 M.J. 975, 976-77 (A.C.M.R. 1992), our sister court determined that calling a seven or eight-year-old girl a "bitch" and a "cunt" was sufficiently indecent to allege an offense based on the common definition of those terms.

Turning now to Specification 3 under Charge V, we find that it does state an offense. All of the elements of the offense are stated either expressly or by fair implication, and the specification provides the appellant with adequate notice of the charge as well as protection against double jeopardy. However, under the facts of this case, the evidence was legally and

factually insufficient to establish the offense of indecent language.

The evidence shows that the appellant used the phrase "stupid bitch" over the phone toward an adult female that he did not know. The language was used in the context of chastising the female for speaking with someone that she did not know, to wit: a stranger. Prosecution Exhibit 1 at 4.⁶ The context in which the words were spoken distinguishes this case from *Caver*, in which this Court held that the use of the term, "bitch," was indecent when a male E-5 used the term toward a female E-3 to imply that she "would sleep around." *Caver*, 41 M.J. at 560-61.

Here, we cannot say the language was grossly offensive to modesty, decency, and propriety because of its vulgar and disgusting nature. The use of the words employed in this case might constitute an offense under other circumstances; however, considering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards, we conclude that the language was not "indecent" within the meaning of the Manual for Courts-Martial. We will take corrective action in our decretal paragraph by setting aside the finding of guilty as to Specification 3 under Charge V, and will reassess the sentence to determine if it continues to be appropriate.

Conclusion

The finding of guilty to Specification 3 under Charge V is set aside, and that specification is dismissed with prejudice. The remaining findings of guilty are affirmed. Because of our action on the findings, we reassess the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986).

The dismissed specification was the least serious of all the offenses charged. We are satisfied that, even without a guilty finding to the dismissed specification, the appellant

⁶ Prosecution Exhibit 1 is the stipulated expected testimony of CS in which CS states that the person on the phone stated "Listen you stupid bitch, didn't your mother ever teach you better than to talk to strangers on the phone."

would have received the same sentence. Therefore, the sentence as approved below continues to be appropriate, and is affirmed.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. Troidl
Clerk of Court