

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, F.D. MITCHELL, J.G. BARTOLOTTA
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL C. DIPAOLO
CULINARY SPECIALIST THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200602442
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 March 2006.
Military Judge: CAPT Edward Smith, JAGC, USN.
Convening Authority: Commander, Submarine Group Two,
Naval Submarine Base New London, Groton, CT.
Staff Judge Advocate's Recommendation: LCDR M.L. Robinson,
JAGC, USN.
For Appellant: Capt Sridhar Kaza, USMC.
For Appellee: LT Derek Butler, JAGC, USN.

16 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of making a false official statement and two specifications of indecent assault, in violation of Articles 107 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 934. The appellant was sentenced to a dishonorable discharge, reduction to pay grade E-1, forfeiture of all pay and allowances, and confinement for 42 months. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's five assignments of error,¹ the Government's response, and the appellant's reply.² We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. See Arts. 59(a) and 66(c), UCMJ.

Corroboration of Confessions

In his first assignment of error, the appellant argues that his 21 January 2005 admissions to the Naval Criminal Investigative Service (NCIS) agent should not have been considered as evidence because it was insufficiently corroborated. He further contends that had his statements been properly excluded, there would be insufficient evidence to convict him of Charge I, false official statement. We disagree.

At trial, two statements of the appellant to NCIS were offered by the Government trial counsel without objection from the defense. Prosecution Exhibits 1 and 2.³ In PE 2, the appellant confessed to NCIS that when the alleged rape of EG was investigated in 2002, he lied to the NCIS agent who took his statement. Specifically, the appellant's lie to the NCIS agent was that he had videotaped himself and EG having sex and afterward he did not have sex with her again but only saw her through a friend Electronics Technician Third Class (ET3) JF.

¹ I. APPELLANT'S CONVICTION FOR MAKING A FALSE OFFICIAL STATEMENT WAS LEGALLY INSUFFICIENT, AS THE ONLY EVIDENCE PRESENTED BY THE GOVERNMENT WAS APPELLANT'S NCIS STATEMENT, WHICH WAS IN VIOLATION OF MIL.R.EVID 304(g) BECAUSE THE STATEMENT'S ESSENTIAL FACTS WERE NOT CORROBORATED [sic].

II. APPELLANT'S CONVICTIONS FOR INDECENT ASSAULT WERE FACTUALLY INSUFFICIENT, AS THE TWO ALLEGED VICTIMS HAD PREVIOUSLY PARTICIPATED IN SEVERAL CASUAL SEXUAL ENCOUNTERS WITH THE APPELLANT, AND DURING THE ALLEGED COMMISSION [sic] OF THE RESPECTIVE OFFENSES BOTH VICTIMS TOOK ACTIONS WHICH GAVE APPELLANT THE REASONABLE BELIEF THAT THEY WERE CONSENTING TO SEXUAL ACTIVITY [sic].

III. THE MILITARY JUDGE ERRED WHEN HE REFUSED TO INSTRUCT THE MEMBERS THAT APPELLANT SHOULD BE FOUND "NOT GUILTY" OF THE INDECENT ASSAULTS IF THEY FOUND THAT THE APPELLANT HAD A REASONABLE BELIEF THAT THE VICTIM'S [sic] WERE CONSENTING TO SEXUAL CONTACT, EVEN IF THAT BELIEF WAS MISTAKEN.

IV. THE SENTENCE WAS INAPPROPRIATELY SEVERE. THIS ISSUE IS RAISED PURSUANT TO *UNITED STATES V. GROSTEFON*, 12 M.J. 431 (C.M.A. 1982).

V. APPELLANT IS ENTITLED TO RELIEF DUE TO A DELAY OF 270 DAYS BETWEEN SENTENCING AND DOCKETING AT THIS COURT.

² The appellant's request for out of time consideration of his reply brief was granted. His request for oral argument was denied.

³ PE 1 is the statement the appellant made to NCIS in 2002 when EG made the allegation that she was raped by the appellant. PE 2 is the statement he made to NCIS on 21 January 2005 concerning allegations of sexual assault made by Hospitalman Second Class (HM2) D. In PE 2, the appellant admitted he made some false statements to NCIS about the alleged rape of EG in 2002 during the course of the investigation.

In his later statement he confessed that was not true; he continued to have sexual relations with EG after the videotaping incident. PE 2. He admitted that he had lied to NCIS because he was scared concerning the rape allegations made by EG. *Id.*

At the end of the Government's case in chief, the defense moved for a "directed verdict" on Charge I and its sole specification, which alleges that part of the appellant's 2002 statement to NCIS was false. Record at 733. The defense contended that there had been no independent corroboration of the false statement and therefore it could not be used as evidence. The military judge denied the motion finding that the confession had been properly corroborated.

Law and analysis

MILITARY RULE OF EVIDENCE 304(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) codifies the trustworthiness test for confession corroboration in military practice, stating in part: "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth."

Our superior court has held that the corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. *United States v. Baldwin*, 54 M.J. 464, 465 (C.A.A.F. 2001)(quoting *United States v. Cottrill*, 45 M.J. 485, 489 (C.A.A.F. 1997)). Only a "slight" or "very slight" quantum of evidence is needed to fulfill the corroboration requirement of MIL. R. EVID. 304(g). *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988); *United States v. Yeoman*, 25 M.J. 1, 4 (C.M.A. 1987). At issue in the instant case is what constitutes an "essential fact."

In *Baldwin*, the appellant provided a detailed confession that he had "touched his daughter's genitals while she was asleep in her bedroom." *Baldwin*, 54 M.J. at 465. The sleeping child apparently had no independent recollection of being touched inappropriately. As part of his confession, however, the appellant related how his wife had entered the room while his misconduct was in progress and left none-the-wiser. The appellant subsequently went weeping to his wife about having been abused as a child, sought treatment and ultimately confessed. While the military judge excluded the confession as uncorroborated, the appellate courts reversed noting that corroboration does not require independent evidence of the particular bad acts constituting the charged offense, but rather

only evidence sufficient to raise an inference that the confession as a whole is trustworthy.⁴

The appellant's 21 January 2005 statement to NCIS went on for two full pages relating his ongoing sexual relationship with EG; how he videotaped a sexual encounter with EG without her knowledge; how EG repeatedly resisted his sexual advances during their last sexual encounter and that he lied to NCIS during a 2002 interrogation regarding an earlier allegation of rape. PE 2. EG testified under oath and her exposition of the relevant facts of their sexual relations and her dogged resistance to his advances during their last sexual encounter substantially mirrored the appellant's confession.

While we agree with the appellant that there was no direct evidence corroborating that one specific portion of his 21 January 2005 statement that he'd lied during a 2002 statement to NCIS, every other significant aspect of his 2005 confession was independently corroborated by EG. Consistent with the case law cited above, we agree with the military judge that there was sufficient evidence corroborating the appellant's confession as a whole and to render it trustworthy.

We find the military judge did not abuse his discretion by admitting the appellant's confession as evidence. We additionally find that a reasonable finder of fact could have found each of the elements of Charge I and its sole specification beyond a reasonable doubt. We find this assignment of error to be without merit.

Sufficiency of the Evidence

In his second assignment of error, the appellant contends the evidence adduced at trial was factually insufficient to find him guilty of the two specifications of indecent assault. The appellant specifically avers that the evidence raised a mistake of fact defense which the Government had the burden to disprove beyond a reasonable doubt but failed to do so. We disagree with the appellant's initial premise and do not find the evidence supports a mistake of fact defense.

A. Indecent assault upon EG

In Specification 1 of Charge II, the appellant was charged with sexually assaulting EG.⁵ EG testified that she and the

⁴ See *Cottrill*, 45 M.J. 485 (confession to indecent acts with 3.5-year-old daughter corroborated by daughter's statement that she hurt in her genital area from the appellant's touching while he was bathing her); *United States v. Maio*, 34 M.J. 215 (C.M.A. 1992)(confession to drug use corroborated by evidence of drug availability and the appellant's prior use of that type of drug); *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990)(confession to drug use corroborated by evidence of appellant's presence at scene of active drug use and his direct access to drugs being used by others).

appellant had a previous consensual sexual relationship. After the appellant broke off the relationship in June/July 2002, EG had sexual intercourse with the appellant on four more occasions, in an attempt to salvage the relationship. Record at 662. The appellant finally told her that he wanted her to move on and that he had "no intentions of getting back together with [her]." *Id.* Shortly after that, in the middle of July, EG began dating ET3 JF.

The appellant was aware of EG's new relationship with ET3 JF. One Sunday morning while EG was visiting ET3 JF in his barracks room, the appellant pounded on his door demanding to speak with EG because she had been "here (on the base) all weekend and . . . completely ignored [him]." *Id.* at 664. Shortly thereafter, on 29 July 2002, the appellant called EG and asked to meet her to discuss why he got upset seeing her on the base with ET3 JF. EG agreed. At approximately 2100 that night, the appellant picked her up at the town post office and took her to his barracks room. The appellant told EG that he wanted to get back with her. EG responded that she had already moved on and that she had no interest in getting back together with him. The appellant then told her that he wanted to have sex with her. EG said "No, I don't want to have sex with you." *Id.* at 669. The appellant tried to kiss her and she pulled her head away. He grabbed the back of her neck and again tried to kiss her. As she struggled to get away, the appellant grabbed her arm with one hand and put his other hand up her dress in an attempt to pull off her underwear. EG repeatedly said "No, . . . will you just leave me alone . . . I don't want to have sex with you." *Id.* at 670. This, however, did not deter the appellant. Sensing her struggles were futile, she "crawled into a shell. . . . trying to focus [her] mind on somewhere else [sic]. . . ." The appellant then climbed on top of her and had intercourse with her. *Id.* at 672. Afterwards, when she had been contacted by NCIS about this incident, the appellant told her that if she told anyone he would "ruin [her] life." *Id.*

B. Indecent assault upon HM2 D

In Specification 2, the appellant had a similar past sexual relationship with the victim.⁶ HM2 D testified that the appellant came to visit her at her barracks room and told her multiple times that he wanted to have sex with her. Each time the appellant asked for intercourse, HM2 D said "No, I [don't] want to." They did, however, kiss each other and HM2 D allowed the appellant to remove her shirt. HM2 D got on top of the appellant and they continued kissing. The appellant then flipped HM2 D over onto her back, grabbed her wrists and put

⁵ EG was the victim's maiden name as she has since married and is now known as EF. Her testimony is found in the record from pp. 648-727.

⁶ HM2 D is the maiden name of HM2 H as she testified at trial. For purpose of this opinion, she is referred to by her maiden name.

them over her head to hold her down. Record at 499. The appellant then tried to unzip her pants repeatedly asking her for sex. She consistently said "no" in response to each request and zipped her pants back up when the appellant would unzip them. He then rubbed her crotch area, placed her legs on his shoulders and simulated having sex with her. HM2 D testified that she had to "knee" him in an attempt to get him off of her. He terminated his advances shortly thereafter. *Id.* at 500.

C. Law and analysis

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ.

The gravamen of the appellant's argument is that the Government failed to disprove the defense of mistake of fact beyond a reasonable doubt. Mistake of fact as to the consent of the victim is a defense to indecent assault. *United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997). For general intent offenses, a viable "mistake-of-fact defense requires both a subjective belief of consent and a belief that was reasonable under all the circumstances." *Id.* at 235 (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996), *United States v. True*, 41 M.J. 424, 426 (C.A.A.F. 1995), and RULE FOR COURTS-MARTIAL, 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)). In *Peterson*, our superior court held that the consent element of this offense is a general intent element, even though indecent assault requires specific intent to gratify lust. *Id.* The appellant asserts that his prior sexual relationship with each victim, coupled with their actions during the charged indecent assaults, gave him a reasonable belief that they were consenting to sexual activity. We find these arguments unpersuasive and wholly unsupported by the record.

Quite to the contrary, the appellant in his statement to NCIS on 21 January 2005 admitted that once he got EG in his room and asked her for sex, she said, "no." PE 2. He additionally admitted that this was the first time she had ever told him "no" and the more advances he made, the more she continued to say "no", she didn't want to have sex with him and "would push [him] away from her." *Id.* at 2. Regarding the sexual assault upon HM2 D, the appellant again admitted that when he immediately asked her for sex upon gaining entry into her room and she said, "No, I don't want to have sex with you." HM2 D testified that when she had told him "no" in the past, he would terminate his advances. Record at 499-500. As with the assault involving EG, the appellant admitted HM2 D also told him "no" many times while he was attempting to have sex with her. While she allowed him to kiss her and remove her shirt, she remained firm and adamant that she didn't want to have sex with the appellant. PE 2 at 1.

We found nothing in the record to suggest that, based upon their past sexual history, either victim may have sent the appellant mixed signals as to the issue of consent. The record is clear that in both instances, neither victim consented to the appellant's advances for sexual intercourse and made their intentions explicitly clear to him. We found no evidence in the record to suggest the appellant had an honest and reasonable belief that either of his victims was consenting to his sexual advances. It appears his intent was to wear down their resistance. The record is equally clear that although the appellant was given an unequivocal "no"; he was not going to take "no" for an answer.

Based on the entire record of trial, we conclude the evidence demonstrates beyond a reasonable doubt that the appellant did not have an honest and reasonable belief that either victim consented to these indecent assaults. We further find that a reasonable finder of fact could have found each of the elements of Specifications 1 and 2 of Charge II beyond a reasonable doubt. Taking into account the fact that we did not see and hear the witnesses, we too are convinced beyond a reasonable doubt that the appellant is guilty of Specifications 1 and 2 of Charge II. Accordingly, we find this assignment of error to be without merit.

Failure to Properly Instruct Members

Related to his previous assignment of error, the appellant contends that the military judge erred by not instructing the members, as requested by the defense, on the mistake of fact defense.

Prior to closing arguments, defense counsel moved for a mistake of fact instruction. Defense counsel's argument in favor of the instruction addressed, *inter alia*, the prior sexual relationship each victim had with the appellant. In the present case, the military judge concluded, as a matter of law, that there was insufficient evidence of a reasonable and honest belief to require a mistake of fact instruction. We agree.

The issue of whether a jury was properly instructed is a question of law, which we review *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The affirmative defense of mistake of fact is a required instruction under R.C.M. 920(e)(3) when it is reasonably raised by the evidence. *United States v. Gutierrez*, 64 M.J. 374, 375 (C.A.A.F. 2007)(citing *United States v. Wolford*, 62 M.J. 418, 422 (C.A.A.F. 2006) and *United States v. Barnes*, 39 M.J. 230, 233 (C.M.A. 1994)).

The evidence that places a special defense in issue need not "be compelling or convincing beyond a reasonable doubt. Instead, the instructional duty arises whenever 'some evidence' is presented to which the fact finders might 'attach credit if' they so desire." *United States v. Taylor*, 26 M.J. 127, 129-30

(C.M.A. 1988)(quoting *United States v. Jackson*, 12 M.J. 163, 166-67 (C.M.A. 1981)).

The defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered in determining whether the accused is entitled to a mistake of fact instruction, but neither factor is dispositive. See *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998); *Taylor*, 26 M.J. at 131. Trial defense counsel seemed to suggest, as evidenced by his opening statement and closing argument, that the defense theory of this case was that of "he said, she said." While neither is evidence, there was very little, if any, evidence offered at trial to suggest the appellant had an honest or reasonable belief that either victim consented to his advances to support a mistake of fact instruction to the members. In fact, the appellant's own statements to NCIS referenced the victim's lack of consent and attempts to resist his advances.

We find that the military judge did not abuse his discretion by not giving the members an instruction on mistake of fact pertaining to either specification under Charge II. Accordingly, we find this assignment of error to be without merit.

Sentence Appropriateness

In his fourth assignment of error, the appellant argues that a sentence which includes 42 months confinement and a dishonorable discharge is inappropriately severe.⁷ We have considered the appellant's record, his clemency petitions, and the entire record of trial. We have also considered the seriousness of his offenses, which included two instances of indecent assault and making a false official statement.

After reviewing the entire record, we find the sentence is appropriate for the offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Post-Trial Delay

The appellant's final assignment of error was that he was denied speedy post-trial processing because it took 270 days from the date of trial to docket his case with this court. In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), assuming without deciding that the appellant was denied his due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. The delay also does not affect the findings

⁷ Submitted in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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*). 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. See Arts. 59(a) and 66(c), UCMJ.

Conclusion

Accordingly, we affirm the findings of guilty and the sentence as approved by the convening authority.

Senior Judge GEISER and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court