

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

BEFORE

W.L. RITTER

J.F. FELTHAM

E.S. WHITE

UNITED STATES

v.

**Maurice O. MILLER
Ship's Serviceman Second Class (E-5), U.S. Navy**

NMCCA 200401906

Decided 29 June 2007

Sentence adjudged 30 April 2004. Military Judge: N.H. Kelstrom. Staff Judge Advocate's Recommendation: LCDR M.C.L. Horrigan, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Recruiting Command, Millington, TN.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FELTHAM, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of violating a lawful general regulation, rape, and two specifications of adultery, in violation of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The convening authority approved the adjudged sentence of confinement for 30 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant raises three assignments of error, claiming: (1) the military judge erred by granting the Government's challenges for cause of two potential panel members; (2) the evidence was not factually sufficient to prove his guilt of rape beyond a reasonable doubt; and (3) the evidence was not legally sufficient to prove his guilt of adultery with SG, the sister of the woman he was convicted of raping, beyond a reasonable doubt.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and

the appellant's reply. 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.

Challenges for Cause

The appellant contends the military judge erred by granting the Government's challenges for cause of two potential members, Lieutenant Yvette R. Parks, U.S. Naval Reserve, and Lieutenant Jeffrey Foxx, U.S. Navy, based upon the "liberal grant mandate" for challenges. We disagree.

During the voir dire of potential panel members, Lieutenant (LT) Parks was questioned about the type of evidence she would expect from the Government in a prosecution for rape. The trial counsel asked her if she could convict an accused of rape based solely on the testimony of the alleged rape victim if she was convinced beyond a reasonable doubt that the alleged victim was telling the truth. She replied, "I'm having trouble with solely on that one person's testimony, you know, if we can get everyone's testimony, you make a determination based on all the evidence." Record at 262.

When the appellant's civilian defense counsel (CDC) asked LT Parks if she would need more than the alleged victim's testimony in order to convict an accused of rape, she replied, "Yes, I think I would need more." The following colloquy ensued:

CDC: Okay. Let's say that the other evidence is some clothing that the person wore that day and some photographs of the person's bedroom where she alleges this event occurred, is that enough or would you need more?

MBR (LT PARKS): I would need more.

CDC: What if she called family and friends right after or within an hour or so of this event and said, "Hey, I was raped," is that enough or would you need more?

MBR (LT PARKS): Was there a documentation of this conversation and those people are going to----

CDC: Assume for the--our discussion at the moment that yes, there is. There is something along those lines. In other words, is that enough or would you need more?

MBR (LT PARKS): You know, it would be difficult, but I think I would need more--I would need more than--I would need to see the circumstances around it, I think.

Id. at 265-66.

In response to questions from the military judge, LT Parks said it was hard for her to determine whether she could convict an accused of rape based solely on the testimony of the alleged victim "because it's difficult to believe that that would be the only evidence" the Government would present.

MJ: . . . Now this really deals with how much of a burden is on the government, in your mind, and whether they could meet that burden with just one witness or not?

MBR (LT PARKS): I suppose they could, there's a possibility.

MJ: Okay. But you clearly feel uncomfortable doing that, is that correct?

MBR (LT PARKS): Yes.

Id. at 272.

During voir dire, Lieutenant Jeffrey Foxx, U.S. Navy, was questioned by the trial counsel about the type of evidence he would require of the Government in a rape prosecution.

TC: . . . Can you convict the accused of rape based solely on the testimony of the alleged victim—based solely on the testimony of the alleged victim if you are convinced beyond a reasonable doubt that the alleged victim is telling the truth?

MBR: (LT FOXX): I don't know. I would probably have to [inaudible].

TC: Why is that?

MBR (LT FOXX): I would have to have the information presented to me to really consider that question, but one person's view of a situation is different than the other's. And we're talking about a he-said-she-said with nothing else to corroborate his story, I might have a little bit of trouble doing that.

TC: Okay. So you need some sort of outside corroboration to believe a witness?

MBR (LT FOXX): That would help me.

Id. at 281.

In response to further questioning by the trial counsel, LT Foxx answered in the affirmative when presented with the following hypothetical: "It sounds like in order to reach that standard, belief beyond-or proof beyond all reasonable doubt, you

want something more than just the testimony itself." Record at 282.

The trial counsel challenged LT Parks and LT Foxx for cause on the grounds that their responses during voir dire indicated "they could not convict the accused based solely on the testimony of the alleged victim." *Id.* at 348. "They required more, they wanted more, and it's on that basis alone." *Id.* The military judge granted the challenges, over defense objections to both, stating:

Well, I was concerned with their responses, too. I'm not certain, and notwithstanding my efforts to try to flesh it out and get them to understand that nobody's trying to trick them here, we're just trying to find out their views, the reluctance of the—on the part of Lieutenant Parks, in particular, but even with Lieutenant Foxx to finally roger up and acknowledge that there is no higher burden on the government than would be required by their determination that one witness is telling the truth that both would find it very, very difficult to do that, to convict on the basis of victim testimony alone.

So I'm going to grant the challenges for cause as to Lieutenant Parks and Lieutenant Foxx under my liberal mandate to grant challenges whenever it appears that, based on the members' responses during voir dire, there may at least be a perception that one side or the other is not receiving a fair shake. So those two are granted.

Record at 348-49.

Our superior court has held that an accused "'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004)(quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), requires that a court member "be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." "[A] decidedly friendly or hostile attitude toward a party" may be grounds for challenge under this rule. R.C.M. 912(f), Discussion.

A military judge's decision on a challenge for cause is reviewed for a "clear abuse of discretion." *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005). "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)(citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). "[T]he abuse of discretion standard of review

recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Gore*, 60 M.J. at 187 (citing *United States v. Wallace*, 964 F.2d 1214, 1217 (D.C.Cir. 1992)). "In evaluating a military judge's ruling on a challenge for cause, [our superior] court has found it appropriate to recognize the military judge's superior position to evaluate the demeanor of court members." *James*, 61 M.J. at 138.

At the time of the appellant's trial, military judges "acted consistently with the liberal-grant mandate" when ruling on both Government and defense challenges for cause. See *United States v. Schlamer*, 52 M.J. 80, 95 (C.A.A.F. 1999)(citing *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987)).

The appellant's court-martial adjourned on 30 April 2004. On 26 May 2005, our superior court held that the "liberal grant" rule does not apply to Government challenges for cause. *James*, 61 M.J. at 139. The appellant claims that, because the military judge based his granting of the Government's challenges for cause on a subsequently-overruled standard, he suffered "substantial prejudice," and is entitled to a new trial. We disagree. Assuming, *arguendo*, that the military judge erred by applying the "liberal grant" mandate, the error did not prejudice the appellant.

"The burden at trial is on the Government to prove every element of the offenses charged beyond a reasonable doubt. The testimony of only one witness may be enough to meet this burden so long as the members find that the witness's testimony is relevant and is sufficiently credible." *United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006). Although these principles were explained to LT Parks and LT Foxx during voir dire, it is apparent from the record that each of them would likely have required the Government to provide more than the testimony of the two alleged victims in order for them to find the accused guilty of rape. It is also apparent from the record that their attitudes in this regard greatly concerned the military judge, and ultimately led to his decision to grant the Government's challenges for cause against them.

"If a potential member states he would require the Government to produce more evidence than the testimony of one witness in order to find any element beyond a reasonable doubt, then he is holding the Government to a higher standard than the law requires and should not be allowed to sit on the panel." *Rodriguez-Rivera*, 63 M.J. at 383. Having reviewed the record, and acknowledging that the military judge was in a superior position to evaluate the demeanor of LT Parks and LT Foxx during voir dire, we hold that he did not abuse his discretion in granting the Government's challenges for cause against them. We decline to grant relief on this assignment of error.

Sufficiency of the Evidence

The appellant contends that the evidence was factually insufficient to support his conviction for rape. He also contends that the evidence was legally insufficient to support his conviction for adultery with SG, the sister of the woman he was convicted of raping. We will discuss these two assignments of error together.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ.

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 as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. See *Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

There is no question that the Government presented legally sufficient evidence on the rape charge. The offense of rape consists of only two elements: (1) an act of sexual intercourse committed by the accused; and (2) execution of the act of sexual intercourse by force and without consent of the victim. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2002 ed.), Part IV, ¶ 45b(1). The alleged victim, RG, then a member of the delayed entry program who was recruited by the appellant, testified that the appellant forced himself on top of her while she was sitting on her bed, inserted his fingers into her vagina, and penetrated her vagina with his penis despite her efforts to resist. This testimony, by itself, provided legally sufficient evidence to establish the elements of rape. We conclude that reasonable court-martial members, having heard this evidence, and having been properly instructed on the elements of rape by the military judge, could have found beyond a reasonable doubt that the appellant raped RG. Moreover, after reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of rape.

The appellant claims the evidence was not legally sufficient to prove him guilty of adultery with SG, the sister of RG, because the Government failed to present legally sufficient evidence that his relationship with SG was prejudicial to good order and discipline. We disagree.

Adultery is an enumerated offense under Article 134, UCMJ, which requires proof of the following elements:

- (1) That the accused wrongfully had sexual intercourse with a certain person;
- (2) That, at the time, the accused or the other person was married to someone else; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, ¶ 62b.

As the appellant notes in his brief, the evidence adduced at trial established that he had sexual intercourse with SG three times, on two separate occasions, at the home of his cousin. The evidence also established that: the appellant was married to someone else at the time; the intercourse did not occur during duty hours; after the first act of sexual intercourse with SG, the appellant asked SG to arrange for RG (the appellant's recruiting prospect at the time) to meet his cousin; and that the appellant, SG, RG, and the appellant's cousin subsequently went out on a double date to a restaurant. After dinner at the restaurant, they went to the house of the appellant's cousin, where the appellant and SG had sexual intercourse.

The appellant testified that, on this occasion, RG walked into the room while he and SG were having sex. He also testified that he told RG he wanted to "hit it" (meaning to have sex with her) before she left for boot camp. Record at 858.

To satisfy the prejudice prong of the terminal element of the offense of adultery under Article 134, UCMJ, the Government need not show actual damage to the reputation of the armed forces. It is sufficient if the adulterous conduct has a "tendency" to be service-discrediting. See *United States v. Orellana*, 62 M.J. 595, 599 (N.M.Ct.Crim.App. 2005)(citing *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003); cf. *United States v. Hartwig*, 39 M.J. 39 M.J. 125, 130 (C.M.A. 1994)).

In considering whether adulterous acts are prejudicial to good order and discipline, or of a nature to bring discredit upon the armed forces, all relevant circumstances should be considered, including but not limited to the following factors: (1) the accused's marital status, military rank, grade, or position; (2) the co-actor's marital status, military rank, grade and position, or relationship to the armed forces; (3) the military status of the accused's spouse or the spouse of the co-actor, or their relationship to the armed forces; (4) the impact, if any, of the adulterous conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the

armed forces; (5) the misuse, if any, of government time and resources to facilitate the commission of the adulterous conduct; (6) the flagrancy of the adulterous conduct, such as whether any notoriety ensued; (7) whether the adulterous act was accompanied by other violations of the UCMJ; (8) the negative impact of the conduct on the affected units; and (9) whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time. See *Orellana*, 39 M.J. at 599; MCM, Part IV, ¶ 62c.

Having considered the relevant legal principles, we believe the appellant's adulterous conduct satisfied the service-discrediting prong of the terminal element of Article 134, UCMJ. The appellant was married at the time of his adulterous relationship with SG. He was a second class petty officer, working as a Navy recruiter, and his relationship with SG involved double dating with his cousin and SG's sister, RG, who was the appellant's recruiting prospect. As the appellant testified at trial, his prospect, RG, walked in on him and SG while they were having sex in a room at his cousin's house. Considering this evidence in the light most favorable to the Government, we are convinced that any rational trier of fact could have found the elements of the crime of adultery, as defined in Article 134, UCMJ, beyond a reasonable doubt. Moreover, after weighing all the evidence in the record of trial, and recognizing that we did not see or hear the witnesses as did the trial court, we are convinced of the appellant's guilt of this offense beyond a reasonable doubt. With respect to the appellant's two assignments of error alleging insufficiency of the evidence, we decline to grant relief.

Conclusion

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

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court