

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AUSTIN E. PAIGE
ELECTRONICS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200602364
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 July 2006.
Military Judge: LtCol Paul J. Ware, USMC.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR E. Korman, JAGC, USN.
For Appellant: CDR Sherry King, JAGC, USN.
For Appellee: LtCol Paul D. Kovac, USMCR; LT Justin E. Dunlap, JAGC, USN.

17 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, following mixed pleas, of assault consummated by a battery and indecent assault, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934.¹ The convening authority approved the adjudged

¹ The appellant was charged with attempting to commit an indecent act (specification of Charge I) and sodomy (specification of Charge II), in violation of Articles 80 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 925. He pled guilty to an indecent act with another, vice sodomy, to the specification of Charge II. After the providence inquiry, the

sentence of confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises two assignments of error challenging the factual sufficiency of the evidence supporting both findings of guilty. We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude the findings and the 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.

Assault of YN2 S

The appellant and Yeoman Second Class (YN2) S were crewmembers onboard USS LOUISVILLE (SSN 724). Record at 199. While attending a party, YN2 S became intoxicated and went to sleep on a couch. Thereafter, he felt a hand reaching underneath his untucked shirt attempting to undo his belt. He stated that he grasped the hand and having determined that it wasn't his girlfriend, maintained his grasp and used his cell phone illumination to identify the appellant. He pushed the appellant away telling him to "get the f*** away." The appellant apologized and departed. Record at 203-05. The appellant testified at trial that he passed out after drinking too much at the party. He denied touching YN2 S. *Id.* at 254.

The appellant claims that the evidence is factually insufficient to convict him of an assault consummated by a battery. Appellant's Brief of 29 Jan 2007 at 11. We disagree. 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. *United States v. Turner*, 24 M.J. 324, 325 (C.M.A. 1987); see Art. 66(c), UCMJ. Reasonable doubt does not mean the evidence must be free from conflict. *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).

There are two elements to a battery:

- (1) the accused did bodily harm to another person; and
- (2) the bodily harm was done with unlawful force or violence.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 54b (2).

Government went forward and the military judge convicted the appellant of an assault consummated by battery regarding the specification of Charge I and an indecent assault regarding the specification of Charge II.

The military judge made special findings of fact on the record. The appellant does not challenge the accuracy of these findings and we find the military judge's findings to be supported by the record. We adopt them as our own. The military judge specifically found that the appellant touched YN2 S on his belt without his consent and that the touching was with unlawful force and violence. Record at 404.

The appellant asserts that his voluntary intoxication prohibited him from forming the specific intent necessary for any intentional touching. The military judge addressed this issue. He noted that the appellant's voluntary intoxication created a reasonable doubt that he held the specific intent necessary for an indecent assault. He was not convinced, however, that the appellant's voluntary intoxication prevented him from forming the general intent necessary for a battery. In this regard, the military judge found that there was no evidence that YN2 S consented to the touching and that any asserted mistaken belief by the appellant to the contrary was unreasonable.

We agree with the military judge's analysis. After reviewing the record, we are convinced beyond a reasonable doubt that the appellant committed a battery on YN2 S.

Indecent Act with ET3 B

On 23 January 2006, Electronics Technician Third Class (ET3) B and the appellant consumed alcohol while bar hopping in downtown Waikiki. At approximately 0230, the appellant, and the appellant's roommate returned to the appellant's house. ET3 B went to sleep on the couch but testified that he was awakened by the sensation of someone performing oral sex on him. He stated that the appellant had undone his pants, and was orally sodomizing him. Record at 82. He testified that he got up from the couch, yelled profanities at the appellant, and left the house. He immediately returned to the USS LOUISVILLE where he reported the assault. *Id.*

The appellant testified that he and ET3 B began to hold hands while sitting on the couch, and that they lay together in a spooning position for a period of time and fell asleep. The appellant acknowledged that as ET3 B was sleeping, he reached into ET3 B's pants and began to rub his erect penis. He stated that ET3 B initially rolled on to his back and opened his legs but then suddenly jumped off of the couch and said "I can't believe this is happening." The appellant testified that he apologized to ET3 B and told him he could sleep in another room and lock the door but ET3 B left the house. The appellant specifically denied orally sodomizing ET3 B, and asserted that he mistakenly believed ET3 B consented to his touching. Record 263-68.

The military judge found the appellant guilty of touching ET3 B's penis. Assuming, *arguendo* that the facts are

substantially as testified to by the appellant, a defense of mistake of fact must include not only a subjective or honest belief of that ET3 B consented but that belief must also be reasonable under the circumstances. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996); see RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The military judge identified a host of factors which suggest the appellant's belief, even if honestly held, was nonetheless unreasonable. Specifically, the appellant did not speak to ET3 B to seek his consent; the appellant had not received any indication previously that ET3 B was sexually interested in him; the appellant did not know if ET3 B was awake or his level of impairment due to intoxication; further, there was no foreplay between the two men; and he did not invite ET3 B in to the privacy of his bedroom. *Id.* at 407.

We agree with the military judge that the appellant's asserted mistake of fact was unreasonable under the circumstances of the case. After reviewing the record, we are convinced beyond a reasonable doubt that the appellant committed an indecent assault on ET3 B.

Conclusion

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

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court