

**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.

**Marco A. RODRIGUEZ
Hospitalman (E-3), U.S. Navy**

NMCCA 200602455

Decided 18 July 2007

Sentence adjudged 17 February 2006. Military Judge: R.W. Redcliff. Staff Judge Advocate's Recommendation: LCDR R.N. Johnson, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

Maj RICHARD BELLISS, USMC, Appellate Defense Counsel
Maj BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A general court-martial, composed of a military judge alone, convicted the appellant, in accordance with his pleas of drunken operation of a vehicle resulting in personal injury, and reckless operation of a vehicle resulting in personal injury, both in violation of Article 111, Uniform Code of Military Justice, 10 U.S.C. § 911. Contrary to his pleas, a general court-martial, composed of officer and enlisted members, convicted the appellant of two specifications of rape, and one specification of indecent acts, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to total forfeiture of pay and allowances, reduction to pay grade E-1, a dishonorable discharge, and confinement for 10 years. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have reviewed the record of trial, the appellant's assignments of error challenging the factual sufficiency of each

conviction¹ and the military judge's denial of the appellant's motion to sever the two rape charges into two separate trials, the Government's answer, 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. Arts. 59(a) and 66(c), UCMJ.

Background

This case involves the appellant's "acquaintance" rape of two victims. One occurred in May 2005 and the other in October 2005. In each case, the appellant and the victim had previously engaged in consensual sexual intercourse in the appellant's barracks room at least once. Both victims alleged that their next act of sexual intercourse with the appellant was not consensual. The appellant moved to sever the rape charges into separate trials pursuant to RULE FOR COURTS-MARTIAL 906(b)(10), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Appellate Exhibit II. That motion was denied. AE XXXI.

Motion to Sever Charges

For his third assignment of error, the appellant claims that the military judge abused his discretion by refusing to sever the rape charges into separate trials. Appellant's Brief at 29. We disagree.

We review a military judge's decision denying a motion to sever charges for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999). Our superior court has summarized the law on severance of charges as follows:

The military justice system encourages the joinder of all known offenses at one trial ([RULE FOR COURTS-MARTIAL 601(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.)]), and permits a motion for "severance of offenses . . . only to prevent manifest injustice." R.C.M. 906(b)(10). "In general, 'an abuse of discretion will be found only where the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from

¹ We have considered the appellant's first and second assignments of error conceding the legal sufficiency of the evidence but challenging the factual sufficiency of the evidence as to each rape conviction and the indecent acts conviction. See Appellant's Brief of 7 Mar 2007 at 9 and 18. Pursuant to our statutory review mandate, Article 66(c), UCMJ, we have reviewed the evidence for both legal and factual sufficiency. Considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable factfinder could have found all the essential elements of each rape and the indecent acts beyond a reasonable doubt. The evidence is, therefore, legally sufficient. See *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006)(citation omitted). After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt of each rape and the indecent acts beyond a reasonable doubt. See *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal.'" [Citations omitted].

To determine whether a military judge has failed to prevent a manifest injustice and denied an appellant a fair trial, we apply the three-prong test found in *United States v. Southworth*, 50 M.J. 74, 76 ([C.A.A.F.] 1999).

United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002).

The *Southworth* three-prong test for determining whether a military judge has failed to prevent manifest injustice is: (1) whether the evidence of one offense would be admissible proof of the other; (2) whether the military judge has provided a proper limiting instruction; and (3) whether the findings reflect an impermissible crossover. *Southworth*, 50 M.J. at 76. No single factor, or the absence of a single factor, controls the ultimate conclusion of whether manifest injustice has been avoided. See *United States v. Duncan*, 53 M.J. 494, 498 (C.A.A.F. 2000) (finding no manifest injustice where military judge found evidence of one sex offense was not admissible to establish other sex offense, where he ensured bifurcation of evidence and gave limiting instructions.)

As to the first prong, whether evidence of one offense is also admissible proof of another offense, the appellant argues that the military judge erred by concluding that it was. Appellant's Brief at 31-32. The military judge found that evidence of one rape offense "is likely to be admissible" to prove the other rape pursuant to MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), to refute affirmative defenses of consent/mistake of fact, and as substantive evidence of the other rape pursuant to MIL. R. EVID. 413. AE XXXI. At trial, however, the military judge did not allow evidence of one rape to be used to prove the other rape or to refute any defense. Record at 750-54, 762. Assuming, without deciding, that evidence of one offense would not be admissible proof of one or more of the other offenses, we conclude that the second and third prongs clearly weigh in favor of the military judge's ruling.

As to the second prong, the military judge gave a "spillover" instruction after the Government concluded its case-in-chief concerning the rape of Hospitalman (HN) S and before presenting evidence concerning the rape of HN R, as follows:

Members, in a moment you will receive evidence concerning the second charged offense that appears on your copy of the charges. I will instruct you now, as I will instruct you later, that each offense charged must stand on its own and you must keep the evidence of each offense separate. The burden is on the Government

to prove each element of each of these offenses by legal and competent evidence beyond a reasonable doubt. Proof of one offense carries with it no inference that the guilt - - the accused is guilty of any other offense. Again I will instruct you further as to this matter at the conclusion of these proceedings.

Record at 526-27. The appellant argues that this "miniature instruction on spillover" was insufficient, as was the findings spillover instruction, because they are "generic" instructions. The appellant asserts that stronger tailored instructions were required because of the similarity between the two rapes. The appellant cites to *Simpson*, 56 M.J. at 465, for support. Appellant's Brief at 32-33. The appellant's reliance on *Simpson* is misplaced.

In *Simpson*, the appellant was charged with multiple sex offenses against different victims. The military judge gave a spillover instruction followed by a MIL. R. EVID. 404(b) instruction. Before discussing the MIL. R. EVID. 404(b) instruction, our superior court found the spillover instruction to be:

[C]rystal clear: members were instructed to keep evidence of each offense separate; that the burden was on the prosecution to prove each and every element of each offense beyond a reasonable doubt; and that proof of guilt of one offense created no inference that appellant was guilty of any other offense. *The military judge then provided the following limiting instruction. . . .*

Simpson, 56 M.J. at 465 (emphasis added). The appellant, however, cites to a portion of the "following limiting instruction" that addresses the limited use of evidence of one offense to establish another offense as an example of how the military judge should have tailored a spillover instruction in his own case. We do not see how the military judge's failure to instruct on a MIL. R. EVID. 404(b) issue that did not exist would have made his instructions "crystal clear" on spillover.

As our superior court did in *Simpson*, we find that the spillover instruction in the appellant's case was "crystal clear." We presume that the members followed the military judge's first spillover instruction in their deliberations, as they promised they would. Record at 527. The military judge again instructed the members concerning spillover in his findings instruction. *Id.* at 817; AE LXXIII. Again, we presume the members followed that instruction as well. *See United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000). The trial defense counsel did not object to this instruction or request a tailored instruction on the spillover issue. Record at 797-801.

As to the third prong of the *Southworth* test, whether the findings reflect an impermissible crossover, we note that the Government bifurcated its case by presenting all evidence concerning the rape of HN S, *id.* at 395-526, and then presented all evidence concerning the offenses against HN R, *id.* at 527-616.² The military judge gave his spillover instruction between the bifurcated presentations. The testimony of each rape victim and the corroborating evidence was compelling if not overwhelming. The evidence presentation itself does not suggest spillover. "Instead of a strongly supported allegation joined with a weakly supported one, the Government presented strong and independent factual cases with respect to each victim." *Southworth*, 50 M.J. at 77-78. Although the appellant was found guilty of all charges, we do not discern any indication that the findings reflect an impermissible crossover of evidence from one offense to another.

Based on this record, we conclude that the appellant has failed in his burden to establish prejudice as a result of the military judge's refusal to sever charges. The second and third *Southworth* prongs weigh heavily in concluding that the military judge's decision did not result in a manifest injustice. Therefore, we hold that the military judge did not abuse his discretion in denying the motion to sever.

Conclusion

The findings and sentence are affirmed as approved below.

Judge KELLY and Judge FREDERICK concur.

For the court

R.H. TROIDL
Clerk of the Court

² The Government presented the expert forensic psychiatry testimony of Lieutenant Commander D, during the portion of the trial dedicated to the rape of HN S. Record at 478-94. His generic testimony concerning acquaintance rapes was also relevant to the rape and indecent acts involving HN R.