

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

**Before  
R.E. VINCENT, V.S. COUCH, J.E. STOLASZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHARLES M. BURLESON  
CULINARY SPECIALIST THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700143  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 12 May 2006.

**Military Judge:** CDR Christain Reismeier, JAGC, USN.

**Convening Authority:** Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR C.D. Jung, JAGC, USN.

**For Appellant:** F.J. Spinner; LT Kathleen Kadlec, JAGC, USN.

**For Appellee:** Maj Tai Le, USMC.

**21 October 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

STOLASZ, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members, of rape, assault, housebreaking, and indecent assault, in violation of Articles 120, 128, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, 930, and 934. The appellant was sentenced to 20 years confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's four assignments of error<sup>1</sup> 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.

### **A. Legal and Factual Sufficiency**

The appellant asserts that the evidence is legally and factually insufficient to sustain his convictions for indecently assaulting CEG, a civilian, raping Aviation Ordnanceman Airman Apprentice (AOAA) KMR, and assaulting Hospital Corpsman Second Class (HC3) Stephen Hood. Legal sufficiency is a question of law we review de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not have personally observed the witnesses, [the court is] convinced of the [appellant's] guilt beyond a reasonable doubt." *United v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

#### **1. Indecent assault of CEG**

The appellant was charged with raping CEG on 22 July 2005. The members found the appellant guilty of the lesser included offense of indecent assault. The elements of indecent assault are:

- (1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
- (2) That the acts were done with the intent to gratify the lust and sexual desires of the accused; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the

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<sup>1</sup> I. THE EVIDENCE IS FACTUALLY AND LEGALLY INSUFFICIENT TO SUPPORT FINDINGS OF GUILTY TO ALL CHARGES AND SPECIFICATIONS.

II. THE MILITARY JUDGE ABUSED HIS DISCRETION IN NOT FINDING PREJUDICE IN LIGHT OF THE VIOLATION OF MILITARY RULE OF EVIDENCE 606 AND THE GOVERNMENT DID NOT PROVE THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

III. PREJUDICE FROM ISSUE II SPILLED OVER INTO THE DELIBERATIONS AND FINDINGS OF GUILTY OF THE REMAINING RAPE SPECIFICATION IN LIGHT OF THE MILITARY JUDGE'S PROPENSITY INSTRUCTION.

IV. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR DENYING THE DEFENSE MOTION TO SEVER THE CHARGES.

armed forces or was a nature to bring discredit to the armed forces.<sup>2</sup>

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 63b.

The appellant and CEG, who were acquainted with each other, were at a local club on the night of 22 July 2005. While there they conversed and thereafter separately attended an after hours party at a friend of the appellant's. During the party, they retreated to an upstairs bedroom in the residence. CEG testified the appellant raped her on three separate occasions while in the bedroom.

The evidence presented at trial consisted of the testimony of CEG, prosecution experts, a defense expert, and various people who attended the party. The appellant denied the accusations, but his friend, Fireman (FN) Wilson Igna, testified that the appellant admitted to him that he had "fingered" CEG and stopped after she protested. Record at 614. The prosecution expert, a sexual assault nurse examiner, testified that, upon examination, she discovered eleven non-genital injuries and a large tear (1.6 centimeters in length and 7 millimeters wide) in CEG's vaginal area. *Id.* at 436-38; Prosecution Exhibit 4.

The defense theory portrayed the sexual encounters and subsequent injuries to CEG as the result of rough sex. The defense expert did not examine CEG but reviewed documents and photographs from her sexual assault exam. She opined that CEG's vaginal injuries could have been caused by blunt force trauma, possibly from digital penetration, a foreign object or a penis. Record at 876-78. She concluded she could not precisely identify the cause of CEG's vaginal injuries. *Id.* at 879.

Although the members did not find the appellant guilty of raping CEG, they did convict him of indecent assault. The evidence supporting this finding includes the appellant's admission to FN Igna that he placed his finger in CEG's vagina, and the testimony of the prosecution expert that there were eleven non-genital injuries and a large tear in CEG's vagina. The testimony of the defense expert also suggested trauma to CEG's vagina caused by penetration of some type. We are convinced that a reasonable fact finder, based on this evidence, could have concluded that an indecent assault occurred. Further, we are convinced after our review of the record, and after having made allowances for not personally observing the witnesses, that the evidence proved beyond a reasonable doubt that CEG was indecently assaulted by the appellant. We further find that the appellant's conduct with CEG was of a nature to bring discredit to the armed forces.

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<sup>2</sup> Although not applicable to the appellant's case, we note that Paragraph 63, Article 134 (Indecent Assault) was replaced by paragraph 45, Article 120, National Defense Authorization Act for Fiscal Year 2006. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 23 at A23-15.

## 2. Rape of AOAA KMR

The appellant was found guilty of unlawfully entering the barracks room of AOAA KMR, and then raping her on 6 Nov 2005. The evidence at trial showed that the appellant and AOAA KMR socialized at a local club on the night in question. Prior to going out, AOAA KMR took the prescription medication Phenergan to calm a queasy stomach. *Id.* at 647-48. At the club she consumed two mixed drinks and 7 or 8 shots and was so intoxicated that, upon returning from the club, she required assistance walking back to her barracks room. The appellant assisted her to her barracks room. She then fell asleep in her room while the appellant watched over her, but was awakened by the appellant messing with the elastic around her sweatpants. She brushed him away, and he became angry and left her barracks room. She then got up and deadbolted the door to her room. *Id.* at 655, 656.

A short time later, she was awakened to the sensation of someone having intercourse with her from behind. She put her hand on her assailant's hip and pushed him away, but did not see his face. She testified that she noticed the window in her barracks room was open, and then fell back asleep due to her inebriated condition. The following morning she confronted the appellant, who insisted he did not touch her, but then stated that they had messed around. *Id.* at 659-62. A short time later AOAA KMR noticed the screen to her window was no longer lying in the bushes below the window. She ran outside and observed the appellant carrying the screen. *Id.* at 664-65. A witness later testified that she saw the appellant carrying the screen with his hands covered by his sleeves. *Id.* at 785; PE 27.

AOAA KMR underwent a sexual assault examination which showed semen present in her labia leading into the vaginal vault. *Id.* at 730-31; PE 19. The defense contended that the appellant engaged in consensual intercourse with AOAA KMR, and that her rape claim was the result of the guilt she felt for cheating on her fiancé. The members rejected the appellant's consent defense, and also convicted him of unlawful entry into AOAA KMR's barracks room with the intent to commit rape.

We conclude that a reasonable fact finder could have found that the appellant unlawfully entered the barracks room of AOAA KMR and raped her. The evidence showed that the appellant knew AOAA KMR was intoxicated when he helped her to her barracks room; that he left the room angry after she rebuffed his advances; that she deadbolted her door; that the window to her room was open with the screen lying below in the bushes; that she woke up to find someone having intercourse with her; and that a later examination found semen in her vaginal cavity. Further, the defense of consent may not be inferred where the victim is unable to resist because of lack of mental or physical faculties. MCM, Part IV, ¶ 45c (1)(b).

After weighing all of the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant unlawfully entered the locked barracks room of AOAA KMR through the open window with the intent to rape her, and did rape her.

### **3. Assault of HC3 Hood**

The evidence showed that on 11 June 2005, the appellant and HC3 Hood were at a local club. They were not acquainted with each other, and their interaction was limited to the appellant's attempt to attract the attention of one of the two females accompanying HC3 Hood. When the club closed, HC3 Hood left with the two females and was confronted by the appellant as he was returning to his car. The testimony at trial was somewhat unclear who started the confrontation or how it came about. However, multiple witnesses testified that the appellant struck HC3 Hood with an uppercut knocking him down, then a second blow to the face as he attempted to rise from the first blow. HC3 Hood did not strike back.

The members found that the appellant assaulted HC3 Hood, and rejected his claim of self defense as not supported by the evidence. We are convinced beyond a reasonable doubt, based on our review of the record, and remembering that we did not personally observe the witnesses, that the appellant assaulted HC3 Hood, and that his self defense claim is not supported by the evidence.

To summarize, the evidence is legally and factually sufficient to support the members guilty verdicts on the charges of indecent assault of CEG; unlawful entry into the barracks room of AOAA KMR with the intent to rape her; rape of AOAA KMR, and assault of HC3 Hood.

## **B. Inadmissible Evidence Considered by the Members During Deliberations**

### **1. Background**

Defense Exhibit H marked for identification was the 53 page verbatim transcribed testimony of CEG from the Article 32, UCMJ, pretrial investigative hearing. The trial defense counsel used DE H to impeach CEG during cross-examination, but did not offer the exhibit into evidence. DE H was inadvertently published to the members with the properly admitted exhibits, and was part of the package of exhibits in the deliberation room. The members had already rendered a verdict, and were literally in the process of returning to their seats to deliver a sentence when the trial participants realized DE H was inadvertently published.

Thereafter, during a post-trial session, the military judge conducted voir dire on the three most senior members to determine the effect, if any, DE H had on their deliberations. The senior member advised the military judge that each member had read DE H, discussed its content, and further stated that it gave them a clearer idea of what occurred between CEG and the appellant on the night in question. Record at 1294-95. The other two members advised the military judge that they read DE H and discussed its content with the other members. *Id.* 1296-1300.

As a result, trial defense counsel requested a mistrial. Appellate Exhibit XCIV. The military judge denied the defense request for a mistrial in a written decision. AE XCVIII.

## 2. Law

The issue before us is whether it was an abuse of discretion for the military judge to deny the defense request for a mistrial. A mistrial is a drastic remedy appropriate only when circumstances cast doubt of the impartiality of proceedings, and when necessary to prevent manifest injustice against the accused. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)(quoting *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993)). We will not reverse the military judge's decision not to grant a mistrial absent clear evidence of abuse of discretion. *Id.* at 90 (citing *Dancy*, 38 M.J. at 6 and *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990)).

As noted, the military judge rendered written findings of fact and conclusions of law. We review the military judge's findings of fact under the clearly erroneous standard, and his legal conclusions *de novo*. *United States v Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). After careful review, we find that pertinent aspects of the military judge's findings of fact are not clearly erroneous, and we adopt them as our own.

## 3. Analysis

The military judge's voir dire of three of the members established that DE H was read, discussed, and considered by the members prior to their findings. He correctly ruled that DE H was extraneous prejudicial information within the meaning of MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).<sup>3</sup> He further indicated that he would not consider the

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<sup>3</sup> Mil. R. Evid. 606(B) provides in pertinent part: "Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial...."

hearsay declarations of the members during his voir dire, only that DE H was published and considered by the members. *United States v. Straight*, 42 M.J. 244, 250-51 (C.A.A.F. 1995)(a presumption of prejudice exists in such cases to avoid inquiry into the deliberative process of the members).

It is well-established that an accused has the right to be tried based on the evidence presented at trial, and that right is violated if extra record evidence is considered. *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989). Here, it is apparent that an inadmissible document was considered by the members during their deliberations. The timing of the discovery of this occurrence made it impossible for the military judge to issue a curative instruction, the "preferred" remedy, to the members. See *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)(citations omitted). However, the military judge attempted to remedy the situation by using voir dire to assess the impact DE H had on the members.

In deciding whether the military judge abused his discretion in this case, we attempt to determine the prejudicial impact, if any, DE H for identification had on the members deliberations. *Diaz*, 59 M.J. at 91. The question is whether the prejudicial impact of DE H was such that there was a reasonable possibility it influenced the members verdict. *United States v Ureta*, 44 M.J. 290, 299 (C.A.A.F. 1996). We also look to other evidence supporting the members finding that the appellant indecently assaulted CEG in making this determination. *Id.* at 299 (error deemed harmless where military judge allowed members to take Article 32 transcript into deliberations, but transcript was not only evidence of appellant's guilt); *United States v. Brassler*, 651 F.2d 600, 603 (8th Cir. 1981)(strength of government's case has a bearing on the issue of prejudicial error).

In this case, we find it was not a clear abuse of discretion for the military judge to conclude that DE H had no prejudicial impact on the members verdict regarding CEG. Although the appellant was charged with raping CEG, the members found him guilty of indecent assault. CEG's testimony both at trial and transcribed in DE H was consistent in that she asserted that the appellant raped her three different times during a period of three hours. There were also inconsistencies between her trial testimony and DE H, as pointed out by defense counsel.

The members verdict apparently suggests that they found neither version credible, but other evidence convinced them that the appellant committed the offense of indecent assault. This evidence consisted, in part, of the appellant's admission to FN Igna that he fingered CEG as well as the findings of the prosecution and defense experts. Thus, under the facts and circumstances of this case, we find no reasonable possibility that DE H prejudicially impacted the members. *Ureta*, 44 M.J. at 299. We find the military judge did not abuse his discretion by denying the defense motion for a mistrial.

## Spillover

The appellant asserts that the prejudicial impact from DE H spilled over, leading the members to find him guilty of raping AOAA KMR as a result of the military judge's propensity instruction. We disagree.

The military judge issued a propensity instruction to the members.<sup>4</sup> During the members' deliberations, he reiterated the substance of this instruction in answer to a member's question. The military judge stated that the first allegation of rape, the rape of CEG, could be used to show the appellant's propensity to commit the second rape, of AOAA KMR, but not the other way around. Record at 1181-83. The members' verdict suggests they conscientiously followed this instruction since they found the appellant guilty of indecent assault of CEG, not rape.

Having already determined there was no reasonable possibility the members were influenced by DE H, and no prejudicial impact resulted to the appellant, we therefore find no reason to conclude that DE H spilled over and impacted those same members to convict the appellant of raping AOAA KMR. The members carefully reviewed the evidence, and rendered a verdict based on that evidence and not on the appellant's propensity to commit sexual assaults. The evidence showed that AOAA KMR was sexually assaulted while intoxicated, and that the members did not believe the appellant's defense of consent. In short, we are convinced that, standing alone, the evidence presented was sufficient to convict the appellant of the rape of AOAA KMR, notwithstanding the member's consideration of DE H.

## Severance

The defense motion to sever the two rape charges was denied in a written decision by the military judge. AE XCVII. A military judge's decision on a motion to sever offenses is reviewed for an abuse of discretion. *United States v. Southworth*, 50 M.J. 74, 76 (C.A.A.F. 1999). "[A]n abuse of discretion will be found only where the defendant is able to show that the denial of severance caused him actual prejudice in that

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<sup>4</sup> "Further, evidence that the accused committed the rape of [CEG] as alleged in Specification 1 of Charge I may be considered by you as evidence of the accused's propensity, if any, to commit the rape alleged in Specification 2 of Charge I. You may not, however, convict the accused of one offense merely because you believe he committed this other offense or merely because you believe he has a propensity to commit sexual assault. Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one rape carries no inference that the accused is guilty of any other rape. However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged." Record at 1157.

it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal.'" *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000)(quoting *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1998)). We review the military judge's findings of fact under the clearly erroneous standard and his conclusions of law *de novo*. *Ayala*, 43 M.J. at 298. We find the military judge's findings are not clearly erroneous and we adopt them as our own.

Although he denied the defense motion for severance, the military judge took precautionary measures to ensure that the members understood that the charged rapes were two separate offenses. Here, as in *Southworth*, the military judge gave adequate instructions and further ordered the Government to present its case in such a fashion as to preserve the distinction between the proof offered on each of the rape charges. *Southworth*, 50 M.J. at 77. For example, during the Government's presentation of evidence, if a witness was testifying to both the rape of CEG and AOAA KMR, he did so separately to ensure the members understood they were distinct charges.

We find that the decision of the members does not suggest spillover. The members found the appellant not guilty of raping CEG, but guilty of the lesser included offense of indecent assault. As we have indicated, we fail to see how the members used evidence of the indecent assault of CEG to convict the appellant of the rape of AOAA KMR. We hold the military judge did not abuse his discretion in denying the motion for severance.

### **Conclusion**

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge VINCENT and Senior Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court