

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

**Before
D.E. O'TOOLE, F.D. MITCHELL, B.G. FILBERT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROBERTO C. DELOYA
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700905
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 June 2007.

Military Judge: Maj Charles Hale, USMC.

Convening Authority: Commanding General, 7th Communication
Battalion, III Marine Expeditionary Force, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol D.J. Bligh,
USMC.

For Appellant: LT Gregory Manz, JAGC, USN.

For Appellee: Capt Geoffrey Shows, USMC; CDR Russell Verby,
JAGC, USN.

30 September 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

O'TOOLE, Chief Judge:

A general court-martial composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of two specifications of violating a lawful order from a noncommissioned officer, two specifications of violating a lawful general order, rape, and three specifications of unlawful entry¹ in violation of Articles 91, 92, 120, and 134, Uniform Code of Military Justice 10 U.S.C. §§ 891, 892, 920, and 934. He was sentenced to four

¹ The appellant was found not guilty of burglary (Article 129, UCMJ) as charged in Specification 1 of Charge II, but guilty of the lesser included offense of unlawful entry, in violation of Article 134, UCMJ.

years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant claims the evidence was legally and factually insufficient to prove rape beyond a reasonable doubt. We have carefully examined the record of trial, the appellant's brief, and the Government's answer. We conclude the findings and the approved 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.

The Facts

In October 2005, the appellant met Lance Corporal (LCpl) V, a female Marine who lived in the barracks at Camp Hansen, in Okinawa, Japan. Record at 101. LCpl V testified she had consensual sexual intercourse with the appellant shortly after they met. Thereafter, the two remained friends, but did not continue in a sexual relationship. *Id.* at 114-15, 240-41, 248. LCpl V also testified that in the year since they had intercourse, the appellant twice came to her room in an intoxicated state. The second time, he entered her room when she was out, startling her when she returned. On this latter occasion, he tried to kiss her. She refused, and had him leave her room. *Id.* at 116-18, 130, 249.

On the evening of 17 November 2006, a group of Marines, including the appellant, gathered in LCpl V's room where they played "drinking games." Then, the group departed, some of them meeting again at an on-base club. *Id.* at 107-11. While there, LCpl V kissed several Marines, but not the appellant. *Id.* at 183. Both the appellant and LCpl V became so intoxicated they were each brought back to the barracks by another Marine. That Marine, Corporal (Cpl) Delaespada, testified that he first returned the appellant to his barracks. He described the appellant as very drunk and falling asleep. *Id.* at 182-83. Cpl Delaespada then assisted LCpl V to her barracks. She needed help walking. By the time they got to her barracks building, LCpl V was asleep or passed out. Cpl Delaespada placed LCpl V on her bed fully clothed. *Id.* at 186-87. He did not lock her door because he could not find her key. *Id.* at 164, 188.

LCpl Felicies lived in the room across the hall from LCpl V. When LCpl Felicies returned to her room at approximately midnight, she found the appellant standing in her bathroom, which connects her room to the one next door. Upon seeing LCpl Felicies, the appellant asked if she had been drinking, stepped towards her, and turned off the light. This scared LCpl Felicies, who told the appellant to get out of her room. She immediately opened her door and asked two Marines in the passageway to remove the appellant from her room. *Id.* at 165-68. They found him hiding behind her door, and they ordered him out. *Id.* at 188-89.

At about this time, the appellant also knocked on Cpl Levan's door. She opened her door and, seeing the appellant, immediately closed and locked it. *Id.* at 195. Later that night, someone periodically knocked on LCpl Felicies' door, and jiggled the door knob, attempting to get in. She believed this to have been the appellant. *Id.* at 168-69. This prompted her to check on LCpl V. When LCpl Felicies entered LCpl V's room, she found the appellant on top of LCpl V, thrusting his hips. LCpl Felicies immediately left to summon Cpl Tyler, the duty noncommissioned officer (NCO). Then, she returned to her room and locked the door. *Id.* at 170-72.

When Cpl Tyler entered the room, he also saw the appellant, with his pants down, on top of LCpl V, thrusting. Cpl Tyler grabbed the bed frame, shook it, and yelled at the appellant "fairly loudly" to get out of the room. The appellant jumped off of LCpl V and crouched on the floor. LCpl V showed no reaction to the NCO shaking her bed, or to the appellant jumping off. Although Cpl Tyler did not recall specifically looking at LCpl V after the appellant jumped off her, he testified that he did not see her move at any time. *Id.* at 196-98, 206.

Cpl Tyler left the room momentarily to get another NCO. When they returned, neither the appellant nor LCpl V were in the bedroom. They found LCpl V lying naked on the bathroom floor, not moving. Cpl Tyler told her to get up, but she did not respond. *Id.* at 198-99. He then sent the other NCO to get LCpl Felicies to assist. Cpl Tyler heard movement in the adjoining room, but could not get through the locked bathroom door. So, he exited LCpl V's room through the front door to try to find the appellant. *Id.* at 200. LCpl Felicies arrived and found LCpl V was wearing a shirt, but her trousers and her underwear were around one ankle. *Id.* at 173. She attempted to dress LCpl V in "basketball shorts." LCpl V responded with "grunt noises." LCpl Felicies explained she was trying to help by putting her shorts on, but gave up when LCpl V persisted in saying "get out." *Id.* at 174-75. LCpl Felicies testified that LCpl V walked her to the door, and told her she did not want any help. *Id.* at 178.

At trial, LCpl V could not recall most of the events at the club, and remembered nothing of what later occurred in her barrack's room and bathroom. She testified she still felt drunk the next morning when she was awakened at approximately 0530 by Criminal Investigative Division (CID) agents. *Id.* at 248. A CID investigator testified he pounded on her door for "a couple minutes" and then entered the still unlocked door. He then "yelled" at LCpl V. She only awoke when he pushed on her mattress. Then, though she was awake, she still appeared intoxicated. *Id.* at 137-39. At trial, she could not remember what the investigators looked like, nor what they said. *Id.* at 248.

A physical examination of LCpl V, conducted later that morning, revealed a "tissue abrasion" consistent with recent

vaginal penetration, but there was no bruising or semen. The forensic examiner testified that sexual intercourse with an unconscious female would not necessarily leave signs of force. *Id.* at 256-58. Finally, despite her lack of specific recall, LCpl V testified that she never consented to having sex with the appellant in 2006. *Id.* at 249.

The appellant provided a sworn statement to CID agents in which he admitted having sexual intercourse with LCpl V. He stated he was "pretty sure she said yeah [regarding consenting to sex] if not I wouldn't have done anything." Prosecution Exhibit 1, at 3. The appellant also told the CID agents he believed LCpl V was conscious while she was having sex with him because she was moaning. He denied raping LCpl V. He also explained that he escaped from LCpl V's bedroom by transiting through her bathroom into the adjoining room, climbing out the window, and down the drainpipe. He did this because he was afraid of getting in trouble for having sex in the barracks. PE 1, at 3-4.

The defense presented a forensic psychologist, who testified regarding the effects of alcohol. The witness said that, based on the testimony, he was not able to form an opinion as to whether LCpl V was so intoxicated as to lack the ability to consent to sexual intercourse. Record at 231. However, the witness testified generally that the more impaired someone is by alcohol consumption, the less likely they are to be able to consent to sex. *Id.* at 230. He also testified that it is possible to be aware enough to use the bathroom, yet not be aware enough to consent to sex. In the view of the psychologist, using the bathroom does not imply a high level of conscious awareness. Record at 228-29.

Principles of Law

The test for legal sufficiency is whether any rational factfinder, viewing all of the evidence in the light most favorable to the prosecution, could reasonably find all the essential elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)(citing *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A factfinder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999). The Government must, however, prove every element beyond a reasonable doubt, *United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982), and the proof must be such as to exclude every fair and rational hypothesis except that

of guilt, *United States v. Gray*, 51 M.J. 1, 56-57 (C.A.A.F. 1999); see *United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994).

The elements of rape as alleged in Charge I are: (1) that the appellant committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without the consent of LCpl V. Charge Sheet; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part I, ¶ 45b(1). In determining whether the second element is proven, "[c]onsent . . . may not be inferred . . . where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent . . ." MCM, Part IV, ¶ 45c(1)(b).

Analysis

We begin our analysis by noting that the appellant admitted having sexual intercourse with LCpl V. He was seen by two different witnesses on top of LCpl V, his pants down, and hips thrusting into her. The physical evidence that she had been vaginally penetrated supported both his admission, and the observations of the witnesses. This quantum of evidence is legally and factually sufficient to prove the first element of rape beyond a reasonable doubt.

In view of the facts in this case, the analysis of the second element focuses on whether LCpl V consented to intercourse with the appellant, or was unable to resist because she was so intoxicated that she lacked the physical and mental faculties to do so. In determining whether LCpl V consented, we consider all of the surrounding circumstances. *Id.*

First, LCpl V testified that, having once had intercourse with the appellant a year prior to the alleged rape, they did not continue in a sexual relationship. Second, she refused the appellant's amorous advances on two occasions in the months preceding the alleged rape, when the appellant went to her room, intoxicated, and tried to kiss her. Third, she testified that she did not consent to intercourse with the appellant at any time during 2006. In light of her concession that she had no specific recollection of the events that night, we understand her testimony to be a description of her general disposition towards the appellant as not being of a sexual nature. This is consistent with her pattern of behavior in the year preceding the alleged rape. This testimony also tends to establish that, despite the lack of interest on her part, the appellant persisted in his sexual interest in, and pursuit of, LCpl V, thereby supporting a desire on his part for continuing in a sexual relationship; a motivation strong enough to prompt the appellant to surreptitiously enter LCpl V's room, about three weeks prior to the alleged rape, wait for her, and try to kiss her.

Moreover, on the night of the alleged rape, the appellant's drunken behavior can reasonably be characterized as "on the prowl," consistent with his prior two appearances in LCpl V's room, drunk, and seeking amorous attention. At sometime after midnight, having been escorted back to the barracks intoxicated, the appellant surreptitiously entered LCpl Felicies' bathroom and was discovered by her. The appellant advanced in her direction, asked if she had been drinking, and shut off the light in her room. This frightened LCpl Felicies, and she sought the aid of Marines in the passageway to get the appellant out of her room. He responded by hiding behind her door, then, acknowledging the directive of the Marines, he left. At around the same time, the appellant was seen knocking on the door of another female Marine, who refused to admit him. Taken in the light most favorable to the Government, the evidence also supports an inference that he returned to LCpl Felicies' room, as she believed, knocked on her door again, and jiggled the door knob in an attempt to gain entry. Thereafter, we know he went into LCpl V's unlocked room, where he was caught in the act of sexual intercourse. Taken together, a reasonable member could find this convincing evidence of sexually aggressive behavior on behalf of the appellant, preceding the alleged rape of LCpl V in her unlocked room. We do as well.

In assessing the capacity of LCpl V to consent to intercourse, we begin by noting that this record is replete with descriptions of her incapacitating intoxication. The Marine who escorted her to her room testified that she could not walk a straight line, and when he got to her barracks stairs, she was asleep. That Marine placed her, fully clothed, on her bed where she was described by two witnesses as asleep and "passed out." Perhaps most importantly, when Cpl Tyler entered LCpl V's room and shook the bed, the appellant jumped off her and crouched on the floor. However, despite being interrupted from the throws of sexual intercourse by the unexpected appearance of the duty NCO, LCpl V made no movement discerned by Cpl Tyler. She did not speak or sit up. She did not even move to cover herself when the appellant leapt from her body, exposing her as she lay on the bed. While Cpl Tyler did not look directly into her eyes to assess her level of consciousness, we find his testimony that LCpl V made no noticeable movement, even to cover herself, to be compelling evidence of her incapacitation.²

A few minutes later LCpl V was located by Cpl Tyler and LCpl Felicies on the bathroom floor, her trousers and panties around one ankle and again passed out. When LCpl Felicies tried to put shorts on LCpl V, she made grunting noises, then aroused, and became combative, apparently unaware that she was naked and on the bathroom floor. In determining how to assess these facts, we

² While we respect that our dissenting brother is not convinced of LCpl V's incapacitation, we find his statement that there is "no evidence" that she was actually unconscious to be an overstatement. There certainly is evidence that she was so drunk that she passed out, and stayed that way, even if it fails to convince him.

look to the defense psychologist's testimony. That witness said intoxicated persons can arouse to a level sufficient to use the bathroom, and yet not be self-aware enough to consent to sex. This is born out by the fact that LCpl V went into, or was assisted into, the bathroom (whether she used the facilities is not known), where she was found unconscious within minutes of the alleged rape. The dissent finds in these facts support for a belief that LCpl V's "actions immediately after the alleged rape" demonstrated mental capacity sufficient to support valid consent to sexual intercourse. To the contrary, we believe that this evidence, viewed in the light most favorable to the Government, shows LCpl V was aroused from alcohol-induced unconsciousness through the efforts of LCpl Felicies, who touched her and spoke to her. Though achieving a level of consciousness, she remained incoherent. As LCpl Felicies agreed, she did not have a conversation with LCpl V, who just kept saying "get out" and "I don't need help" despite being naked on the floor of the bathroom. Record at 175, 179. The defense psychologist referred to this incident as an example of one who is no longer passed out, but is "not clear headed at all." *Id.* at 231. We are convinced beyond a reasonable doubt that the direct observations of Cpl Tyler and LCpl Felicies immediately after the alleged rape, understood in view of the psychologist's opinion, prove that LCpl V was so drunk that she was unconscious and, even when aroused by external stimulation, she lacked any meaningful level of cognitive ability beyond the most rudimentary functions.

As a further measure of LCpl V's intoxication, she testified that she was still drunk when awakened the next morning by CID agents. At trial, she had no recollection of either the events in her room the preceding night, nor even of the agents questioning her. While LCpl V's precise blood alcohol level was apparently never measured, we find it unreasonable to conclude that, despite the level of incapacitating intoxication described in various testimony, LCpl V somehow aroused from drunken unconsciousness, to momentarily competent lucidity, consented to having sex with someone whom she had repeatedly rejected as a sexual partner, and then lapsed back into incapacitation so profound that when the appellant leapt from her body, still in the act of intercourse, she was unable to even cover herself from the view of the duty NCO, who had entered the room and shaken her bed. Minutes later, she was again found to be unconscious. Our common sense and knowledge of the ways of the world tells us that such a scenario is neither a fair nor a reasonable hypothesis.

Finally, the appellant admitted that he had sex with LCpl V, but we find equivocation in his assertion that, as he did so, he was "pretty sure she said yeah." Moreover, the appellant's escape through her bathroom, out the window of an adjoining room, and down the drainpipe, seems to be an over-reaction to being discovered having consensual sex in the barracks. Even if it might not be under other circumstances, we believe that when a fellow Marine, with whom he says he was "pretty sure" he just had consensual sex, lay unconscious on that bathroom floor, the

appellant's dramatic escape reflects his consciousness not of a barracks violation, but guilt of having raped the incapacitated Marine he left behind.

Considering all of the evidence, we conclude that any reasonable factfinder could find each element of the offense of rape was proven beyond a reasonable doubt. We are also convinced beyond any reasonable doubt.

Conclusion

The findings and sentence, as approved, are affirmed.

Senior Judge MITCHELL concurs.

FILBERT, Judge (Dissenting):

Having carefully reviewed the record of trial, I am not convinced beyond a reasonable doubt of the appellant's guilt to the offense of rape. I reach this conclusion because of the lack of evidence that Lance Corporal (LCpl) V did not consent to sexual intercourse with the appellant.

No witness testified that LCpl V's sexual intercourse with the appellant was nonconsensual. LCpl V testified she did not recall any of the events in her room with the appellant. The only direct evidence regarding consent was the appellant's sworn statement to Criminal Investigation Division in which he stated LCpl V did consent and that he would not have engaged in sexual intercourse with her if she had not consented. He also unambiguously stated he did not rape LCpl V.

No evidence was introduced that LCpl V was actually unconscious or incapable of consent at the time the appellant initially made his sexual advances towards her. Moreover, the testimony from Corporal (Cpl) Tyler and LCpl Felicies, the two witnesses who actually saw the appellant and LCpl V in bed together, did not establish lack of consent by LCpl V. Both witnesses had a limited view of the LCpl V while she was on the bed and both admitted they could not see whether LCpl V was conscious at the time the appellant was on top of her or after he jumped off the bed. Both witnesses also testified they did not see LCpl V's face at anytime when she was in bed. In fact, LCpl Felicies testified that she simply thought she "caught people having sex" when she walked in the room. Record at 177.

The Government's theory at trial was that LCpl V could not consent due to her intoxicated state. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2005 ed.), Part IV, ¶ 45c(1)(b). In my view, the actions of LCpl V immediately after the sexual encounter with the appellant fatally undermine this hypothesis. LCpl V made her way to the bathroom within a few seconds after Cpl Tyler and Cpl Bailey walked in her room. She also was able to tell LCpl

Felicies to "get out" several times after LCpl Felicies woke her and tried to get her dressed. Record at 174-76. Further, LCpl V walked LCpl Felicies out of her room, telling her she did not want LCpl Felicies' help. Commander Russell, a Navy psychologist, explained that an individual undergoing an alcohol-induced blackout is capable of consenting to sex during the period of intoxication. *Id.* at 221-23. Contrary to the majority opinion, LCpl V's actions immediately after the alleged rape demonstrate to me she had the mental and physical faculties to consent to sexual intercourse with the appellant moments before.

The majority opinion characterizes the appellant's conduct as "on the prowl" in seeking "amorous attention" on the night in question. Under the circumstances of this case, I do not see how the appellant's conduct, albeit inappropriate, in trying to find female companionship on the night in question, or his sexual interest in LCpl V, leads to the conclusion he was willing to rape LCpl V. There was no evidence in the record suggesting the appellant had any intention or plan to sexually force himself on LCpl V or any other female. In fact, the record was clear that when the appellant had once previously tried to kiss LCpl V in her room, he stopped when she indicated she was not interested. *Id.* at 116-17, 130.

Given the conduct of LCpl V on the night in question, I similarly do not believe her general disposition toward the appellant to be relevant or persuasive. The record established that LCpl V was highly intoxicated and was acting in a manner at the base club that led to her being escorted back to the barracks. Moreover, she testified she no had memory of even being with the appellant in her barracks' room. Thus, LCpl V's general disposition towards the appellant did not appear to play any role in her conduct on the night in question.

Consequently, I would set aside the guilty finding to the offense of rape, affirm the remaining findings of guilty, and reassess the sentence. I would affirm only a reduction to pay grade E-1, confinement for 3 months, and a bad-conduct discharge. *See United States v. Sales*, 22 M.J. 305, (C.M.A. 1986); *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002).

For the Court

R.H. TROIDL
Clerk of Court