

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

**Before
E.S. WHITE, J.E. STOLASZ, B.G. FILBERT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOSEPH A. HENRY
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200800028
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 May 2007.

Military Judge: CAPT Keith Allred, JAGC, USN.

Convening Authority: Commanding General, Marine Corps
Recruit Depot, San Diego, CA.

Staff Judge Advocate's Recommendation: Col B.A. White,
USMC.

For Appellant: LT Brian Korn, JAGC, USN.

For Appellee: Capt Geoffrey Shows, USMC.

19 August 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

A general court-martial, composed of a military judge alone, convicted the appellant, contrary to his pleas, of unlawful entry and indecent assault, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.¹ The appellant was

¹ The appellant was acquitted of unlawful entry with intent to commit indecent assault therein, but found guilty of the lesser included offense of unlawful entry. The appellant was also acquitted of attempt to destroy private property, attempted assault, attempt to disobey an order, unauthorized absence, destruction of property, wrongfully communicating a threat, and wrongfully engaging in conduct likely to cause death or grievous bodily harm,

sentenced to 15 months confinement, forfeiture of all pay and allowances for 15 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error,² claiming: (1) he was too intoxicated to form the intent to gratify his lust or sexual desires, making him not guilty of indecent assault; (2) his trial defense counsel provided ineffective assistance in not calling Gunnery Sergeant (GySgt) [R] to testify regarding the appellant's intoxication on the morning of the events in question; (3) his trial defense counsel provided ineffective assistance in failing to effectively demonstrate the appellant drank beer on the night in question, in not calling his wife a second time to testify during sentencing, and in failing to request deferment of adjudged forfeitures; and (4) the convening authority erred in rejecting the pretrial agreements that both the trial counsel and staff judge advocate recommended.

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

I. The Facts

The appellant contends his voluntary intoxication rendered him unable to form the specific intent to gratify his lust or sexual desires at the time he assaulted the victim. He urges us to set aside the guilty finding as to that offense and, at most, find him guilty of the lesser included offense of assault consummated by a battery. We disagree.

In November and December 2006, the appellant was serving as a drill instructor at Marine Corps Recruit Depot (MCRD), San Diego. On 6 November 2006, the appellant and his wife were involved in an altercation with each other which resulted in the issuance of a military protective order (MPO) forcing the appellant to move to the barracks onboard MCRD, San Diego. On 16 December 2006, Staff Sergeant (SSgt) [O], invited the appellant to his home for dinner. SSgt O lived at the house with his girlfriend, Ms. [R]. The appellant, SSgt O and Ms. R spent the evening drinking alcohol, playing pool and watching movies. The appellant and SSgt O drank whiskey and soda. The appellant testified they also drank beer, though SSgt O testified they only drank whiskey and soda.

in violation of Articles 80, 86, 109, 128, 130, and 134, UCMJ, 10 U.S.C. §§ 880, 886, 909, 928, 930, and 934, respectively.

² The appellant raises these assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

In the early morning hours of 17 December 2006, the appellant, SSgt O and Ms. R all fell asleep in the living room while watching a movie. Ms. R awoke and unsuccessfully tried to wake SSgt O. She woke the appellant to tell him he could sleep in the guest bedroom and then went to sleep by herself in her bedroom. At approximately 0400, Ms. R heard someone who she presumed to be SSgt O enter her bedroom. The person climbed onto the bed pulled off her pants, and placed his hands on her buttocks. At that point, Ms. R realized the person touching her was not SSgt O. She ran out of the room, and woke up SSgt O, still asleep on the couch, who told the appellant to leave the house.

The appellant left, but continued to knock on the door and call SSgt O's cell phone. The appellant left after several minutes, but not before posting a note he had written regarding the incident on the front door of the house. The appellant drove himself back to base without incident. Captain (Capt) [H], the appellant's commanding officer, discussed the incident with the appellant "between 0630 and 0700." Record at 165. The appellant "kind of told [him] a little bit about what happened." *Id.*

II. Intoxication of the Appellant (AOE I)

A. 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 (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. 229, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder 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 elements of indecent assault as alleged in specification 4 under Charge I are:

- (1) That the appellant assaulted Ms. R, a person not his wife, by pulling her pants down and grabbing her buttocks;
- (2) That the acts were done with the intent to gratify the lust or sexual desires of the appellant; and

(3) That, under the circumstances, the conduct of the appellant 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.

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

Evidence of voluntary intoxication may raise reasonable doubt as to the existence of specific intent. RULE FOR COURTS-MARTIAL 916(1)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). When raising an issue of voluntary intoxication as a defense to a specific intent offense, "there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent,' not just evidence of mere intoxication." *United States v. Peterson*, 47 M.J. 231, 234 (C.A.A.F. 1997)(quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989).

B. Analysis

We find the appellant's intoxication at the time of the indecent assault on Ms. R did not render him unable to form the specific intent necessary to commit the offense. He entered Ms. R's room at approximately 0400, slipped into the bed beside her, and then pulled her pants down and grabbed her buttocks. This conduct was sufficiently focused and directed so as to amply demonstrate the appellant's lustful intent. See *United States v. Dock*, 40 M.J. 112, 128-29 (C.M.A. 1994); *United States v. Ledbetter*, 32 M.J. 272, 273 (C.M.A. 1991). Additionally, the appellant's own testimony demonstrates he was lucid and aware of his surroundings. Record at 171, 178-179. For example, the appellant provided the following details as to what occurred immediately after the assault on Ms. R:

So while he was, you know, yelling at me and screaming at me, we were at the guest room that he showed me earlier. I went to the guest room and I grabbed all my stuff. I was still fully dressed so all I had to do was grab my jacket and my cell phone. So I had my stuff in my hand and I didn't want to leave because I wanted to talk to him at first. . . .

Id. at 171.

The appellant's conduct after the assault demonstrates he was functioning in a rational manner. After repeatedly calling SSgt O on his cell phone, the appellant wrote a coherent note attempting to explain the events and placed it on the SSgt O's front door. He then drove his car to MCRD from SSgt O's home without incident. Moreover, Capt H testified he spoke with the appellant within two to three hours after the assault and the appellant seemed coherent and aware of his surroundings. Capt H

also testified he could not smell alcohol on the appellant's breath. *Id.* at 166-67.

Based on the totality of the evidence, we are satisfied beyond a reasonable doubt that the appellant's voluntary intoxication did not negate his ability to form the specific intent necessary to commit indecent assault. We have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of indecent assault. Furthermore, 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 ourselves are convinced beyond a reasonable doubt of the appellant's guilt of this offense.

III. Ineffective Assistance Claims (AOE's II & III)

The appellant next contends that trial defense counsel should have called GySgt R to testify at trial regarding the appellant's intoxication. GySgt R was present during Capt H's interview of the appellant on the morning of the events in question. The appellant also contends his trial defense counsel failed to effectively demonstrate the appellant drank beer and was therefore highly intoxicated on the night in question, call his wife a second time to testify in sentencing, and request deferment of adjudged forfeitures.

A. Principles of Law

The test for determining ineffective assistance of counsel has two prongs: deficient performance and prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by the defense counsel were so serious that they deprived him of a fair trial. *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Scott*, 24 M.J. at 192. In order to show ineffective assistance, the appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

B. Analysis

The appellant's ineffective assistance of counsel assertions constitute nothing more than bare allegations and speculation concerning his trial defense counsel's claimed errors and omissions. His claims that his trial defense counsel erred in failing to call GySgt R, and in not calling the appellant's wife

to testify a second time during sentencing, are unsupported by any post-trial affidavit of the appellant or other credible evidence. *Cf. United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); *United States v. Griffin*, No. 200201471, 2007 CCA LEXIS 565 at 15, unpublished op. (N.M.Ct.Crim.App. 20 Dec 2007), *rev. denied*, __ M.J. __, 2008 CAAF LEXIS 806 (C.A.A.F. June 30, 2008). We also find nothing in the record to undermine our presumption that appellant's trial defense counsel made tactical decisions not to call GySgt R and not to recall the appellant's wife during sentencing.³ We note Capt Hall did testify at trial and stated the appellant "appeared inebriated" when he and GySgt R saw the appellant that morning. Record at 165. The trial defense counsel also called the appellant who testified in detail as to how much he drank and the level of his intoxication. *Id.* at 172-73.

Similarly, the appellant offers nothing to demonstrate his trial defense counsel failed to show the appellant drank beer on the night in question. In actuality, his counsel did present evidence of the appellant's beer consumption through the appellant's own testimony. *Id.* at 172. The trial defense counsel also cross-examined both SSgt O and Ms. R on this point and was able to get SSgt O to concede he had beer in his house. *Id.* at 51, 68.

Likewise, the appellant provides nothing to support his claim his trial defense counsel erred in failing to request deferment of adjudged forfeitures. The appellant provides no evidence that he wanted or asked his trial defense counsel to submit a request for deferment of adjudged forfeitures. Moreover, his counsel submitted a clemency request asking "that Pvt Henry's forfeitures be given to his wife and children." Clemency Request of 20 Aug 2007, at 1-2, Encls. (1)-(4).

The conclusion the trial defense counsel rendered adequate assistance and exercised reasonable professional judgment is further supported by the vigorous pretrial, trial and sentencing representation he provided to the appellant. In light of the evidence in the record and the appellate filings, we conclude the appellant has demonstrated neither deficient performance nor prejudice.

IV. Rejection of Pretrial Agreements (AOE's IV)

The appellant claims the convening authority erred in rejecting pretrial agreements that both the trial counsel and staff judge advocate recommended. We disagree. The decision whether to accept or reject a pretrial agreement offer is within the sole discretion of the convening authority. R.C.M. 705(d)(3). There is no evidence in the record that he abused his discretion.

³ The appellant's wife testified during the guilt phase of the trial. Record at 74-109.

Conclusion

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

Senior Judge WHITE and Judge STOLASZ concur.

For the court,

R.H. TROIDL
Clerk of Court