

**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.

**BRANDON J. KING
AVIATION ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200700342
GENERAL COURT-MARTIAL**

Sentence Adjudged: 16 June 2006.
Military Judge: LtCol David Jones, USMC.
Convening Authority: Commander, Navy Region Southwest Asia,
Bahrain.
Staff Judge Advocate's Recommendation: LCDR F.L. Moore,
JAGC, USN.
For Appellant: LT Heather L. Cassidy, JAGC, USN.
For Appellee: LT David H. Lee, JAGC, USN.

22 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of rape, forcible sodomy, assault with intent to rape, adultery, and indecent assault, in violation of Articles 120, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 925, and 934. The appellant was sentenced to confinement for three years and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

On appeal, the appellant asserts that the evidence is factually insufficient to prove his guilt beyond a reasonable doubt. He further avers that the military judge abused his

discretion when he admitted evidence of the appellant's prior sexual acts with other women because said acts were neither logically nor legally relevant. We have carefully examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and 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.

Evidence of Prior Acts

The appellant was stationed in Bahrain and was charged with various sex-based offenses with a female Muslim foreign worker. He provided five separate written statements to investigators of the Naval Criminal Investigative Service (NCIS) between 25 October 2005 and 20 November 2005 regarding his actions on the night in question. At trial, the appellant unsuccessfully moved to suppress two of his statements in their entirety based, *inter alia*, on voluntariness. Appellate Exhibit XIX. The appellant's motion included an alternative request to suppress six specific passages from three of the statements. Prosecution Exhibit 8, one of two written statements made by the appellant to NCIS on 17 November 2005, included the following two passages which the military judge declined to suppress:

There is no way that I feel that I raped MALAK, I just feel that I took advantage of her and her feelings, but then again I have done that to several other women in the past.

. . . .

I want to add that I've been with several other women in the past that when they say no during sex, they don't mean to stop. In those situations I felt as though if I hit the right spot, they will start to change their mind[s].

On appeal, the appellant argues that the military judge erred and abused his discretion when he declined to suppress these two passages as "prior bad acts." Appellant's Brief and Assignments of Error of 12 Jul 2007 at 29.

A military judge's decision to admit evidence is normally reviewed under an abuse of discretion standard. *United States v. Hays*, 62 M.J. 158, 163 (C.A.A.F. 2005)(internal citations omitted). When a military judge conducts a proper MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) balancing test, his ruling will not be overturned absent a clear abuse of discretion. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). We agree with the parties that the three-part

*Reynolds*¹ test is an appropriate vehicle to evaluate the admissibility of prior acts evidence.

The appellant argues that the first contested quote does not make any fact at issue more or less likely and is improper propensity evidence under MIL. R. EVID. 404(b). Appellant's Brief at 25. At trial, the prosecution countered this argument with the observation that the statement doesn't indicate a propensity to do anything illegal or bad, *per se*, but simply reflects the appellant's willingness to take (sexual) advantage of women's feelings. In its written opposition to the appellant's motion, the prosecution asserted that the statement is admissible under MIL. R. EVID. 404(b) as evidence of the appellant's intent and the absence of mistake.

The military judge did not enter formal written findings but rather ambiguously opined on the record that the statement, standing alone, did not reflect a "prior bad act, as it's commonly seen." Arguably, this suggests that the military judge's perception of MIL. R. EVID. 404(b) evidence is somehow limited to prior acts that are only bad in a criminal sense. In any case, the military judge went on to observe that the statement was relevant insofar as it "gives context to" the appellant's actions on the night in question.

It is possible the military judge went through a proper MIL. R. EVID. 404(b) analysis at trial. Having carefully reviewed the record, however, we find that the absence of verbal precision and detail by counsel and the military judge, both with respect to what constitutes a prior act under MIL. R. EVID. 404(b) and how the statement was relevant to the instant proceeding, creates sufficient uncertainty in our minds that we will consider the admissibility issue *de novo* giving no deference to the military judge's ruling. See *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

We agree with the prosecution's written argument at trial that the statement is probative of the appellant's "intent and the absence of mistake." AE XX at 13. In cases involving the issue of sexual consent and possible mistake of fact, evidence of an accused's criminal *mens rea* has been found to be relevant. *Reynolds*, 29 M.J. at 109. The military judge's characterization of the statement's relevance as "giving context" to the appellant's action that night can be interpreted to reflect a similar relevance finding. In any case, we find that the appellant's statement at issue meets the first two prongs of the *Reynolds* test. As the appellant personally acknowledged that he acted in this way on prior occasions, we find that his statement

¹ *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989)(The three part test can be stated as follows: (1) does the evidence reasonably support a finding that the appellant committed the stated prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of the evidence; and (3) is the probative value substantially outweighed by the danger of unfair prejudice).

reasonably supports a finding by court members that the appellant committed the stated prior acts. With respect to relevance, we are satisfied that the first statement is relevant evidence of the appellant's intent and the absence of mistake on the night in question.

Under the third *Reynolds* prong, we find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. As noted at trial, the statement does not imply and the prosecution did not argue that the appellant had raped or sexually assaulted women in the past. Record at 452-53. The parties and the military judge agreed that the most prejudicial interpretation that the members could reasonably draw is that the appellant manipulated women emotionally to get them to consent to romantic contact. We agree.

While this arguably could place the appellant in a bad light with members who feel that any sort of emotional manipulation to get sex is wrong, it would have little effect on the members' determination of whether or not the victim actually consented on the night in question. Potentially, as the military judge noted, the members could find this statement exculpatory insofar as it might explain why the victim might have ultimately been lulled into consenting to sexual relations as the defense claimed. Thus, while there is some minimal danger of unfair prejudice, we find that the danger did not substantially outweigh the statement's relevance to the appellant's intent and lack of mistake.

We further note that the military judge affirmatively instructed the members that the contested statements could only be used for the limited purpose of showing the appellant's intent or to rebut a claim of mistake. Record at 1618. There is no evidence the members did not understand or follow this instruction. We conclude, therefore, that the military judge did not abuse his discretion when he declined to suppress this passage from the appellant's statement to NCIS.

For similar reasons, we find the second contested statement is also admissible under MIL. R. EVID. 404(b). As with the first passage, we agree with the prosecution's written assertion at trial that the statement was probative of the appellant's intent and lack of mistake. AE XX at 13. Mirroring our analysis of the first contested passage, we find the first two *Reynolds* prongs have been met.

Under the third *Reynolds* prong, we find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The evidence is highly probative of the appellant's willingness to continue romantic efforts even after a woman has clearly told him "no." While the appellant and the victim's account of how the appellant got into the victim's room differ markedly, they substantially agree that the victim

struggled, told the appellant "no" on at least two occasions as he attempted to enter her, and that she tried to scoot away from him as he refused to take "no" for an answer. As noted above, the military judge instructed the members that they could only use the appellant's statement for the limited purpose of showing the appellant's intent or to rebut a claim of mistake. Record at 1618. We conclude, therefore, that the military judge did not abuse his discretion when he declined to suppress this second passage from the appellant's statement to NCIS.

Factual Sufficiency

We review the factual sufficiency of the evidence *de novo*. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). We may believe one portion of a witness's testimony and disbelieve another. While there is significant dispute regarding how the appellant got into the victim's bedroom, his own statements to NCIS substantially corroborate the victim's somewhat more disjointed account of the appellant's forceful advances and the victim's obvious non-consent. After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c).

Conclusion

The findings and the approved sentence are affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court