

**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.

**CHAD M. MCCRACKEN
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200600484
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 February 2005.
Military Judge: LtCol Paul J. Ware, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft
Wing, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col C.J. Woods,
USMC.
For Appellant: Maj Jay S. Stephens, USMC.
For Appellee: Maj Wilbur Lee, USMC.

29 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of indecent assault, adultery, and drunk and disorderly conduct, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to confinement for one year, forfeiture of all pay and allowances, a bad-conduct discharge, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error, claiming:
(1) the military judge erred by failing to suppress the

appellant's written statement to the Naval Criminal Investigative Service (NCIS); (2) the finding of not guilty to rape, but guilty to the lesser included offense of indecent assault and the offense of adultery were logically inconsistent; and (3) the evidence was not legally or factually sufficient to prove appellant's guilt to the charges and specifications.

After carefully considering the record of trial, the appellant's brief and assignment of errors, the Government's answer, and the appellant's reply, we conclude there is partial merit in the appellant's contention that there was insufficient evidence of indecent assault. We will take remedial action in our decretal paragraph. After our corrective action, we conclude the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

We will address the appellant's assigned errors out of order. First, we take up the question of the admissibility of the appellant's statements to NCIS. Second, we will discuss the question of the sufficiency of the evidence. As a result of our resolution of the sufficiency issue, the second assigned error contesting the consistency in the verdicts has been rendered moot.

Background

The appellant, a 23-year-old Sergeant, and Corporal M (Cpl M) were involved in a romantic relationship while deployed to Al Asad Air Base, Iraq. Cpl M's husband, a Sergeant, had been a member of the same squadron and maintained contact with members of the command, although he was not deployed with them.

During March 2004, the appellant and Cpl M became sexually involved, and repeatedly engaged in mutual masturbation and on occasion, "dry humping" while in the appellant's BEQ room, and in the presence of his roommates. On 29 April 2004, at approximately 2300, the appellant was drinking alcohol and talking with fellow Marines, including Cpl M, in the common smoking area of his barracks. The appellant was loud and visibly intoxicated. The appellant decided to go to his room and Cpl M accompanied him. Once there, he stripped to his boxers and climbed into bed. Cpl M knelt down beside his bed and began touching the appellant's chest and face. The appellant asked her to stay and she lay down in the rack next to him. The appellant and Cpl M both testified that they began kissing and engaging in heavy petting of each other's genitalia. Cpl M acknowledged that the appellant rubbed her vaginal area and that she became sexually aroused. The appellant testified that Cpl M initiated the rubbing of each other's genitals as she had done on all the other occasions when they were intimate. The appellant testified that Cpl M was on top of him at first and then he was on top while they were "grinding" their pelvises. Record at 679.

Cpl M testified that while she was still in the appellant's rack, he undid her bra and began to touch her breasts. She asked him to fix her bra, but the appellant then pulled down her shorts while she was trying to fasten her own bra. She testified that she squeezed her legs together, but that the appellant was able to open her legs and insert his penis in her vagina for a few seconds. When she slightly pushed him, he fell off the rack because their bodies were so close to the edge of the rack. Cpl M testified that she asked him to stop but did not raise her voice. The appellant, however, testified that "at the very end" of their sexual encounter, Cpl M "said something to the effect that she was either uncomfortable or it didn't feel right," and that he immediately stopped and rolled off of her. He asked her "if she was sure she wanted to do this." *Id.* A few minutes later, the appellant left to go to the head, but prior to leaving, he kissed Cpl M and she kissed him back.

During this sexual encounter between the appellant and Cpl M, two of the appellant's three roommates, Cpl Labounty and Cpl Marshall, were in their racks, and had been awakened by the commotion. Cpl Labounty testified at trial that he heard rustling of the plastic mattress covers, and also heard whispering coming from the appellant's rack during the encounter. Cpl Labounty also heard CPL M say "this just doesn't feel right," but he did not hear her say words to the effect of "no" or "stop please" or "don't do this." He also did not hear any kind of struggle. Cpl Labounty testified that when Cpl M left the room, his other roommate, Cpl Marshall commented about the disturbance being made by the appellant and Cpl M.

Cpl M returned to her BEQ room for about fifteen minutes, but then she joined the appellant and other Marines who were talking in the BEQ hallway and later in the smoking area outside. Several witnesses testified that they saw Cpl M that night after she left the appellant's room and that she seemed normal while laughing and socializing with a group including the appellant.

Cpl M also acknowledged returning twice with the appellant to the hallway outside the appellant's BEQ room to talk. Cpl M testified that she wanted to talk about ending the relationship, but the appellant wanted her to come back into his room. Cpl Labounty, who was still trying to sleep inside the room, had enough of what he conceived as their inconsiderate behavior, and yelled at them and threw his alarm clock at the door.

The next day, Cpl Labounty reported the incident to his command. Cpl Labounty also testified at trial that later that day, Cpl M approached him, apologized to him, and told him that it was an innocent encounter and that nothing happened.

Following a command investigation, the appellant was informed by a command representative that the command was sending the case to nonjudicial punishment (NJP). The appellant was advised of his *Booker* rights, and the paperwork for NJP was

prepared. The appellant invoked his right to consult an attorney. Despite his efforts, however, he was unable to consult an attorney.

On 9 May 2004, NCIS Special Agents (SAs) Eric E. Powers and Patrick J. Myers, picked the appellant up at his unit and transported him to the NCIS Office at Al Asad Air Base. The offices at the NCIS building were hot, as the air conditioning was broken. The appellant was informed that he was suspected of rape, and was advised of his rights, including his right to counsel. The appellant was also given a cleansing warning. The appellant signed a cleansing warning sheet and did not renew his request for counsel. Rather, during the course of the interrogation, the appellant informed the SAs that he had previously requested counsel for the NJP, but was told by his command that he was only getting NJP and did not rate counsel. The NCIS SAs did not disabuse the appellant of the notion that his command still intended to process the case at NJP. However, the NCIS SAs did not promise the appellant that he would receive NJP in exchange for making any statements. The appellant did not request an attorney, and he was subsequently interrogated for seven hours, during which time he was allowed two smoke breaks, and was provided soda to drink. Ultimately, the appellant completed a written statement, in which he admitted to mutual masturbation with Cpl M and inserting his penis into her vagina.

Admissibility of the Appellant's Statements

The appellant alleges that the military judge erred in admitting the appellant's written statement to the NCIS agents because it was given involuntarily and was made after the appellant invoked his right to counsel. Appellant's Brief of 27 Sep 2006 at 6. In his argument, the appellant specifically asserts that his 9 May 2004 statement was coerced, and also, was the product of unlawful inducement because the NCIS "capitalized on the Appellant's honest belief that if he cooperated, he would be given non-judicial punishment," and that the actions of the appellant's command regarding NJP and the statements of the NCIS SAs about NJP created a "de facto" immunity from prosecution of the offenses at court-martial. Appellant's Brief at 8-11; Appellant's Reply Brief of 30 Nov 2006 at 1-3. We disagree and will address each of the appellant's assertions separately.

1. Voluntariness of Confession

Article 31(d), UCMJ, prohibits the admission into evidence of any statement that is "obtained . . . through the use of coercion, unlawful influence, or unlawful inducement . . ." See *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002). An appellant's confession must be voluntary to be admissible against him. *Id.* (citing *Dickerson v. United States*, 50 U.S. 428, 433 (2000)). Voluntariness of a confession is a question of law that we review *de novo*. *United States v. Cuento*, 60 M.J. 106, 108 (C.A.A.F. 2004)(quoting *United States v. Bubonics*, 45 M.J. 93,

94-95 (C.A.A.F. 1996)). The key issue is whether the confession is the product of an essentially free and unconstrained choice by its maker. *Id.* Ploys intended to mislead or lull him into a false sense of security do not render a statement involuntary provided the ploys do not rise to the level of compulsion or coercion. *United States v. Jones*, 34 M.J. 899, 907 (N.M.C.M.R. 1992)(citation omitted).

To be voluntary, a confession must be the product of the suspect's own balancing of competing considerations. *Id.* If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of the confession would offend due process. *Cuento*, 60 M.J. at 108 (citing *Bubonics*, 45 M.J. at 94-95). This determination is made by examining "the 'totality of all the surrounding circumstances'" of the confession, including "'both the characteristics of the accused and the details of the interrogation.'" *Ellis*, 57 M.J. at 378 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

In *Ellis*, our superior court explained that the "totality of the circumstances" test includes an examination of "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions." *Id.* at 379. Moreover, the Court in *Ellis* explained that when evaluating the totality of circumstances, appellate courts look not only to what occurred, but also to what did not occur, such as threats or physical harm. *Id.*

Interrogation of a suspect in custody must cease if the suspect requests counsel. MILITARY RULE OF EVIDENCE 305(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). An ambiguous comment or request, however, does not require that interrogation cease. A request for counsel must be articulated "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 461-62 (1994). If the mention of an attorney "fails to meet the requisite level of clarity," questioning may continue. *Id.* "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62

We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000). "[W]e review fact finding under the clearly-erroneous standard and conclusions of law under the *de novo* standard." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)(citations omitted). "In reviewing a ruling on a motion to suppress, we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*,

44 M.J. 409, 413 (C.A.A.F. 1996)(citations omitted). In the instant case, the military judge found by a preponderance of the evidence that the appellant voluntarily waived his rights and made the challenged statement of his own free will. The military judge neither explained his ruling nor attach written findings. Record at 327.

Viewing all the facts taken together, we find that the appellant's statements were voluntary and admissible, and that the military judge did not abuse his discretion in denying the appellant's motion to suppress his statement to NCIS. The appellant was old enough and intelligent enough to make an informed waiver of his rights, and his waiver was voluntary and was not the product of coercion. Moreover, we find that the appellant had been fully advised of his rights and, contrary to the appellant's argument on appeal, he did not unambiguously invoke his right to counsel, but rather affirmatively waived this right. We further find that the conditions of the interrogation and tactics employed by the NCIS agents were not inherently coercive and did not overcome the appellant's will to resist. We therefore conclude that the appellant's statement was voluntary. Under these circumstances, we conclude that the military judge did not abuse his discretion by denying the appellant's motion to suppress his statement to NCIS.

2. Immunity

In challenging the military judge's decision to admit his written statement to NCIS, the appellant also asserts, for the first time on appeal, that "the command's actions in telling the appellant that he was going to NJP and preparing the paperwork for this NJP, combined with the statements of the NCIS special agent about NJP, and that this interview was just to 'clear things up' were a *de facto* promise that [the appellant] would not be taken to court-martial, that his statements would not be used against him at a court-martial and that the allegations were going to be addressed at NJP." Appellant's Brief at 11; Appellant's Reply Brief at 3. We disagree.

A motion to suppress statements, to dismiss a charge or specification because the prosecution is barred by a grant of immunity, or an allegation of improper use of immunized testimony in the prosecutorial decision are waived if not brought before the military judge at the appropriate time, absent plain error. See *United States v. Allen*, 59 M.J. 478, 483 (C.A.A.F. 2004)(an "allegation of improper use of immunized testimony in the prosecutorial decision constitutes a waivable basis for a motion to dismiss"); RULE FOR COURTS-MARTIAL 905(e) and 907(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). A plain error analysis requires the determination of (1) whether there was an error; (2) if so, whether the error was plain or obvious, and, (3) if the error was plain or obvious, whether it was prejudicial. See *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

We conclude that there was no grant or *de facto* grant of immunity because there was never a promise of immunity made to the appellant. Neither the appellant's command nor the NCIS agents made an offer, explicit or otherwise, that if the appellant admitted to nonconsensual sexual intercourse with Cpl M the case would remain at NJP. *See, e.g., United States v. McKeel*, 63 M.J. 81, 83 (C.A.A.F. 2006)(promise not to prefer charges in return for accepting nonjudicial punishment and waiving administrative separation board); *United States v. Jones*, 52 M.J. 60, 65 (C.A.A.F. 1999) (promise to dispose of charges at nonjudicial punishment if service members agreed to pay restitution and testify against co-accused); *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992)(promises charges will not be brought if service member testifies before a board investigating a training death); *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991)(promise not to prosecute if accused participated in a child-sexual-abuse-treatment program); *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986)(promise not to prosecute if accused told where drugs were located onboard ship). Because there was no offer of immunity, the failure of the military judge to *sua sponte* raise and rule on the issue was not error, plain or otherwise. This issue is without merit.

Legal and Factual Sufficiency

In his third assignment of error, the appellant contends that the evidence was insufficient to find the appellant guilty beyond a reasonable doubt of indecent assault, adultery and drunk and disorderly conduct. We agree, in part, with the appellant's position concerning the indecent assault offense, but disagree with regard to the adultery and drunk and disorderly conduct offenses.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, 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), UCMJ.

The term "reasonable doubt" does not mean 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). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). 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); *United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994).

To prove indecent assault, in violation of Article 134, UCMJ, the Government must establish, *inter alia*, that the alleged assault act was done without legal justification, excuse or lawful consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 54c(1)(a). At trial, the military judge instructed the members that if they found the appellant not guilty of rape, then they should determine whether the appellant committed an indecent assault upon Cpl M on 28 April 2004, by "pulling down [Cpl M]'s shorts and underwear and attempting to insert his penis into her vagina." Record at 748.

Having carefully reviewed the record of trial we are not ourselves convinced beyond a reasonable doubt of the appellant's guilt to the lesser included offense of indecent assault. The evidence established that the appellant and Cpl M had an ongoing sexual relationship, and that she had consented to and often initiated mutual masturbation and "dry humping" in the past. Moreover, on this occasion, she acknowledged consenting to mutual masturbation and "dry humping" preceding the alleged rape. Most importantly, however, is the fact that the evidence did not establish that Cpl M reasonably manifested her lack of consent to the appellant's pulling down of her shorts and underwear. We find particularly persuasive the testimony of Cpl Labounty, an independent witness to the sexual encounter, who did not hear or sense Cpl M's expression of non-consent to the appellant's advances.

We therefore find the evidence factually insufficient to support the finding of guilty to this specification. Accordingly, we will set aside the finding of guilty to indecent assault in our decretal paragraph. We do, however, find that the evidence is legally and factually sufficient to support a finding of guilty to the lesser included offense of indecent acts with another. Arts. 59(a) and 66(c), UCMJ; *Jackson*, 443 U.S. at 319; *Turner*, 25 M.J. at 325. The appellant's sexual interactions with Cpl M, a married Marine in his squadron, while in his BEQ room in the presence of his roommates, and which were witnessed by them, were indecent. Prejudice to good order and discipline was evident when Cpl Labounty hurled an alarm clock at the couple from his rack across the room when he finally became fed-up with their antics.

As to the offenses of adultery and drunk and disorderly, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. 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 are ourselves convinced

beyond a reasonable doubt of the appellant's guilt for these offenses.

In light of our action in setting aside the appellant's conviction of indecent assault, the appellant's assignment of error concerning the inconsistency of the verdicts is rendered moot.¹

Conclusion

Accordingly, we set aside the guilty finding to indecent assault as a lesser included offense of the charged offense of rape. We affirm a guilty finding to the lesser included offense of indecent acts with another, in violation of Article 134, UCMJ. The specification is modified by excepting the word "rape" and substituting therefore the words "wrongfully commit an indecent act with Cpl M at his Barracks room by pulling down Cpl M's shorts and underwear and attempting to insert his penis into her vagina while in the presence of Corporal Labounty, USMC, and Corporal Marshall, USMC." We affirm the remaining findings of guilty to the offenses of adultery and drunk and disorderly conduct.

Having found prejudicial error at trial, we must perform sentence reassessment. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

In *United States v. Sales*, 22 M.J. 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

We have considered the entire record of trial and the evidence properly admitted during presentencing. We conclude that, had the error not occurred, the members would have sentenced the appellant to no less than a bad-conduct discharge, reduction to pay grade E-1, and confinement for 6 months, and affirm that sentence.

Senior Judge GEISER concurs.

¹ We note, however, that this court has previously determined that "inconsistent verdicts, whether from judge or jury, provide no grounds for reversal of a conviction." *United States v. Betts*, No. 200300629, 2005 CCA LEXIS 301, unpublished op. (N.M.Ct.Crim.App. 28 Sep 2005)(quoting *United States v. Barrow*, 42 M.J. 655,664 (A.F.Ct.Crim.App. 1995)) *aff'd*, 64 M.J. 176 (C.A.A.F. Sept 11, 2006).

COUCH, Judge (concurring in part, dissenting in part):

I concur with the majority that the appellant's confession was voluntary and that he did not possess *de facto* immunity at the time his confession was made. I also concur that the evidence is factually insufficient to support the appellant's conviction for indecent assault. However, I do not concur with the majority's decision to affirm a finding of guilty for indecent acts with another, and therefore I respectfully dissent.

The appellant was acquitted of rape but convicted of adultery, and the record provides ample evidence that the sexual conduct between him and Cpl M was consensual. The majority shares this interpretation of the evidence, and uses it as a basis for affirming the lesser included offense of indecent acts with another for consensual sexual activity in the presence of the appellant's roommates. The majority is correct in its statement of the law that such conduct, if proven, meets the elements of the offense of indecent acts with another. See *United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999). However, this was not the Government's theory of liability presented at trial, nor is it consistent with the *actus reus* element as provided by the military judge to the members.

"An appellate court may not affirm an included offense on 'a theory not presented to the' trier of fact." *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)(quoting *Chiarella v. United States*, 445 U.S. 222, 236 (1980)). "To do so 'offends the most basic notions of due process,' because it violates an accused's 'right to be heard on the specific charges of which he is accused.'" *Id.* (quoting *Dunn v. United States*, 442 U.S. 100, 106 (1979)). "[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn*, 442 U.S. at 107.

In this case, the Government never mentioned the presence of the appellant's two roommates during opening statement, nor did Cpl M during her direct testimony. Neither of the roommates testified during the Government's case. The only reference to the roommates' presence by the Government during closing argument was in relation to the drunk and disorderly offense. Record at 763. The military judge made no reference to the appellant's roommates when he instructed the members that they could consider the offense of indecent acts with another if they found, *inter alia*, that the appellant fondled the breasts and vagina of Cpl M.¹ *Id.* at 749. Because the Government did not present a theory of indecent acts with another based upon sexual intercourse in the presence of others at trial, and the members were not

¹ Even if we were to affirm a finding of indecent acts with another using the theory that the appellant fondled Cpl M's breasts and vagina, such a finding would be an unreasonable multiplication of charges in relation to the appellant's conviction for adultery. See *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001).

instructed with elements of the offense consistent with that theory, I do not think we are free to affirm a conviction on that theory on appeal.

I agree with the appellant's claim that his sentence to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to pay grade E-1 is inappropriately severe. This sentence, along with the fact that the appellant's general court-martial convictions render him a felon and registered sex offender, seems unfair and unjust within the context of a case involving sexual misconduct between two consenting adults. See *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005); see also Art. 66(c), UCMJ.

In view of the action I would take on the findings, on reassessment of the sentence, I would affirm a sentence no greater than three months confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1.

For the foregoing reasons, I respectfully dissent.

For the Court

R.H. TROIDL
Clerk of Court