

**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.

**BILL NAPIER III
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200800030
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 September 2007.
Military Judge: Maj Charles C. Hale, USMC.
Convening Authority: Commanding Officer, 3d Marine Division
(-)(Rein), Camp Foster, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol K.J. Brubaker,
USMC.
For Appellant: LCDR K.B. Reeves, JAGC, USN; LT William
Stoebner, JAGC, USN.
For Appellee: Capt Geoffrey Shows, USMC.

15 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of two specifications of violating a lawful general order and adultery in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. Officer members convicted the appellant, contrary to his pleas, of making a false official statement, sodomy, indecent assault, and of wrongfully harassing another service member in violation of Articles 107, 125, and 134, UCMJ, 10 U.S.C. §§ 907, 925, and 934. The appellant was acquitted of rape, three specifications of making a false official statement, and of extortion. He was sentenced to

confinement for 12 months, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises two assignments of error. First, he asserts that the military judge erred when he provided an erroneous findings instruction to the members indicating that the difference between rape and the lesser included offense (LIO) of indecent assault was that the latter required a lesser degree of force than the former. Additionally, the appellant asserts that evidence supporting his conviction for indecent assault was legally and factually insufficient.

We have considered the record of trial, the appellant's briefs and assignments of error and the Government's responses. In addition, we have carefully considered and specifically commend the excellent oral argument presented by the parties on 25 June 2008. We find 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. See Arts. 59(a) and 66(c), UCMJ.

Instructional Error

The question of whether members were properly instructed is a question of law we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). We note that the defense did not object to the military judge's instructions. Normally, absent plain error, a failure to object to an instruction results in waiver of the issue on appeal. *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999). We agree with the appellant that a passive failure to object may not result in waiver if it is unclear from the record whether the failure to object was the product of a "conscious choice." *Id.*

In the case at bar, the defense counsel's failure to object appears to have been the result of a conscious choice. The military judge made specific reference to that portion of the instructions delineating the difference between rape and indecent assault. The defense counsel was then specifically asked if he objected to that particular portion of the instructions. The defense affirmatively declined to object. Record at 320-21. We are satisfied that absent plain error the instructional issue was waived.¹

The appellant asserts that the military judge erred in two ways. First, the appellant argues that the LIO of indecent

¹ Plain error requires that there be (1) an error; (2) that the error be plain (clear or obvious); and that (3) the error affect the substantial rights of the defendant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

assault should not have been instructed on in the first place as, under the facts of the case, there was no factual matter distinguishing the two offenses. Secondly, the appellant asserts, and the Government concedes, that the definitional portion of the instructions relating to the charge of rape and the LIO of indecent assault inaccurately conveyed that each offense required a different amount of force. Appellant's Brief and Assignment of Errors of 27 Mar 2008 at 13-15; Answer on Behalf of the Government of 28 Apr 2008 at 8.

A military judge is obligated to "'assure that the accused receives a fair trial.'" *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006)(quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). This obligation includes the duty to "provide appropriate legal guidelines to assist the jury in its deliberations" *Id.* (quoting *United States v. McGee*, 1 M.J. 193, 195 (C.M.A. 1975)). A military judge has a *sua sponte* duty to instruct the members on a matter that is "reasonably raised by some evidence." *Smith*, 50 M.J. at 455. A military judge may only instruct on an LIO where the greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser offense. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008). Failure to provide correct and complete instructions may amount to a denial of due process. *Wolford*, 62 M.J. at 419 (citing *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979)).

Decision to Instruct on the Lesser Included Offense

The offense of rape requires that the sexual intercourse take place by force *and* without the consent of the victim. A charge of rape often requires the members to make a factual determination of where persuasion or mere acquiescence ends and force begins. Where there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more than the incidental force involved in penetration is required for conviction. Thus, consideration of both the alleged attacker's and the alleged victim's conduct is necessary in factually assessing the sufficiency of the force required by Article 120, UCMJ. *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990).

Indecent assault, on the other hand, considers the sufficiency of the force primarily in the context of whether such force resulted in an offensive touching, however slight. While consent is an element of indecent assault, the relation of force to consent is different than in a rape charge. *United States v. Ayers*, 54 M.J. 85, 90 (C.A.A.F. 2000). The same offensive touching may be lawful or unlawful for one reason under Article 120, UCMJ, and lawful or unlawful for a different reason under Article 134, UCMJ. See *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). While we agree with the appellant that the conduct which forms the basis for indecent assault as an LIO of rape is *usually* conduct separate from the act of penetration, it

need not necessarily be so. Under the facts of the case at bar, the incidental force involved in penetration, while insufficient to support a rape charge could well be entirely sufficient to support a conviction for indecent assault.

We find that the military judge's decision to instruct on indecent assault as an LIO of rape was not error. The rape charge presented by the Government required the members to consider force and constructive force in the context of the victim's will and resistance. The incidental force inherent in the actual penetration was essentially irrelevant to the members' evaluation of the facts relating to the victim's consent to that penetration.

The indecent assault charge, on the other hand, required the members to focus primarily on the force inherent in the actual penetration to determine if the force resulted in an offensive touching, however slight. While the victim's consent was still at issue, it was interrelated with the force element in a different way. These two different analytical frameworks relating to the element of force constituted a sufficient factual distinction to support the military judge's decision to instruct on indecent assault as an LIO of rape.

Content of Instruction on Lesser Included Offense

The military judge's instruction to the members detailing the difference between rape and indecent assault stated in pertinent part that:

The offense charged in Specification 2 differs from the lesser included offense of indecent assault in that the offense charged requires an essential element that [the members] be convinced beyond a reasonable doubt that the act of penetration be done by force and without consent whereas the lesser offense of indecent assault requires a battery. *An unlawful and intentional application of force or violence to another, however slight, with the intent to gratify the lust and sexual desires of the accused.*

Record at 327-28.

With respect to the alleged instructional error, the appellant does not contest that the military judge correctly instructed the members on the elements of rape and the elements of indecent assault. Record at 325-27. He also does not contest that the military judge's instructions, included legally accurate definitions of the terms "bodily harm" and "battery." The defense asserts, however, that while the military judge may have correctly defined "bodily harm" and "battery" earlier in his instructions; at the point he was describing the difference between rape and indecent assault under the facts of the case, he inappropriately included the "however slight" language from the

definition of "bodily harm" in his definition of "battery." This, the appellant contends, confused the members by suggesting that the quantum of force necessary to constitute rape was greater than the quantum of force necessary to constitute an indecent assault.

Having considered the entire record of trial, we do not find that this misstatement constituted plain error. The military judge correctly instructed the members on the elements of indecent assault as an LIO of rape. Further, the military judge correctly defined both "battery" and "bodily harm" moments before his misstatement. While the appellant is correct that the term "however slight" does not modify the force element of battery, we do not find that the military judge's misstatement was plain and obvious error. Further, we find that the misstatement, taken in the context of the entire record of trial, in no way affected the substantial rights of the appellant. We, therefore, find no plain error and decline to grant relief on this assignment of error.

Legal and Factual Sufficiency

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.Crim.Ct.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 offense of indecent assault requires that: (1) the accused assaulted a certain person not the spouse of the accused in a certain manner; (2) the acts were done with the intent to gratify the lust or sexual desires of the accused; and (3) under the circumstances, the conduct of the accused 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. The appellant asserts that there was no evidence upon which a reasonable fact-finder could rely in order to find that he used unlawful force to put his penis in the victim's vagina. Appellant's Brief at 21. The appellant's argument appears to misapprehend the force requirement inherent in an assault specification.

The force required for any battery, indecent or otherwise, is only that necessary to accomplish an offensive touching. Unlike rape, the force element of indecent assault relates directly to the harmful result and need not necessarily be

sufficient to overcome the will and resistance of the victim. For example, sneaking up on an unknown woman from behind and placing a hand on her buttocks clearly constitutes an indecent assault. The force element is met by the act of touching and is wholly unrelated to whether or not the victim perceived, feared or resisted the attacker's action. While consent is an element of indecent assault, it is separate from the force element.

The appellant's arguments appear to go more to the victim's lack of consent than the quantum of force used to achieve penetration. Having carefully reviewed the record, we find ample evidence of the victim's non-consent. The victim testified that she had been dating the appellant for a time when she decided to break up. She testified that he did not take it well, often showing up at her workplace and at her barracks room at all hours of the night. Her claim that he yelled at and remonstrated with her over a period of weeks was supported by the testimony of her roommate and numerous co-workers and supervisors. Events eventually reached the point where the victim had to borrow another Marine's automobile so that the appellant couldn't track and follow her around.

Immediately prior to the intercourse alleged in the rape specification, the appellant again confronted the victim about getting back together. Record at 167. She followed him to his barracks room on another floor. The victim testified that the appellant said he wanted to have sex with her and offered to write a note acknowledging that he raped her and that he was married so she wouldn't get in trouble for committing adultery with him. Record at 168. He drafted and handed her the note. Prosecution Exhibit 1. She testified that he then accessed several naked and semi-naked photos of her on his computer and threatened to pass the photos around the command if she wouldn't have sexual intercourse with him. He then demanded that she take off her clothes. When she initially refused, he came at her in what she characterized as a threatening manner. The victim testified that she quickly disrobed to avoid being attacked. The appellant then had sex with her. Part way through the sex, the appellant demanded oral sex and she complied.

Taken together with the rest of the record, this testimony, the corroboration of the appellant's obsession given by the victim's roommates and co-workers, the note written by the appellant in which he acknowledged being married, having raped her and expressing an intent to rape her again, and the presence of the compromising photos on the appellant's computer are sufficient to convince this court that a rational fact finder could have found the appellant guilty of indecent assault. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to the LIO of indecent assault.

Conclusion

The findings and approved sentence are affirmed.

Judge KELLY concurs.

COUCH, Judge (concurring in part, dissenting in part and in the result):

I concur with the majority that the military judge did not commit plain error in his instruction to the members of indecent assault as a lesser included offense of rape. *United States v. Brown*, 65 M.J. 356 (C.A.A.F. 2007). However, I do not concur with the majority's decision to affirm the appellant's subsequent conviction of indecent assault, and therefore I respectfully dissent.

Recognizing that we did not see or hear the witnesses, the record still provides ample evidence that the sexual conduct between the appellant and the alleged victim, Corporal AB, was consensual.² Art. 66(c), UCMJ. The couple had engaged in sexual intercourse less than a week before the alleged assault, after the couple had broken up and Corporal AB had told the appellant she didn't want anything else to do with him. Record at 186. The day before the alleged assault the couple engaged in sex again, during which Corporal AB kicked the appellant when he stated his intent to ejaculate inside her. Corporal AB testified that the appellant stopped the act of intercourse and did not become violent with her. *Id.* at 163-64, 190.

The next day the couple engaged in sex again, which forms the basis of the appellant's conviction for indecent assault. Corporal AB testified that on this occasion, the appellant told her to take her clothes off; she complied and laid down on the appellant's bed. *Id.* at 173. She did not resist, nor did she call out for help to other Marines in the barracks. Corporal AB also described how the appellant stopped during the act of intercourse, whereupon she voluntarily performed fellatio on him until he ejaculated. *Id.* at 174, 195. After this act, the couple resumed vaginal intercourse. *Id.*

Because I view the sexual intercourse between the appellant and Corporal AB as consensual, the act of penetration did not constitute bodily harm because it was not unlawful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶¶ 63c and 54c(1)(a). Therefore, I reluctantly substitute my judgment for that of the court-martial members because I view the record as factually insufficient to affirm the appellant's conviction for indecent assault. *United States v. Beatty*, 64 M.J. 456, 458

² Corporal AB was 26 years old, and a college graduate with a Bachelor of Arts degree in Criminal Justice. Record at 179-80.

(C.A.A.F. 2007)(citing Art. 66(c), UCMJ, and *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

For the foregoing reasons, I respectfully dissent. I would set aside the findings of guilty to and dismiss Charge III and its specification. Given the seriousness of that offense, I would set aside the sentence and return the case to the convening authority with a sentencing rehearing authorized.

For the Court

R.H. TROIDL
Clerk of Court