

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

**Before  
E.E. GEISER, R.G. KELLY, L.T. BOOKER  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ROGELIO F. ROSALES  
LANCE CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200800041  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 19 January 2007.  
**Military Judge:** LtCol Jeffrey Meeks, USMC.  
**Convening Authority:** Commanding General, 1st Marine  
Division (Rein), Camp Pendleton, CA.  
**Staff Judge Advocate's Recommendation:** LtCol R.M. Miller,  
USMC.  
**For Appellant:** LT Heather Cassidy, JAGC, USN.  
**For Appellee:** LCDR Christopher Perone, JAGC, USN; Capt G.S.  
Shows, USMC.

**25 November 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

GEISER, Senior Judge:

The appellant was charged in the alternative with rape and adultery with three different dependant spouses of Marines deployed to Iraq. Contrary to his pleas, a general court-martial with enlisted representation convicted the appellant of two specifications of adultery, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. §934, and not guilty of the three rape specifications and the one additional adultery specification.<sup>1</sup> The approved sentence included a dishonorable

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<sup>1</sup> The appellant was also acquitted of impeding an investigation in violation of Article 134, UCMJ.

discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

The appellant raises two assignments of error. First, the appellant asserts that the military judge committed plain error when he permitted presentencing testimony by the two women involved in the adultery specifications and their husbands which included impact testimony which the appellant asserts related specifically to the rape specifications of which he was acquitted. Secondly, the appellant alleges that a sentence including a dishonorable discharge and two years confinement is inappropriately severe.

We have examined the record of trial, the assignments of error and 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.

### **Background**

Mrs. B: The first woman, B, was married to Cpl B, who had been deployed to Iraq for approximately five months. While there, Cpl B served with the appellant in Al Ramadi. The appellant and Cpl B had been roommates in 2004. The appellant, due to an impending end of obligated service discharge, returned early from Iraq in June 2005. Cpl B subsequently discovered that the appellant had taken some photographs from Cpl B's personal belongings prior to departing.

On 27 June 2005, the appellant called B, who he had briefly met previously through her husband, soliciting a ride to pick up his car and some of his belongings. B testified that she believed she was helping out another Marine from her husband's unit and agreed to assist the appellant. The following day, B drove to the appellant's barracks only to discover that the appellant already had his vehicle. He did not explain how or why this occurred. B nonetheless helped the appellant bring some items from his car to his barracks room.

The appellant almost immediately informed her that her husband had cheated on her during their engagement before he deployed to Iraq. The appellant claimed to have photographs of Cpl B's alleged infidelity. There is no evidence in the record that the inculpatory photographs were ever produced or even existed. After talking for 30-45 minutes, the appellant suggested that they get a cup of coffee. B drove the appellant to a nearby Starbucks where they continued to talk.

B testified that the appellant told her that her husband had admitted to having sex with other women.<sup>2</sup> The appellant told B

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<sup>2</sup> Cpl B testified at trial that he'd never cheated on his wife either before or after their marriage and that he had never discussed any such matters with

that she deserved to know this information. Record at 664. The appellant then suggested that they go back to B's apartment. Although reluctant at first, B agreed. They rented a couple movies and, at the appellant's suggestion, brought some alcohol back to B's apartment.<sup>3</sup> The appellant mixed drinks for both of them. After drinking for 30-45 minutes, B was in the bathroom vomiting.

B testified that the appellant came up behind her and reached around beneath her shirt to fondle her breasts. Although still ill, B indicated that she managed to shove the appellant off. The appellant then allegedly took off B's shorts and pulled her underwear down to her thighs. B testified that she did not say anything to the appellant at this point but that she eventually pushed him away and went to lie down on her bed. B saw the appellant enter the bedroom and sit on the bed beside her. B testified that she passed out while the appellant was in the bedroom. She awoke sometime later to discover the appellant on top of her thrusting his penis inside her vagina. She told the appellant to stop and he complied. She then went back to sleep.

The following morning, the appellant told B not to tell anyone what had happened. She testified that at the time she agreed not to tell anyone because she believed it was her fault for bringing the appellant into her apartment. She did not call 911 or alert neighbors. When she spoke to her husband on the phone the following morning, she did not mention the incident, but did question him about the allegations of infidelity during their engagement. He denied the allegations.

Mrs. BR: A second woman, BR, testified that in May 2006, she hosted a farewell party for a Marine and his wife who were to separate from the service the following day. The appellant also attended the party. At the time, BR's husband had been deployed to Iraq for three months. Later in the evening, the revelers decided to go elsewhere to drink. BR stayed behind to watch T.V. while her children slept upstairs.

The appellant returned shortly thereafter because he had "forgotten some alcohol." Record at 953-54. He encouraged BR to come with him to the mobile party which had settled in a few houses away. When BR deferred due to her children, the appellant agreed to come back with her every ten minutes to check on them. She agreed and they walked over to the party. Throughout the evening, the appellant and BR returned periodically to check on the children.

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the appellant. Further, he testified that the photos taken by the appellant were not inculpatory - simply showing Cpl B in a hot tub with other Marines on liberty.

<sup>3</sup> Cpl B testified that he had only seen his wife drunk on 2 prior occasions and that on both occasions B had quickly become drunk and ill from the alcohol.

Witnesses testified that BR "flirted" with the appellant throughout the party; at various times sitting on his lap and touching him affectionately. She did not consume alcohol during the party. During the course of the party, the appellant and BR discussed personal matters. The appellant told BR that she would never be happy with her husband and that she should leave him. *Id.* at 976.

BR testified that she allowed the appellant to kiss her at her home. Eventually, the departing Marine and his wife returned and went to sleep on the first floor. BR went to sleep on the couch and offered her room to the appellant. Later that evening, BR went to the bedroom to get a blanket from her bed. *Id.* at 964-67. She testified that the appellant pulled her onto the bed and forcibly penetrated her. She acknowledged that she did not say anything to or strike the appellant during the encounter.

### **Presentencing Testimony**

On appeal, the appellant asserts that certain testimony elicited during presentencing was improper as it related more to the offense of rape - of which the appellant was acquitted - than to the offense of adultery. The appellant further avers that the women in question were co-actors and not victims as the Government asserted. The appellant did not object to this testimony at trial thereby waiving the issue on appeal absent plain error. RULE FOR COURTS-MARTIAL 801(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

In order to prevail on a plain error analysis, an appellant must demonstrate that: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights of the appellant. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)(citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). The appellant has the burden of persuading the court that all three prongs have been met. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

Pursuant to R.C.M. 1001(b)(4), the Government may present "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Such evidence includes but is not limited to evidence of "financial, social, psychological and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command ..." *Id.* Evidence presented under this rule must be "direct...and closely related in time, type, and/or outcome to the convicted crime." *Hardison*, 64 M.J. at 282.

The appellant cites *United States v. Taylor*, 64 M.J. 416 (C.A.A.F. 2007) for the generic proposition that adultery is an "offense against the marriage" and "against the spouse" as

opposed to an offense against any of the individuals involved. *Id.* at 420. He therefore argues that neither of the women were technically "victims" of the adultery offenses of which the appellant was found guilty. Appellant's Brief and Assignment of Errors of 24 Apr 2008 at 15. As applied to the facts of this case, however, this is too narrow a view of the term victim.

In *United States v. Wilson*, 35 M.J. 473 (C.M.A. 1992), for example, the charges arose from group sexual activity between service members and several minor females. During pre-sentencing, the father of one of the minor females who the particular appellant had not had sexual relations with was permitted to testify regarding the harm the overall incident had on his family. The court expressly stated that permitting this testimony simply acknowledges that crime impacts society. *Id.* at 476.

We agree with the appellant that with respect to the actual penetration involved in rape, one who consents to the penetration is not a victim of force. As suggested by *Wilson*, however, that is not the end of the inquiry. *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987), articulates various ways consent can be obtained. Consent obtained by fraud in the inducement, for example, includes such "general knavery" as: "'No, I'm not married'; 'Of course I'll respect you in the morning'; 'We'll get married as soon as...';... and so on." *Id.* at 116.

The evidence in the instant case makes clear that each of these women was to a greater or lesser extent a victim of fraud in the inducement. In one instance, the appellant lied about a husband's infidelity in an effort to get a woman to have sex with him. In the other, the appellant openly disparaged her relationship with her deployed husband in order to encourage her to have sex with him.

During the presentencing portion of the trial, the military judge admitted testimony by B that her sense of trust in people, particularly men, was severely damaged. She further testified that she became "defensive and on guard" and went through a period of "depression" and that she had symptoms of "PTSD." Record at 1375. She further testified that the incident had an adverse affect on her marriage and that she was in counseling. *Id.* She ended her testimony by stating that "I just feel sorry for the next person who has to go through this." *Id.*

While, as the appellant, asserts, portions of this testimony could relate to the rape, it could also logically relate to B's embarrassment and humiliation at having fallen for the appellant's lies about her husband's fidelity. Engaging in sexual intercourse after having been misled into a feeling of vulnerability and betrayal could easily result in the kind of depression and defensiveness described by B in her testimony. Absent a timely defense objection, we do not find the military judge committed error, much less plain error, by allowing this

testimony.<sup>4</sup> If there was error, for the reasons cited in the section on sentence appropriateness, we find it harmless beyond a reasonable doubt.

Similarly, BR testified that she and her relationship with her husband would never be the same after the episode. She was no longer as trusting of men and did not have the same faith in herself as before. *Id.* at 1377. With respect to the trust and familial impact of the episode, as with B, we find no error, much less plain error. The majority of her testimony, however, involved the impact the investigation and in-court testimony had on her. In this regard, she testified that it had been the hardest experience of her life. She claimed to feel attacked and to have things from her past brought up that she was not proud of. *Id.* At this point the trial defense counsel properly objected to the testimony regarding the impact of the trial and investigation as improper aggravation. Although he erroneously overruled the objection, the military judge gave an instruction to the members almost immediately after the challenged testimony. He gave a similar instruction just prior to deliberations. While we agree this line of testimony was improper, the military judge's instructions appear to have mitigated the impact on the members.<sup>5</sup>

### **Sentence Appropriateness**

The appellant argues that a dishonorable discharge and confinement for two years is inappropriately severe for two specifications of adultery. We have considered the appellant's record, his 248 days of pretrial confinement, and the entire record of trial to include his prior court-martial for adultery.<sup>6</sup> We have also considered the seriousness of his offenses. Intentionally targeting the wives of deployed Marines for sex is reprehensible. That the appellant would continue with such conduct after having been punished at court-martial for the same offense and with a pending second court-martial for the same offense is beyond belief. The appellant's conduct strikes directly at the trust and confidence needed to maintain unit cohesion, morale, and combat effectiveness. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395

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<sup>4</sup> Cpl B's testimony similarly focused on issues of trust and the impact this event had on their marriage and on B individually. For the reasons above, we do not find the military judge committed plain error admitting this testimony.

<sup>5</sup> Cpl BR's testimony similarly emphasized the impact of the investigatory and legal process on he and his wife. As with the testimony of BR, we hold that any error was not plain and, in any case, was sufficiently mitigated by the military judge's instructions.

<sup>6</sup> Records reveal that the appellant had a prior summary court-martial for adultery with another Marine dependant wife and was pending court-martial for the incident with B at the time he engaged in intercourse with BR.

(C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268  
(C.M.A. 1982).

**Conclusion**

The findings and the approved sentence are affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL  
Clerk of Court