

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

**Before  
J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**SHANE R. F. DILLMAN  
LIEUTENANT (O-3), CHC, U.S. NAVY**

**NMCCA 200900504  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 1 June 2009.

**Military Judge:** CAPT Moira Modzelewski, JAGC, USN.

**Convening Authority:** Commander, Naval Air Force Atlantic,  
Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR Frank T Katz,  
JAGC, USN.

**For Appellant:** Capt Jeffrey R. Liebenguth, USMC.

**For Appellee:** CAPT M. Claudette Wells, JAGC, USN; LT Brian  
C. Burgtorf, JAGC, USN.

**17 August 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial received mixed pleas and convicted the appellant of five specifications of fraternization, one specification of rape through the use of force, one specification of conduct unbecoming an officer, and three specifications of adultery, in violation of Articles 92, 120(a), 133, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920(a), 933, and 934. The military judge sentenced the appellant to ten years confinement and a dismissal. The convening authority approved the sentence as adjudged.

## Sufficiency of the Evidence as to Rape

In his sole assignment of error, the appellant avers that the evidence is factually insufficient to support his conviction for raping Airman Apprentice (AA) [A]. We disagree. After considering the record of trial and submissions of the parties, we hold that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant exists. Arts. 59(a) and 66(c), UCMJ.

### Background

The appellant was a member of the chaplaincy and for the period pertinent to the assigned error was assigned in that capacity to the USS CARL VINSON (CVN 70). The victim, AA [A], first encountered the appellant as part of a group of newly assigned personnel undergoing shipboard indoctrination in the late summer of 2007. Record at 106-08. Following the 30-day indoctrination, AA [A] sought counseling from the appellant in connection with various personal matters. *Id.* at 110. The appellant invited her to join him in using physical exercise to relieve stress. *Id.* at 111. With another Sailor present, AA [A] participated in a workout with the appellant. *Id.* at 112. The appellant made arrangements with AA [A] for a subsequent workout in early October 2007. *Id.* at 123. Following this workout, the appellant drove AA [A] to an off-base apartment. *Id.* at 142. AA [A] initially remained in the appellant's car and declined to go into the apartment. *Id.* at 143. Informed that the stop would take time, she went into the apartment with the appellant. *Id.* What followed gave rise to the conviction of the Article 120 offense that is the subject of the assignment of error. Additional facts specifically regarding the rape are developed below.

### Principles of Law

Article 66(c), UCMJ, requires this court to conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, after weighing 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. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt does not mean that 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).

At trial, the Government was required to prove that the appellant caused another to engage in a sexual act by using force. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45a(a).

## Discussion

The events that transpired in the appellant's off-base apartment on 6 October 2007 are critical in assessing the factual sufficiency of the Article 120 offense. An alibi was proffered, with friends and family members placing the appellant at his family home in Williamsburg, Virginia that day. The credibility of AA [A], subjected to a lengthy and aggressive cross-examination, provides the basis for establishing the factual sufficiency of Charge II, Specification 2.

After the appellant and AA [A] had something to eat in the appellant's apartment, he offered her a massage. Record at 153. AA [A] testified that she removed her footwear and lay face down on a bed and the appellant began massaging her. *Id.* at 156. She became uncomfortable and declined to participate in the massage. *Id.* The appellant lay next to AA [A], providing comforting and complimentary words and stating that he was in love with her. *Id.* at 157. AA [A] told the appellant that she was not interested in a relationship with him. *Id.* The appellant caressed AA [A]'s face, tried to kiss her on the mouth, and then straddled her when AA [A] rebuffed his advances. *Id.* at 158-59. Critically, AA [A] testified, ". . . I tried to push him back and he straddled me. So I could not get up—I could not get out. He got on top of me." *Id.* at 159. Although the exact words used were the subject of extensive cross-examination, and ambiguities were developed, AA [A] testified that she told the appellant to stop and that she did not want this, but the appellant held her left arm above her head and pulled down his shorts with his free hand. *Id.* The actions of AA [A] during this encounter eliminate any ambiguity. AA [A] testified, "I tried to push him off but I couldn't push him off." *Id.* The appellant then held both her hands above her head with his one hand and used the other to remove AA [A]'s shorts. *Id.* at 160, 278. AA [A] told the appellant to stop, but the appellant eventually put his penis inside of her, stopping only when her crying became screaming, startling him such that he got off of her. *Id.* at 161. AA [A] testified, "I was crying before he did it, during and after." *Id.* AA [A] testified that she ran into the bathroom and that the appellant repeatedly apologized to her, stating, "I thought that's what you wanted." *Id.* at 162-63. AA [A] told the appellant, "I told you to stop. That's not what I wanted." *Id.* at 289.

While the defense theory at trial was alibi, and no testimony was received regarding the rape other than from AA [A], the military judge did nonetheless find that the state of the evidence did raise mistake of fact as to consent.

Consent and mistake of fact as to consent may constitute affirmative defenses to a charge of rape in violation of Article 120. The defense must show, by a preponderance of the evidence, that the victim said or did things that indicate a freely given agreement to the sexual conduct at issue by a competent person.

If the defense makes such a showing, then the Government must prove beyond a reasonable doubt that the defense does not exist. We agree with the military judge that the evidence does not support a conclusion that AA [A] actually consented or that the appellant mistakenly believed she did.

The military judge, in her special findings, determined that no actual consent existed. This finding is amply supported by the record, which demonstrates that AA [A] repeatedly told the appellant that she did not wish to engage in sexual intercourse and that she actively resisted his advances.

The military judge also determined that no mistake of fact as to consent existed. She noted that AA [A] testified that the appellant told her, while she was taking shelter in the bathroom following the intercourse, that he thought that she had wanted to engage in intercourse and that he seemed to be "sincere" when he said it. The military judge found, as do we, that even if the appellant's self-serving apology were indicative of a mistaken belief as to consent, that belief was not reasonable under the circumstances of this case -- namely, the act of the appellant in taking advantage of a junior enlisted member who had come to him for counseling, who had resisted physically and emotionally all attempts by the appellant to engage in sexual activity, and who cried "before, during, and after" the intercourse, her crying at some point becoming screams that finally got the appellant's attention.

We may only affirm such findings of guilty as we find correct in law and fact. After complete consideration of the record, the pleadings, and making allowances for, and mindful of our statutory requirement to recognize that the trial court saw and heard the witnesses, we conclude that the Government has sustained its burden of proof, beyond a reasonable doubt, on Charge II, Specification 2. *See Turner*, 25 M.J. at 325. The appellant caused AA [A] to engage in a sexual act by using force. The alibi defense was not credible. No mistake of fact as to consent existed. The assigned error is without merit.

### **Conclusion**

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

For the Court

R.H. TROIDL  
Clerk of Court