

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SHARBEL Z. GABRIEL
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900429
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 October 2008.

Military Judge: LtCol J.G. 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: Mr. Patrick J. Callahan, Esq.; Capt Sean
Patton, USMC.

For Appellee: LT Sergio Sarkany, JAGC, USN.

4 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARBERRY, Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of rape, assault consummated by a battery, and indecent exposure, in violation of Articles 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 928, and 934. The approved sentence was confinement for two years, reduction in pay grade to E-1, total forfeiture of pay and allowances for a period of two years and a dishonorable discharge.

On appeal, the appellant raises four assignments of error. First, he alleges that his conviction for indecent exposure was

not legally sufficient. Second, he argues that his convictions for rape and assault consummated by a battery must be set aside on grounds of factual insufficiency. Third, he avers that ineffective assistance of counsel deprived him of a fair trial. Finally, he claims that his constitutional right to due process was violated because the members voted to convict him without holding the Government to its burden of proof.¹

We have examined the record of trial and the pleadings of the parties. For the reasons below, we set aside the appellant's conviction for indecent exposure; however, we conclude that the appellant's other convictions are correct in law and in fact and that no error materially prejudicial to a substantial right of the appellant remains. Following reassessment, we affirm the adjudged sentence. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a lance corporal (LCpl) in the U.S. Marine Corps, was stationed at Camp Pendleton, CA, and living in the barracks on 29-30 December 2006, when the events in question occurred. That night, he met the complaining witnesses, both civilians, for the first time: Ms. T, whom he was later convicted of raping, and Ms. F, whom he was later convicted of assaulting. Record at 171, 198.

Ms. T and Ms. F were guests that night of Corporal (Cpl) J, who had invited them to his barracks room, where they spent the evening drinking, talking, and playing games. *Id.* at 144-45. At some point, LCpl H and the appellant stopped by, and they stayed for several hours. *Id.* at 145-46, 171. Around midnight, LCpl H. and the appellant departed for their own rooms, leaving the two women and Cpl J inside. *Id.* at 146, 171, 202. The two women and Cpl J fell asleep in the room - Cpl J on his single bed, Ms. F on a couch in the middle of the room, and Ms. T on the lower bunk of a bunk bed across the room from Cpl J. *Id.* at 152-54, 189-90; Prosecution Exhibit 4 for identification.

Ms. F testified that later that night she was awakened by the appellant tucking a blanket around her and touching her breast. Record at 172-73. She angrily told him to get away from her and went back to sleep, awakening later to Ms. T's screams. *Id.*

Ms. T testified that after retiring for the night, she awoke because of a sharp pain in her vaginal area and discovered her jeans and panties pulled down, and the appellant on top of her engaging in sexual intercourse. *Id.* at 204. She immediately pushed him off and woke Ms. F and Cpl J. *Id.* at 205. Ms. F accompanied Ms. T to the bathroom, where Ms. T discovered blood, the result of a fresh, 2-centimeter cut in her vagina. *Id.* at

¹ The third and fourth assignments of error were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

205, 253. She believed the appellant had cut her while in the act of having nonconsensual intercourse with her.

Upon exiting the bathroom, the women saw Cpl J and the appellant, who had been brought back to Cpl J's room by Cpl J. *Id.* at 147, 205. Confronted by an angry and upset Ms. T, who was accusing him of rape and of causing her to bleed, the appellant lowered his shorts and underwear, briefly exposing his penis in an apparent effort to refute Ms. T's accusations by demonstrating that he had no blood on him. *Id.* at 148, 161, 205.

Legal Sufficiency

We review questions of legal sufficiency *de novo* as a matter of law. *United States v. Chatfield*, 67 M.J. 432, 441 (C.A.A.F. 2009). In considering a legal sufficiency challenge, the test is whether, taking the evidence in the light most favorable to the prosecution, "a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The elements of indecent exposure are: (1) that the accused exposed a certain part of his body to public view in an indecent manner; (2) that the exposure was willful and wrongful, and (3) that, under the circumstances, the appellant's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit on the armed forces. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2005 ed.), Part IV, ¶ 88b.²

While there is no doubt that the appellant publicly exposed his penis, at issue is whether the exposure was "indecent." *United States v. Caune*, 46 C.M.R. 200, 201 (C.M.A. 1973). We do not believe that it was.

The Manual for Courts-Martial defines "indecent" as signifying "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." MCM, Part IV, ¶ 90c. A plain reading of this definition requires that any conduct purported to be indecent exposure must tend to excite lust.

We can find no evidence, even taken in a light most favorable to the prosecution, that the appellant intended to excite lust in himself or others. The Government witnesses, including Ms. T, all testified that the appellant exposed himself only for about two seconds to demonstrate that he did not have blood on his penis and, thus, did not rape Ms. T. Record at 161, 228. No one testified that he exposed himself for any other reason, and none of the three witnesses, although disgusted with

² All references in this opinion to the Manual for Courts-Martial are to the 2005 edition, as this was the edition in effect on the date of the incidents charged.

his behavior, testified that they felt his actions had any sexual connotation. Record at 148, 161, 174, 205, 228.

Accordingly, we are convinced that a reasonable trier of fact could not have found the appellant's exposure to be indecent, and we set aside his conviction for indecent exposure.

Factual Insufficiency

Applying the well-known test for factual sufficiency, as set forth in *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), this court must make its own determination as to whether or not we are convinced of the appellant's guilt beyond a reasonable doubt "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses." *Id.* We will take each charge in turn.

Rape

The elements of Article 120 (Rape) in December 2006 were: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without consent. MCM, Part IV, ¶ 45b.

"Any penetration, however slight, is sufficient to complete the offense." MCM, Part IV, ¶ 45c(1)(a). Furthermore, consent may not be inferred "where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice." MCM, Part IV, ¶ 45c(1)(b).

The appellant lists several reasons why he believes the facts do not support a conviction for rape. Primarily, he argues that it is inconceivable that Ms. T, who was awakened earlier that night by the sounds of bottles falling over, could remain asleep while the appellant approached her, removed his trousers, got on her bed, straddled her, pulled down her jeans and underwear, lifted her up and pulled her legs apart. He also argues that these actions could not have occurred without waking up Ms. F and Cpl J, who were asleep in the same room. Additionally, the appellant maintains that discrepancies in the witnesses' testimony regarding the manner in which Ms. F and Cpl J were awakened after the rape undermine the credibility of Ms. T's account.

We disagree. Having carefully reviewed all the evidence, and making allowances for the fact that we did not personally observe the witnesses, we are convinced that the appellant raped Ms. T.

Ms. T testified that she was vaginally penetrated by the appellant while she was sleeping. The evidence adduced at trial supports Ms. T's testimony. Record at 204. Ms. T indicated clearly that she and the appellant had no prior relationship, and

there was nothing to suggest that she was remotely interested in the appellant. To the contrary, Ms. T indicated that the appellant was "creepy" and gave her "a bad vibe." *Id.* at 199, 202. Her misgivings regarding the appellant were such that she asked LCpl H to stay with her until the appellant left the barracks room. *Id.* at 202.

After the appellant and LCpl H left the room, leaving the door cracked open due to the heat, Ms. T. went to sleep. *Id.* at 203. The fact that Ms. T did not hear the appellant return is of no moment. Ms. T testified that the door was not shut, she is a heavy sleeper, and drank a bottle of wine and a half shot of tequila; in conjunction with her loose pants, it is quite likely that she would not have been awakened by the appellant's actions until she felt the sharp pain of penetration in her "private part." *Id.* at 197, 203, 204.

Ms. T's account is further supported by the fact that she immediately reported the incident to Ms. F and Cpl J and voluntarily underwent a Sexual Assault Response Team examination that morning. The examiner detected a fresh 2-centimeter tear around the vaginal opening. *Id.* at 253.

Ms. F and Cpl J also had been drinking that night.³ This might explain how they both could have slept through the rape, particularly if it was accomplished in stealth, in the dark, and with a victim who was unconscious. Moreover, the day after Ms. T's accusation, the appellant admitted to Cpl J that he engaged in sexual intercourse with Ms. T in the barracks room that night. According to Cpl J, the appellant claimed that Ms. T, "pulled her pants down and pulled him in, and he was like, 'no . . . you're my buddy's girl,' and [the appellant] kind of made penetration and then he was like, no, I can't do it." *Id.* at 149. These facts undermine the appellant's argument that such an encounter could not realistically have occurred in that room without anyone hearing.

Finally, it is well-settled that "beyond a 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). After carefully reviewing the record, we find that Ms. T's testimony at trial remained substantially consistent and detailed and withstood a vigorous cross-examination. We therefore find that the evidence supports the elements of rape beyond a reasonable doubt and affirm the finding of guilty to the sole specification of Charge I and to the charge itself.

Assault Consummated by a Battery

The elements of Article 128 (Assault consummated by a battery) are: (1) that the accused did bodily harm to a certain

³ Cpl J testified that he had, in fact, "passed out." Record at 162.

person; and (2) that the bodily harm was done with unlawful force or violence. MCM, Part IV, ¶ 54b(2).

"Bodily harm" is defined as "an offensive touching of another, however slight." MCM, Part IV, ¶ 54c(1)(a). Force or violence is unlawful when done "without legal justification or excuse and without the lawful consent of the person affected." *Id.*

The appellant argues that the evidence is factually insufficient to support his conviction of assault consummated by a battery because Ms. F testified that he did not grab her breast but instead brushed against it as he was placing a blanket upon her. Moreover, if his actions constituted an assault, he argues, Ms. F would not simply have gone back to sleep.

Again, we disagree. Ms F. testified that she went to sleep on a couch in the barracks room and awoke when she felt the appellant tucking her in with a blanket and running his hand over her left breast "a couple to [sic] times." Record at 184. The record is clear that she did not consent to the touching, as demonstrated by her angry reaction to it. *Id.* at 173, 186. Whether Ms. F's breast was brushed, groped or grabbed does not make the unwanted touching any less offensive. We are convinced that the appellant entered the room and touched Ms. F in an offensive manner. Had his intentions been simply to place a blanket on Ms. F, he could have done so without touching or coming remotely close to her breast. The fact that Ms. F did not immediately report the assault and went back to bed makes her account of the events no less credible.

Once again applying the test for factual sufficiency set out in *Turner*, and taking into consideration that we did not personally see and hear the witnesses, we are convinced beyond a reasonable doubt that the appellant assaulted Ms. F.

Ineffective Assistance of counsel

The appellant alleges that his trial defense counsel was ineffective in his assistance, thus depriving the appellant of his Sixth Amendment right to counsel, in three ways: (1) by failing to question Ms. T about her Article 32 testimony regarding whether her pants were pulled down only to a spot just above her knees and failing to argue that penetration could not have occurred if her pants were above her knees; (2) by failing to develop and present evidence that Ms. T and Ms. F each had a character for untruthfulness, and (3) by failing to use a peremptory challenge on Master Sergeant (MSGt) G, a panel member whose wife had been raped as a child. Notwithstanding that the appellant did not proffer an affidavit or other evidence of his claims, we nonetheless ordered an affidavit from his trial defense counsel.

The U.S. Supreme Court has established a two-part test for demonstrating ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail, the appellant must show: (1) that a deficiency in counsel's performance is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the "deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive defendant of a fair trial, a trial whose result is reliable." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. 668, at 687).

We find this assignment of error to be without merit. Specifically, we do not believe the appellant has surmounted his "high hurdle" with regard to any of the three issues he highlights. *Moulton*, 47 M.J. at 229. Just as there is a distinction between "reasonable doubt" and "some conflict," so is there a distinction between reasonable professional judgments and tactical decisions that do not ultimately prove successful and mistakes or omissions so serious and/or numerous as to render a counsel's contribution short of the standard of competency required by the Sixth Amendment. *Strickland*, 466 U.S. at 689-90.

The appellant charges his trial defense counsel first with failing to elicit testimony from Ms. T about whether her jeans and underwear were pulled below or above her knees. LCDR S, the appellant's trial defense counsel, explained that the decision not to go into detail about the degree to which the jeans were lowered was not an oversight. Affidavit of LCDR S of 28 Dec 2009 at 1. It was a strategic decision by counsel, who wanted to focus the members on other inconsistencies relating to Ms. T's testimony about the jeans, e.g., she claimed that they required a belt to stay up, yet she did not wear one.⁴ Counsel articulated these inconsistencies in his closing argument. Record at 331. His decision not to delve into the location of the jeans and panties was based on a plausible strategic purpose. Whether the members ultimately disagreed with his theory of the case does not *ipso facto* make these decisions ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

The appellant next charges his trial defense counsel with failing to call witnesses who would have established that Ms. T and Ms. F had characters for untruthfulness. The appellant argues that a Marine prosecutor not involved with this case, as well as Ms. T's ex-husband, LCpl K, held opinions that the two women were untruthful.

⁴ Ms. T testimony at the Article 32 hearing was not actually as clear-cut as the appellant claims. She testified on direct examination at the Article 32 hearing that her panties and jeans were at her ankles, then said they were "just around my knees, right above them, maybe a little below them; I don't remember." Appellate Exhibit XXIX at 197. On cross-examination, when asked to point to the spot on her legs where her jeans had been pulled, trial defense counsel noted that she pointed to a spot above her kneecap when she said, "Around right here." *Id.* at 221.

LCDR S's, uncontradicted affidavit indicates that he talked to both potential witnesses. Affidavit of LCDR S at 1. He decided, however, not to call either to testify because the Marine prosecutor did not know Ms. T or Ms. F well enough to lay a proper foundation for opinion evidence, and LCpl K was compromised by extreme bitterness toward his ex-wife, which would have severely undermined the value of his opinion. *Id.*

Finally, the appellant claims he was deprived of a fair trial when his trial defense counsel failed to exercise his peremptory challenge on a member who acknowledged during voir dire that his wife had been raped as a small child. Record at 98-99. MSgt G stated during voir dire that his wife had been raped by her stepfather around the age of nine or ten. *Id.* Upon further questioning from trial defense counsel, MSgt G said that the rape had no current impact on his wife, and he felt it would not affect his ability to sit fairly and impartially in this trial. *Id.* at 101.

Defense challenged MSgt G based on the theory that there was both an actual bias and an implied bias associated with him based on his wife's rape. *Id.* at 118. The Government argued that MSgt G answered clearly that he would not be biased and should be taken at his word. *Id.* at 120. The military judge agreed. As the rape was no longer relevant to MSgt G and his wife, the military judge also held that that there was no actual or implied bias and denied the challenge for cause. *Id.* at 121-22

Following challenges for cause and a peremptory challenge from the Government, the panel would have included five members. If the defense used its peremptory challenge, the panel would have been reduced to four, below the number required for a general court-martial. LCDR S's uncontradicted affidavit indicates that he explained this to the appellant, and they discussed the fact that a five-member panel presented a better mathematical scenario for the defense than a six-member panel. Affidavit of LCDR S at 2. It also indicates that they discussed that falling below the required quorum might result in a larger panel, and it would certainly result in delay. *Id.* At that stage, LCDR S noted, "LCpl Gabriel decided that he wanted to push forward immediately with MSgt G." *Id.*

We believe that LCDR S articulated a plausible strategic reason for choosing not to exercise a peremptory challenge on MSgt G. More importantly, the appellant concurred in his counsel's reasoning. In short, the appellant has provided no evidence suggesting that counsel was deficient in this aspect of his performance. Moreover, even if there had been a deficiency, we see nothing to suggest that the presence of MSgt G on this panel deprived the appellant of a fair trial.

Therefore, the appellant's request for relief on the basis of ineffective assistance of counsel is denied.

Due Process

The appellant argues that his conviction violates his constitutional due process rights because the members failed to follow the military judge's instructions and did not hold the Government to its burden of proof on every element of every offense.

The appellant argues that his claim is supported by the conclusions of a private investigator, Ms. M, who was hired by the appellant. The appellant alleges, via a report attached to the record, that three of the members indicated to Ms. M that the Government did not prove every element of every offense for which he was convicted. Clemency Request of 12 Jan 2009 at enclosure (1), page 5.

RULE FOR COURTS-MARTIAL 1007(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) strictly prohibits questioning members "about their deliberations and voting," subject to certain exceptions listed in MILITARY RULE OF EVIDENCE 606(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Those exceptions are confined to questions of whether "extraneous prejudicial information was improperly brought to the attention of the court-martial, whether an outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence." Where members' statements fall outside of these exceptions, we are barred from receiving them. *Id.* These rules also make clear that, "to the extent there is any justification for post-trial interviews, impeaching a verdict is not one of them." *United States v. Ovando-Moran*, 48 M.J. 300, 304 (C.A.A.F. 1998) (citation omitted).

The hearsay statements attributed to the panel members in this case clearly do not fall under the exceptions listed in MIL. R. EVID. 606(b) and, *Ovando-Moran*, 48 M.J. at 304. Therefore, they are proscribed by statute, and we will not consider them.

Conclusion

In accordance with our discussion on indecent exposure, the finding of guilty of Specification 1 of Charge II is set aside. We have considered the remaining assignments of error and find them without merit. We have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Upon reassessment, we conclude that there has not been a dramatic change in the penalty landscape as a result of our action, and that the sentence as adjudged and approved is appropriate and no greater than would

have been adjudged but for the error noted. Accordingly, we affirm the remaining findings and the approved sentence.

Senior Judge GEISER and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court