

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

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

UNITED STATES OF AMERICA

v.

**JOSEPH J. KARRAS
SARGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000340
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 February 2010.

Military Judge: CDR Douglas Barber, JAGC, USN.

Convening Authority: Commanding General, Training and Education Command, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.

For Appellant: LT Michael Torrissi, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

14 December 2010

OPINION OF THE COURT

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

CARBERRY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of unauthorized absence, one specification of operating a motor vehicle while drunk, and one specification of abusive sexual contact with a minor, in violation of Articles 86, 111, and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 911, and 920.

The appellant was sentenced to reduction to pay grade E-1, forfeiture of all pay and allowances, six months confinement, and

a bad-conduct discharge. The convening authority (CA) approved the sentence.

The appellant raises three assignments of error related to his conviction of abusive sexual contact with a child: (1) that the specification fails to state an offense; (2) that the military judge improperly instructed the members on the elements of the offense; and, (3) that the evidence is legally and factually insufficient to sustain that conviction.

Background

At approximately 2100 on 9 October 2009, the appellant arrived at the home of his friend Sergeant (Sgt) H and began drinking and watching a movie with Sgt H and his 12-year-old niece, CK. Record at 406, 407. At approximately 0130, after drinking at least 11 beers and a shot of alcohol, the appellant fell asleep on the family-room couch.¹ Sgt H then told CK to go to bed. *Id.* at 407. Approximately 15 minutes after going to bed, CK testified that she went downstairs to get a juice box. *Id.* at 381. She testified that the appellant got up from the couch, got on top of her and began kissing her neck and lips as he held her wrists above her head. *Id.* at 383-84. She testified that he then pulled her onto the couch, pulled her pants down to her ankles, had intercourse with her, and "put his finger in my private". *Id.* at 385, 386.

Mrs. H, CK's aunt, entered the family room between 0230 and 0300, and saw CK straddled on top of the appellant who was lying on the sofa. *Id.* at 417. She did not see the appellant fondle CK or otherwise move at that time. *Id.* at 423.

Soon after the incident, CK was taken to the hospital and examined by a sexual assault nurse examiner. *Id.* at 463. The examining nurse testified that CK related that the appellant removed her shirt and pants and that she was placed on the appellant's lap where she assumed a straddling position atop him. *Id.* at 464. The examining nurse testified that CK told her that the appellant kissed and licked her neck, and penetrated her vagina with his fingers by moving her underwear over and engaged in sexual intercourse with her. In addition to collecting the clothes CK wore during the incident and taking swabs of CK's neck, thighs, external genitalia, and perianal/buttocks, the nurse performed a physical examination that found tears to CK's perineum that the examiner concluded occurred within 48 hours of the examination and which were caused by a force being exerted against her tissue beyond its ability to stretch. *Id.* at 472. The witness testified that CK's injuries were consistent with her account. *Id.* at 473.

¹ The appellant contends that he drank 19 cans of beer and a shot of vodka. The record suggests that he drank 11-12 cans of beer and a shot of vodka. Record at 566 - 588.

The swabs and clothing were tested by personnel at the United States Army Criminal Investigation Laboratory. *Id.* at 482, 487. The samples tested negative for semen, but male DNA was detected on swabs taken from CK's thighs, external genitalia, perianal/buttocks, underwear, neck and bra. *Id.* at 489, 491, 493-94. The Government's DNA examiner was unable to conclusively determine the identity of the source of the male DNA on CK's thighs, external genitalia, perianal/buttocks, and bra. However, the examiner identified the appellant as the source of the DNA detected on CK's neck and on both the inside and outside of her underwear. *Id.* at 494-498, 502.

Failure to State an Offense

We consider first the appellant's argument that Specification 3 of Charge III fails to state an offense.

"A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted). Whether a specification states an offense is a question of law, which this Court reviews *de novo*. *Id.*

Specification 3 of Charge III reads:

In that Sergeant Joseph J. Karras, U.S. Marine Corps, on active duty, did, at or near Marine Corps Base, Quantico, Virginia, on or about 10 October 2009, engage in sexual contact, to wit: fondling the breast and groin areas of [CK], a child who had attained the age of 12 years but not yet attained the age of 16 years.

In this case the elements of abusive sexual contact with a child are: (1) that the accused engaged in sexual contact with a child; and, (2) that at the time of the sexual contact the child had attained the age of 12 but had not attained the age of 16. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45b(9). Sexual contact is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desires of any person." *Id.* at ¶ 45a(t)(2).

The appellant argues that use of the word "areas" expands the scope of Article 120(i), UCMJ, by implying that it is a crime to touch the areas surrounding the breast and groin, e.g., the shoulder. Appellant's Brief of 20 Aug 2010 at 13. He further argues that alleging the word "areas" amounts to alleging acts that do not constitute a crime and is the essence of a failure to state an offense. We note that at trial, the appellant neither objected to the wording of this specification, nor requested a bill of particulars. Moreover, he does not assert on appeal that

the specification fails to expressly allege the elements of abusive sexual contact with a child, or that he was not provided notice to defend against that charge.

We conclude that the specification expressly alleged every element of the offense and provided the appellant sufficient notice of the charge he had to defend against. *Crafter*, 64 M.J. at 211. The Government's usage of the word "areas" in the specification, though arguably surplusage, did not impact the sufficiency of that notice. Thus, we are satisfied that the specification adequately states an offense of which the appellant received sufficient notice.

Erroneous Instruction

The appellant also argues that the military judge erred when he instructed the members that one of the elements included the fondling of the "breast and groin areas." He contends that the word "areas" expands the breadth of Article 120(i), UCMJ, by making it illegal to touch areas adjacent to or in the proximity of the groin or breast, e.g., the shoulder. The question of whether a court-martial was properly instructed is a question of law, which we review *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

The appellant argues that the instruction is erroneous because it expands the scope of Article 120(i), UCMJ, beyond the breast and groin to include ". . . an undefined region of unknown size and surface area surrounding the breast groin [sic] of the alleged victim." Appellant's Brief at 12. We disagree.

We note that in instructing the members on abusive sexual contact with a child, the military judge twice read the correct definition of sexual contact and also provided a written copy of that definition for use in deliberations. *Id.* at 642; AE XXXVIII at 4. The instructions make clear that sexual contact means the intentional touching of the breast or groin. The instructions do not suggest that criminality may attach to touching of an area near the breast or groin. In light of context in which the word "areas" was used and the military judge's correct definition of sexual contact that omitted the word "areas", we conclude that the military judge properly instructed the members on the elements of the offense of abusive sexual contact with a child. *Cf. United States v. Schroder*, 65 M.J. 49, 53 (C.A.A.F. 2007) (charged acts including "placing his hand upon her groin area" satisfy the Military Rule of Evidence 414(f) definition of sexual contact.).

Legal and Factual Sufficiency

The appellant next contends that the evidence is legally and factually insufficient to sustain his conviction of abusive sexual contact with a child.

We review questions of legal sufficiency *de novo*. *United States v. Chatfield*, 67 M.J. 432, 441 (C.A.A.F. 2009). After considering the evidence, including the presence of male DNA on CK's bra, CK's testimony that the appellant fondled her groin, and the presence of the appellant's DNA on both the inside and outside of CK's underwear, in the light most favorable to the prosecution, we are convinced that any reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Id.* (citations omitted).

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 also determine whether 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.*

The appellant maintains: (1) that there is insufficient evidence to prove beyond a reasonable doubt that he fondled the breast or groin of CK; and, (2) that due to his unconsciousness or voluntary intoxication, he was unable to form the necessary specific intent to commit the offense.

We agree that the record contains insufficient evidence upon which we can conclude beyond a reasonable doubt that the appellant fondled CK's breast. At trial, CK did not claim that the appellant fondled her breast. The only evidence of record supporting a finding that the appellant fondled CK's breast was the DNA examiner's testimony that she found unidentified male DNA on CK's bra and the SANE nurse's testimony that CK reported that the appellant removed her shirt, a claim CK denied making at trial.

The evidence is, however, sufficient to convince this court beyond a reasonable doubt that the appellant fondled CK's groin. First, CK testified that the appellant moved her underwear and inserted his finger into her vagina and that testimony is corroborated by the forensic evidence of the appellant's DNA on both the inside and outside of her underwear. Both CK and the DNA examiner were subject to cross-examination and apparently found credible, on this matter, by the members.

We are likewise convinced beyond a reasonable doubt that the appellant possessed the specific intent to commit the offense. Although the exact amount of alcohol the appellant consumed was in dispute, even the defense expert testified that an individual with a blood alcohol content level of .22 can form specific intent. *Id.* at 593. We note that the estimated BAC of .22 is premised on the appellant's consumption of 19 alcoholic drinks. The record, however, suggests that the appellant most likely drank 12-14 alcoholic drinks and that his BAC would have been significantly lower than .22. In either case, we are convinced beyond a reasonable doubt that the appellant had the ability to form specific intent and did so when he fondled CK's groin area.

Sentence Reassessment

That does not conclude our analysis, as we must assess what, if any, prejudice the appellant may have suffered by his conviction of abusive sexual contact with a child which included fondling of CK's breast, a finding we have found to be factually insufficient. We may only reassess a sentence to cure the effect of prejudicial error when we are confident that, absent any error, the sentence adjudged would have been at least a certain severity and when so convinced may reassess and affirm only a sentence of that magnitude or less. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citation omitted); see also *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). The effect of our determination to set aside the verbiage related to the fondling of CK's breasts does not impact the offenses of which the appellant stands convicted and the sentencing landscape is virtually unchanged.

The only impact upon the affirmed findings is to reduce the number of acts constituting abusive sexual contact with a child from two to one - specifically the act of fondling CK's groin. The appellant's fondling of CK's groin was the primary focus at trial, and clearly the more serious of the two acts alleged. Both the severity of the offenses of which the appellant stands convicted and the authorized punishment are unaffected.

The admissibility of evidence on sentencing is also unchanged. Similarly, the Government and defense sentencing theories would be unaffected. The gravamen of the Government's presentencing case was that the appellant, a noncommissioned officer, engaged in sexual activity with a 12-year-old child while under the influence of alcohol, then drove his vehicle while drunk, and later failed to go to his appointed place of duty. The Government's case in aggravation focused primarily upon the impact of that abusive sexual contact on the victim and her family. The appellant's case in sentencing primarily focused upon his service and service reputation, his family, and rehabilitative potential.

We conclude that exception of the words related to fondling CK's breast does not dramatically alter the sentencing landscape. We have reassessed the sentence and are confident that the adjudged sentence would have been at least the same as that adjudged by the members and approved by the CA even if the error had not occurred. We also find the sentence to be appropriate for this offender and his offenses. Art. 66(c), UCMJ; *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).

Conclusion

The words "the breast and" and the letter "s" in the word "areas" are excepted from Specification 3 of Charge III. The remaining findings and the sentence, as approved by the convening authority and reassessed by this court, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER and Judge PRICE concur.