

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

**Before
THE COURT EN BANC**

UNITED STATES OF AMERICA

v.

**ROBERT E. LAMB
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000044
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 June 2009.

Military Judge: LtCol Peter Rubin, USMC.

Convening Authority: Commanding General, Marine Air Ground Task Force Training Command, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Capt Robert Eckert, Jr., USMC; LT Brian Burgtorf, JAGC, USN.

21 September 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, S.J., delivered the opinion of the court in which BOOKER, S.J., PRICE, J., PERLAK, J., and FILBERT, J., concur. MAKSYM, S.J., filed an opinion concurring in the result joined by REISMEIER, C.J., MITCHELL, S.J., and PAYTON-O'BRIEN, J.. BEAL, J., filed an opinion concurring in the result.

CARBERRY, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his plea, of one specification of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated, in

violation of Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). Pursuant to his plea, the military judge convicted the appellant of one specification of violation of a lawful general order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The appellant was sentenced to a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant asserts two assignments of error. First, he asserts that the evidence is factually insufficient to support a finding of guilt as to Charge II, aggravated sexual assault. Second, the appellant asserts that the statutory scheme of Article 120 violates his right to due process by placing the burden on the accused to disprove an element of the Government's case.

For the reasons set out below, we affirm only the findings of guilt for Charge I and its specification. We set aside the finding of guilty for Charge II, its specification, and the sentence. Charge II and its specification are dismissed. A rehearing on sentence is authorized.

Background

On 26 November 2008, Private (Pvt) Peterson invited Private First Class (PFC) R to his barracks room to "hang out" and drink with him and the appellant. Record at 367. That evening, at approximately 1715, PFC R arrived at Pvt Peterson's barracks room and began drinking. *Id.* at 370. Over the course of the next approximately 2 hours, PFC R testified that she consumed two or three shots of Jack Daniels and six or seven shots or "mouthfuls" of Jaegermeister, listened to music, played with iTunes, and spoke telephonically with several friends. *Id.* at 203, 214, 370-73, 376-77, 395-96. Those friends testified that PFC R sounded giddy and intoxicated. *Id.* at 203-04, 207-09, 215, 217. At approximately 1940, PFC R was discovered asleep in Pvt Peterson's bed and escorted by the duty noncommissioned officer (Duty NCO) to her barracks room. *Id.* at 247-49, 256-58, 379. Although the Duty NCO noted that PFC R was moving slowly and having a little difficulty putting on her shirt and shoes, he testified that PFC R awoke without difficulty, put on her shoes while standing without stumbling and walked to her room without assistance. *Id.* at 247-48, 256-58, 266. At 1945, PFC R sent a text message to her ex-boyfriend indicating she was raped. *Id.* at 310-14, 380; PE-3. At 0253 on 27 November 2008, PFC R's blood was drawn as part of a sexual assault examination. Record at 294-95; PE-4 at 10. The toxicology results indicated the absence of any drugs and a blood alcohol concentration (BAC) below the threshold level for detection (<.02). Record at 415, 422-23.

PFC R has little to no memory of the events that took place between 1800 and 1940, when she was awakened by the Duty NCO, and has no recollection of the appellant engaging in any sexual contact with her. *Id.* at 378, 402.

Principles of Law

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

At trial, the Government was required to prove: (1) that the accused engaged in a sexual act with PFC R; and (2) that PFC R was substantially incapacitated. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45b(3)(c). Substantially incapacitated means a level of mental impairment due to consumption of alcohol; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions. *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 505-06 (01 Jan 2010).

Discussion

Only the second element, PFC R's incapacitation, is in issue. PFC R's level of intoxication is critical to addressing this element.

In support of the theory that PFC R was not substantially incapacitated, the appellant called Lieutenant Colonel LTC) Timothy Lyons, U.S. Army. The military judge recognized LTC Lyons as an expert in the field of forensic toxicology. Record at 415. LTC Lyons testified that the blood drawn during the sexual assault examination, when tested for alcohol, was below the threshold level for BAC detection (<.02). *Id.* at 415, 422-23. After comparing PFC R's testimony as to how much she drank to the toxicology report, LTC Lyons testified that PFC R's testimony was inconsistent with the laboratory results as he would have expected a reasonably high BAC level at 0253 if she had consumed the amount of alcohol she testified to. *Id.* at 421. Using both average and above average rates for alcohol elimination, LTC Lyons opined that PFC R's BAC was between .10 and .15 at the time of the alleged assault and that blacking out below a .18 is observed only in 10% of the population. *Id.* at 424-25. LTC Lyons went on to testify that passing out at BAC below .20 is not possible. *Id.* at 429. Finally, LTC Lyons testified that PFC R's ability to awaken so quickly and walk without exhibiting signs of intoxication was inconsistent with her account of the amount of alcohol she said she drank. *Id.* at 421-22. While it is possible that PFC R suffered an inability to record memory and exercise good judgment due to her alcohol consumption, LTC Lyons concluded that, based on her BAC at 0253, she did not ingest enough alcohol to enter a sedated or passed out state. *Id.* at 423.

Notwithstanding the fact that PFC R suffered memory loss due to her alcohol consumption, became sick and went to sleep after the sexual contact the appellant, we have reasonable doubt as to whether she was substantially incapacitated. In light of the testimony of LTC Lyons and the Duty NCO, and the appellant's videotaped statement to the Naval Criminal Investigative Service, in which the appellant describes PFC R as flirtatious and a willing and active participant in the sexual contact, we are not convinced beyond a reasonable doubt that PFC R was substantially incapacitated at the time of the sexual act. Accordingly, we set aside the finding of guilty as to Charge II.

Assignment of Error II

Our decision to set aside the finding of guilt on the Article 120 offense renders the second assignment of error moot.

Sentence Rehearing

Due to our action on findings, we next consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Based on the orders violation and aggravated sexual assault together, the members imposed a sentence of a bad-conduct discharge. All that remains is the orders violation. The maximum punishment for the Article 120 offense was confinement for 30 years, forfeiture of all pay and allowances, and a dishonorable discharge. MCM, Part IV, ¶ 45f(2). The maximum punishment for the orders violation was confinement for 2 years, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* at ¶ 16e(1). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the court-martial would have imposed. *Buber*, 62 M.J. at 479-80. The "only fair course of action" is to have the accused resentenced at the trial level. *Id.* at 480.

Conclusion

We affirm the findings of guilty for Charge I and its specification. The findings of guilt for Charge II and its specification are set aside. Charge II and its specification are dismissed. The sentence is set aside and the record is returned to the Judge Advocate General of the Navy for transmission to an appropriate CA who may order a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ.

Senior Judge BOOKER, Judge PRICE, Judge PERLAK, and Judge FILBERT concur.

MAKSYM, Senior Judge (concurring in the result):

While I concur with the majority by way of remedy, I write separately relative to the dismissal of the aggravated sexual assault charge due to factual insufficiency. This was an extremely close case, the result of which is mandated by the absence of evidence. This court is bound by the record that lies before it. It cannot speculate beyond the four corners of that record. *United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003).

The prosecution bears the burden of proof. In this case, for whatever reason, the Government did not call an expert witness to rebut the uncontroverted expert testimony advanced by the defense relative to the amount of alcohol consumed by and the impact of alcohol on the alleged victim, nor did they elicit sufficient concessions from the expert to undermine the conclusions he offered the court. Moreover, while I viewed with great import the testimony of Private (Pvt) Hansen -- arguably the most important Government witness when faced with the reality that the alleged victim recalls so very little about her ordeal -- his testimony was problematic. Pvt Hansen testified that he entered the barracks room in question and observed the alleged victim lying stripped on the bed, partially covered by a blanket, armed with "a thousand yard stare". According to Pvt Hansen, she was not blinking and presented absolutely no movement. Pvt Hansen testified that he became so concerned that he shook the alleged victim by the jaw, and after realizing no response, checked her pulse. He testified that the appellant and Private First Class Peterson appeared nervous and were perspiring. He then freely admitted that he left the room, but rather than reporting the incident at once, waited 20 minutes to report the incident to anyone. In fact, he testified that he smoked a cigarette, chatted with his sister on the phone, and, after leaving what he described as a near-catatonic victim alone with two suspicious characters for 20 minutes, only then did he place an anonymous note at the duty desk requesting that someone look into what was happening in the barracks room in question.

However, Pvt Hansens' observations of a victim who could not be readily awakened were contradicted by the testimony of the duty noncommissioned officer in the barracks who testified that the victim was awakened by a "normal" shake one might use to arouse a sleeping person, that she seemed "wobbly" but coherent, and was able to put her shoes on from a standing position.

I also note that the Government failed to call Pvt Cates as a witness minus any apparent explanation. Pvt Cates was in the room during the alleged assaults and was apparently blithely typing on his computer. He was, in fact, the person who told Pvt Hansen that there was sex occurring in the room in question. Yet he is not called by either party to tell us what he knew.

I am mindful that during my review of the record, I must recognize that the trial court saw and heard the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). However, this record presents a rare factual scenario where I can accept the testimony of all of the witnesses at face value yet still find a reasonable doubt as to guilt. The victim recalls little to nothing, and understandably considers the events as sexual assault. The victim was clearly drinking, and was obviously intoxicated. Pvt Hansen viewed the victim in a non-responsive state. Shortly thereafter, the duty noncommissioned officer in the barracks easily awakened the victim and viewed her in a coherent state. Scientific testimony suggested that the victim may have suffered a blackout, but was unlikely intoxicated to the point of losing substantial capacity. On these facts, there is a reasonable doubt as to whether, at the time of the alleged sexual assault and indecent act, the victim was substantially incapacitated, or intoxicated to a lesser extent but clearly in a blackout state. Without testimony from an expert to testify to the contrary or some corroboration as to whether, at the time of the assault, the victim was in a state described by Pvt Hansen or in one described by the duty noncommissioned officer in the barracks, I am left in doubt.

Finally, from a statutory perspective, the United States must prevail upon the court by way of proof in illustrating beyond any reasonable doubt that the alleged victim was substantially incapacitated by alcohol or any other substance during the very short time frame in question. Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). I would note that military jurisprudence relative to the application of what does and does not constitute substantial incapacitation is far from well-developed. The Government's position is badly compromised by the absence of conventional and expert testimony.

I suspect that the court is presented with more than merely an alleged victim in this case. Concluding that there is a reasonable doubt is not the same as concluding no crime occurred. However, while I may have grave suspicion as to the

existence of heinous crime, suspicion does not satisfy the Government's heavy burden of proof beyond any reasonable doubt.

Chief Judge REISMEIER, Senior Judge MITCHELL, and Judge PAYTON-O'BRIEN joining

BEAL, Judge (concurring in the result):

I would set aside the conviction for aggravated sexual assault alleged under Charge II for the reasons stated in my dissent to *United States v. Medina*, 68 M.J. 587, 596 (N.M.Ct.Crim.App. 2009), *rev. granted*, ___ M.J. ___ (C.A.A.F. Mar. 30, 2010). I concur with the majority opinion in all other respects.

For the Court

R.H. TROIDL
Clerk of Court