

**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.

**JONATHAN D. RAMON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000144
GENERAL COURT-MARTIAL**

Sentence Adjudged: 25 June 2009.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding General, 1st Marine
Division (REIN) Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj M.J. Kent,
USMC.

For Appellant: Capt Michael Berry, USMC.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

28 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.**

PER CURIAM:

A general court-martial with enlisted representation convicted the appellant, contrary to his plea, of one specification of forcible rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was acquitted of a separate specification of assault in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to a dishonorable discharge, confinement for a period of 3 years, total forfeiture of pay and allowances, and reduction to the pay grade of E-1. The convening authority approved the sentence with respect to discharge, forfeitures, and reduction, but disapproved confinement in excess of 2 years.

In his sole assignment of error, the appellant alleges that the military judges erred in failing to instruct the members as to mistake of fact as to consent.

Background

The appellant and the victim were husband and wife, had a strained relationship and were in the process of divorce at the time of the rape. Upon his return from Iraq in July 2008, the appellant was served with divorce papers and ordered to live in the barracks. On 20 August 2008, the appellant and his wife agreed that he would move back into the marital home provided he stayed in a separate room. Record at 324. With the exception of one evening when the appellant slept on the floor of the victim's bedroom, the two slept in separate rooms and from the time he returned from Iraq in July 2008 until the day of the rape, 4 September 2008, they had not had sexual intercourse. *Id.* at 327, 354.

The victim and the appellant offer different accounts of what transpired. According to the victim, the appellant walked in uninvited while she was showering and entered the shower. She objected to his entering the shower but did not leave because she was in the midst of washing her hair and felt that leaving would make the situation worse. *Id.* at 333. According to her account, the appellant then began to touch her and she twice told him to stop. He then placed his fingers into her vagina and she pushed him away. The appellant then pushed her against the shower wall and had sex with her despite her repeated requests for him to stop. *Id.* at 290.

The appellant paints a somewhat different picture. According to his statement to the Naval Criminal Investigative Service, Prosecution Exhibit 2, he and his wife were taking a shower together and after five minutes began flirting with one another. The appellant then began to kiss her and run his hands down her body. At that point, the appellant states that he received a "not right now" sort of look and they both returned to washing their hair until he touched her hair and body and they kissed again and ultimately engaged in sexual intercourse with her body moving with his. The appellant admits that his wife asked him to stop but "being on the verge of an orgasm," he instead held her close and ejaculated in her vagina. *Id.* at 2.

According to both the appellant and the victim, immediately following the incident, the victim sat on the floor of the shower with the water running over her and began to cry and the appellant struck his head against the shower wall with such force that he cracked the shower enclosure. Record at 333; PE 2 at 2.

The appellant made three subsequent statements to three different witnesses indicating that he and the victim were initially engaged in consensual intercourse during which she told him to stop but he continued to have sex and acknowledging that

he raped his wife and expressing remorse. PE 2 at 3; Record at 396, 450.

Failure to Instruct

The question of whether or not the military judge erred by failing to instruct the members on the affirmative defense of mistake of fact as to consent is a legal question reviewed *de novo*. RULE FOR COURTS-MARTIAL 920(e)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A military judge has a *sua sponte* duty to instruct on an affirmative defense if reasonably raised. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); R.C.M. 916(d) and 920(e)(3). "The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire." *Davis*, 53 M.J. at 205 (citation omitted).

We agree with the appellant that the affirmative defense of mistake of fact as to consent was reasonably raised by the appellant's statement to NCIS and his subsequent statements to witnesses in which he described the sexual encounter with his wife as consensual up until she told him to stop. Moreover, any doubt as to whether the evidence raises an affirmative defense is resolved in favor of the accused. *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981).

Given this, we find that the military judge erred when he failed to *sua sponte* instruct the members on the affirmative defense of mistake of fact as to consent. The failure to instruct on an affirmative defense has constitutional implications, and "'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (citations and internal quotation marks omitted).

In this instance, the Government presented the members with two theories of rape, i.e., that the entire encounter between the appellant and his wife was nonconsensual or, alternatively, the appellant raped his wife when he continued to have sexual intercourse with her after she withdrew her consent. In light of the appellant's repeated statements admitting that he continued to have sex after his wife told him to stop, his acknowledgments that his actions were wrong, his description of his wife crying sitting on the shower floor after the incident, and his banging of his head against the shower enclosure, we are convinced that the appellant was not operating under any mistaken belief as to consent when he disregarded her requests to stop and instead elected to continue to have sex. We are likewise convinced beyond a reasonable doubt that the error in not instructing the members as to mistake of fact as to consent did not contribute to

the appellant's conviction. Notwithstanding the fact that the appellant's statement contains some evidence raising consent and mistake of fact as to consent to the initial segment of intercourse with the victim, e.g., flirting, kissing and sexual intercourse, it is clear that the appellant raped his wife after she told him to stop. Finally, we note that mistake of fact as to consent was not a theory presented or argued to the members by trial defense counsel. Based on these facts and our review of the entire record, we find that the military judge's error did not contribute to the appellant's conviction.

We are not, however, convinced beyond a reasonable doubt that the military judge's error did not contribute to the sentence. Thus, we will reassess the sentence in accordance with the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006). After carefully considering the entire record, we are satisfied beyond a reasonable doubt that, even if error had not occurred, the members would not have adjudged a sentence less than that approved by the convening authority in this case.

Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court