

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

**Before  
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRENNEN J. MILTON  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100218  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 8 December 2010.

**Military Judge:** Maj Clay A. Plummer, USMC.

**Convening Authority:** Commanding General, 2d Marine  
Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** LtCol J.W. Hitesman,  
USMC; **Addendum:** Maj C.S. Ruwe, USMC.

**For Appellant:** LT Daniel W. Napier, JAGC; USN; LT Jentso J.  
Hwang, JAGC, USN.

**For Appellee:** CDR Kimberly D. Hinson, JAGC, USN; Capt Mark  
V. Balfantz, USMC.

**11 October 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MODZELEWSKI, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of failure to obey a lawful order by drinking alcohol while on restriction and one specification of wrongful sexual contact, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The

military judge sentenced the appellant to sixty days confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his two assignments of error, the appellant argues that the evidence was factually and legally insufficient to support his conviction on either charge.

After examining the record of trial, the appellant's two assignments of error, and the pleadings of the parties, we conclude 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 occurred. Arts. 59(a) and 66(c), UCMJ.

### **Background**

In June 2009, Lance Corporal (LCpl) M reported to 2d Marine Division and met the appellant. Both men were attached to the 2d Marine Division band and quickly became friends, spending time together both at work and off-duty. Record at 77. They belonged to a circle of friends from the band; among this small group it was well-known that the appellant was gay. *Id.* at 86. In the months preceding the charged offenses, the appellant twice told LCpl M that he was in love with LCpl M. *Id.* at 87. LCpl M told the appellant that he was not gay, but maintained a friendship with the appellant and socialized frequently. *Id.* at 132.

It is undisputed that there was some physical contact between the two men prior to 28 October 2009. The appellant gave LCpl M a pedicure on two occasions and slept in LCpl M's rack on several occasions. *Id.* at 88-89, 131-32. At a party in early October 2009, the appellant gave a back rub to LCpl M. When LCpl M rolled over, the appellant rubbed him on the chest, kissed him on the forehead, and told LCpl M that he loved him. *Id.* at 91-92, 148. LCpl M did not immediately signal that he did not welcome the contact. Instead, he did not speak to the appellant the rest of the night and told the appellant some time later that he no longer wanted to be friends. *Id.* at 133. Despite this assertion, LCpl M remained in the same circle of friends with the appellant and saw him occasionally. *Id.* at 134, 139.

LCpl M testified that, on the night of 28 October 2009, the appellant stopped by LCpl M's barracks room, carrying a full

bottle of vodka, and asked LCpl M for a ride to the 7 Day Store, where he bought Hawaiian Punch. *Id.* at 78, 129, 138. When they returned from the store, the appellant went into the kitchen, poured a drink, and returned to the room with a plastic cup containing a light red drink. *Id.* at 128-29. Although LCpl M did not see the appellant pour vodka into the cup, LCpl M testified that when he found the bottle the next morning it was half-empty. *Id.* at 129.

LCpl M testified that he fell asleep in his rack, while his roommate slept in the top rack and the appellant watched a movie from the chair, drink in hand. *Id.* at 79. Others testified that LCpl M and the appellant sat on the lower bunk. *Id.* at 154, 167. LCpl M testified that he awoke at about 0330, and the appellant was sitting on the end of his rack, touching his leg. When LCpl M asked the appellant what he was doing, the appellant stopped, and LCpl M went back to sleep. *Id.* at 80, 128. LCpl M testified that approximately fifteen minutes later, he woke to find the appellant touching or grasping his penis through the bottom of his PT shorts. LCpl M told the appellant to stop, pushed his hand away, and got out of the rack. The appellant replied, "Sorry," and remained in the rack, apparently sleeping. LCpl M sat in a chair in the room until 0600, at which time the appellant awoke, got dressed, and left the room. LCpl M then awakened his roommate and reported the incident to him. *Id.* at 79-81.

A fellow band member, LCpl C, testified that he saw the appellant at approximately 0800 on 29 October 2009, shortly after the events described above by LCpl M. The appellant, who appeared "kind of down and kind of sad," told this acquaintance, "I messed up," and "I touched [LCpl M]." *Id.* at 144-45.

On 28 October 2009, the appellant was on restriction, as a result of nonjudicial punishment imposed on 6 October 2009. Prosecution Exhibits 2 and 4. As a condition of his restriction, the appellant was ordered not to consume alcohol. PE 2 at 1. The commanding officer of Headquarters Company testified that the appellant went to office hours on 6 October 2009; that restriction was imposed; that the appellant was briefed afterwards according to standard protocol about the conditions of restriction; and that the appellant and he both signed the restriction order.

## Principles of Law

The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if a rational trier of fact could have found the essential elements of the crime, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. In contrast, 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 factual sufficiency review with the understanding that we did not personally observe the witnesses. *Turner*, 25 M.J. at 325.

## Discussion

### I

We examine first the sufficiency of evidence for conviction of wrongful sexual contact. At trial, the Government was required to prove: (a) that the appellant had sexual contact with LCpl M; (b) that he did so without LCpl M's permission; and (c) that the appellant had no legal justification or lawful authorization for the sexual contact. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(13). The definition of sexual contact includes the intentional touching of the genitalia of another with intent to "arouse or gratify the sexual desires of any person." Art. 120(t)(2), UCMJ. Consent is an element of this offense: that is, the prosecution must prove beyond a reasonable doubt that this sexual contact was without the permission of LCpl M. In contrast, mistake of fact as to consent is an affirmative defense to this offense. In this case, mistake of fact as to consent means that the appellant held, as a result of ignorance or mistake, an incorrect belief that LCpl M consented. This mistake must have been reasonable under all the circumstances: that is, it must have been based on information, or lack of it, that would indicate to a reasonable person that LCpl M consented. Art. 120(t)(15), UCMJ. Once raised, the prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist.

We are convinced that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

First, the evidence at trial was sufficient to support a determination beyond a reasonable doubt that the appellant touched LCpl M's penis with the intent of arousing or gratifying his own or LCpl M's sexual desires. The appellant openly discussed his attraction to LCpl M and the events of the night in question leave no doubt that it was an intentional touching and of a sexual nature. Secondly, the evidence clearly established that there was no legal justification or authorization for the sexual contact. And finally, the record sufficiently established that LCpl M had not given his permission for this touching. LCpl M was asleep at the time of the touching; he had not previously given permission for this sexual contact; LCpl M had no prior sexual relationship with the appellant; and he denied at trial that he had in any way consented to the touching. There was no evidence before the trial judge of actual consent.

What remains, then, is whether the prosecution's evidence was sufficient to prove beyond a reasonable doubt that the mistake of fact as to consent did not exist: that on the night of the incident, the appellant was not under a mistaken belief that LCpl M consented to the touching of his penis, or that, if he was, any mistake of fact on the appellant's part was unreasonable. Our review is not informed by special findings made by the military judge, as neither party requested findings pursuant to RULE FOR COURTS-MARTIAL 918(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Nevertheless, we are convinced that the military judge, as trier of fact, had sufficient evidence to conclude beyond a reasonable doubt that the appellant either was not under a mistaken belief that LCpl M consented to the touching of his penis, or that any such mistaken belief on his part was unreasonable.

Although LCpl M knew that the appellant was attracted to him, LCpl M had not welcomed or reciprocated earlier advances, had told the appellant he was not gay, and had told the appellant that he wanted to end the friendship because the appellant was placing him in an awkward situation. On the evening in question, the appellant waited until LCpl M was asleep before touching him, initially on the feet or legs. LCpl M awoke, questioned the appellant, whereupon the appellant stopped. After LCpl M again fell asleep, he was awakened by the appellant fondling him and touching his penis. The appellant makes much of the fact that the testimony of LCpl M was at times both inconsistent with his prior statements and confused as to the sequence of events during the incident. But reasonable doubt does not require that the evidence be free from conflict.

*Reed*, 51 M.J. at 562 (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)). Additionally, the appellant's statements to then LCpl C shortly after the incident that he "messed up" and "touched [LCpl M]" buttress the evidence provided by LCpl M himself.

Considering the entire record, we are convinced of the appellant's guilt beyond a reasonable doubt. The appellant speculates that LCpl M had a motive to fabricate, as he didn't want "the world to think he was gay." Appellant's Reply Brief at 5. Notwithstanding this argument, and recognizing that we did not personally see LCpl M's testimony, we are persuaded both as to the plausibility of his account and the appellant's guilt beyond a reasonable doubt. We find that the evidence is factually as well as legally sufficient to sustain the conviction of wrongful sexual contact.

## II

Turning to the charge of violation of the restriction order, the Government was required to prove that: (a) the commanding officer issued a lawful restriction order; (b) the appellant had knowledge of that restriction order; (c) the appellant had a duty to obey the order; and (d) the appellant failed to obey the order by drinking alcohol while on restriction. MCM, Part IV, ¶16b(2). The commanding officer's testimony and the restriction order establish that the appellant was on restriction on 28 October 2009 as a result of nonjudicial punishment; that the appellant was ordered not to consume alcohol while on restriction; and that the appellant had knowledge of that order. LCpl M testified that the appellant brought a full bottle of vodka to the room with him on the night of 28 October 2009; that LCpl M then drove the appellant to the 7 Day Store to buy a punch mixer; that upon their return the appellant went into the kitchen to mix a drink and returned, drink in hand, to watch the movie; that the appellant put the bottle of vodka in the wall locker; and that when LCpl M saw it the next day it was half-empty. LCpl M testified that the appellant's drink had no ice and was lighter in color than Hawaiian Punch.

Viewing this evidence in the light most favorable to the Government, we are convinced that a rational trier of fact could have found the appellant failed to obey the restriction order. There is direct evidence that he had knowledge of the order, and strong circumstantial evidence that indicates he was drinking a mix of vodka that he brought to the room and Hawaiian Punch that

he purchased that evening. Furthermore, after considering the record before us, this court is convinced beyond a reasonable doubt of the appellant's guilt on the orders violation.

### **Conclusion**

The findings and the sentence, as approved by the CA, are affirmed. To the extent that the CA's action purports to order the punitive discharge executed upon completion of appellate review, it is a nullity and does not require corrective action. See *United States v. Tarniewicz*, \_\_ M.J. \_\_, 2011 CCA LEXIS 150 (N.M.Ct.Crim.App. 30 Aug 2011).

Chief Judge REISMEIER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL  
Clerk of Court