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

Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTONIO M. CASTELLANO
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201100248
GENERAL COURT-MARTIAL

Sentence Adjudged: 23 November 2010.
Military Judge: LtCol David A. Jones, USMC.
Convening Authority: Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Col J.R. Woodworth, USMC.
For Appellant: LCDR Michael R. Torrisi, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: LT Ritesh Srivastava, JAGC, USN.

26 June 2012

OPINION OF THE COURT

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

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his plea, of one specification of adultery in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of one

specification of attempted adultery, two specifications of indecent conduct, one specification of sodomy and two specifications of assault consummated by a battery, in violation of Articles 80, 120, 125, and 128, UCMJ, 18 U.S.C. §§ 880, 920, 925, and 928.

The members sentenced the appellant to confinement for eighteen months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

Background

In May, June and October of 2010, various sets of charges and additional charges were referred for trial by the same general court-martial, initially alleging three female victims on Okinawa, Japan. By the time the appellant was arraigned and tried at this general court-martial beginning on 15 November 2010, various charges had been withdrawn and dismissed by the Government and the final slate of the charges[1] focused upon two female victims, both Marines. In September of 2009, Lance Corporal (LCpl) B was seven months pregnant and the next-door neighbor of the appellant and his wife. The appellant's visit next door, ostensibly to check on a single expectant mother and fellow Marine, resulted in the appellant entering a plea of guilty to adultery. He also was convicted of performing oral sodomy during this encounter, but without a finding of the aggravating factor of force that was alleged. The conduct giving rise to the charges involving the second Marine, Private First Class (PFC) H, begin a year later in September of 2010. Not accounting for the appellant's marital status, his initial interaction with PFC H, a new Marine to Okinawa, might appear to be a dating/liberty buddy situation. Various conduct of a physical and sexual nature ensued, exceeding the scope of whatever consent may have been given by PFC H. These acts resulted in guilty findings of attempted adultery, two specifications of indecent conduct, and two specifications of assault consummated by a battery as lesser-included offenses of charged Article 120 offenses.

[1] The multiple sets of allegations and victims in this case resulted in repeated charge numbering. For clarity's sake we will refer to the charges involving Lance Corporal (LCpl) B as "LCpl B Charge __" and those involving Private First Class (PFC) H will be referred to as "PFC H Charge __."

The appellant raised 9 assignments of error in his initial brief and later filed a supplemental assignment of error.[2] After carefully considering the record of trial, the appellant's assignments of error, and the Government's responses, we grant relief by setting aside the two Article 128 guilty findings regarding PFC H. Following that action on the findings, and upon our reassessment of the sentence, no error materially prejudicial to the substantial rights of the appellant remains.

---

[2] I. WHETHER APPELLANT'S CONVICTIONS FOR INDECENT ACTS, ASSAULT CONSUMMATED BY A BATTERY, AND ATTEMPTED ADULTERY ARE FACTUALLY AND LEGALLY SUFFICIENT.

II. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS THAT THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT AS TO CONSENT APPLIED TO THE LESSER-INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.

III. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS THAT IT WAS THEIR DUTY AS FACTFINDER TO DETERMINE WHETHER APPELLANT'S CONSENSUAL SODOMY CHARGE MET THE FACTORS OUTLINED IN *UNITED STATES V. MARCUM*.

IV. A SPECIFICATION IS CONSTITUTIONALLY DEFICIENT IF IT DOES NOT ALLEGE ALL OF THE ELEMENTS OF THE CHARGED OFFENSE AND FAIRLY INFORM THE ACCUSED OF WHICH HE MUST DEFEND. WAS APPELLANT'S FORCIBLE SODOMY SPECIFICATION CONSTITUTIONALLY SUFFICIENT WHEN IT DID NOT ALLEGE ANY OF THE THEORIES OF CRIMINALITY OUTLINED IN *UNITED STATES V. MARCUM*?

V. WHETHER THE MILITARY JUDGE CONSTRUCTIVELY AMENDED APPELLANT'S INDECENT ACTS SPECIFICATIONS BY INSTRUCTING THE MEMBERS THAT HIS CONDUCT COULD BE INDECENT IF "OPEN AND NOTORIOUS."

VI. WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE MEMBERS THAT CONSENT AND MISTAKE OF FACT AS TO CONSENT WERE DEFENSES TO INDECENT ACTS.

VII. WHETHER APPELLANT'S CONVICTIONS FOR ATTEMPTED ADULTERY, INDECENT ACTS AND ASSAULT CONSUMMATED BY A BATTERY ARE AN UNREASONABLE MULTIPLICATION OF CHARGES.

VIII. WHETHER APPELLANT'S CONVICTIONS FOR INDECENT ACTS IN SPECIFICATION 3 OF PFC H CHARGE II AND ASSAULT CONSUMMATED BY A BATTERY IN SPECIFICATION 4 OF PFC H CHARGE II ARE AN UNREASONABLE MULTIPLICATION OF CHARGES.

IX. WHETHER THE ADULTERY AND ATTEMPTED ADULTERY SPECIFICATIONS FAIL TO STATE AN OFFENSE BECAUSE THEY DO NOT ALLEGE THAT THE CONDUCT WAS PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OR OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES.

Supplemental AOE. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO ADMIT EVIDENCE OF AN UNRELIABLE REPORT OF THE UNCHARGED SEXUAL ASSAULT THROUGH THE TESTIMONIAL HEARSAY OF AN NCIS AGENT WITHOUT CONDUCTING ANY M.R.E. 413 ANALYSIS.

Legal and Factual Sufficiency

We conduct *de novo* review for legal and factual sufficiency. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). When reviewing for legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Id*. (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id*. at 325. The appellant has challenged the factual and legal sufficiency of his convictions for attempted adultery, indecent acts and assault consummated by a battery. Having reviewed the record, we are convinced of the legal and factual sufficiency of the appellant's guilt for one count of attempted adultery, two counts of indecent conduct, and two counts of assault consummated by a battery.[3]

We are convinced that the appellant, a married man, committed the crime of attempted adultery because he engaged in overt acts that "apparently tended to effect the commission" of the crime of adultery. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4b. Kissing PFC H, putting his hands down PFC H's pants, touching her breasts, and inserting his finger into her vagina are all acts which serve to effect sexual intercourse. Additionally, the appellant told PFC H that "if we had sex, it would be awesome." Record at 487. Combined with his overt actions, this evidence of intent convinces us beyond a reasonable doubt that the appellant, a married man, attempted to have sexual intercourse with PFC H and that a reasonable factfinder could have found all the essential elements of this charge.

The evidence likewise supports the indecent conduct convictions. The members found the appellant guilty of Specification 1 of PFC H Charge II because he forced his hands down PFC H's pants. Similarly, the members determined beyond a reasonable doubt that the appellant was guilty of Specification 3 of PFC Charge II because he pushed PFC H to the floor, lay on top of her, and rubbed his pelvic region on her pelvic region.

[3] Because we set aside Specifications 2 and 4 of PFC H Charge II based upon instructional error, *infra*, we do not address so much of this assignment of error as challenges the legal and factual sufficiency of those specifications.

The evidence supporting these charges was PFC H's testimony. PFC H indicated that she consented to kissing the appellant, but not to the acts outlined in the indecent conduct charges. She provided credible testimony that the appellant used force to touch her without her consent, and we are convinced beyond a reasonable doubt that all the essential elements of these two specifications could have been found by the trier of fact and that the appellant is guilty of indecent conduct.

Instructional Error

Having determined that the appellant's convictions are factually sufficient, as qualified in footnote 3 above, we now turn to assignments of error II, V, and VI, which allege instructional error.[4] We review allegations of instructional error *de novo*. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). A military judge is required, *sua sponte*, to instruct on an affirmative defense if there is some evidence in the record upon which the members might rely in order to determine the availability and viability of an affirmative defense. *Id*.; *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003); RULE FOR COURTS-MARTIAL 920(e)(7), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Furthermore, "[a]ny doubt whether an instruction should be given 'should be resolved in favor of the accused.'" *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995) (quoting *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)).

Mistake of fact as to consent is a defense to assault consummated by a battery. *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40, M.J. 432, 433 (C.M.A. 1994)). Additionally, a military judge must, *sua sponte*, instruct the members that the mistake of fact as to consent defense also applies to a lesser included offense. *United States v. Hurko*, 36 M.J. 1176, 1179 n.3 (N.M.C.M.R. 1993). In this case, the record contains enough evidence to reasonably raise the issue of the affirmative defense of mistake of fact as to consent as applied to assault consummated by a battery. The military judge instructed the members on the defense of mistake of fact as to consent for the sexual assault charges only, but did not specifically instruct the members on this defense as it pertained to the lesser included offense of

[4] In assignment of error II, the appellant avers that the military judge erred by not instructing the members on the affirmative defense of mistake of fact as to consent when explaining the lesser included offense of assault consummated by a battery. Similarly, in assignment of error VI, the appellant asserts that the military judge should have instructed the members on consent and mistake of fact as to consent when explaining indecent acts.

assault consummated by a battery. While the members may have applied the mistake of fact as to consent defense to both sexual assault and the lesser included offense of assault consummated by a battery, doing so would have taken great liberties with the very precise, offense-specific instructions given by the military judge. The military judge stated his intention to repeat instructions he may have already given on one offense to subsequent offenses where it pertained. In the absence of a clear instruction on an affirmative defense raised by the evidence and applicable to the lesser included offense, we find that the appellant has met his burden in establishing error.

The error carries constitutional implications and must be reviewed for prejudice using a harmless beyond a reasonable doubt standard. *Lewis*, 65 M.J. at 87. 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." *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003) (citations and internal quotation marks omitted). In this case, we cannot find beyond a reasonable doubt that the error did not contribute to the appellant's conviction. Therefore, we set aside the appellant's convictions under specifications 2 and 4, PFC H Charge II, for assault consummated by a battery.

In assignment of error VI, the appellant argues that the military judge erred by failing to instruct the members that mistake of fact as to consent is a defense to indecent acts.[5] Consent and mistake of fact as to consent are currently not defenses to any crime under Article 120, UCMJ, except rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. MCM, Part IV, ¶ 45a(r); *see United States v. Langley*, 33 M.J. 278 (C.M.A. 1991) (holding that military judge did not err when he instructed members that mistake of fact as to consent was not applicable to indecent acts). As such, the military judge was not required to instruct the members on mistake of fact as to consent for Specifications 1 and 3 of PFC H Charge II

Marcum Issues

The appellant's arguments in assignments of error III and IV both address issues stemming from the military judge's application of the factors outlined in *United States v. Marcum* to Specification 2 of LCpl B Charge III. 60 M.J. 198 (C.A.A.F.

[5] PFC H Charge II, Specifications 1 and 3.

2004). The military judge determined that the sexual activity outlined in that specification was not protected pursuant to the liberty interest outlined in *Marcum* and *Lawrence v. Texas* and thus instructed the members on both nonconsensual sodomy and the lesser included offense of consensual sodomy. 539 U.S. 558 (2003); Record at 849, 869, 1008-09. At trial, the members found the appellant not guilty of forcible sodomy but guilty of sodomy, contextualized by the military judge's own *Marcum* ruling. Record at 1014. The appellant avers that the military judge erred in conducting his *Marcum* legal analysis, instead of instructing the members that it was up to them to determine whether the *Marcum* factors were met. Additionally, the appellant argues that Specification 2 of LCpl B Charge III was constitutionally deficient because it did not include any of the *Marcum* factors. We disagree.

In *Marcum*, the Court of Appeals for the Armed Forces (CAAF) outlined three factors used to determine whether certain sexual activity falls within the liberty interest outlined in *Lawrence*. 60 M.J. at 207. These factors are questions of law properly analyzed by the military judge, not questions of fact to be determined by the trier of fact. *United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16, at *9, unpublished op. (N.M.Ct.Crim.App. 26 Jan 2012); *see United States v. Harvey*, 67 M.J. 758, 763 (A.F.Ct.Crim.App. 2009) (holding that military judge does not abuse his discretion by failing to instruct members on *Marcum* analysis). Inherent in this determination is the principle that "[w]hether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for the determination by the triers of fact." *United States v. Carson*, 35 C.M.R. 379, 380 (C.M.A. 1965). This principle informs not only the question of whether the *Marcum* factors must be answered by the military judge or the trier of fact, but also whether the *Marcum* factors must be included in a specification.

The appellant argues in assignment of error IV that the *Marcum* factors must be plead and submitted to the trier of fact as *de facto* elements. However, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in a case of federal crimes, which are solely creatures of statute. *Liparota v. United States*, 471 U.S. 419, 424 (1985). Judicially created principles, such as the *Marcum* factors, are not elements of offenses. As explained in *Carson*, the *Marcum* analysis is instead a question of law decided by the military judge. 35 C.M.R. at 380. Consequently, Specification 2 of LCpl B Charge II was not constitutionally deficient and did

not have to include any of the *Marcum* factors in order to provide the appellant with proper notice. Assignments of error III and IV do not merit relief.

Terminal Element

The CAAF recently held that, regardless of the context, "it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication." *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012). Assuming error, "a charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error." *Id*. (citations and footnote omitted). In a plain error analysis, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). When an accused pleads guilty and the providence inquiry "clearly delineates each element of the offense and shows that the accused understood 'to what offense and under what legal theory [he was] pleading guilty,'" there is no prejudice under the plain error analysis. *Ballan* (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)).

In this case, the appellant pled guilty to the adultery specification and was adequately apprised of the elements and legal theory of that offense.[6] During the providence inquiry, the military judge read and explained the three elements of adultery, including the terminal elements of prejudice to good order and discipline and service discrediting. The appellant, in turn, explained to the military judge why he felt he had committed adultery. The record thoroughly establishes that the appellant understood the elements and voluntarily pled guilty. In accordance with *Ballan*, we find that the appellant suffered no prejudice and affirm his guilty plea to the offense of adultery.

The appellant's assignment of error alleging that an attempted adultery charge must include not only the elements of an attempt, but also the actual elements of adultery, including the terminal element, is without merit. The elements for Articles 80 and 81, UCMJ, outlined in the Manual for Courts-Martial do not carry any requirement for the recitation of the elements of the target offense. *See, e.g., United States v. Norwood*, No. 201000495, 2011 CCA LEXIS 85 (N.M.Ct.Crim.App. 5

[6] Adultery is the sole specification under LCpl B Charge V.

May 2011), *aff'd,* __ M.J. __, 2012 CAAF LEXIS 633 (C.A.A.F. Jun. 6, 2012). We hold that the attempted adultery specification is not defective.

Sentence Reassessment

Having set aside two specifications of assault consummated by a battery, we must determine if 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). We find that there has not been a dramatic change in the sentencing landscape and we are able to reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986).

The appellant faced the prospect of confinement for eighteen years, a dishonorable discharge, total forfeitures and reduction to E-1 for the offenses of which he was found guilty. The two findings as to the lesser included offenses of assault consummated by a battery each carry a maximum period of confinement of six months, which serves to lower the maximum confinement by one year. The record as a whole and facts adduced on the affirmed charges and specifications give ample justification for the sentence awarded, with or without the additional assaults. The appellant, a married Marine, committed adultery with and oral sodomy upon a fellow Marine, his neighbor. He engaged in indecent conduct with a junior Marine, new to the island, in an attempt to engage in an adulterous relationship with her. We are confident that the members would have imposed, and the convening authority would have approved, a sentence which included a bad-conduct discharge, forfeiture of all pay and allowances, reduction to E-1, and at least eighteen months confinement.

Conclusion

The remaining assignments of error are either without merit or are mooted by our action. The findings of guilty of Specifications 2 and 4 of PFC H Charge II are set aside and those specifications are dismissed. The remaining findings are

affirmed. Upon reassessment, the sentence as approved by the convening authority is affirmed.

For the Court

R.H. TROIDL
Clerk of Court