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

Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STETSON O. HOLMES
ELECTRONICS TECHNICIAN (REPAIR) SEAMAN (E-3), U.S. NAVY

NMCCA 201100602
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 August 2011.
Military Judge: CDR Carrie Stephens, JAGC, USN.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: LCDR E.M. Baxter, JAGC, USN.
For Appellant: LT Jared Hernandez, JAGC, USN; LT Gregory M. Morison, JAGC, USN; LT Daniel C. LaPenta, JAGC, USN.
For Appellee: Maj Paul M. Ervasti, USMC.

18 December 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.

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of conspiracy to commit aggravated sexual assault, one specification of aggravated sexual assault, one specification of abusive sexual contact, and one specification of indecent conduct, in violation of Articles 81 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and

920. The members sentenced the appellant to three years confinement, total forfeitures, and a dishonorable discharge. The convening authority approved the sentence as adjudged.[1]

The appellant raises three assignments of error: (I) that the evidence relating to the conspiracy conviction is factually insufficient; (II) that the evidence relating to the aggravated sexual assault conviction is factually insufficient; and (III) that the military judge erred in permitting testimony from the Government's expert witness because his testimony failed to meet the standards for reliable scientific expert testimony.

After considering the pleadings and the entire record of trial, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

I. Factual Summary

The appellant and three male friends, Electronics Technician Seaman (ETSN) Northrup, ETSN Heckrotte, and ETSN Ariston, went to a local bar. At the bar, they met two more friends, Interior Communications Electrician Fireman Apprentice (ICFA) Wylie, and the victim, ETSN TL. The six Sailors stayed at the bar until closing, went to a diner together, and then rented a room at a nearby motel, arriving in the motel room at 0356. At the motel, the appellant was initially seen kissing ETSN TL on the bed, and ETSN TL recalls kissing him. Shortly thereafter, ETSN TL laid down on one of the beds and either went to sleep or passed out due to excessive consumption of alcohol. The appellant then engaged in sexual intercourse with her, with his companions present in the room. After the appellant was finished, the other four Sailors took turns having sexual intercourse and performing other sexual acts with ETSN TL.

Both the victim and ETSN Northrup testified at trial. Their testimony indicates that ETSN TL was passed out or was in varying degrees of consciousness throughout these sexual encounters. ETSN Ariston videotaped ETSN Northrup and ICFA Wylie on his cell phone as they were having sex with ETSN TL. Those videos, albeit short and of poor quality, corroborate that

[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

testimony, as ETSN TL appears inert. After all the men had finished having sex with ETSN TL, ETSN Ariston called them into a "huddle," and they agreed that "this night never happened." Record at 429-30. The appellant, ETSN Heckrotte, and ETSN Ariston then left the motel at 0525 and returned to the base. ICFA Wylie and ETSN Northrup stayed in the motel with ETSN TL until she awoke. When she awoke, ETSN TL asked what had happened. ETSN Northrup "summarized the night without the sex." *Id.* at 436. That is, he told ETSN TL that they went to the bar and then the diner, and then came to the motel to sleep. *Id.* Over the course of the following day, ETSN TL recalled fragments or "snippets" of the sexual activity and reported the incident.

II. Factual Sufficiency

The appellant argues that neither his conspiracy conviction nor his aggravated sexual assault conviction can be sustained, as the evidence for each is factually insufficient to convince this court of his guilt beyond a reasonable doubt. We review questions of factual sufficiency *de novo* as a matter of law. Art. 66(c), UCMJ.

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [appellate court] are themselves convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987). After reviewing the record of trial and briefs of the parties, we are convinced of the appellant's guilt of these two offenses beyond a reasonable doubt.

We turn first to the appellant's argument that the evidence is factually insufficient to sustain his conviction for aggravated sexual assault. He asserts that we cannot be convinced beyond a reasonable doubt that ETSN TL was substantially incapacitated or, alternatively, that the appellant did not have a mistake of fact as to her consent.

The record before us convinces us beyond a reasonable doubt that ETSN TL was substantially incapacitated, and that the appellant had no reasonable mistake of fact as to her consent. ETSN TL had at least seven drinks while at the bar and fell down twice while there. At the diner, she fell asleep. Although the surveillance cameras from the motel record ETSN TL walking on her own into the building, she is hugging the wall in one hallway, and is passed out standing up at the exterior door.

The record also offers abundant evidence that she was substantially incapacitated in the room. ETSN TL testified that she was barely able to move, "pretty much like a zombie," and unable to stop the sexual activity due to her intoxication. Record at 662-63. ETSN Northrup testified that, when the appellant had sex with her, he did not see ETSN TL move or actively participate in the sexual activity. ETSN Northrup had sex with her shortly after the appellant and testified that she was unresponsive at that time. That testimony is corroborated by the videos taken by ETSN Ariston, which show her inert while ETSN Northrup and ICFA Wylie had sex with her. There is no doubt that ETSN TL was substantially incapacitated.

The appellant took the stand at his trial and testified that ETSN TL had consensual sex with him and that he was then surprised to see her have consensual sex with his companions as well. His testimony was not credible. Based upon her intoxication and in light of all the circumstances, we are convinced beyond a reasonable doubt not only that ETSN TL was substantially incapacitated, but also that the appellant knew she was not consenting to sex with him, and that no reasonable adult would have believed that she was consenting.

We turn next to the appellant's argument that the conspiracy conviction must fail because there is not sufficient proof that the appellant and ETSN Ariston entered into an agreement to commit sexual acts with ETSN TL while she was substantially incapacitated. We disagree.

An agreement to commit an offense "need not be in any particular form or manifested in any formal words, [rather] [i]t is sufficient if the agreement is merely a mutual understanding among the parties." *United States v. Mack*, 65 M.J. 108, 114 (C.A.A.F. 2007) (citations and internal quotation marks omitted). The existence of the conspiracy may be established by circumstantial evidence, including "reasonable inferences derived from the conduct of the parties themselves." *Id.* (citations omitted).

In *United States v. Harman*, 66 M.J. 710, 715 (Army Ct.Crim.App. 2008), *aff'd,* 68 M.J. 325 (C.A.A.F. 2010), the Army Court of Criminal Appeals upheld a conviction for conspiracy to maltreat prisoners where the appellant actively participated in the abuse of prisoners and encouraged others to do so, as evidenced by a picture of the appellant smiling and giving the thumbs-up signal. While not evidence of a verbal pact, the

court found that the picture supported a reasonable inference of an agreement. *Id.*

Here, as in *Harman*, there is no direct evidence of an explicit verbal agreement between the appellant and ETSN Ariston. But the record contains abundant circumstantial evidence of an implicit agreement. First, the appellant told a Naval Criminal Investigative Service (NCIS) agent that, while ETSN TL was in the restroom at the diner, ETSN Ariston said to the group, "I know she want me and Holmes, you all could jump in too, we can all try tonight." Record at 553-54.

At the motel room, the five men had sex with ETSN TL in the following order: ETSN Holmes, ETSN Ariston, ETSN Northrup, ICFA Wylie, ETSN Heckrotte, and then ETSN Ariston again. The appellant never left the motel room during the other Sailors' assaults. ETSN Ariston used his phone to video-record ETSN Northrup and ICFA Wylie while they had sex with the inert victim. During the videos, the other members of the group can be heard talking in the background as they watched their companions having sex with ETSN TL. Prosecution Exhibits 2 and 3. Video recordings from the motel security system also show ICFA Wylie, ETSN Ariston, and ETSN Northrup in the hallway in their underwear. PE 1. The men appear to be having a conversation; ETSN Northrup testified that he was discussing with ETSN Ariston his inability to become erect.

After the assaults, ETSN Ariston called a "huddle" of all the men, including the appellant, and they agreed with him that "this night never happened." Record at 429-30. It is apparent from that conversation that none of the men expected the victim to remember the assault. It is reasonable to infer from this conduct of the parties that the men were working in concert under a common understanding. *Id.* at 1028 (military judge's instructions on the offense of conspiracy).

Of note, the appellant left the motel with ETSN Ariston and ETSN Heckrotte only 90 minutes after their arrival, and only after they each had sex with ETSN TL, further circumstantial evidence that they rented the room with the plan to sexually assault ETSN TL. In fact, no other explanation fits the chain of events and the appellant's conduct. The appellant testified that two of the men decided to rent a motel room because they did not have duty that day. He and the others joined them to "take a nap" before they reported for duty. *Id.* at 832. Instead of going to sleep, however, the appellant testified that he had consensual sex with ETSN TL almost immediately, and then

watched with some surprise as she had consensual sex with others, and that he then left with two of the men to return to the base. The appellant's version of events is illogical and unbelievable.

We adopt the logic of the Army Court of Criminal Appeals in *Harman*, and find that the appellant's direct involvement, combined with his failure to stop or report the sexual assaults, support a reasonable inference that the conspirators had reached a common understanding to commit sexual acts upon ETSN TL while she was substantially incapacitated. Based on the record before us, we are convinced of the appellant's guilt of this offense beyond a reasonable doubt.

III. The Testimony of Dr. Henry

We turn finally to the appellant's contention that the military judge erred by permitting the Government's expert to testify that the victim was substantially incapacitated for two reasons. First, he contends that the expert's methods were unreliable, and that the military judge had a *sua sponte* duty to conduct a *Daubert*[2] hearing to assess the reliability of his methodology and to articulate her analysis on the record before allowing the expert's testimony. Second, the appellant argues that the expert should not have been allowed to give what amounted to a legal opinion. We find this assignment of error to be without merit.

At trial, the Government called Dr. Stafford Henry, M.D., and properly qualified him, without objection, as an expert in the fields of general psychiatry, forensic psychiatry, and addiction psychiatry. Dr. Henry described his methodology to the members, stating that he formed his opinions in this case by reviewing the NCIS investigation, the surveillance video, the cell phone video, and the Article 32 testimony of ETSN TL, and by conducting a fact-to-face assessment of ETSN TL. He also visited both the diner and the motel. Record at 699-700. Dr. Henry declined to speculate as to ETSN TL's blood alcohol content (BAC) when she was in the motel; he testified that any such estimates are inaccurate because there are too many variables that would affect an individual's BAC, and further testified that the only accurate measure of blood alcohol level is either a blood test or breathalyzer. *Id.* at 713-15.

[2] *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993).

Without objection, trial counsel asked Dr. Henry for his opinion on whether ETSN TL was substantially incapacitated. *Id.* at 716. Dr. Henry then testified that in his opinion ETSN TL was substantially incapacitated. He based that opinion on how much she drank, her self-described level of impairment, and what others described about her level of impairment and alertness at the bar, at the diner, and at the motel, and gave specific examples. *Id.* at 716-17. Earlier in Dr. Henry's direct testimony, the trial counsel had read the definition of substantial incapacitation that would later be provided to the members and confirmed with Dr. Henry that the legal definition was "consistent with . . . terminology you would use as a medical professional?" *Id.* at 711. That is, the trial counsel verified that when Dr. Henry used the term "substantial incapacitation," he was talking about the same type or level of impairment that the members would later be instructed upon.

Trial defense counsel called their own expert witness in forensic psychiatry, Captain (CAPT) Simmer, to discuss the issue of ETSN TL's level of intoxication. Of note, CAPT Simmer was taken out of turn to accommodate his schedule and actually testified in the midst of the Government's case, prior to Dr. Henry. CAPT Simmer testified about blackouts and alcohol's effect on memory and described his methodology. Trial defense counsel then asked CAPT Simmer, without objection, "(D)o you have an opinion as to whether [ETSN TL] was substantially incapacitated the morning of January 15th?" CAPT Simmer replied, "My opinion is that there's not enough information to know for certain whether she could consent or not, we just don't know. . . Having said that, I think the majority of the information we do have suggests that she probably could, but we don't know for sure." *Id.* at 577. Under further direct examination, CAPT Simmer gave his opinion that ETSN TL's BAC was in the range of .1 to .14. *Id.* at 582.

Arguably, trial defense counsel waived any objection to the reliability of Dr. Henry's methodology, as he had ample opportunity to challenge the testimony on these grounds and chose not to do so. Prior to trial, defense counsel had Dr. Henry's report, which included his methodology and opinions, and provided that report to CAPT Simmer. Rather than challenging Dr. Henry's methodology pretrial or at trial, defense counsel elected to impeach his opinions through cross-examination and the contradictory testimony of CAPT Simmer. When an appellant intentionally waives a waivable right at trial, it is extinguished and may not be raised on appeal. *Compare United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (applying

waiver to multiplicity issue where appellant unconditionally waived all waivable motions in pretrial agreement), *with United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) *and United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009) (declining to apply waiver doctrine to multiplicity issue not raised during guilty plea). Assuming *arguendo* that the matter was not waived, we review the admission of the testimony for plain error. MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Plain error can be established if: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to the appellant's substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

The appellant's argument is based on the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), in which the Court emphasized the importance of a trial judge's role as gatekeeper in assessing the reliability of expert scientific testimony. In *Daubert*, the Supreme Court articulated a number of factors to consider in determining the overall reliability of a particular technique or theory, including whether it can be tested, whether it has been subjected to peer review, its known or potential rate of error, and its general acceptance in the particular scientific community. *Id.* at 593-94.

Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the court held that when expert testimony's "factual basis, data, principles, methods, or their application are *called sufficiently into question . . . th*e trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of (the relevant) discipline.'" *Id.* at 149 (quoting *Daubert*, 509 U.S. at 592) (emphasis added).

While the military judge is the gatekeeper charged with excluding dubious science, "[n]either *Daubert* nor *Kumho Tire* require a trial judge to *sua sponte* hold a *Daubert* hearing every time scientific evidence is offered." *United States v. Clark,* 61 M.J. 707, 710 (N.M.Ct.Crim.App. 2005) (citations omitted). Here, the testimony of Dr. Henry was "not particularly novel or controversial." *United States v. Quintanilla,* 56 M.J. 37, 85 (C.A.A.F. 2001). In fact, the defense's psychiatric expert used fundamentally the same methodology, although CAPT Simmer arrived at a different conclusion as to substantial incapacitation. In light of the noncontroversial and unremarkable nature of the expert testimony, and the fact that the defense expert had previously testified on the same issues, we decline to impose on the military judge a *sua sponte* obligation to conduct a *Daubert*

hearing to explore the methodology of the Government expert. We conclude that the record demonstrates that the military judge did not err either by admitting the testimony or by failing to hold a *Daubert* hearing.

Neither did the military judge err by allowing Dr. Henry to offer his opinion on substantial incapacitation. Expert testimony is not objectionable simply because it embraces an "ultimate issue" that is to be decided by the trier of fact. MIL. R. EVID. 704. The fact that the trial counsel had earlier confirmed that the doctor's medical definition of "substantial incapacitation" substantially conformed to the legal definition does not alter that fundamental premise. The expert's testimony would arguably have been of little value to the members if they were left to ponder what Dr. Henry meant when he used the term "substantial incapacitation."

We find that the military judge did not have an affirmative duty to conduct a *Daubert* hearing on this particular evidence in the absence of an objection. We further conclude that there was no material prejudice to the substantial rights of the appellant.

Conclusion

The findings and the sentence are affirmed.

Judge KELLY and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of Court