

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JASON K. KENNEDY
MASTER-AT-ARMS SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100624
GENERAL COURT-MARTIAL**

Sentence Adjudged: 25 August 2011.

Military Judge: Maj Brandon Bolling, USMCR.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR M.C. Holifield,
JAGC, USN.

For Appellant: LT Gregory M. Morison, JAGC, USN.

For Appellee: Capt Crista D. Kraics, USMC.

26 April 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 panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of violating a lawful general order and one specification of abusive sexual contact, by exceptions and substitutions, in violation of Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The members sentenced the appellant to a reprimand, confinement

for one year, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

In his sole assignment of error, the appellant argues that the evidence was factually and legally insufficient to support his conviction for abusive sexual contact.

After examining the record of trial, the appellant's assignment 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

On 31 January 2011, the appellant went to a party hosted by another Sailor at her apartment. The guests at the party were largely young, junior, and intoxicated. Master-at-Arms Seaman (MASN) SM was a guest at the party and was drinking heavily. During the evening, he vomited, asked the appellant for a glass of water, and then went into a bedroom and passed out on the floor, at the foot of the bed. Prosecution Exhibit 3 at 1; Record at 168. Subsequently, the appellant entered the bedroom and lay down on the floor as well, between the bed and the wall. Record at 217. Two female Sailors were already in the bedroom: MASN PC, who was passed out on the bed, and MASN KF, who was taking care of her. MASN KF then left the room for a short time, leaving MASN PC passed out on the bed, MASN SM passed out on the floor at the foot of the bed, and the appellant lying down on the floor to the side of the bed. *Id.* at 215-17.

At that juncture, MASN JK entered the bedroom to retrieve some personal gear, and saw MASN SM lying unconscious on the floor at the foot of the bed, with his pants pulled down and an erect penis. The appellant's head was close to MASN SM's genital area, but he quickly moved away when MASN JK opened the door, laying down away from MASN SM and pretending to be asleep. *Id.* at 186-87. MASN JK quickly exited the room, closed the door, and went to talk to other Sailors about what to do. MASN KF then opened the door and saw the same scene: MASN SM with pants open, penis exposed and erect, and the appellant on top of MASN SM on his hands and knees. *Id.* at 218. Both Sailors described seeing the appellant's face very close to MASN SM's penis, although neither saw the appellant actually touching MASN SM's genitals. *Id.* at 192, 221. Within a few minutes, MASN JK

went back into the room to remove MASN SM; he found MASN SM still unconscious, but his pants were pulled up, zipped and buttoned. The appellant was still in the bedroom. MASN JK and another Sailor dragged MASN SM by his feet out of the room, and he regained consciousness during that process.

MASN SM has no recollection of any sexual contact between himself and the appellant. Although he recalls being dragged out of the bedroom, he has no memory of what happened in the bedroom after he passed out. *Id.* at 176.

In addition to the testimony of these witnesses, the Government introduced into evidence the appellant's statement to the Naval Criminal Investigative Service (NCIS). PE 3. Although the statement is vague and contains no unambiguous confession to the charge of abusive sexual contact, the appellant made a number of incriminating admissions: he remembered "inching towards" MASN SM; although he could not specifically recall oral sodomy, he recalled having a "gag reflex"; he recalls then "inching away" from MASN SM. PE 3 at 1. The appellant also stated that he had thought about what it "would feel to give another male oral sex," and that "I can't justify why I did what I did because I am not nor was I sexually aroused by him but I guess it was curiosity." *Id.* at 2. Additionally, the appellant sent MASN SM a Facebook message within a few days of the incident in which he apologized for whatever he "did or didn't do to you." PE 4.

The Article 120 specification alleged that the appellant did "engage in sexual contact [by] performing oral sex on and touching with his face and hands the exposed genitalia of [MASN SM] while he was substantially incapacitated." The members found the appellant guilty by exceptions and substitutions, excepting the words "performing oral sex on and touching with his face and hands the exposed genitalia of [MASN SM] while he was substantially incapacitated," and substituting the words "touching with his hands the exposed genitalia of [MASN SM] while he was substantially incapacitated." The members acquitted the appellant of the Article 125 sodomy charge arising from the same course of conduct.

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, 325 (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

At trial, the Government was required to prove: (1) that the appellant had sexual contact with MASN SM; and (2) that he did so when MASN SM was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(8). The definition of sexual contact includes the intentional touching of the genitalia of another with intent to "arouse or gratify the sexual desire of any person." Art. 120(t)(2), UCMJ.

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 MASN SM's exposed genitalia, and did so with a sexual intent. Although no eyewitnesses testified that they observed the appellant actually touching MASN SM's genitalia, the record is replete with circumstantial evidence that he did so. When MASN KF left the bedroom, MASN SM was lying on the floor unconscious with his pants on. When MASN JK entered the room shortly thereafter, he observed MASN SM's pants pulled down, his penis was exposed and erect, the appellant was beside MASN SM with his head close to MASN SM's genital area, and he quickly moved away. When MASN KF opened the bedroom door a few minutes later, she saw the same scene. When they returned to retrieve MASN SM, his pants had been pulled up, zippered and buttoned. MASN SM was still unconscious, and the appellant was still in the room. A rational trier of fact could certainly conclude from this circumstantial evidence that the appellant touched MASN SM's genitalia in the course of pulling down his pants and exposing his penis. Similarly, a rational trier of fact could readily infer from the circumstantial evidence and from the appellant's own statements that the appellant touched MASN SM's genitals with the intent to gratify his own sexual desires.

Secondly, the evidence is clear that MASN SM was substantially incapacitated: the record supports that he was

"passed out" or unconscious from the time he lay down on the bedroom floor until he was dragged by his feet from the room. The trial judge instructed on consent, but there is no evidence in the record that indicated either consent or a mistake of fact as to consent. Finally, the appellant's statement to NCIS and his apology to MASN SM buttress the evidence provided by the Government's witnesses.

Considering the entire record, we too are convinced of the appellant's guilt beyond a reasonable doubt. Recognizing that we did not personally see the victim's testimony or that of the other percipient witnesses, we are persuaded both as to the plausibility of their account, and as to 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 abusive sexual contact.

Conclusion

We affirm the findings and the sentence as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court