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

Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, T.R. ZIMMERMANN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SHAUN T. LUCAS
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201100372
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 March 2011.
Military Judge: LtCol Stephen Keane, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC.
For Appellant: Capt Bow Bottomly, USMC; Capt Michael Berry, USMC.
For Appellee: Capt Samuel Moore, USMC.

28 August 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.

ZIMMERMANN, Judge:

A general court-martial with enlisted representation convicted the Appellant, contrary to his pleas, of one specification of forcible rape and one specification of adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The approved sentence included confinement for 24 months, forfeiture of all

pay and allowances, reduction to pay grade E–1, and a bad-conduct discharge.

The Appellant asserts the following errors: (1) the evidence is factually insufficient as to forcible rape; (2) the military judge erred in instructing the members that a mistake of fact must be both honest and reasonable; (3) the specification alleging forcible rape fails to state an offense because it does not fully allege the element of force; (4) the specification alleging adultery fails to state an offense because it does not allege the terminal element; (5) the verdict is fatally ambiguous due to the military judge's instruction that the members could find the Appellant guilty of adultery if they found the conduct was either prejudicial to good order and discipline or service discrediting, and therefore this court cannot conduct its review under Article 66, UCMJ; and (6) the evidence is factually insufficient as to adultery.

We have reviewed the record of trial and the pleadings of the parties, and heard oral argument on 23 May 2012.

For the reasons set out below, we set aside the findings of guilty for Charge I and the specification thereunder and dismiss them with prejudice.

Background

Beginning in late 2009, the Appellant and a female Marine in his unit, Corporal (Cpl) C, became close friends. In March 2010, they went on a date that culminated in consensual sexual intercourse in the Appellant's off-base housing. At the time, the Appellant was a sergeant and Cpl C was a corporal, both on active duty and in the same unit at Marine Corps Air Station Yuma, Arizona.

In April 2010, the Appellant married another woman (not Cpl C). Later that month, he was promoted to staff sergeant.

On 27 May 2010, the Appellant went to Cpl C's barracks room on her invitation to discuss some problems Cpl C was having with her chain of command.[1] He arrived there at approximately 1730, on his way to the change of command ceremony that all Marines in

[1] Cpl C had recently been disciplined for having alcohol in the barracks and had been told that she was to stand two extra duties that weekend, which would interfere with her plans to go to Los Angeles to celebrate her 21st birthday.

the unit were required to attend which was to begin at 1900. She was wearing "boots and uts," which is the camouflage utility trousers and combat boots with a Marine Corps Martial Arts Program (MCMAP) belt, with the green t-shirt and no camouflage blouse. The Appellant was wearing his uniform, as well, including his blouse.

There is substantial disagreement between the parties as to the chain of events that took place next. Cpl C testified that while in her barracks room, the Appellant held her face down on her bed with his right forearm, using his left hand to undo their respective MCMAP belts and unbutton and pull down not only his trousers, but hers as she fought to keep them up. He then penetrated her vagina with his penis from behind, thereby committing forcible rape. After a few minutes of "fighting with all of [her] might," Cpl C "froze" and stopped resisting the sexual intercourse. The Appellant, according to Cpl C, then turned her over onto her back and continued having nonconsensual sexual intercourse with her from the front.

The Appellant did not take the stand in his own defense at trial. However, during the videotaped interview conducted by an agent of the Naval Criminal Investigative Service (NCIS), he admitted that he was married and that he did have sexual intercourse with Cpl C, but insisted that the sexual activity was consensual. Prosecution Exhibit 18. He told the NCIS agent that at one point, Cpl C expressed reservations due to his marital status, but that "she went with it" and that her actions subsequent to voicing her concerns indicated her willingness and consent to engage in the sexual activity despite any moral misgivings she might have had about the fact that he was a married man. At the end of the interrogation, which lasted approximately two hours, the agent typed up a one-page statement and asked the Appellant to sign it. The statement made no reference to Cpl C's conduct that indicated consent, including at least eight references during the interrogation by the Appellant to the agent that Cpl C was laughing throughout the entire episode.[2]

The parties agree that after the intercourse had continued for several minutes, the Appellant asked Cpl C where she would like him to ejaculate. Pursuant to her instructions, he ejaculated on her stomach, avoiding the new navel ring she had acquired. The parties also agree that the Appellant and Cpl C then went to the double sinks in Cpl C's barracks room to clean

[2] Cpl C testified at trial that she expressed her consent to the March sexual encounter by, *inter alia*, laughing.

up, and both of them proceeded to the change of command ceremony. During the ceremony the two exchanged multiple text messages. In fact, over the eight days following the incident, the Appellant and Cpl C sent each other over 100 text messages. Although Cpl C told the NCIS agent that there was one text message that night, the agent did not obtain any of the text messages.

Fourteen days after the events of 27 May, Cpl C approached a female acquaintance and reported that she was raped. The acquaintance suggested that Cpl C report it to the authorities, so Cpl C told a sergeant in her chain of command. A victim advocate and NCIS then became involved, and the instant charges ensued.

On 8 June 2010, under NCIS direction, Cpl C placed a phone call to the Appellant in an effort to elicit a confession from him. NCIS recorded the call. The premise of the conversation was Cpl C's claim that she was pregnant. The Appellant sounded upset to hear this news, but told Cpl C that they were both responsible and they would handle the situation together. Significantly, Cpl C did not dispute the Appellant's assertion of joint responsibility, nor did she claim that the rape was forcible in any way during the call. While she did state that, "I told you 'no'," she said the reason for saying that was a fear of becoming pregnant. She did not reference the Appellant holding her down, removing her clothes without her permission, or any other force about which she later testified at trial.

Factual Sufficiency – Forcible Rape

The Appellant challenges the sufficiency of the rape allegation on two grounds: that the Government failed to prove force beyond a reasonable doubt and failed to disprove the Appellant's claim of mistake of fact as to consent beyond a reasonable doubt.

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 review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Based on such a review, we agree with the Appellant that the Government failed to prove the element of force and disprove the Appellant's mistake of fact beyond a reasonable doubt.

1. Force

To prove force, the Government must prove that the Appellant took "action to compel submission of another or to overcome or prevent another's resistance by . . .[using] physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45a(t)(5). We find the Government's evidence relative this issue fails for three reasons: (1) the chain of events about which Cpl C testified is illogical and unbelievable, 2) Cpl C's character for untruthfulness and her actions subsequent to the incident lead us to the conclusion that her testimony is not credible; and (3) the Appellant's version of events is more credible, as indicated by the NCIS videotaped interrogation (PE 18) and his evidence of good military character.

a. Logistics of Cpl C's Account of the Incident

Cpl C testified that the Appellant began and continued having sexual intercourse with her as she repeatedly "begged him to stop." She also claimed that she resisted with all her might, yet it was to no avail due to the difference in size between the parties.[3] According to Cpl C, the Appellant was able to accomplish a great deal with his left hand in order to facilitate the sexual intercourse (remove clothing, for example), all the while using only his right forearm on her back to hold her down on the bed:

> I was using all my strength in my arms to try and push up. My hands were underneath me. My arms were underneath my body about shoulder length apart. I was pushing up with all my might trying to push back, sir.
>
> . . . .
>
> I couldn't [leave], sir. He was holding me down. There was no way I could get up, sir.

Record at 345. She also claimed he was able to take her boot off without her cooperation.

It is illogical to believe that a man weighing just over 200 pounds could accomplish these tasks against a female Marine,

[3] The Appellant is approximately 67 inches tall and 207 pounds, and Cpl C weighs approximately 155 pounds.

trained in Marine Corps Martial Arts, weighing 155 pounds, under the circumstances described in the record before us. This is especially so when it appears that the Appellant is right handed (*see* PE 18, showing him sign his statement to NCIS with his right hand), and there is no allegation or evidence that Cpl C was intoxicated or otherwise incapacitated.

b. Cpl C's Post-Incident Conduct

We note that Cpl C exchanged approximately 30 text messages with the Appellant on the evening of 27 May; her explanation was that she wanted to avoid a confrontation. There were an additional 70 text messages that followed the next week; however, she only reported to the NCIS agent that there was one text message, which she claimed she had deleted.[4] It defies logic that one who suffered a traumatic forcible rape would carry on repeated friendly contact with her assailant, and then delete the messages. Additionally, Cpl C and the Appellant had at least one friendly face-to-face conversation between 27 May and the time Cpl C reported an assault.

The day after the incident, Cpl C found out that she did not, in fact, have to stand two extra duties, so she went to Los Angeles to celebrate her 21st birthday with fellow Marines and friends. Her behavior did not seem out of the ordinary to any of the friends who testified, nor did she report anything having occurred with the Appellant. One witness, Cpl C's immediate supervisor, testified that the following week Cpl C came to work looking disheveled and late, to the point where he recommended disciplinary action. Other Marines testified that they did not notice a difference in her appearance. We find that this conduct undercuts Cpl C's credibility sufficiently to raise a reasonable doubt as to the Appellant's guilt.

c. Cpl C's Character for Untruthfulness and Complaint Discrepancies

While there were witnesses who testified that Cpl C had good character for truthfulness, there were also witnesses who testified that she was not truthful. Significantly, JB, a former friend to whom Cpl C made her initial complaint, gave a completely different account of the circumstances of the conversation. For example, JB testified that Cpl C initially approached the witness laughing, and saying the witness would be angry with Cpl C for what she was about to disclose. This

[4] She also claimed to not remember any of these messages at trial.

behavior is inconsistent with the reporting of a sexual assault. While Cpl C denied that the conversation with JB took place in that manner, her multiple inconsistent statements to JB[5] and supposed lack of memory about important events militate in favor of our finding that JB's account from Cpl C's first recitation is the more likely version of what transpired between Cpl C and the Appellant.

Finally, during the 8 June recorded phone call that was intended to elicit a confession from the Appellant, Cpl C failed to mention any use of physical force by the Appellant or her vain efforts to escape from him, and, in fact, indicated that the only reason she did not consent was due to a fear of getting pregnant. Her choice of words during this phone call was completely inconsistent with a person who had endured the forcible rape that Cpl C described at trial. Also, it is significant that Cpl C did not dispute the Appellant's statement during the call that they were both responsible for the alleged pregnancy. Had the intercourse been nonconsensual, it would make no sense for the complaining witness to assume any degree of responsibility for the resulting pregnancy.

d. The Appellant's Good Military Character and the NCIS Statement

The Government presented no evidence that the Appellant possessed a character for untruthfulness. We find that the explanations he gave to the NCIS agent regarding the events of 27 May are believable, especially considering the evidence of his good military character and service history admitted at sentencing.[6]

Based on the totality of the evidence, we are not persuaded of the Appellant's culpability as we conclude that the alleged victim's testimony lacks credibility and we hereby reject it.

2. Mistake of Fact

[5] JB testified that Cpl C gave three significantly differing accounts of the afternoon in question.

[6] Although we recognize that the Appellant's typed statement to NCIS in some form admits culpability, we express grave concern about the lack of detail in the statement, particularly in light of the fact that NCIS interviewed the Appellant for almost two hours, yet produced a statement about the incident consisting of a mere 14 lines. Furthermore, when comparing the typed written statement and the interrogation video to the NCIS agent's in-court testimony, we note the agent left out or seriously mischaracterized important relevant details the Appellant provided during the interrogation.

Cpl C testified that during the earlier consensual sexual encounter between them in March, she had been laughing. While she denied laughing during the events of 27 May during her trial testimony, we find the Appellant's mention of her laughing at least eight times during the NCIS investigation to be credible and telling. Furthermore, his account that her only reservation or hesitation to engage in the sexual conduct was based on his marital status is believable, especially in the context of his explanation that once he removed his wedding band, Cpl C willingly participated in kissing, play-wrestling, and sexual intercourse with him. We find that these facts indicate that even if Cpl C did not subjectively consent to the sexual activity, her conduct was such that the Appellant had an honest and reasonable mistake of fact as to her consent.

Mindful that the members saw and heard the witnesses, we are not ourselves convinced beyond a reasonable doubt that the Appellant forcibly raped Cpl C. We will set aside the findings of guilty to Charge I and its specification and dismiss that charge and specification in our decretal paragraph.

In light of our resolution of the sufficiency of the forcible rape allegation above, the Appellant's other assignments of error relating to that charge and specification are moot.

Failure to State Offense – Adultery

The Appellant correctly notes that the adultery specification under Charge II failed to contain an explicit allegation of service discredit or prejudicial conduct, as required for violations of Article 134, UCMJ.

Whether a specification states an offense is a matter we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if it alleges every element of the charged offense, either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); *Crafter,* 64 M.J. at 211; RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). When a specification does not expressly allege an element of the intended offense, appellate courts must determine whether the terminal element was necessarily implied. *Fosler*, 70 M.J. at 230. The interpretation of a specification in such a manner as to find an element was alleged by necessary implication is

disfavored. *Ballan*, 71 M.J. at 33-34; *see also United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

"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." *Ballan*, 71 M.J. at 34. Under the plain error analysis, the Appellant has the burden of showing (1) there was error; (2) the error was plain or obvious; (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). Absence of the terminal element within a specification is plain and obvious error. *United States v. Humphries*, 71 M.J. 209, 2012 CAAF LEXIS 691 (C.A.A.F. 2012). However, the defective specification alone is insufficient to constitute substantial prejudice to an appellant's material right. *Id*. at *17. The Appellant's burden regarding prejudice may be met if neither the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued. Thus, we must examine the record to see if the missing terminal element is somewhere extant in the trial record, or whether the element is essentially uncontroverted. *Id.* at *19-20.

Looking to the plain language contained within the four corners of the adultery specification, we are unable to conclude that it alleges the terminal element expressly or by necessary implication. *See United States v. Nealy*, 71 M.J. 73 (C.A.A.F. 2012). However, consistent with *Nealy*, having found error, we will test for prejudice. The Appellant bears the burden of demonstrating prejudice. *Ballan*, 71 M.J. at 34 n.6 (citing *Girouard*, 70 M.J. at 11). He has failed to meet that burden.

We note that during the pretrial proceedings and the Government's opening statement, there was no mention of the terminal element or the evidence the Government intended to introduce to prove it. However, during the defense case in chief,[7] there was direct testimony from LCpl JM as to the effect the Appellant's conduct had on good order and discipline of the armed services, and the defense registered no objection. Specifically, the following occurred during the Government's cross-examination of LCpl JM:

> TC: Everybody in that motor-T platoon knows about this; is that correct?

[7] We note that although this testimony was presented during the defense case on the merits, the defense failed to move either pretrial for a bill of particulars or at the close of the Government's case for dismissal of the adultery specification under R.C.M. 917.

W: Besides some of the new members of our unit, sir , it would be safe to say that. Yes, sir.

TC. And this incident has affected the platoon's morale; is that correct?
DC: Objection. Speculation, sir.

MJ: Response:

TC: He's part of the motor-T platoon, sir. He serves with Staff Sergeant Lucas. I think he can make an observation about whether it's affected the platoon's morale. It's also an element of adultery. It has to be prejudicial to good order and discipline and one of that is that it has had an impact on the unit.

MJ: Response?

DC: One man testifying to the – all right. That's fine. We'll withdraw.

MJ: You're withdrawing the objection?
DC: Yes, sir.

MJ: The objection is overruled. You may ask the question.

TC: Has this affected your platoon's morale?
W: You could say a little bit. Yes, sir. I mean to an extent. Yes, sir. I don't think any one person pays too much attention to it, sir. We all just kind of do our jobs and try to put the past in the past and try to move forward.

Record at 528.

The defense counsel, upon re-direct examination, even conducted further questioning of JM regarding the terminal element:

DC: Lance Corporal, has it affected morale the fact that you have one person charged for adultery at a general court-martial and the other person that was part of the adultery has not receivd anything whatsoever? Has that affected morale?
W: I would have to say so. Yes, sir.

Id. at 530.

Trial counsel then asked the following question: "A staff sergeant had sex with a corporal in the barracks and that doesn't affect the unit's morale?" The response from LCpl JM was " . . . I would say that it affected them a little bit . . . ." *Id.* There was no objection from the defense during the questioning of LCpl JM concerning the terminal element. In closing argument, the trial counsel referenced the elements of adultery, to include the terminal element. *Id.* at 548. The military judge then properly instructed the members on the terminal elements. *Id.* at 587-89. The defense did not object to these instructions. Based on the record before us, there was absolutely no indication that the Appellant or his counsel were surprised to learn of the Government's theory on the terminal element, albeit as presented during a defense witness' testimony, or unable to defend against the evidence regarding the terminal element. Most importantly, the defense counsel conceded that the Appellant "committed adultery" in his closing argument and specifically refers to the disparity in rank with respect to conduct prejudicial to good order and discipline. *Id*. at 568, 569, 577.

The Government's theory, and therefore the terminal element, "is somewhere extant in the trial record," and the Appellant was provided sufficient notice. *Humphries,* 2012 CAAF LEXIS 691, at *17. Therefore, under the totality of the circumstances in this case, in line with the court's reasoning in *Humphries*, we must conclude that the Appellant suffered no prejudice. *See id*.; *United States v. McMurrin*, 70 M.J. 15, 19-20 (C.A.A.F. 2011); *see also Fosler*, 70 M.J at 229.

The Appellant has not met his burden of showing that the error materially prejudiced his substantial right to notice. Accordingly, we decline to grant relief on this issue.

Ambiguity of Verdict – Adultery

In a supplemental assignment of error, the Appellant argues that this court cannot conduct review under Article 66, UCMJ, for two reasons: "this Court simply cannot be sure whether appellant was found guilty of a clause 1 offense or a clause 2 offense" and "the members' verdict contains an implicit not-guilty finding." Appellant's Supplemental Brief of 1 Jun 2012 at 3. We disagree.

Pursuant to Article 66(c), this court conducts a *de novo* review of a case for factual and legal sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

When the charge presents multiple or alternate theories of liability, a general guilty verdict to the charge attaches a guilty verdict to all of the theories. *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008) (citing *Turner v. United States*, 396 U.S. 398, 420 (1970)); *see also United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987) ("It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members").

In this case and in the context of Article 134 charged as clauses one and two, a general guilty verdict attaches equally to both the theories, service discrediting and prejudicial to good order and discipline.

The verdict was not ambiguous and this error is without merit.

Factual Sufficiency – Adultery

In his final assignment of error, the Appellant claims that the evidence was insufficient to prove the terminal element under Article 134, UCMJ. We disagree.

The MCM provides that:

> Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember.

MCM, Part IV, ¶62c(2).

Some factors to be considered are:

(a) The accused’s marital status, military rank, grade, or position;
(b) The co-actor’s marital status, military rank, grade, and position, or relationship to the armed forces;

. . . .

(d) The impact, if any, of the adulterous relationship on the ability of the accused, [or] the co-actor . . . to perform their duties in support of the armed forces;

(e) The misuse, if any, of government time and resources to facilitate the commission of such conduct;

. . . .

(g) The negative impact of the conduct on the units or organizations of the accused [or] the co-actor . . . such as a detrimental effect on unit or organization morale, teamwork and efficiency . . . .

Id.

We are convinced beyond a reasonable doubt of the Appellant's guilt with the understanding that we did not see or hear the witnesses. *Turner,* 25 M.J. at 325.

Even disregarding Cpl C's testimony entirely, the Government proved that there was a significant disparity in rank between the Appellant and Cpl C; that the adulterous behavior occurred in the barracks during a work day, just prior to the change of command; that the Appellant failed to comply with regulations requiring him to sign in and out of the barracks when visiting residents; that Cpl C was aware that, at least according to her supervisor, she would have been culpable under the UCMJ for the crime of adultery; and that, at least according to her supervisor, Cpl C returned to work the week following the adulterous conduct with a disheveled appearance, "standoffish" behavior, looking "depressed," and arriving late to work. We find that these factors sufficiently indicate a detrimental effect on the unit and the stature of or respect toward a servicemember, thus satisfying the terminal element.

Sentence Reassessment

Due to our action on findings, we next consider whether 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)). Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the members would have imposed. *Buber,* 62 M.J. at 479-80. The "only fair course of action" is to have the Appellant resentenced at the trial level. *Id*. at 480.

Conclusion

The findings as to Charge I and its specification are set aside and Charge I and its specification are dismissed with prejudice. The findings as to Charge II and the specification thereunder are affirmed. The sentence is set aside, and the record is returned to the Judge Advocate General of the Navy for transmission to an appropriate convening authority who may order a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved. Art. 66(d), UCMJ. The record will then be returned to this court for completion of appellate review.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge PAYTON-O'BRIEN and Senior Judge MAKSYM concur.[8]

[8] Senior Judge MAKSYM participated in the decision of this case prior to departing the court.