

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

**Before  
J.R. PERLAK, M.D. MODZELEWSKI, R.G. KELLY  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ALEC R. SCOGIN  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201200003  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 24 June 2011.

**Military Judge:** LtCol David M. Jones, USMC.

**Convening Authority:** Commanding General, 3d Marine  
Logistics Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol E.H. Robinson,  
Jr., USMC.

**For Appellant:** Maj Kirk Sripinyo, USMC; LT Ryan Mattina,  
JAGC, USN.

**For Appellee:** Maj William C. Kirby, USMC.

**31 August 2012**

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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.**

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of violation of a lawful general order and one specification of aggravated sexual assault, 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

confinement for two years, total forfeitures, reduction to the pay grade of E-1 and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises two assignments of error: (1) that the judge erred in giving the members an instruction on false exculpatory statements; and (2) that the military judge erred by failing to instruct the members on the proper application of the Article 120, UCMJ, affirmative defenses, violating his right to due process. 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.

### **Background**

These charges arose from events in a barracks in Okinawa, Japan, after a group of young Marines returned from an evening of Halloween celebrations. Private AC (AC) had gone out with a group of friends to several bars. At one of the bars, she met the appellant for the first time, and he joined their group for the evening. Over the course of the evening, AC drank a substantial amount of alcohol. At the third bar, a military policeman from the Provost Marshall's Office (PMO) asked AC's companions to escort her back to the barracks, as she appeared too intoxicated to be out any longer. When the taxi arrived back at the barracks, AC vomited outside, and the appellant and AC's friend, Lance Corporal (LCpl) Morris, then carried AC up to her barracks room, got her partially undressed, and put her in bed. With their assistance, she went to the bathroom on two occasions to vomit, and then went back to bed. LCpl Morris then left AC's room to go to his own room, which was directly across the passageway. When LCpl Morris returned to check on AC a few minutes later, he found AC fleeing the room, and the appellant in the doorway of her room watching her run away. AC ran to the room of another Marine, Corporal (Cpl) Wendt, and reported that the appellant had raped her.

### **False Exculpatory Statements**

Over the course of the next few hours and the following day, the appellant made statements to six different people about what had transpired in the room in those few minutes when he was alone with AC. Those statements, summarized here below, are now the subject of the first assignment of error.

His first conversation was with LCpl Morris, as AC was fleeing the scene. When LCpl Morris asked what had happened, the appellant told LCpl Morris that AC needed to vomit again, that he had helped her to the bathroom, and that she had then attacked him. LCpl Morris left to find AC; when he returned, the appellant repeated this story. Record at 782-83.

The next three conversations happened in a short time period after the appellant returned to his own barracks. As the appellant entered his barracks, LCpl Ngwenya, the barracks assistant duty officer, received a call reporting the allegation of rape, stopped the appellant, and held him until PMO arrived. While waiting for PMO to arrive, the appellant told LCpl Ngwenya that he had helped a girl up to her room, and that "she started screaming something and he ran through her back door of their barracks; and he came in through our back door." *Id.* at 493. When the assistant duty officer from AC's barracks came to check on the appellant, the appellant told that Marine that he had helped escort AC up to her room, that he had left the room, and that within seconds he saw AC running outside the room screaming and crying. *Id.* at 882-83. During this same timeframe, Cpl Wendt arrived and confronted the appellant, who stated that he and LCpl Morris had taken AC to her room and that he then left. *Id.* at 931.

Later that day, the appellant spoke to Cpl Buchard from his unit and told him a different version of the evening's events. The appellant told Cpl Buchard that he, AC, and two other Marines had been out drinking in town, that they moved the party back to his room; that the two other Marines gave the appellant and AC "their privacy"; that he had asked AC permission to have sex; that AC consented; that, after they had sex, AC began to feel sick, and went to the restroom; that when he went to check on her, AC came out of the bathroom screaming and crying, and ran from the building; that he had followed her all the way outside, but then had been stopped by PMO. *Id.* at 992-93.

On that same day, the appellant spoke to a Naval Criminal Investigative Service (NCIS) agent. He initially denied any sexual contact with AC, and told the special agent that he and LCpl Morris had brought AC back to her room, that they had helped her to the bathroom to vomit, and that she started "freaking out" and ran out of the room. *Id.* at 1026-28. Later during the interview, the appellant apologized for "stretching the truth," and said that he recognized that the agents knew what the facts were, and that he was "prepared to give [them] the full truth." *Id.* at 1029. He then made a statement in

which he admitted to having consensual sex with AC. He stated that, after consensual sex, AC had again felt ill, vomited in the restroom, and then "freaked out" and ran out of the room. *Id.* at 1031-33.

At trial, the military judge gave the members the benchbook instruction<sup>1</sup> on false exculpatory statements. The essence of that instruction is that "[i]f an accused voluntarily offers an explanation or makes some statement tending to establish [his] innocence and such explanation or statement is later shown to be false, (the members) may consider whether this circumstantial evidence points to a consciousness of guilt."<sup>2</sup> In tailoring the instruction, the military judge included as possible false exculpatory statements all of the six statements outlined above: the statements to the five Marines and to the NCIS agent. The trial defense counsel objected to categorizing the appellant's denial to LCpl Morris as a false exculpatory statement, but did not object to the remainder of the instruction. Relying on *United States v. Colcol*, 16 M.J. 479 (C.M.A. 1983), the appellant now maintains that the military judge erred in giving the instruction because the alleged false statements were simply general denials of his guilt, and because the determination of the falsity of the statements turned on the ultimate question of his guilt or innocence. Appellant's Brief of 30 Mar 2012 at 9. We disagree.

### **Discussion on False Exculpatory Statements**

Absent objection at trial, we review the military judge's decision to give an instruction for plain error.<sup>3</sup> *United States v. Girouard*, 70 M.J. 5, 16 (C.A.A.F. 2011). To establish plain error, the appellant must show that (1) the trial judge committed error; (2) the error was plain or obvious; and, (3) the error materially prejudiced a substantial right of the appellant. *Id.*

The instruction given by the military judge reflects an established principle of law. Both our own military jurisprudence and Supreme Court jurisprudence recognize that

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<sup>1</sup> Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 1012 (Ch-7, 7-22, 01 Jan 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Because defense objected at trial to characterizing the appellant's explanation to LCpl Morris as a false exculpatory statement, we review the military judge's instruction as to that particular statement for an abuse of discretion.

false statements by an accused in explaining an alleged offense may themselves tend to show guilt. *Colcol*, 16 M.J. at 484 (citing *Wilson v. United States*, 162 U.S. 613 (1896)).

The appellant's reliance on *Colcol* is misplaced, as the facts of that case are easily distinguished. In *Colcol*, the appellant was suspected of a theft of mail matter. When initially questioned by an Office of Special Investigations (OSI) agent, Sergeant (Sgt) Colcol reportedly "stated that he was not involved in any illegal activity and will give a statement to that effect." *Colcol*, 16 M.J. at 482. In a second interview several hours later, Sgt Colcol confessed. At his trial, however, Sgt Colcol took the stand and repudiated portions of his written confession. *Id.* at 482. At the close of the case, trial counsel requested a false exculpatory statement instruction, which the judge gave over defense objection.

On appeal, the Court of Military Appeals (CMA) noted that the instruction given by the judge correctly stated the principle of false exculpatory statement, but the court declined to find that principle applicable to the facts of the *Colcol* case. The court found that "unlike a false explanation or alibi given by a suspect when he is first confronted with a crime, [Sgt Colcol's] general denial of guilt does not demonstrate any consciousness of guilt." *Id.* at 484. Moreover, the CMA noted that in order to decide that the appellant's general denial of illegal activity was false; the factfinder had to decide the very issue of guilt or innocence. In this situation, the CMA found that the instruction "would only tend to produce confusion because of its circularity." *Id.*

Here, the appellant did not make general denials of guilt, but gave six false explanations of what had happened when he took AC to her room, all of which differed from his second statement to NCIS, in which he admitted to sexual intercourse with AC in her room, but maintained that it was consensual. Rather than general denials of guilt, his various accounts were intended for various discrete purposes, i.e., to explain why AC was seen fleeing the room, to explain why she was crying or "freaking out," to place himself outside the room when she fled, or to paint a picture of himself as her caregiver while she was ill. In his explanation to Cpl Buchard, the appellant gave a false explanation of consensual sex occurring in his own barracks room. In these various accounts, the appellant did not merely deny guilt in a general fashion. Instead, he invented scenarios that, if believed, would exonerate him of any

wrongdoing. His statements to the five Marines and his initial statement to the NCIS agent fell squarely within the recognized principle of law that false exculpatory statements may properly be considered as circumstantial evidence that points to a consciousness of guilt.

We find that this instruction was fairly raised by the evidence adduced at trial, and that the military judge did not err in so instructing the members.<sup>4</sup>

### **Instructions Regarding the Affirmative Defenses**

In his second assignment of error, the appellant contends that his right to due process was violated when the military judge instructed the members on the affirmative defenses of consent and mistake of fact as to consent without informing the members that they were to consider the evidence pertinent to those defenses on the related issues of the victim's capacity and the appellant's use of force.

We review the adequacy of the judge's instructions regarding consent *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). Erroneous instruction on an affirmative defense has constitutional implications, and "must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)(quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). As the appellant notes, this court has previously considered this same issue and resolved it adversely to the appellant. *See, e.g., United States v. Escochea-Sanchez*, No. 201000093, 2011 CCA LEXIS 77, unpublished op. (N.M.Ct.Crim.App. 19 Apr 2011), *set aside on other grounds*, \_\_\_ M.J. \_\_\_, 2012 CAAF LEXIS 567 (May 8, 2012) (summary disposition); *United States v. Nevandro*, NMCCA No. 201000641, unpublished op. (N.M.Ct.Crim.App. 30 Aug 2011) (per curiam). For the reasons set forth in those cases, we find any error to be harmless beyond a reasonable doubt, and decline to grant relief.

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<sup>4</sup> With regard to the appellant's explanation to LCpl Morris, we find that the military judge did not abuse his discretion in characterizing that statement as a false exculpatory statement.

**Conclusion**

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court