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

Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSE M. LOPEZ
MASTER SERGEANT (E-8), U.S. MARINE CORPS

NMCCA 201200457
GENERAL COURT-MARTIAL

Sentence Adjudged: 2 July 2012.
Military Judge: LtCol Stephen Keane, USMC.
Convening Authority: Commanding General, 1st Marine Division (Rein), Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj V.G. Laratta, USMC.
For Appellant: Capt Jason Wareham, USMC; Capt Michael D. Berry, USMC.
For Appellee: LCDR Keith B. Lofland, JAGC, USN; Maj David N. Roberts, USMC.

30 July 2013

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 violation of two lawful general regulations, wrongful sexual contact, an indecent act, assault consummated by a battery, possession of child pornography, and kidnapping in violation of Articles 92, 120, 128, and 134, Uniform Code of

Military Justice, 10 U.S.C. §§ 892, 920, 928, and 934. The members sentenced the appellant to four years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged. As a matter in clemency, the CA waived the automatic forfeitures and suspended the adjudged forfeitures for a period of six months after his action, contingent upon the appellant maintaining an allotment to his wife.

The appellant now assigns eight errors: in summary, he argues that his conviction for kidnapping is legally and factually insufficient; that the military judge abused his discretion in denying the appellant's motion to dismiss the kidnapping charge pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); that the Commandant of the Marine Corps exerted undue command influence through his "Heritage Brief"; that the various convictions for fraternizing with Lance Corporal (LCpl) VT, for committing sexual offenses against Sergeant (Sgt) JR, and for possessing child pornography are all legally and factually insufficient; and that the trial counsel committed prosecutorial misconduct both by attempting to manipulate a witness and by knowingly allowing a witness to give false testimony.[1] We disagree, and will affirm the findings and sentence.

Background

In April 2009, the appellant hosted a platoon function at his home for subordinate Marines; during that party, two events unfolded that ultimately became the subject of charges at his 2012 court-martial. First, the appellant accosted Sgt JR as she exited his restroom, led her into his bedroom, and kissed and fondled her breasts. Second, later in the evening, LCpl VT became visibly intoxicated and needed to lie down; the appellant initially escorted LCpl VT to his bedroom and left her there. As the party was winding down, LCpl VT exited the bedroom, still clearly intoxicated and not wearing her pants. When a female Marine accompanied LCpl VT back into the bedroom to retrieve her pants, she saw the appellant completely naked and passed out on the bed on his back. Within a short period, another Marine stepped into the bedroom and observed the same. For various reasons thoroughly explored at trial, neither the assault of Sgt JR nor the incident involving LCpl VT was reported to the chain

[1] With the exception of the two assignments of error pertaining to the kidnapping conviction, all assignments of error are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of command in the weeks or months that followed, but instead came to light only after the events recited below were reported.

In April 2011, the appellant and Sgt JR were on assignment in Japan and were billeted at the New Sanno Hotel, a U.S. military facility in Tokyo. On the night in issue, they went out together for dinner and drinks, and returned to the hotel by cab. Sgt JR was very intoxicated, fell asleep in the cab, and awoke to feel the appellant removing his hand from under her shirt and bra. Upon arrival at the hotel, the appellant followed Sgt JR into her room on the sixth floor. While Sgt JR was placing a call to her husband on Skype, the appellant appeared to pass out on her bed. Sgt JR then went into the bathroom and either fell asleep or passed out on the floor, believing that she had locked the door.

Sgt JR woke to find the appellant in the bathroom with her, lifting her from the floor and urging her to "get to bed." When she saw that the appellant intended to get into the bed with her, Sgt JR went to the desk and pretended to place another Skype call, but the appellant shut the laptop computer to prevent the call. When Sgt JR then attempted to leave her hotel room, the appellant blocked her path and pushed her back onto the bed. She attempted to leave again, but the appellant lay on top of her to prevent her from doing so. After struggling unsuccessfully with the appellant, Sgt JR feigned sleep. She then felt the appellant lift her skirt, and saw what appeared to her to be camera flashes and believed that the appellant has taken pictures underneath her skirt; her leggings and underwear had been removed, and Sgt JR testified that she had not removed them herself. Shortly thereafter, Sgt JR succeeded in leaving the bed and the room.

The appellant followed Sgt JR down the hallway and out onto a fire escape balcony, where he attempted first to convince her to come back into the hotel and then to pull her back in. Sgt JR eventually freed herself from the appellant, went down the fire escape, and entered the hotel on the third floor with the appellant still following her. Surveillance camera footage shows the appellant holding Sgt JR in a bear hug and forcing her into the elevator on the third floor as she struggled to free herself and leave the elevator.

By this time, a hotel security officer, Mr. Giuliani, had been alerted by alarm that a fire escape door on the 6th floor had opened. He reviewed the hotel's surveillance camera footage, which showed Sgt JR leaving the sixth floor with the

appellant in pursuit, and went in search of the couple in the hotel. While looking for them on the sixth floor, Mr. Giuliani observed the elevator doors open and the appellant carrying Sgt JR out of the elevator in a bear hug. Mr. Giuliani confronted the appellant, who claimed that Sgt JR had too much to drink and that he was escorting her back to her room. Mr. Giuliani noticed Sgt JR mouthing to him what appeared to be "help me," at which time he separated the two. When Mr. Giuliani asked Sgt JR what had happened, she asked instead to speak to her Officer-in-Charge. Upon his arrival, Sgt JR reported the events of the evening to him.

During the ensuing investigation, law enforcement agents seized the appellant's digital camera, a cell phone that had been issued to him for use in Japan, his personal laptop computer, and hard drive.[2] The forensic examination of the laptop and hard drive revealed, *inter alia*, searches for nude images of Sgt JR, searches for pornography involving sleeping or "passed out" females, searches using the term "lolita," the use of peer-to-peer software, and a limited number of child pornography images. Further facts relevant to the assigned errors are included in the discussion below.

Discussion

We turn first to the two assigned errors regarding the kidnapping conviction, averring that it is legally and factually insufficient in that there was no evidence presented on the terminal element and that the military judge abused his discretion in denying the R.C.M. 917 motion to dismiss. The test for legal sufficiency is whether any rational trier of fact could have found that the evidence met the essential elements of the charged offenses, viewing the evidence in a light most favorable to the Government. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt, allowing for the fact that we did not personally observe the witnesses. *Id*. at 325. We readily find in the affirmative as to both.

Through the testimony of Sgt JR, the testimony of Mr. Giuliani, and the video evidence from the surveillance cameras, the Government established at trial that the appellant seized

[2] Investigators did not find the photographs that Sgt JR described the appellant taking while he pinned her down; the members acquitted the appellant of the indecent act specification alleging that he took such photographs.

Sgt JR, that he held her against her will, and that his conduct was willful and wrongful, satisfying the first three elements of the charge. On appeal, the appellant appears not to challenge the sufficiency of that evidence. Instead, he avers that the Government adduced no testimony or evidence that his actions were prejudicial to good order and discipline, the fourth and terminal element. We disagree.

"The terminal element in a clause 1 . . . Article 134 case is an element of the offense like any other. . . . [It] must be proved beyond a reasonable doubt like any other element. Whether any given conduct violates clause 1 . . . is a question for the trier of fact to determine, based upon all the facts and circumstances; it cannot be conclusively presumed from any particular course of action. *United States v. Phillips,* 70 M.J. 161, 165 (C.A.A.F. 2011). Here, Sgt JR testified that everyone knew about the incident upon her return to her unit, that it was "uncomfortable," that there was "a lot of immaturity," and that her co-workers treated her assault by the appellant, a Master Sergeant of Marines and her direct supervisor, as "just a joking matter." Record at 431.

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case the members, could indeed have found all the essential elements of kidnapping beyond a reasonable doubt. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not personally see the witnesses' testimony, we are convinced beyond a reasonable doubt of the appellant's guilt as to this charge.

We turn now to the appellant's argument that the military judge abused his discretion in denying an R.C.M. 917 motion to dismiss the kidnapping charge and specification. Having found that the appellant's conviction of this offense legally and factually sufficient, the appellant's assignment of error as to the military judge's R.C.M. 917 ruling is moot.

The appellant also summarily avers that the Commandant of the Marine Corps exerted undue command influence (UCI) on the members.[3] We review allegations of UCI *de novo. United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). Article 37(a),

[3] AE III: "Whether the Commandant of the Marine Corps exerted undue command influence on the members when they attended a "Heritage Brief" about the Marine Corps' response to alleged sexual assaults?"

UCMJ, states, "No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to his judicial acts." The appellant has the initial burden of producing sufficient evidence to raise unlawful command influence. *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994). This threshold is low, but it must be more than "a bare allegation or mere speculation." *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994) (citation omitted).

At trial, the military judge *sua sponte* raised the issue of a recent brief by the Commandant and asked whether counsel intended to inquire into its impact on the members, as neither counsel had addressed the issue during group *voir dire*. Record at 224. The civilian defense counsel then questioned five of the members. Their responses indicated that the Commandant had discussed the statistics for sexual assaults in the Marine Corps,[4] emphasized that "we needed to just take care of each other,"[5] and that Marines need to "live up to our ethos."[6] None of the members indicated that they felt any pressure from the Commandant or the CA for any particular outcome in the appellant's case. Record at 230-32, 239-43. At the conclusion of *voir dire*, the military judge again raised the question of whether the defense desired to raise a motion asserting UCI, and defense counsel expressly declined to do so. *Id*. at 300.

Because of the insidious nature of UCI and its potential devastating impact on the very integrity of the court-martial process, we decline to reflexively apply waiver even here where the civilian defense counsel specifically declined to raise a UCI motion. However, the record before us is devoid of any facts that, if true, constitute UCI. Moreover, we find no indication whatsoever that the proceedings were unfair. *Stombaugh*, 40 M.J. at 213. The defense has failed entirely to meet its initial burden of production both at trial and on appeal, and we find this assignment of error to be without merit.

As noted above, the appellant submitted five additional summary assignments of error with citation to *United States v. Grostefon,* 12 M.J. 431 (C.M.A 1982). After careful consideration of the record and the pleadings, we find that those matters raised by the appellant are not substantiated by

[4] Record at 231, 240, 246.

[5] *Id* at 231.

[6] *Id*. at 253.

the record and do not merit further analysis or relief. *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987).

Conclusion

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 exists. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge PERLAK participated in the decision of this case prior to detaching from the court.