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

Before
F.D. MITCHELL, J.A. FISCHER, M.K. JAMISON
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MELVIN A. MANCIAGONZALEZ
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300211
GENERAL COURT-MARTIAL

Sentence Adjudged: 7 February 2013.
Military Judge: Col James Carberry, USMC.
Convening Authority: Commanding General, 3d Marine Division, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol B.C. Corcoran, USMC.
For Appellant: LT Jessica Fickey, JAGC, USN.
For Appellee: Capt Matthew Harris, USMC.

24 October 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 plea, of one specification of forcible sodomy in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925.[1] The convening authority (CA) approved the adjudged sentence of one year confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

[1] The members acquitted the appellant of a single allegation of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920.

The appellant now assigns a single error: that his conviction for forcible sodomy was factually and legally insufficient.[2] We disagree and conclude the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed.[3] Arts. 59(a) and 66(c), UCMJ.

Background

The appellant and Lance Corporal (LCpl) HK met during Marine Combat Training at the School of Infantry. They started dating in early 2011 while attending separate military occupational specialty schools aboard Camp Johnson, North Carolina. They were subsequently sent to separate duty locales, the appellant to Hawaii and LCpl HK to San Diego, California, however they continued to correspond frequently including exchanging love letters.

In July 2011, the appellant took leave prior to his scheduled deployment to Afghanistan and met LCpl HK in San Diego. Together they travelled to Los Angeles where they visited and stayed with the appellant's extended family. During the trip from San Diego to Los Angeles, the appellant gave LCpl HK a diamond engagement ring. At the time, LCpl HK wore a "purity ring" on her wedding ring finger as a reminder and symbol of her virginity. The appellant removed LCpl HK's "purity ring" and replaced it with the engagement ring.

After visiting and dining with the appellant's family at his relative's home in Los Angeles, the appellant, his aunt, and LCpl HK travelled to his aunt's home in another part of the city to spend the night. His aunt lived in a small, single story, one bedroom house. The appellant and LCpl HK spent the night in the bedroom and shared the only bed while the appellant's aunt

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[2] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] We note the last name of the CA who signed the original and two modifications to the convening order, "Padilla," appears approximately 21 times throughout the record (Record at 70, 99, 122, 136 x 2, 149, 179, 197, 199, 204, 207, 224, 237 x 2, 251, 330, 353, 361, 381, 391, and 393). These are apparent transcription errors as the reference does not make sense in the context of the proceedings and appears to be substituted in each instance for the word "need". Despite this anomaly there is no indication the record of trial is incomplete with substantial omissions thus raising a presumption of prejudice that the Government must rebut. *United States v. Lashley,* 14 M.J. 7, 9 (C.M.A. 1982).

slept in the living room on the floor. On the second day of the visit, the appellant and LCpl HK went sightseeing and shopping with the appellant's aunt. While shopping, the appellant purchased lingerie for LCpl HK, although she testified she told him not to buy it. Following the sightseeing and shopping, they all returned to his aunt's house. The appellant and LCpl HK returned to the bedroom they were sharing.

The parties disagree on the details of what happened next. LCpl HK testified that when she and the appellant retired to the bedroom, the appellant asked her to try on the lingerie he'd purchased. LCpl HK testified she initially refused, however the appellant kept insisting and she eventually relented on the condition the appellant leave her alone. LCpl HK then changed into the lingerie in the bathroom before returning to the bedroom. LCpl HK testified a struggle immediately ensued and the appellant pulled her onto the bed and repeatedly tugged at her underwear in an effort to pull it down, while she attempted to push him away, pull up her underwear, and maneuver away from him. LCpl HK testified she told the appellant to stop multiple times during this struggle. LCpl HK testified the appellant managed to get her underwear down to just above her knees, licked her vagina, then pinned her arms down and penetrated her vagina with his penis. LCpl HK said she felt pain when the appellant penetrated her and she loudly said "Ow". She testified the appellant then stopped thrusting and she was able to shove him off of her. LCpl HK testified she then noticed blood near her vagina, became very angry and at some point took off the engagement ring and threw it at the appellant.

The appellant did not take the stand in his own defense at trial. However, during a videotaped interview conducted by an agent of the Naval Criminal Investigative Service, admitted as Prosecution Exhibit 1, the appellant maintained that the couple engaged in consensual foreplay and sexual intercourse during this encounter, including switching positions during intercourse. The appellant said he noticed that LCpl HK was bleeding from her vagina during intercourse so he stopped to ask if she was alright. The appellant said LCpl HK then saw the blood and became upset. The appellant stated he attempted to comfort LCpl HK by kissing and hugging her and then he grabbed her, pulled her on top of him and started to perform oral sex on her for approximately a minute and thirty seconds while she was on top of him. The appellant indicated LCpl HK told him to stop several times, however he continued to perform oral sex. The appellant said he then stopped performing oral sex on LCpl HK because he knew it was wrong.

Following the sexual encounter, the appellant and LCpl HK went to the living room of his aunt's house and watched a movie. Later that night the appellant's friend drove LCpl HK and the appellant to San Diego and dropped LCpl HK off at her duty station. The appellant and LCpl HK went to dinner the following evening and over the next several days exchanged numerous texts and Facebook messages concerning the sexual encounter. In these exchanges, LCpl HK took an accusatory tone telling the appellant: "But u did hurt me.....in a way that no one else has ever"; and "U rapped [sic] away my innocents [sic].....I wasn't ready!!!" PE 6 at 4-5. In reply the appellant stated, "I am srry [sic] my love put me in jail my love I know wat [sic] I done is horrible to u [sic]," and "just tell ur [sic] chain of command put me out of this misery I can't live like this I need ur [sic] forgiveness. Its [sic] was article 120 or 121 just do it my love I deserved to go to jail." *Id.* at 5 and 7-8.

Discussion

In accordance with Article 66(c), UCMJ, this court reviews issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993); *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991).

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 [this court] are . . . convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)

The elements of forcible sodomy applicable in this case are: (1) that the appellant engaged in unnatural carnal copulation with LCpl HK; and (2) that the act was done by force and without consent of LCpl HK. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person, or to place that person's

sexual organ in the mouth or anus of another person. Art. 125, UCMJ.

While the appellant's and LCpl HK's accounts of their sexual encounter differed, ultimately both LCpl HK's testimony and the appellant's statements to NCIS established that (1) the appellant inserted his tongue into LCpl HK's vagina; (2) LCpl HK told the appellant "no" and/or "stop" multiple times prior to and/or during his act of sodomy; and (3) the appellant applied force by grabbing, pushing or pulling and holding LCpl HK in place while he performed the act against her will. Moreover, the content of appellant's multiple texts to LCpl HK post incident indicate his consciousness of guilt. After reviewing the record, we find that a rational trier of fact could have found that the essential elements of forcible sodomy were met beyond a reasonable doubt, and we are ourselves convinced beyond a reasonable doubt as to the appellant's guilt.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court