

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

**Before
M.D. MODZELEWSKI, E.C. PRICE, R.G. KELLY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JESSE ROSALES
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201200363
GENERAL COURT-MARTIAL**

Sentence Adjudged: 21 May 2012.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, Marine Corps
Installations Pacific, Camp Smedley D. Butler, Okinawa,
Japan.

Staff Judge Advocate's Recommendation: Capt C.P. Hur, USMC.

For Appellant: LT Jared Hernandez, JAGC, USN; LT Robert E.
Burk, JAGC, USN.

For Appellee: LCDR Clay Trivett, JAGC, USN; LT P.S.
Reutlinger, JAGC, USN.

12 February 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:

The appellant entered mixed pleas before a military judge sitting as a general court-martial. He was convicted, pursuant to his pleas, of two specifications of willful disobedience of a superior commissioned officer, one specification of assault consummated by a battery, one specification of unlawful entry, and one specification of wrongfully making a military pass, in

violation of Articles 90, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 928, and 934. Contrary to his pleas, the military judge convicted the appellant of one specification of abusive sexual contact¹ and one specification of unlawful entry, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934.² The military judge sentenced the appellant to 51 months of confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended confinement in excess of 36 months.³

The appellant has submitted one assignment of error: that the convictions for abusive sexual contact and unlawful entry were not factually sufficient. After considering the pleadings, as well as the entire record of trial, 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.

Factual Sufficiency

In accordance with Article 66(c), UCMJ, this court reviews issues of factual sufficiency *de novo*. 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 themselves 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 abusive sexual contact that the Government was required to prove in this case were: (1) that the appellant engaged in sexual contact with EC; and (2) that the appellant did so by causing bodily harm to EC. Art. 120, UCMJ. The elements of unlawful entry that the Government was required to prove were: (1) that the appellant entered the property of another which amounts to a structure used for habitation; (2) that such entry was unlawful; and (3) that, under the

¹ As a lesser included offense of the charged offense of aggravated sexual contact.

² In addition to finding the appellant not guilty of the greater offense of aggravated sexual contact, the military judge also acquitted the appellant of attempted rape, burglary, kidnapping, and assault with intent to commit rape.

³ To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

circumstances, the appellant's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 111b. An entry is unlawful if "made without the consent of any person authorized to consent to entry or without other lawful authority." *Id.* at ¶ 111c.

Facts and Discussion

The Government's case rested largely, although not entirely, on the testimony of the victim, EC. The facts adduced at trial reveal the following chain of events. Late on the night in issue, the appellant introduced himself to EC in the smoke pit outside her barracks. Most of the Marines present at the smoke pit were drinking, and it was a party atmosphere, with music and dancing. According to EC, she and the appellant talked, drank a beer, and danced briefly together. One of EC's friends, Corporal (Cpl) JC, soon recognized that EC was intoxicated and tried to escort EC to her barracks room, but needed help because of her level of intoxication. The appellant offered to assist Cpl JC, and both Marines assisted EC to her room, put her to bed, and then departed from her room.

About an hour later, EC awoke and decided to return to the smoke pit. As EC left her room, she discovered the appellant in the barracks passageway. She testified that the appellant approached her as she was trying to lock her door, that he put one hand on her back, and that he pushed open the door with his other hand, pushing EC into the room, and locking the door behind him. He prevented her from turning on lights in the room, then picked her up and put her on the bed, restraining her by pinning her arms behind her back. She testified that she struggled, but that after he restrained and overpowered her, she then decided to feign sleep. She testified that he laid down next to her, that she was between the appellant and the wall, and that he kissed her, fondled her, and put his hand down her pants and under her underwear while she pretended to be asleep. After he touched her under her underwear, EC jumped out of the bed and ran first to turn on a light and then to leave the room. The appellant chased her. EC first went into the shared bathroom and tried to exit into the adjoining barracks room, but found the door locked. She then tried to leave through her door into the passageway, but the appellant tried to block her. They argued briefly at the door, and EC was able to convince the appellant to let her leave to go smoke a cigarette. As soon as she was out of the room, EC ran to Sergeant (SGT) D's room. At the door to his room, the appellant caught up with her and held

her hands behind her back, but EC kicked the door until she wakened Sgt D, and he opened the door. She ran into the room, and told Sgt D that the appellant had assaulted her.

EC's version of events was corroborated by significant other evidence, which included *inter alia* the following. The Marine in the next room heard an argument and heard someone try to open the door to her room from the bathroom, consistent with EC's testimony about trying to escape through that room. Cpl C saw EC shortly after her report to Sgt D, and testified that EC was "hysterical . . . almost like she's seen a ghost. The ghost touched her." Record at 504. Sgt D testified that he awoke to someone loudly kicking his door and that when EC entered, she was in a traumatized state. Sgt D also testified that the appellant fled the scene, which is itself indicative of a consciousness of guilt, that Sgt D gave chase and that he yelled to the duty officer to stop the appellant from leaving the barracks. When the appellant returned to the scene, he made a statement to Sgt D that also indicated a consciousness of guilt, saying "I'm going to deal with this like a man." *Id.* at 577.

Defense counsel presented evidence at trial that EC was an untruthful person in general, and that she had previously made a false allegation of rape against another Marine. Trial defense counsel cross-examined EC extensively about her admittedly false allegation of rape, and also called the Marine who was the victim of that false complaint. Both trial and appellate defense counsel rely heavily on that evidence to argue against the sufficiency of the evidence in this case. Additionally, both at trial and now on appeal, defense counsel highlight inconsistencies in the various statements EC gave regarding the evening's events. Finally, the appellant argues that the element of unlawfulness and the terminal element of the unlawful entry charge were not proven. Appellant's Brief of 14 Dec 2012 at 12.

After reviewing the evidence, we are convinced of the appellant's guilt beyond a reasonable doubt. It is well-settled that proof beyond a reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). While the record reveals that this victim was untruthful on a prior occasion, it also reveals that the facts and circumstances of that situation were markedly different from the evening in question. Most importantly, the record reveals a clear motive for EC to lie in the previous situation, having been caught in a compromising position by her husband. Despite

the trial defense counsel's aggressive pursuit of this theory of the case, the record betrays no motive for EC to lie about the events of this evening or her encounter with the appellant. Additionally, trial counsel presented evidence of EC's character for truthfulness. Moreover, both the appellant's and EC's behavior in the immediate aftermath of the incident, corroborated by several witnesses, is wholly consistent with EC's substantive version of events.

Based on this record, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt on the two specifications.

Conclusion

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court