

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Corye T. TODD
Staff Sergeant (E-6), U.S. Marine Corps**

NMCCA 200400513

Decided 9 July 2007

Sentence adjudged 31 July 2003. Military Judge: J.A. Maksym. Staff Judge Advocate's Recommendation: CAPT D.L. Bailey, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aviation Training Support Squadron ONE, Naval Technical Training Center, Meridian, MS.

LT DARRIN MACKINNON, JAGC, USN, Appellate Defense Counsel
LCDR PAUL BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial comprised of officer members, of fraternization, making a false official statement, adultery, and endeavoring to impede an investigation, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The appellant was sentenced to confinement for 30 days, reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged. After considering the record of trial, the appellant's sole assignment of error, and the Government's response, 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.

Legal and Factual Sufficiency

In his only assignment of error, the appellant asserts that his convictions for fraternization, adultery, and impeding an investigation should be overturned because the Government's key witness, Lance Corporal (LCpl) H, lacked credibility and, therefore, the Government's evidence was legally and factually insufficient. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; see also Art. 66(c).

At trial, this case presented as a classic "he said, she said" credibility battle over whether the appellant, a staff non-commissioned officer instructor, had sexual intercourse with one of his students, LCpl H. It is undisputed that the appellant picked up LCpl H in his personal vehicle on base, drove to a supermarket, and purchased wine for LCpl H (she was underage). The appellant then stopped by his personal residence and allowed LCpl H to go inside. At issue is what occurred inside. LCpl H claimed she and the appellant watched two movies, and twice engaged in sexual intercourse. The appellant claimed LCpl H watched the movies, but did not have sex with him. The appellant's wife, also an instructor on the command staff, was on duty, and not at home that night.

LCpl H testified that as the appellant drove her back to the base, he instructed her as follows:

[H]e said if anybody sees you or asks anything about seeing you with me [in] the car, seeing you get out of the car, just tell them that you were at a bar and you called me to pick you up.

Record at 283.

As word of the appellant's conduct with LCpl H circulated among the junior enlisted students in the barracks, the command began an investigation into the allegations of fraternization. LCpl H testified that after her first interview with one of the investigators, the appellant approached her in the duty hut. After inquiring of LCpl H what she had been asked and whether she had said anything about him, the appellant instructed LCpl H not to mention his name to the investigators, and how to answer if they questioned her again:

[H]e told me not to mention his name or if anything was brought up, if his name was mentioned at all by Master Sergeant Adkins or anything, to stick to what he had told me to tell them, to tell anybody who had asked me, which was if - - that I had called him from a club to come and pick me up.

Id. at 287.

The Government called two witnesses who participated in an interview of the appellant as part of the command investigation. During that interview, the appellant changed his story several times when confronted with evidence from LCpl H. The appellant initially told the investigators he had given LCpl H a ride from a nightclub off base, after she called him to come pick her up. The appellant told the investigators he could not recall the name of the club, or whether LCpl H had called him at home or on his cell phone. The appellant admitted to the command investigators that, when he drove LCpl H back onto the base, he "dropped her off between the post office and barracks 203 because it was dark and no one would see us." *Id.* at 395.

The appellant does not contest the legal and factual sufficiency of his conviction for making false official statements to the command investigators regarding his activities with LCpl H on the night of the offenses. We conclude that as for the charges of fraternization, adultery, and impeding an investigation, on the basis of the record before us and considering the evidence in the light most favorable to the Government, a reasonable factfinder could have found all the essential elements of the charged offenses beyond a reasonable doubt. *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson*, 443 U.S. at 319).

Likewise, we too are convinced of the appellant's guilt beyond a reasonable doubt. While there are certain inconsistencies within the testimony of LCpl H, there are also inconsistencies - - and outright falsehoods - - in the admissions and testimony of the appellant. Reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, we conclude that the appellant is guilty beyond a reasonable doubt.

Injudicious Comments by the Military Judge

Central to the appellant's assignment of error are several statements made on the record by the military judge. Appellant's

Brief of 28 Apr 2006 at 16. At the close of the Government's case on the merits, the defense counsel moved for a finding of not guilty under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). During an Article 39(a), UCMJ, session the military judge denied the motion, but not before he critiqued the Government's evidence:

The government is very fortunate that the Rule requires me to view this evidence in the light most favorable to the United States as I was inclined to give a very close look to Charge III on a motion. To call the evidence presented by the government scanty at this point would be to articulate that your average individual in Monaco on a beach is fully dressed.

Record at 425.

The defense counsel made a motion for reconsideration of the military judge's R.C.M. 917 ruling at the close of the defense case on the merits. After denying the motion, the military judge made the following comment:

The evidence, as I indicated on the record yesterday, is all rather scanty. The credibility of the complaining witness is pathetic; but nonetheless, this court is not empowered to grant a [R.C.M.] 917 motion based solely [sic] on its opinion of the credibility of a witness. I would add for the record, before [sic] appellate review purposes, if I were so empowered, I would have granted the motion. Indeed, were this a judge alone trial, I would have acquitted on this defense. I find reasonable doubt.

Id. at 550.

After the members delivered their sentence and prior to adjournment, the defense counsel asked the military judge for a recommendation of clemency in light of his earlier comments. In response, the military judge provided the following comments:

It is my normal practice not to issue a clemency recommendation in a members case. I believe that I have made my position very clear as to Charge III [endeavor to impede an investigation]. The Navy-Marine Corps Court of Criminal Appeals can take my opinion, and can use their extraordinary findings capability, and reverse that particular finding if they deign to do so.

... I have no particular recommendation of clemency in this case. I'm not known as a lenient sentencer [sic]. Having said that, I think that the Convening Authority should take a very careful look at the credibility of

[LCpl H] and the credibility of the other junior Marines who testified.

Do I believe that, in the main, there was sufficient evidence to convict the accused? In the main, yes. Do I believe that the accused lacked veracity at certain points? Yes. Do I believe that lack of veracity was equaled or overtaken by the complaining junior Marines? Indeed, yes. I was very troubled by the lack of credibility of [LCpl H] and her junior colleagues.

And indeed, while the sentence may not have been much different if my findings had reached the same conclusion as the members did, I would indicate for the record, that if Congress altered the statute, and I was allowed to offer judgment; notwithstanding the verdict in this case, I would exercise those powers as to Charge I [fraternization] and Charge III and potentially as to Charge II [adultery], because of the gross lack and absence of credibility of [LCpl H] in this court's eyes. As to the sentence, I would not make a recommendation to the Convening Authority. I would leave that to his good offices.

Id. at 670-71.

Despite the military judge's repeated invitations on the record, we decline to disturb the court-martial's verdict. We will, however, take this opportunity to once again express our concern with the comments made by, and lack of judicial deportment exhibited by, this military judge during his trials. See *United States v. Barnes*, 60 M.J. 950 (N.M.Ct.Crim.App. 2005), and *United States v. Denson*, No. 200400048, 2005 CCA LEXIS 243, unpublished op. (N.M.Ct.Crim.App. 20 Jul 2005).

The record is replete with needless comments and arrogant behavior by the military judge. The military judge grilled potential members, openly questioned the integrity of a potential member without sufficient basis, characterized as "imbecilic" a convening authority's conduct in the case, openly contemplated contempt proceedings against a former panel member, and criticized a witness' decision to smoke a cigarette. Record at 65, 189, 201, 243-44, and 312. More troubling to us is the military judge's goading of the military counsel by his incessant sarcasm, and his pompous condescension towards them, often in the presence of the members. *Id.* at 80, 128-29, 130-32, 138, 164, 190, 191, 200, 249, 267, 286, 303, 306, 331, 355, 387, 397, 399, 424, 445, 454, 463, 466, 468-69, 481, 510-11, 550-52, 573, and 575.

We expect military judges to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others." *United States v. Quintanilla*, 56 M.J. 37, 42 (C.A.A.F. 2001)

(citing Canon 3B(4) of the American Bar Association Model Code of Judicial Conduct (2000 ed.)). "Because 'jurors are ever watchful of the words that fall from him,' a military judge must be circumspect in what he says to the parties." *United States v. Loving*, 41 M.J. 213, 253 (C.A.A.F. 1994)(quoting *United States v. Clower*, 48 C.M.R. 307, 310 (1974)); see also *United States v. Cooper*, 51 M.J. 247, 253 (C.A.A.F. 1999). We will not tolerate incivility by a military judge toward any trial participant, and that includes counsel.

Even more serious than the treatment of counsel in this case was the military judge stating his opinion regarding the credibility of witnesses and the existence of reasonable doubt in a case where members, not the military judge, were the triers of fact by operation of the appellant's forum election. It is clear from the military judge's comments that he thinks there should be a rule within military law that allows for a judgment of acquittal, as exists in federal trials under FEDERAL RULE OF CRIMINAL PROCEDURE 29.¹ Record at 671.

A military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty before findings are announced. R.C.M. 917(a). R.C.M. 917(d) specifically prohibits the military judge from evaluating the credibility of witnesses when deciding a defense motion for a finding of not guilty.²

A military judge may not trespass on the functions and responsibilities of the court members. *United States v. Felton*, 31 M.J. 526, 534 (A.C.M.R. 1990)(citing *United States v. Cisneros*, 491 F.2d 1068, 1074 (5th Cir. 1974)). "When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues." *Quintanilla*, 56 M.J. at 42 (quoting Standard 6-3.4, Special Functions of the Trial Judge, ABA Standards for Criminal Justice (2d ed. 1980)).

Our superior court has held that, even after the members have sentenced an accused, "the military judge might dismiss a specification as to which he [or she] concluded the proof was legally insufficient to establish guilt." *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A. 1988)(interpreting a military

¹ FED.R.CRIM.P. 29(a) permits a trial judge to "on its own consider whether the evidence is insufficient to sustain a conviction." FED.R.CRIM.P. 29(b) allows the trial judge to reserve decision on the motion for acquittal and "proceed with trial . . . submit the case to the jury, and decide the motion either before the jury returns a verdict of guilty or is discharged without having returned a verdict."

² The record is clear that the military judge recognized this part of the rule, Record at 546, and thus we are perplexed as to why he persisted in giving his evaluation when the rule specifically indicated it was irrelevant.

judge's authority under R.C.M. 917 as compared to that of Federal District judges under FED.R.CRIM.P. 29); see also R.C.M. 917, Drafter's Analysis. However, a military judge may not set aside findings of guilty based upon his own disbelief of the prosecution witnesses, since "their credibility was solely for the court members to decide." *Griffith*, 27 M.J. at 48. Otherwise, the military judge may become an impermissible "thirteenth juror." *Id.*

A military judge is not without recourse in a situation where the judge believes the findings of guilty are against the weight of the evidence. A military judge is always free to make a clemency recommendation to the convening authority on the record, after findings and sentence have been announced. *Id.* at 43-44. Such a recommendation by a military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence. *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999)(citing *United States v. Clear*, 34 M.J. 129 (C.M.A. 1992)); see also R.C.M. 1105(b)(2)(D) and 1106(d)(3)(B).

Conclusion

While we recognize that much of the military judge's behavior in this case occurred in the absence of the members, his overall demeanor was unacceptable. Irrelevant banter by the military judge, such as occurred in this case, has the very real potential to call into question the members' verdict, undermines confidence in the military justice system, and displays a lack of judicial temperament. Once again, we admonish this military judge to refrain from making injudicious comments on the record.

Despite the concerns noted above regarding the military judge's judicial temperament, we find his rulings were correct in both law and fact, and that the members heard and considered all the evidence, were properly instructed, returned a verdict fully supported by the evidence, and adjudged an appropriate sentence for these offenses. While we do not condone the inappropriate comments made by the military judge, in the context of the entire trial, the legality, fairness, and impartiality of the court-martial were not put in doubt. See *United States v. Foster*, 64 M.J. 331, 339 (C.A.A.F. 2007)(citing *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987)).

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Senior Judge VOLLENWEIDER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court