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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHARLES F. BELL II
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200800199
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 December 2007.
Military Judge: CAPT Dennis Bengtson, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: CDR B.J. Cordts, JAGC, USN.
For Appellant: LT Brian Korn, JAGC, USN.
For Appellee: LT Elliot Oxman, JAGC, USN.

17 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, consistent with his pleas, of making a false official statement and assault consummated by a battery, in violation of Articles 107 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 928. He was found guilty, contrary to his pleas, of sodomy and indecent acts, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934. The approved sentence was confinement for one year, reduction to pay grade E-1, and total forfeiture of all pay and allowances.

The appellant raised three assignments of error. First, the appellant asserts that the military judge erred by improperly instructing the members on a mistake of fact defense to the sodomy and indecent acts offenses. Second, should this court determine that the appellant was never entitled to a reasonable mistake of fact defense as to sodomy, the appellant avers that his trial defense counsel was ineffective by attempting to utilize mistake of fact as a defense. Finally, the appellant asserts that the record of trial has "substantial omissions" and is therefore incomplete.[1]

We have carefully examined the record of trial and the pleadings of the parties. 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

In December 2006, the appellant, a 20-year-old Electronics Technician Third Class stationed onboard USS SHILOH (CG 67) in Yokosuka, Japan, began an online acquaintance with the 14-year-old female dependant (SN) of an Information Systems Technician First Class also stationed in Yokosuka, Japan. The appellant and SN exchanged emails and phone calls, and eventually entered into a sexual relationship.

In late December 2006 or early January 2007, the appellant, at the victim's invitation, surreptitiously entered the victim's house through her bedroom window. On this occasion, the appellant acknowledged that he engaged in oral sodomy and vaginal intercourse with the victim. The victim testified that he also kissed her breasts and engaged in the other activities charged in the indecent acts specification. The appellant later asserted to investigators that on this first occasion he believed the victim was 17 years old based on her physical appearance.

Subsequent to their first sexual encounter, the appellant and the victim discussed her age. The appellant stated to investigators that the victim told him she was either 15 or 16 years old. At the time he couldn't remember which. Subsequently, in March 2007, the appellant, with the victim's consent, again entered the victim's bedroom through her window. On this occasion, the appellant and victim again engaged in indecent acts and oral sodomy but did not engage in intercourse

[1] The appellant's motion for oral argument is denied.

because they were interrupted when the victim's mother unexpectedly entered the room.

Instructional Error

The appellant avers that the military judge erred twice in his instructions to the members. His first alleged error was to improperly instruct the members that the affirmative defense of reasonable mistake of fact applied to the specification alleging sodomy with a child. In support, the appellant cites to *United States v. Wilson*, 66 M.J. 39 (C.A.A.F. 2008) for the proposition that a mistake of fact defense is not applicable to the offense of sodomy with a child. This need not detain us, however. The appellant's trial took place some two years before *Wilson* was decided. We are satisfied that application of the *Wilson* decision was prospective only and was inapplicable to the appellant's trial. *See Williams v. United States*, 401 U.S. 646, 651 (1971).

Even assuming *arguendo* that the statutory interpretation underlying the *Wilson* decision should have been prophesized by the military judge and counsel in the appellant's case, any error committed by the military judge was harmless beyond a reasonable doubt. Clearly an error which enhanced the appellant's opportunity to obtain an acquittal by providing what he now claims was an unauthorized affirmative defense inured to his benefit.

The appellant's contention that the alleged error somehow precluded him from mounting an alternative defense is not supported by the record. The record reflects a strong Government case with respect to the appellant's sexual relations with the victim. The victim testified to the appellant's actions in her bedroom, the victim's mother testified to finding the appellant and her daughter in a compromising sexual position when she entered the room and the appellant himself made an inculpatory statement to NCIS investigators acknowledging that he engaged in both sodomy and sexual intercourse with the victim. Mistake of fact as to the victim's age was the only remotely plausible line for the defense to take.

The second instructional error alleged by the appellant is that the military judge inappropriately modeled his sodomy mistake of fact instruction on the indecent acts specification as opposed to the carnal knowledge specification. The two instructions dealing with mistake of fact as to the carnal knowledge and the sodomy specifications differ in several ways.

The most obvious difference between the instructions related to the burden of proof/persuasion. For mistake of fact to apply to a carnal knowledge specification, the defense has the burden to prove by a preponderance of the evidence that the appellant had an honest and reasonable mistake of fact regarding the victim's age. For the same mistake defense to apply to sodomy or indecent acts, however, the military judge instructed that the issue of mistake need only be reasonably raised by the evidence. The appellant does not contest the correctness of these differing burdens.[2]

The appellant also does not contest that both mistake of fact instructions properly required that the members find the appellant's mistake to have been both honest and reasonable. In this regard, we note that when addressing the specification alleging sodomy, the military judge properly instructed the members on the requirement that the appellant's mistake not be the result of his own "negligence" in ascertaining the victim's correct age. Record at 602. He did not, however, similarly instruct the members that the same lack of negligence requirement also applied in the context of the carnal knowledge specification. *Id.* at 599-600. While this was error, it clearly inured to the appellant's benefit. In any case, the error was harmless beyond a reasonable doubt as the appellant was acquitted of the carnal knowledge specification.

The only other evident difference between the military judge's mistake of fact instructions as to carnal knowledge and sodomy was that, as noted by the appellant, in the carnal knowledge instruction, the military judge expressly instructed the members that "[e]ven if the defense fails to convince you that this defense of mistake exists, the burden remains on the prosecution to prove the appellant's guilt beyond a reasonable doubt to include each and every element of the offense of carnal knowledge." *Id.* at 600. In the context of the mistake of fact instruction as to the sodomy offense, the appellant has no burden of proof and the military judge properly instructed that "[t]he government must prove beyond a reasonable doubt that Petty Officer Bell did not have a reasonable and honest belief that (SN) was 16 years of age or older." *Id.* at 602-03. This, the appellant asserts, confused the members by suggesting "that

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45c(2) (carnal knowledge) provides in pertinent part that "It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age."

the only thing the government must prove beyond a reasonable doubt to obtain a conviction on sodomy and indecent acts is that the reasonable mistake of fact defense does not exist." Appellant's Brief and Assignments of Error of 24 Jun 2008 at 10. The appellant asserts that this confusion could "easily explain the factually inconsistent verdict" as to carnal knowledge and sodomy. We disagree.

While the appellant's citations to the record are accurate, they are incomplete. Four sentences after the citations above, the military judge expressly instructed the members that "[t]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of each offense alleged." Record at 603. Shortly thereafter, the military judge again instructed the members that "if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty." *Id.* at 604. While these instructions were not tied to a specific charge or element, we, nonetheless, find the appellant's argument that the members were somehow confused by the military judge's instructions unpersuasive.

We further observe that the members' findings were entirely consistent with the evidence presented. The record reflects that intercourse only occurred during the appellant's first sexual encounter with the victim. The members' not-guilty verdict quite reasonably might have credited the appellant's statement to NCIS that on the first occasion he reasonably believed the victim to be 17 years old. Between the first and second encounters, however, the appellant acknowledged discussing age with the victim and being informed that she was either 15 or 16 years old. At this point the members could quite reasonably believe that the appellant was on notice that the victim was not as old as he'd initially believed and that further inquiry was now reasonable. The reasonableness of the appellant's mistake of fact during the second sexual encounter, which included sodomy and indecent acts but not intercourse, could have been evaluated in a different light by the members.

For the reasons noted above, we find that the military judge did not incorrectly instruct the members on the mistake of fact defense applicable to the sodomy specification. Any error in the mistake of fact instruction regarding carnal knowledge was harmless beyond a reasonable doubt. Based on our findings

above, the appellant's second assignment of error alleging ineffective assistance of counsel is moot.

Incomplete Record

A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). Where an omission from the record of trial is substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979).

The appellant asserts that the record of trial in this case is incomplete insofar as the transcript on page 535 begins in the middle of a sentence. The appellant goes on to aver that the missing portion of the transcript reflected an Article 39(a), UCMJ, session during which instructions were discussed. He concludes from this that the omission constitutes a substantial omission and gives rise to a "presumption of prejudice." Appellant's Brief at 16.

It appears from the face of the record that the Article 39(a) session had just begun moments before. The first issue discussed by the military judge was a summary of an Article 802 session during which instructions had been discussed. Such a summary is ordinarily among the first administrative items addressed at the beginning of an Article 39(a) session. In an abundance of caution, however, we provided the appellant a specific additional opportunity to provide this court with some evidence that the missing portion of the record was, in fact, a discussion of proposed instructions. The appellant declined to offer any affidavits or declarations in support of his speculation regarding the significance of the missing portion of transcript.[3]

Having carefully considered the entire record and in the absence of any evidence to the contrary, we are satisfied that the record in this case is essentially verbatim and that the omission does not constitute a substantial omission creating a

[3] Absent evidence to the contrary, we also presume that the military judge knew and followed the law not to do anything of substance in an Article 802 session.

presumption of prejudice. This assignment of error is without merit.

Conclusion

The findings and the approved sentence are affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court