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.

WAYNE J. DIGGS
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 200800633
SPECIAL COURT-MARTIAL

Sentence Adjudged: 17 April 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.
For Appellant: Maj Brian Jackson, USMC.
For Appellee: LCDR Ian K. Thornhill, JAGC, USN; LT Duke Kim, JAGC, USN.

24 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

Officer and enlisted members sitting as a special court-martial convicted the appellant, contrary to his pleas, of five specifications of violating a lawful general regulation; three specifications of communicating indecent language; and two specifications of soliciting adultery, violations of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The convening authority (CA) approved the adjudged sentence of reduction to pay grade E-1 and discharge from the United States Marine Corps with a bad-conduct discharge.

The appellant alleges three errors before us: insufficient evidence with respect to two of the indecent language specifications; ineffective assistance of counsel; and an inappropriately severe sentence. Having conducted our own thorough review of the record of trial and the parties' pleadings, we are satisfied that the findings and the approved 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.

The appellant was a staff noncommissioned officer assigned to a Marine Corps Brig. The victims of his various offenses were junior Marines, for the most part female, also assigned to the staff of the brig. The appellant would engage these Marines in inappropriate conversations when, generally, he and an individual female Marine were alone in a fairly private and quiet part of the Brig. These conversations included expressing appreciation for the way the females looked; questions about their and their comrades' sexual appetites; and inquiries about whom they would like to have sexual relations with, both among the staff and within the brig population.

Legal and Factual Sufficiency of the Evidence

We turn first to the specifications involving indecent language, and we will apply the well-known tests for both factual sufficiency and legal sufficiency. *See United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987)(citations omitted).

Communicating indecent language violates the General Article, and

> [w]hat constitutes legally punishable verbal obscenity is a relative matter which requires consideration of many diverse factors such as fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and the probable effect of the communication to mention but a few. The true test of verbal obscenity is whether the particular language is calculated to corrupt morals or excite libidinous thoughts . . . . The necessary attribute of indecency or obscenity can, therefore, be said to be adequately alleged if the language employed by the accused when reasonably construed by community standards, serves to convey a libidinous message whether or not the words themselves are impure.

United States v. Linyear, 3 M.J. 1027, 1030 (N.C.M.R. 1977) (citations omitted).

One of the targets of the appellant's indecent language was Lance Corporal (LCpl) Z. When the members returned the verdict with respect to LCpl Z, they struck some, but not all, of the

language from the indecent communication specification.[1] The appellant now claims that more language should be deleted because, he maintains, LCpl Z herself did not testify that the appellant spoke the words alleged. He asserts rather that LCpl Z simply followed the trial counsel's lead.[2]

We cannot tell from the record whether the members excepted the bracketed language because they did not believe that the appellant uttered it, or because they did not believe it to be obscene. *See, e.g.*, Appellate Exhibit XLV and Record at 300-01. While we acknowledge that questions and assertions by counsel are not evidence, *see United States v. Watson*, 14 M.J. 593, 594 (A.F.C.M.R. 1982), it is unclear from this record whether LCpl Z was agreeing that she had testified in a particular fashion, was adopting the trial counsel's statement as her own, or was simply agreeing to be oriented. Viewing the evidence in the light most favorable to the Government, we conclude that LCpl Z was testifying that those were the appellant's words. We further note that, even if the language that the appellant contests is removed from the specification, the remaining language still states an offense and the evidence is legally and factually sufficient to support the members' finding of guilt.

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[1] The members excepted the language in brackets from the specification that alleged "You have a black girl's ass," ["you must attract a lot of black guys,"] "I bet the guys you sleep with like to put it in your ass," "I bet you like to take it in the ass," ["you seem like the type of girl who would like to have a lot of fun in bed,"] "have you ever seen a black penis?" ["have you ever had sex with a black guy?"] "would you ever have sex with a black guy?" ["would you ever have sex with me?"] ["would you have sex with me if I didn't have a wife or if I was divorced?"] and ["you will no longer be able to have sexual relationships with just anyone and your life is going to become boring"] and returned a guilty finding to the specification as excepted. Record at 305-06.

[2] The particular exchange occurred during the Government's case in rebuttal and reads as follows:

> Q: Lance Corporal [Z], I'd like to ask you some additional questions. It kind of ties into the testimony you gave earlier on this case. You talked about Staff Sergeant Diggs making these comments to you, I bet you like to take it in the ass. You seem like the type of girl who would like to have fun in bed. I bet the guys you sleep [with] like to put it in your ass.
> A: Yes, sir.
>
> Q: After he made these comments to you -- when he made these comments to you, was anybody else present?
> A: Most of the time, no, sir.

Record at 243.

Turning to the indecent language offense involving LCpl B, we note first that the language used[3] is indeed profane. As the parties correctly note, mere profanity is not enough to declare language "obscene." *See United States v. Hullett*, 40 M.J. 189, 193 (C.M.A. 1994). Here, however, the language goes beyond mere workplace banter. The language is communicated by a staff noncommissioned officer to a lance corporal; it has innuendos of rape (as could be the case were a guard to have intercourse with a prisoner); and it was uttered in a setting where the lance corporal was alone with the appellant. We are satisfied that the evidence regarding LCpl B is legally and factually sufficient and that the appellant's conviction for communicating indecent language to her should stand as well.

Ineffective Assistance of Counsel

We now consider the appellant's assertions that his defense counsel was ineffective by failing to move for a finding of not guilty regarding certain language in an indecent communication specification and by failing to object to what the appellant casts as uncharged misconduct involving another female Marine.

To prevail on a claim of ineffective assistance, the appellant must demonstrate (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" and (2) that the "deficient performance prejudiced the defense . . . through errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The appellant's first claimed error is without merit. He asserts that an effective defense counsel would have moved for a not-guilty finding on certain of the indecent language alleged with respect to LCpl Z. The appellant claims that such a motion would have been "dispositive" and cites as analogous several cases which loosely stand for the proposition that failure to make a meritorious motion to suppress evidence can be said to constitute ineffective assistance. *See, e.g., United States v. Loving*, 41 M.J. 213, 244 (C.A.A.F. 1994)(citing *Kimmelmann v. Morrison*, 477 U.S. 365, 375 (1986)). We are convinced, however, that a motion for a partial not-guilty finding would not have been meritorious, as the very high standard that the defense must satisfy (the absence of some evidence which . . . could reasonably tend to establish every essential element; RULE FOR COURTS-MARTIAL 917(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)) is not supported by the record; we likewise find no prejudice from this alleged error for reasons related to our resolution of the appellant's first assignment of error regarding LCpl Z.

[3] "Is there anyone in the brig who you would like to f***?"

The appellant also alleges that his defense counsel should have objected to testimony offered by LCpl J, another female Marine at the Brig. The Government originally included a specification that alleged sexual harassment directed toward LCpl J, but withdrew the specification before trial. The appellant now claims that all evidence relating to his interactions with LCpl J was uncharged misconduct that should have been excluded through a proper defense objection.

The testimony of LCpl J occurred in the context of the orders violation, Charge I. In order to prove the appellant guilty of the offense, the Government was required to show beyond a reasonable doubt that a lawful general regulation, which he had a duty to obey, was in effect, and that the appellant violated it in certain respects. Specifically, the Government was required to prove that the appellant's actions created an intimidating, hostile, or offensive working environment. The Government elected to meet its burden by showing, among other things, that the conduct was so severe or pervasive that a reasonable person would perceive, and the victim did perceive, the work environment as hostile. SECNAVINST 5300.26D of 03 Jan 2006, Encl. 1 ¶ 3c (Prosecution Exhibit 1).

Evidence of other crimes, wrongs, or acts is admissible if it is offered for a permissible purpose. *See United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989); *see generally* MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The Government properly offered LCpl J's testimony to show the type of workplace environment that the appellant created, and indeed LCpl J testified to the specific effect on the named victims of Specifications 1 and 3 of Charge I. The first two steps of the *Reynolds* test are thus completed. We are convinced as well that this evidence, which consumed only a short portion of the record of trial, did not create any danger of unfair prejudice to the appellant or confusion on the part of the members: the evidence related to events that occurred during the period charged with respect to the other victims; the circumstances of the approach to LCpl J were similar (isolated victim, quiet part of the duty day, discussion about sexual proclivities of LCpl J and other Marines) to those of the approaches to the other victims; and the questions from the members, AE XX, show that they placed the testimony in an appropriate context.

The appellant's final assignment of error is that his approved sentence of reduction to pay grade E-1 and a punitive discharge was inappropriately severe. In support, he points to clemency requests from the members recommending that the CA substitute an administrative discharge for the bad-conduct discharge. We note that clemency is distinct from sentence appropriateness. *Cf. United States v. Healy*, 26 M.J. 394 (C.M.A. 1988)(clemency is sole prerogative of CA).

We are satisfied that the approved sentence is appropriate for this offender and for his offenses. *See United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). That the CA chose not to mitigate a lawful and otherwise appropriate sentence is of no import. The appellant was in a supervisory position over junior Marines. He abused that position by engaging in inappropriate sexual discussions with these Marines and by creating an unprofessional, unhealthy, environment of sexual harassment at the work place. He did so for a prolonged period and in circumstances that jeopardized all Marines, prisoners and brig staff alike, under his supervision.

Conclusion

The findings and the approved sentence are affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court