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

Before
E.E. GEISER, L.T. BOOKER, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHARLES D. MYERS
STOREKEEPER SECOND CLASS (E-5), U.S. NAVY

NMCCA 200800759
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 June 2008.
Military Judge: CAPT J. Harty, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR F.J. Yuzon, USN.
For Appellant: LT Michael Maffei, JAGC, USN; Capt S. Babu Kaza, USMC.
For Appellee: LT Timothy Delgado, JAGC, USN.

22 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

Contrary to his pleas, the appellant was convicted by a military judge sitting as a general court-martial of raping his stepdaughter on divers occasions between March and July 2000, a violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The convening authority approved the sentence of confinement for 15 years, reduction to the lowest enlisted pay grade, and a dishonorable discharge from the service.

Before us, the appellant asserts three errors: first, that the evidence is legally and factually insufficient to sustain a conviction; second, that the military judge erred in considering the testimony of Naval Criminal Investigative Service (NCIS) Special Agent F; and third, that the appellant is illegally being denied "good time" credit at the rate applicable when he committed his offense.[1]

Background

The appellant married G in 1999. His spouse had two children, M (a son) and J (a daughter), who at the time of the marriage were living with family in Guam. In December of 1999, M and J, respectively 10 and 9 at the time, flew to the states to live with the appellant and G near the appellant's duty station in Brunswick, Maine.

A short time after the family united, the appellant was transferred to southern California. The family made the cross-country trip in the early part of 2000, traveling by way of the appellant's family home in Tennessee. After some time in transient housing, the family moved into government quarters in Camarillo, California. It was here that the appellant is alleged to have raped J on multiple occasions.

M and J returned to Guam in late 2000. The incidents of rape came to light several years later, when J reported them to a school health official, and the investigation was not completed until 2005. The allegation of rape was preferred in 2006 along with allegations of sodomy and indecent acts; the latter allegations were withdrawn when it appeared that they would not survive a challenge on statute-of-limitations grounds. Record at 35-36. *See generally United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008).

Discussion

The tests for legal and factual sufficiency are set out in *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). For the former, the evidence is sufficient if, considering it in the

[1] The appellant's third assignment of error is not properly raised during the course of an Article 66 review. *See United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002). We note that the appellant did, on 6 April 2009, file a petition for extraordinary relief in the nature of a writ of habeas corpus, and we will address that application in a separate opinion.

light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). For the latter, the test is whether we are ourselves convinced beyond a reasonable doubt of the appellant's guilt, weighing all the evidence in the record and taking into account the fact that we did not personally observe the witnesses when they gave their testimony. 25 M.J. at 325.

To prove that a rape occurred in 2000, the prosecution was required to show (a) that an act of sexual intercourse occurred, and (b) that the intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, ¶ 45b(1)(2000 ed.). The element of "force" includes not only brute physical force but also parental coercion. *See, e.g., United States v. Palmer*, 33 M.J. 7, 9-10 (C.M.A. 1991).

When we examine the record, and we view the evidence in the light most favorable to the prosecution, we readily conclude that the evidence is legally sufficient. The victim in this case, J, described multiple instances of being accosted while in the appellant's home in California. Two stand out: the first incident that J can recall, which occurred in a shower stall and in the course of which the appellant tried to stimulate her with a toothbrush, Record at 462-77 *passim*; and the second, which occurred in the appellant's bedroom and in which she lay on her stomach "wanting to scream". Record at 485. Both accounts present credible evidence of sexual intercourse accomplished without J's consent; additionally, there are descriptions of physical force ("I tried to push him off", Record at 470)) and parental compulsion (the incidents in the bedrooms, J having only recently come into the family from her life in Guam) from which a reasonable fact-finder could find beyond a reasonable doubt the elements of the offenses.

As far as factual sufficiency is concerned, we are likewise convinced. We find it of no moment that J could not describe either the appellant's penis (except through descriptions of its texture) or the appellant's tattoo; her testimony that she was frequently facing away from the appellant, and that she tried to keep her eyes shut, is sufficient in our minds to explain her inability to give verbal testimony of visual observations. The testimony from the appellant's spouse about the couple's sexual relations in the shower, while plausible, at times borders on the fantastical and does nothing in our minds to create a reasonable doubt as to the elements of the offenses. We note

the family dynamics that were in play from the arrival of the children in late 1999 until their departure in the fall of 2000 and find they contributed to the parental compulsion type of constructive force. We readily acknowledge that the military judge, the fact-finder, was in a better position to observe and judge the credibility of the witnesses before him, but in our review of the written record we are left firmly convinced of the appellant's guilt of the rapes between March and July 2000.

We have reached our conclusions regarding legal and factual sufficiency without reference to evidence offered by NCIS Special Agent F. At trial, the appellant sought to suppress inculpatory statements that he made to the agent, claiming that he had attempted to invoke his right to remain silent but that the agent had failed to honor his election. He renewed his motion as an assignment of error.

After a lengthy hearing, the military judge granted the defense motion in part, although on grounds different from those advanced by the defense. Appellate Exhibit XXII. The military judge ruled that the appellant's written statement would be suppressed, as "his written statement adopted an admission other than what he thought he was admitting." *Id*. at 15. The military judge did, however, permit the Government to introduce oral admissions regarding the appellant's stripping naked and entering the shower while J was bathing and kissing and fondling her while she was in the shower. We presume that the military judge, who sat as the trier of fact, acted consistently with his ruling in considering the testimony of that witness. In our own review, we have disregarded her testimony entirely and, as noted in our discussion of the legal and factual sufficiency of the evidence above, there was ample evidence available from sources other than the NCIS agent for the fact-finder, and for us, to draw our conclusions. As a result, assuming for the sake of argument that the military judge erred in his ruling, the error was harmless beyond a reasonable doubt and no relief is warranted.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court