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

Before
R.E. VINCENT, E.C. PRICE, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CARLTON THOMAS, JR.
GUNNER'S MATE FIRST CLASS (E-6), U.S. NAVY

NMCCA 200900367
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 April 2009.
Military Judge: LtCol Raymond Beal, USMC.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: LCDR F.J. Yuzon, JAGC, USN.
For Appellant: Capt Michael Berry, USMC.
For Appellee: LT Brian Burgtorf, JAGC, USN.

29 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape and indecent assault, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members acquitted the appellant of sodomy, a violation of Article 125, UCMJ, 10 U.S.C. § 925. The appellant was sentenced to five years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the

adjudged sentence, but deferred and waived automatic forfeitures.

The appellant raised five assignments of error.[1] The appellant's first four assignments of error allege a myriad of legal errors necessitating the setting aside of his conviction of indecent assault (Charge III). His fifth assignment of error contends that the evidence at trial was not legally and factually sufficient to prove that he raped Ms. [H], the victim (Charge I).

We have carefully reviewed the record of trial, the appellant's five assignments of error, the Government's response, and the appellant's reply brief. Regarding the appellant's second assignment of error,[2] we agree, and the Government concedes, that the military judge committed prejudicial error by failing to *sua sponte* provide a mistake of fact instruction to the members regarding the indecent assault charge, Charge III. Accordingly, we will take corrective action in our decretal paragraph.

Following our corrective action and after reassessing the sentence, we conclude that the remaining findings and the

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[1] The appellant raised the following assignments of error:

I. THE FINIDNG OF GUILTY TO CHARGE III (INDECENT ASSAULT) IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ASSAULTED MS. HALL.

II. THE MILITARY JUDGE COMMITED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE MEMBERS THAT MISTAKE OF FACT AS TO CONSENT IS A DEFENSE TO CHARGE III, ALLEGING INDECENT ASSAULT, WHERE EVIDENCE RAISED THE ISSUE OF WHETHER APPELLANT HAD AN HONEST, REASONABLE AND MISTAKEN BELIEF THAT MS. HALL CONSENTED TO APPELLANT KISSING HER ON THE NECK.

III. THE FINIDNG OF GUILTY TO CHARGE III (INDECENT ASSAULT) IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE (1) THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE ELEMENT THAT WHEN APPELLANT KISSED MS. HALL'S NECK, HE DID SO WITH THE INTENT TO GRATIFY HIS LUSTS OR SEXUAL DESIRES AND (2) IMPERMISSIBLE SPILLOVER FROM THE ALLEGED RAPE IS THE ONLY RATIONAL EXPLANATION IN THIS CASE FOR A FINDING THAT THIS ELEMENT IS SATISFIED.

IV. THE FINIDNG OF GUILTY TO CHARGE III (INDECENT ASSAULT) IS FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE ELEMENT THAT WHEN APPELLANT KISSED MS. HALL'S NECK, IT WAS PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OR OF A SERVICE DISCREDITING NATURE.

V. THE FINIDNG OF GUILTY TO CHARGE I (RAPE) IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT DID NOT PROVE BEYOND A REASONABLE DOUBT THE ELEMENT THAT THE SEXUAL INTERCOURSE BETWEEN APPELLANT AND MS. HALL WAS ACCOMPLISHED BY FORCE.

[2] The caption section of the appellant's pleading refers to this assignment of error as II, but in the body of his brief, it is referenced as IV. We shall consider it as assignment of error II.

sentence, as reassessed, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Factual Background

At trial, Ms. [H] testified that on 3 September 2007, she met the appellant at an automotive store in Jacksonville, Florida. Record at 210. She stated that they exchanged phone numbers and then the appellant gave her a ride to her apartment. *Id.* at 211-12. Later that evening, they spoke on the telephone and exchanged text messages. *Id*. at 212-13. Early the next morning, the appellant called her and asked if he could stop by her apartment before work. *Id.* at 213. The Appellant arrived at approximately 0500 and watched television with her on her living room couch for a brief period of time. *Id.* at 213, 215.

Ms. [H] further testified that, shortly thereafter, the appellant began touching her on the leg and she told him that they were not going to have sex. *Id*. at 215-16. She stated that the appellant acknowledged her statement by saying "Okay", but then reinitiated his attempts to rub her leg. *Id.* After she repeated her statement that they were not going to have sex, the appellant replied that she was dealing with a "grown man and not a boy." *Id.* at 216. She became frustrated, left the couch and went into her bedroom for a few minutes and then returned to the couch. *Id.* Upon her return, the appellant started to kiss her on the neck. She attempted to push the appellant away and repeated her earlier statements that they were not going to have sex. *Id.* at 216-17.

Ms. [H] stated that the appellant repeatedly told her that she was dealing with a grown man and not a boy. He used his body weight to hold her down and keep her from moving while she tried to push him away. *Id.* at 217, 219. Ms. [H] testified that the appellant then held her arms over her head with one of his hands as she continued to try to push him away and told him to stop. *Id.* at 217-18. She stated that the appellant then pulled her pants down with his other hand and teeth as she continued to try to get away. *Id.* at 219. Ms. [H] then testified that the appellant performed oral sex on her for a minute or two while she kept telling him to stop.[3] *Id.* at 220.

Finally, Ms. [H] testified that the appellant inserted his penis into her vagina as she tried to "scoot back to get away,"

[3] We note that the members found the appellant not guilty of forcible sodomy, Charge II.

but she was not able to do so. *Id.* at 220-21. She stated that the appellant raped her for no more than five minutes. *Id.* at 221. She then returned to her bedroom, while the appellant threw a condom into her trash can and left the apartment. *Id.* at 221-23. Ms. [H] and her friend [AH] both testified that, after the appellant departed, Ms. [H] called [AH] and asked [AH] to come over to her apartment. *Id.* at 221, 267-69. Ms. [H] and her former work supervisor, [SB], both testified that Ms. [H] called [SB] and asked her to come to the apartment. *Id.* at 221-25, 257-59. [SB] then contacted her husband, a police officer, and the local police department. *Id.* at 259.

Mistake of Fact Instruction

We conduct a *de novo* review of questions of law pertaining to the military judge's instructions. *United States v. Simpson,* 58 M.J. 368, 378 (C.A.A.F. 2003). Mistake of fact as to consent may be an affirmative defense to a charge of indecent assault, but it requires "both a subjective belief of consent and a belief that was reasonable under all circumstances." *United States v. DiPaola*, 67 M.J. 98, 101 (C.A.A.F. 2008)(quoting *United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997)).

"A military judge is required to instruct the panel on affirmative defenses, such as mistake of fact, if the record contains some evidence to which the military jury may attach credit if it so desires." *Id.* at 100 (citations and internal quotation marks omitted). "When the defense has been raised by 'some evidence', the military judge has a *sua sponte* duty to give the instruction." *Id.* (quoting *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)). "The evidence to support a mistake of fact instruction can come from evidence presented by the defense, the prosecution or the court-martial." *Id.* Therefore, it is not necessary for an accused to testify in order to establish a mistake of fact defense. *Id.* (citing *United States v. Jones,* 49 M.J. 85, 91 (C.A.A.F. 1998)).

We note that the appellant's trial defense counsel requested the mistake of fact instructions from paragraphs 5-11-1 and 5-11-2 of the Military Judges' Benchbook.[4] Appellate Exhibit XXV. However, the request did not delineate to which charges the mistake of fact instructions applied. The military judge, after consulting with counsel during an Article 39(a), UCMJ, session, decided to, and subsequently did, provide mistake of fact instructions for both the rape and forcible sodomy charges to the members. Record at 388-93, 434-39. He did not

[4] Dept. of the Army Pamphlet 27-9 (Ch-2, 1 Jul 2003).

provide, nor did the trial defense counsel specifically request, a mistake of fact instruction for the indecent assault charge. *Id.* at 388-393, 439-442.

During the Article 39(a) session addressing proposed instructions, the military judge asked the appellant's trial defense counsel to describe the evidence adduced at trial which supported a mistake of fact instruction as to the rape charge. *Id.* at 388-89. In response, the trial defense counsel relied on Ms. [H]'s testimony that while she sat on her couch with the appellant, he made sexual advances toward her. She felt uncomfortable, left the couch and went to her bedroom. After a few minutes, she returned to the couch and then the appellant engaged in sexual activity with her. *Id.* at 389. The military judge noted that the determination whether a mistake of fact is reasonable "is left to the members" and decided to provide the mistake of fact instruction on both the rape and forcible sodomy charges. *Id.* at 391-93.

Ms. [H] testified that the appellant began to kiss her neck after she returned from her bedroom and sat on her couch next to the appellant. *Id.* at 216. Additionally, a police detective testified that, during questioning, the appellant indicated that all of his sexual activity with the victim was consensual. *Id.* at 289. We conclude that there was some evidence that required a mistake of fact instruction for the indecent assault charge, even in the absence of a specific request from the appellant, and the military judge erred in failing to *sua sponte* provide the instruction.

Having found error, we must determine whether this constitutional error was harmless. The test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *DiPaola*, 67 M.J. at 102 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Similar to the Court of Appeals for the Armed Forces determination in *DiPaola*, "[i]n the context of this case, we cannot say that the absence of a mistake of fact instruction on this offense was harmless beyond a reasonable doubt because that instruction resulted in a finding of not guilty when given with respect to" the forcible sodomy charge, which involved "the same victim in the same setting." *Id.* at 102.

Accordingly, we will set aside the findings of guilty of the specification of Charge III and Charge III in our decretal paragraph and take other necessary corrective action.

Legal and Factual Sufficiency as to the Element of Force

In his fifth assignment of error, the appellant challenges the legal and factual sufficiency of the force element of the rape charge. We conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). 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," this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *Id*. at 324. (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The offense of rape in 2007 had two elements:

> (1) that the accused committed an act of sexual intercourse; and
>
> (2) that the act of sexual intercourse was done by force and without consent.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45b(1). We look at the totality of the circumstances to determine whether the elements of force and lack of consent are established. *United States v. Bright*, 66 M.J. 359, 363 (C.A.A.F. 2008). Force can be actual or constructive. Actual force is physical force used to overcome the victim's lack of consent. *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005)(citing *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991)). Constructive force can be shown by proof of a coercive atmosphere that includes, for example, threats or statements that resistance would be futile. *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003). "[W]here there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more than the incidental force involved in penetration is required for conviction." *United States v. Bonano-Torres,* 31 M.J. 175, 179 (C.M.A. 1990)(citation omitted); *see also United States v. Webster*, 40 M.J. 384, 386 (C.M.A. 1994). Lack of consent can be manifested verbally, physically, or by a combination of the two. *Leak*, 61 M.J. at 245-46.

We disagree with the appellant's assertion that his actions can be characterized as "persistent sexual overtures." Appellant's Brief of 10 Sep 2009 at 17. We distinguish the "persistent sexual overtures" in *Bonano-Torres* from the facts in this case. In *Bonano-Torres,* the alleged assailant was persistent in his sexual advances until the alleged victim permitted the appellant to engage in sexual intercourse with her so she could go to sleep and, accordingly, she made no attempt to get away. 31 M.J. at 176. In this case, the evidence adduced at trial shows that the appellant used physical force to overcome Ms. [H]'s lack of consent. The victim testified that she repeatedly manifested her lack of consent to the appellant by informing him that she did not want to engage in sexual activity. Additionally, Ms. [H] described her physical attempts to resist the appellant and distance herself from him immediately prior to penile penetration. Record at 216-21.

Having considered the evidence in the record of trial, we are convinced that a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. After taking into consideration that we did not have the opportunity to see and hear the witnesses, we are also convinced beyond a reasonable doubt of the appellant's guilt.

Conclusion

Accordingly, the findings of guilty to Charge III and its specification are set aside and Charge III and its specification are dismissed. Because of our action on the findings, we must reassess the sentence in accordance with the principals set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). In reassessing the sentence, we find that there has not been a dramatic change in the sentencing landscape. The appellant remains covicted of rape, and we believe that the adjudged sentence is no greater than that which would have been adjudged if the prejudicial error had not been committed.

The remaining findings and the sentence as approved by the convening authority are affirmed

Judge PRICE and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court