

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

**Before  
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL J. CHEESEMAN  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900567  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 22 May 2009.

**Military Judge:** LtCol David S. Oliver, USMC.

**Convening Authority:** Commanding General, 3d Marine Logistics Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol J.J. Murphy III, USMC.

**For Appellant:** LT Brian D. Korn, JAGC, USN; LT Ryan Santicola, JAGC, USN.

**For Appellee:** Capt Mark V. Balfantz, USMC.

**9 November 2010**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PRICE, Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of violating a lawful general order, aggravated sexual assault, and unlawful entry, violations, respectively, of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The convening authority approved the adjudged sentence of confinement for one year and a bad-conduct discharge.

The appellant raises three assignments of error including: (1) that the military judge abused his discretion in prohibiting the appellant from introducing evidence of his victim's sexual

behavior; (2) that the evidence is legally insufficient to sustain the finding of guilty of unlawful entry; and, (3) that the evidence is factually insufficient to sustain the guilty finding of aggravated sexual assault.

After careful examination of the record of trial and the parties' pleadings, 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.

### **Background**

The appellant's offenses occurred after a night of heavy drinking by the appellant, his victim, and other members of their unit. The offenses occurred in a barracks room shared by the victim and another female. The victim awoke from a deep sleep, perhaps induced by the amount of alcohol that she had consumed, to the appellant penetrating her vagina. She testified that she had only met the appellant several days earlier when he inspected her room, barely knew him, and had no previous relationship with him. She denied inviting the appellant into her barracks room, and saying or doing anything that would lead him or any reasonable person to conclude that she wished to engage in sexual activity that night.

In a videotaped statement to investigators, the appellant initially denied detailed memory of the evening due to intoxication, but vehemently denied being in the victim's room or engaging in sexual activity with her. Prosecution Exhibit 9. When confronted with evidence of his presence, the appellant then admitted being in the barracks room and claimed that Corporal (Cpl) K, a drunken male friend, had invited him, but again denied engaging in sexual activity with the victim. The appellant's second version of events included admissions that, late at night and while intoxicated, he entered the room of two sleeping female Marines without their knowledge or permission, sat next to the sleeping victim and watched Cpl K engage in sexual activity with her roommate a few feet away, and that the victim woke up and immediately left the room.

Following additional questioning, the appellant then claimed that the victim consented to and actively participated in a lengthy sexual encounter which included intercourse. When asked to assess the victim's ability to consent to sexual intercourse, the appellant answered:

I would say no, only because I knew - well I didn't know at the time -- well I knew at the time, but we were both under the influence of alcohol, so it was kind of like - oh - oh - yea - I said yes -- she's you know, she's not saying no -- so obviously it's like - alright - she was kind of going along with it - so I'm taking that as - alright - hey let's go.

Both the victim's roommate and Cpl K testified that they witnessed the appellant engage in sexual intercourse with the victim. The victim's roommate testified that she saw the appellant on top of an unmoving victim. Cpl K testified that he was heavily intoxicated and had limited memory of the evening, that he did not recall inviting the appellant into the victim's room, and that he saw the victim actively engaged in intercourse with the appellant.

### **Victim's Sexual Behavior**

We consider first the military judge's ruling with respect to other behavior by the victim. We review a judge's ruling to admit or exclude evidence for an abuse of discretion. We find no such abuse in this case.

We have reviewed the closed hearing at which this evidence was discussed, and it is clear from the defense counsel's submission and argument that he simply wanted to attack the victim's credibility by showing that she had lied about a subsequent and unrelated incident in the barracks. The military judge permitted cross-examination regarding her deceptive responses in order to escape punishment, but precluded questions about the underlying activity. We agree with the military judge's ruling that the activity leading up to the opportunity to lie was not constitutionally required. See MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010).

### **Unlawful Entry - Legal Sufficiency**

The appellant contends that the evidence is legally insufficient to find his entry into the victim's barrack's room "unlawful," because Cpl K invited him to enter. The elements that the Government was required to prove were that the appellant entered a structure assigned to the victim; that he did so unlawfully, that is, without the consent of any person authorized to admit entry or without other lawful authority; and that under the circumstances, the appellant's acts were prejudicial to good order and discipline in, or of a nature to bring discredit upon the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 111.

Here, neither the victim nor her roommate invited or otherwise authorized the appellant to enter their barracks room on the night of the incident. It is likewise clear that the appellant was not in their room in the proper performance of his duties.

The appellant's contention that his presence in the females' room was not unlawful as he had been invited in by Cpl K, a male, is unpersuasive. First, Cpl K had no recollection of having

invited the appellant into the room and there is no evidence that Cpl K, possessed actual or apparent authority to authorize the appellant's late-night entry into the victim's room.

Considering the evidence in the light most favorable to the Government, we find that a reasonable fact finder could have found the elements of the offense beyond a reasonable doubt, and after weighing all the evidence in the record and recognizing that we did not see or hear the witnesses, we are also convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ.

### **Aggravated Sexual Assault - Factual Sufficiency**

The appellant argues that the evidence does not establish the elements of the offense beyond a reasonable doubt, or in the alternative that he established the affirmative defenses of consent or mistake of fact as to consent. We disagree.

To prove the aggravated sexual assault, the Government was required to prove that the appellant engaged in a sexual act with the victim when she was substantially incapable of appraising the nature of the sexual act or was incapable of declining participation in the act. MCM, Part IV, ¶ 45a(c)(2).

#### **(1) Was the victim substantially incapable of appraising the nature of, or declining participation in sexual intercourse?**

The appellant's act of sexual intercourse with the victim is amply demonstrated in the record through the testimony of the victim, her roommate, the sexual assault examiner, and in his final account to investigators, and we are convinced beyond a reasonable doubt that intercourse occurred. We are likewise convinced, from the testimony of the victim and other Marines who saw her that night, and the appellant's various versions of the evening's events, that the victim was highly intoxicated, asleep, or both, at the time penetration occurred.

In fact, the only evidence in notable contradiction of the victim's testimony was the appellant's third version of events, corroborated in small part by Cpl K. We accord this version of events little weight as it was the appellant's third story, it substantially conflicted with his two earlier accounts and included numerous attempted deceptions, and in light of his demeanor displayed in the videotape. With respect to the appropriate weight to accord Cpl K's partially corroborating testimony, we are mindful that he admittedly was heavily intoxicated and possessed limited recall of events, that he was the appellant's friend, and that the members saw and heard him testify.

Having carefully reviewed the record, we are convinced, beyond any reasonable doubt, that the victim was substantially

incapable of appraising the nature of, or declining participation in sexual intercourse at the time of penetration. See *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007) (reasonable doubt does not mean that the evidence must be free of conflict).

## **(2) Affirmative Defenses**

The military judge instructed the members on the affirmative defenses of consent and mistake of fact as to consent regarding the sexual intercourse.

### **(a) Consent**

If the affirmative defense of consent is raised at trial, "then the defense bears the burden of satisfying the finder of fact, by a preponderance of the evidence, that the victim used 'words or overt acts indicating a freely given agreement to the sexual conduct at issue by a *competent person*.'" *United States v. Crotchett*, 67 M.J. 713, 715 (N.M.Ct.Crim.App. 2009) (quoting Article 120(t)(14), UCMJ) (emphasis added and footnote omitted) *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009).

Here, the members' guilty verdict inescapably reflects their belief, beyond a reasonable doubt, that the victim was "substantially incapable of appraising the nature of the sexual act or incapable of communicating unwillingness to engage in the sexual act" ostensibly due to being asleep, severely intoxicated or both. Therefore, under the statute, she was not "a competent person" capable of consent. Article 120(t)(14), UCMJ.

Even assuming we found the appellant's claim of the victim's active participation in the sexual activity credible, which we do not, the victim's incapacity rendered her incompetent to consent and rendered the affirmative defense of consent unavailable at the time of penetration.

But the statute provides an alternative affirmative defense in this scenario, mistake of fact as to consent. *United States v. Medina*, 68 M.J. 587, 589 (N.M.Ct.Crim.App. 2009) (citing Article 120(t)(15), UCMJ), *rev. granted*, \_\_\_ M.J. \_\_\_ (C.A.A.F. Mar. 30, 2010).

### **(b) Mistake of Fact as to Consent**

The appellant's description of consensual sexual activity including intercourse, could, if credited, reasonably be interpreted as evidence that the appellant reasonably and honestly held, "as a result of ignorance or mistake an incorrect belief that [the victim] consented" through words or deeds to the sexual conduct at issue. Art. 120(t)(15), UCMJ.

We find the appellant's claim insufficient to prove, by a preponderance of the evidence, that "as a result of ignorance or

mistake" he reasonably and honestly believed that PFC W consented to intercourse. *Id.*

As previously discussed, we find the appellant's tale of an extended period of consensual sexual activity incredible. Assuming *arguendo* that the victim did, at some point, actively participate in intercourse, we are unconvinced that the appellant reasonably and honestly believed that she consented at the time of initial penetration as she was asleep and/or intoxicated.

The appellant's admission that he didn't believe that she was capable of consenting due to intoxication weighs heavily against any finding, by a preponderance of the evidence, that he actually believed she consented.

Moreover, the reasonableness of any such belief is unsupported by the evidence. The appellant and the victim had met only days earlier and had limited interaction; the appellant, an intoxicated noncommissioned officer entered the room of two intoxicated and sleeping subordinate female Marines in the middle of the night, without invitation or authorization; and then sat on the bed of one of those Marines and watched his drunken friend engage in intercourse with the victim's drunken roommate several feet away. According to the appellant's own account, he then awakened the sleeping victim and, though aware she was intoxicated, engaged in multiple sexual acts, including intercourse, with her. Such actions are inconsistent with a mistaken belief, "which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense." *Id.*

### **(3) Conclusion**

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.

### **Instructional Error**

The military judge's instructions on the affirmative defenses of consent and mistake of fact as to consent omitted the statutorily prescribed burden on the Government "of proving beyond a reasonable doubt that the affirmative defense did not exist," if the defense first proved "[consent or mistake of fact as to consent] by a preponderance of the evidence."<sup>1</sup> Art. 120(t)

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<sup>1</sup> The military judge instructed the members that if at the time of the alleged sexual intercourse it was more likely than not that: (1) "[the victim] consented," or (2) "the [appellant] honestly and reasonably believed that [the victim] consented," then this consent or mistake "is a complete defense" and "you *should* find the accused not guilty[]." Record at 253-54 (emphasis added). Similar instructions were addressed in *Mozee v. United States*, 963 A.2d 151, 159 (D.C. 2009) (where if the appellant met the burden of proving the

(16), UCMJ. Though not objected to at trial or raised on appeal as error, the military judge's failure to properly instruct the members on these affirmative defenses is not subject to the manual's waiver rules, and has potential constitutional implications. *Medina*, 68 M.J. at 590 (citations omitted); *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003). However, we are convinced beyond a reasonable doubt that these instructions "did not contribute to the [appellant's] conviction or sentence." *Medina*, 68 M.J. at 590. As the appellant failed to prove the existence of either affirmative defense by the statutorily mandated "preponderance of the evidence," the Government's burden of proof under the statutory scheme was never triggered. Therefore the military judge's failure to properly instruct on that statutorily prescribed burden had no impact on the findings or sentence.

### **Conclusion**

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

Senior Judge BOOKER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL  
Clerk of Court

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affirmative defense of consent by a preponderance of the evidence; the jury was "required" to find him not guilty; see also D.C. Code § 22-3007 (2008)). We acknowledge the distinction between "required" and "should" with respect to findings of not guilty if the appellant sustains his burden, but find no prejudice where, as here, the appellant failed to sustain that initial burden of proof.