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

Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JEFFERSON G. RUIZ
SEAMAN (E-3), U.S. NAVY

NMCCA 200800022
GENERAL COURT-MARTIAL

Sentence Adjudged: 30 June 2007.
Military Judge: CDR Robert Redcliff, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: CDR Noreen Hagerty-Ford, JAGC, USN.
For Appellant: Capt Kyle Killian, USMC; LT Sarah Harris, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC.

29 June 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A panel of members with enlisted representation sitting as a general court-martial convicted the appellant, contrary to his pleas, of rape and adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The members sentenced the appellant to 26 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 365 days.

The appellant submitted six assignments of error.[1] The issue addressed in the appellant's first assignment of error produced a long history of post-trial litigation including a *Dubay* hearing on 26 March 2009. The case was re-docketed with this Court on 6 May 2009. On 11 December 2009, we provided portions of potentially relevant mental health records to the appellant. Since we are not convinced beyond a reasonable doubt of the appellant's guilt on either charge, we dismiss the charges on factual sufficiency grounds, and need not decide the appellant's assignments of error.

Principles of Law

Article 66(c), UCMJ, requires a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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).

When the charged offenses occurred, the elements for rape were: (1) That the appellant 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). Any penetration, however slight, was sufficient to complete the offense. If a victim in possession of his or her mental faculties failed to make lack of consent reasonably manifest by taking such measures of resistance as were called for by the circumstances, the inference could be drawn that the victim did consent. Consent, however, could not be inferred if resistance would have been futile, where resistance was overcome by threats of death or great bodily harm, or where the victim was unable to resist because of the lack of

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[1] I. The Government violated Appellant's Fifth Amendment Due Process rights when it failed to disclose *Brady* material that the victim in Appellant's court-martial suffered from a personality disorder and was recommended for separation despite Appellant's specific request for such material.

II. The military judge abused his discretion when he denied Appellant's motion to suppress the statement given to the NCIS polygraph examiner.

III. Appellant was prejudiced where the trial counsel exploited the influence of her office to express her personal belief as to the veracity of the testimony of Seaman Medina.

IV. The military judge committed plain error by failing to instruct the members on how to consider the prior inconsistent statements of Seaman Medina.

V. The approved bad-conduct discharge should not be affirmed where Appellant's due process right to speedy post-trial review was violated, or in the alternative, under the court's Article 66, UCMJ, powers.

VI. The Staff Judge Advocate erred by failing to comment on the legal errors raised by Appellant in his clemency matters.

mental or physical faculties. All the surrounding circumstances were to be considered in determining whether a victim gave consent. *Id.* at ¶ 45c(1). A mistake of fact defense requires both an honest and reasonable belief of consent.[2] RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); *see United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997).

Force and Consent

The complaining witness, Airman (AN) P, testified that prior to the day of the alleged rape, she was "good friends" with the appellant after meeting him in boot camp. Record at 499-500. AN P gave the appellant a letter stating that she would "miss [him] very much," that he was "someone very special," and thanking him for his friendship and songs that "touched the profoundest part of [her] tender heart." Defense Exhibits A-B.

On or about 26 November 2005, AN P and the appellant watched a movie together in a theater at a local mall. Record at 517, 527. The appellant held her hand, kissed her on the lips, and "French-kissed" her throughout the movie; she did not tell him to stop, but testified that she did not kiss him back. *Id.* at 527-28, 580. After the movie, AN P went to a hotel room with the appellant and she paid the $95.36 cost of the room. *Id.* at 527-30; PE 5. AN P testified that once in the hotel room, after she removed her coat, he pulled her "gently" toward him and removed her shirt, undershirt, and bra. *Id.* at 533-34. AN P testified that she did not help him undress her, and said "I don't think it's a good idea." *Id.* at 534-35, 584. The appellant then laid her on the bed, kissing her face, neck, and chest. *Id.* at 536. AN P testified that he tried to pull her pants down and she tried to hold them up, but he pulled them down when they slipped from her hands. *Id.* at 538. When she made her statement to NCIS about a week after the alleged rape, she stated only that the appellant unbuttoned her pants and took them off. *Id.* at 585-86.

A 20-minute conversation then ensued, in which the appellant and AN P discussed her desire to wait for marriage to have sex, and the appellant expressed his feelings for her. *Id.* at 539-40. AN P testified that when the conversation ended, the appellant tried to pull down her underwear and, as with her pants, he was only able to pull them down when they slipped from her hands. *Id.* at 540. Her underwear was not ripped. *Id.* at 618. In his first statement to the Naval Criminal Investigative Service (NCIS), the appellant stated that although AN P initially held her underwear up, she let him take them off when he kissed her stomach. Prosecution Exhibit 6 at 3. AN P testified that the appellant then tried to penetrate her, but that she prevented penetration by moving from side to side. Record at 541.

[2] The military judge found that the evidence raised the issue of mistake of fact as to consent and gave an instruction to the members. Record at 1458-59.

The appellant signed a second NCIS statement over nine months after the alleged rape and his first statement. PE 7. There was extensive expert testimony concerning his inability to review the five-page statement in ten minutes due to his poor English reading skills, and he made no corrections, even to an obvious error that he weighed 65 lbs. Record at 836, 912, 1016-97. According to the statement, the appellant grabbed AN P's knees and forced her legs open, as she tried to push him away. PE 7 at 4. Although the word "grabbed" was used, Special Agent Kurokawa, who typed the statement, testified that he never asked the appellant whether he used his hands to force her knees apart and that he did not include that in the statement. Record at 909-10. Special Agent Bach testified that AN P also never said that he forced her legs open. *Id*. at 730. AN P's testimony at trial directly contradicted parts of the statement. She testified that her legs were spread apart by the appellant's body, that he was gentle with her, and that she never tried to push him off. *Id*. at 540, 547, 569. Assuming without deciding that the statement was knowing and voluntary, it does not amount to a confession of rape. The appellant told NCIS that although his penis touched her vagina, there was no penetration, and that he "kept doing it because she was moaning." *Id*. at 818; PE 7 at 4-5. When asked about AN P resisting the removal of her clothes, he stated, "I felt like she wanted it. She wanted what I was doing to her." PE 7 at 5.

According to AN P, the appellant "finally gave up" and used the bathroom. Record at 542-43. AN P waited for him to exit the bathroom, got dressed in the bathroom, and then sat back down on a bed. *Id*. at 543-44, 609. AN P called her grandmother and cousin on the phone, and the appellant rested his head on her lap. *Id*. at 545, 589. AN P spoke in Spanish and the appellant could not understand what she was saying, but she did not tell either relative what happened or cry during the phone calls. *Id*. at 589; PE 6 at 3. Eventually, they checked out of the hotel, shared a taxi, and returned to the base together. Record at 546.

Under the circumstances, AN P did not make her lack of consent "reasonably manifest." AN P testified that she never said no because she "was just assuming" he would not listen to her. *Id*. at 637. Although AN P testified that she said, "I don't want to have sex," and "I don't think this is a good idea," she never told or asked the appellant to stop undressing her or touching her. *Id*. at 583-84, 616. She also did not tell NCIS that she said, "I don't want to have sex" when she reported the incident. *Id*. at 616, 635. AN P testified that the appellant was not violent and never once threatened her or tried to restrain her, and even acknowledged that the appellant was *gentle* with her, yet she did not try to push the appellant off or try to get off the bed because he would "probably not let me go." *Id*. at 535, 543-47, 569, 588. There is no evidence in the record suggesting that resistance would have been futile, that resistance was overcome by threats, or that AN P was unable to resist because of a lack of mental or physical faculties.

There is reasonable doubt as to whether AN P consented to the appellant's sexual advances, or in the alternative, whether the appellant had an honest and reasonable mistake of fact as to consent. Though persistent, the appellant stopped short of raping or attempting to rape AN P, and got off the bed when it became clear that AN P did not want to have sexual intercourse. We are not convinced beyond a reasonable doubt on the consent element.

Evidence of Penetration

We are also not convinced beyond a reasonable doubt that there was penetration, an element of both the rape and adultery charges. AN P testified, "He didn't penetrate like in-in, but it was very very slightly . . . The—it didn't like—it touched it, but it didn't go exactly like in-in." *Id.* at 541-42. She also testified that at the time she was not sure whether the appellant's penis touched her labia or the lips of her vagina. Id. at 575. AN P testified that in the dark hotel room with the way the appellant was on top of her, she could not see the appellant's penis touching her vagina. *Id.* at 614-15. When asked whether it could have been the appellant's knee, AN P testified, "Well, yes, but the knee . . . [t]he knee is thicker than the penis." Id. at 615. AN P could not remember whether the appellant wore a condom, testifying, "That happened like two years ago," and that it is "better to forget than to live with the trauma." *Id.* at 620. She also testified, "I know it wasn't rape, but I did . . . feel violated" and that she "didn't see it as a rape." *Id.* at 567-68. AN P further testified that the day after the alleged rape, she told SN Medina that there was no sexual intercourse, and SN Chengfeliz testified that AN P told him there was no penetration. *Id.* at 549, 693.

Reporting the Alleged Rape

On the night of the alleged rape, after returning to the barracks, AN P did not report the rape or tell anyone what happened. *Id.* at 548. Seaman (SN) Medina testified, contrary to AN P's testimony, that the next day, a smiling AN P pulled him aside, told him "we did it," and explained that she and the appellant had feelings for each other. *Id.* at 1146. In the next few days, AN P discovered that rumors were spreading about her being in a hotel room with the appellant. *Id.* at 552, 570, 592. SN Chengfeliz testified that he had previously counseled AN P when she told him she "liked" the appellant, a married man. *Id.* at 551, 676, 688. When he confronted her with the new rumors and she explained her version of events, he reported it to the command. *Id.* at 683. AN P testified that she would not report it because she was afraid she would get into trouble or be kicked out of the Navy for being in a hotel room with a married man. *Id.* at 552-55, 572, 683. AN P testified that about a week after the alleged rape, upon learning she would not get in trouble as long as she was not "cooperating" with the appellant, she reported the incident, when confronted by a SAVI advocate, a

chief, and a member of law enforcement. *Id.* at 572. The manner in which the rape was reported raises further doubt as to why AN P made the accusation.

Conclusion

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are not convinced beyond a reasonable doubt of the appellant's guilt. The findings of guilty and the sentence are set aside. The charges and specifications are dismissed with prejudice.

For the Court

R.H. Troidl
Clerk of Court