

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JESSE A. SPICER  
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 201000241  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 30 October 2009.

**Military Judge:** CDR Kevin O'Neil, JAGC, USN.

**Convening Authority:** Commanding General, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.

**Staff Judge Advocate's Recommendation:** Col K.J. Brubaker, USMC.

**For Appellant:** LT Michael Torrissi, JAGC, USN.

**For Appellee:** Capt Robert Eckert, USMC.

**21 December 2010**

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

REISMEIER, Chief Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification of false official statement and rape, in violation of Articles 107 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 920. The appellant was sentenced to 90 days confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant asserts three assignments of error. First, he asserts that the military judge erred by barring evidence regarding the victim's sexual experience and expert testimony that her sexual experience made it less likely that she submitted to the intercourse at issue due to parental compulsion. Second, he claims that the evidence is factually insufficient to support a finding of guilt as to Charge I, false official statement. Finally, he argues that the military judge improperly denied a defense challenge for cause of an officer member. This court ordered oral argument as to the first issue, and specified the question for argument as to whether the evidence was factually sufficient to support a finding of guilt as to rape.

We have considered the record of trial, as well as the briefs and oral arguments for both sides. For the reasons set out below, we affirm only the findings of guilt for Charge I and its specification, the false official statement. We set aside the finding of guilty for Charge II, its specification, and the sentence. Charge II and its specification are dismissed. A rehearing on sentence is authorized.

### **Background**

The victim, VL, was 26 years old at the time of trial. When she was 13 years old, the appellant moved in with her mother and SL, VL's older brother (older by two years). The appellant married VL's mother shortly thereafter.

The appellant purchased cigarettes for both VL and SL from the time the children were 13 and 15, respectively. Shortly thereafter, the appellant began buying them alcohol as well. Soon, the appellant began to ask VL to show him her breasts. VL was 14 years old when this began. Eventually, the appellant brought a camera on the trip to the store, and photographed VL's bare breasts.

The appellant also began fondling VL's breasts when she was 14 years old, in ninth grade. VL would wake to the appellant's hand under her shirt and on her breasts. Shortly thereafter, the appellant came into VL's room and masturbated in front of her, ejaculating into a towel. VL's school friend, TL, substantiated the timing of these events, noting that VL disclosed the breast touching while they were freshmen and the masturbation when they were sophomores.

In October 1999, when VL was 16, the appellant, VL and TR, VL's boyfriend, were playing cards. The appellant coaxed VL to put on her mother's lingerie. TR noted that VL modeled the lingerie, but did so reluctantly. While VL was out of the room putting on the lingerie, the appellant asked TR if he wanted to "tag team" VL. Later that night, after VL and TR had gone to her room, the appellant came to VL's bedroom door and requested to come in. Despite the appellant's repeated requests - which were

characterized by VL as sounding "pathetic" - VL refused to allow the appellant into her room.

On another occasion (the exact timing is unclear, but VL apparently was 15 years old), the appellant drove VL, her boyfriend, and another male friend to a remote location where VL engaged in consensual sexual activity with the two teenage males. During the event, the appellant walked up and told the three that it was time to go, but it is unclear whether he was in the area and observing the conduct prior to interrupting it.

At times, the appellant took VL to his office when VL was grounded, and had her assist with office work. During one visit, the appellant had VL put on a tee shirt that he had cut. The appellant then used a sponge to wet the shirt.

Finally, in December 2000, when VL was 17 years old, the appellant took VL to his office on a weekend evening. VL wanted to go on a road trip which included attending her boyfriend's birthday party in Charleston on 28 December. The appellant, on his own, suggested to VL that if she agreed to have sex with him, he would talk VL's mother into allowing VL to go for the weekend. VL stated that she agreed to have sex with the appellant because she wanted to go on the trip, and because she felt like she did not have a choice.

## **Factual Sufficiency**

### **1. Principles of Law**

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); see also Art. 66(c), UCMJ. The test for factual sufficiency is whether, 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; see also Art. 66(c), UCMJ.

At trial, the Government was required to prove: (1) that the accused committed an act of sexual intercourse with VL; and (2) that the act of sexual intercourse was done by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 45b(1).<sup>1</sup> The Government's theory at trial was that the force used in this case was constructive - specifically, parental

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<sup>1</sup> The rape allegation arose from an incident in December, 2000. The applicable elements therefore differ from those in effect today.

compulsion. No other theory of guilt was relied upon or advanced at trial since there was only a single theory at trial.

Constructive force exists where a child acquiesces because of duress or a coercive atmosphere created by a parent (or stepparent, as in this case). Where constructive force is present, the court is permitted to conclude that the youth and vulnerability of the child, when coupled with the appellant's position of authority, created a situation in which explicit threats or displays of force were not necessary to overcome the child's resistance. Where evidence of constructive force is offered, the question is whether the child merely acceded to the will of the parent because of the moral, psychological, or intellectual force a parent figure wields over a child. *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991). Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, 3-45-1 (Ch-2, 1 Jul 2003).

## 2. Discussion

In support of the theory that VL acceded to parental authority, the Government attempted to portray the appellant's aberrant relationship with his stepdaughter as one in which he methodically progressed in his relationship with VL, purposefully blurring boundaries and conditioning VL not to disclose his sexual advances, desensitizing her to the escalating wrongful behavior that moved from viewing her exposed breasts, to photographing them, then to touching them, and on to exhibition and facilitating sexual contact with others. This progression culminated in intercourse.

However, VL's testimony calls that portrayal into question. On direct examination, when describing the intercourse at issue, the following exchange occurred between VL and the trial counsel:

Q. What did your step-father say to you when you got into his office?

A. I was - there was some trips planned. My friend, [M] and [T] were supposed to go to Alabama. And then my boyfriend at the time, [JS], was having a birthday party in Charleston the same weekend. And [the appellant] told me if I had sex with him, he'd talk my mom into letting me go for the weekend with one of them.

Record at 285-86. Trial counsel then portrayed this event as one being controlled by the appellant, rephrasing the exchange as one in which the appellant "said that if you had sex with him you could go on this trip." *Id.* at 586. Of note, VL did not correct this portrayal when the trial counsel asked. Instead, VL went on to say that she had sex with the appellant because she felt like she had no choice, that she did not want to have sex with him, and that she didn't tell anyone, such as her mother, because VL had nowhere to go, no one to tell, and no one could do anything

about it. Importantly, VL also testified that during the course of the intercourse, she thought that the event was being videotaped, causing her to "freak out" and put an immediate stop to the intercourse. *Id.* at 287.

On cross-examination, the civilian defense counsel engaged on the point of control, asking VL:

Q. And he told you that if you has sex with him, you could go off on your trip?

A. No. He said he would talk my mom into letting me go if I had sex with him.

Q. So, he would intercede for you and help you get to a place you wanted to go, correct?

A. Yes.

Q. And you had sex with him because you wanted to go on that trip, correct?

A. Yes.

*Id.* at 316.

As noted at the outset, youth and vulnerability of a child, coupled with a parent's position of authority, can create a situation in which explicit threats or displays of force are not necessary to overcome a child's resistance. On this record, we have a reasonable doubt as to whether VL merely acceded to the will of the appellant because of the moral, psychological, or intellectual force he wielded over VL.

VL's testimony made clear on both direct and cross-examination that her mother held the key to the trip VL desired to take. The appellant neither denied nor offered permission to take the trip. It was VL's *mother's* determination that VL could not go on the trip that VL sought to address via her stepfather. The appellant threatened nothing, indirectly or otherwise; his offer was to intercede on behalf of VL to help her get what she wanted from her mother: permission to go on a road trip. While perhaps morally bankrupt, we have a reasonable doubt that the appellant's offer rose to the level of parental compulsion.<sup>2</sup>

It is critical to note that VL terminated the intercourse upon concluding that the event was being videotaped. We recognize that fear of a video might trigger panic and some greater act of resistance than might otherwise be possible (or

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<sup>2</sup> We note that after the lingerie event, the appellant came to VL's door, repeatedly begging to be let in, presumably in order to engage in the threesome he had mentioned to VL's boyfriend. VL nevertheless refused the appellant entry. We recognize that this act of denial was in the presence of a third party. However, there is nothing in the record to suggest that as a result of her refusal, VL suffered any threats, punishment or retribution at the hands of the appellant. To the contrary, it appears that her refusal ended the event.

even likely, in the face of parental compulsion). We also realize that the crime of rape is concluded at penetration by force and without consent, not at some later point when a victim finally is able to repel an attacker. Additionally, we note that a child may in fact resist without necessarily undermining a conclusion that there was parental compulsion. However, VL's demonstrated ability to resist and actually terminate the intercourse, when combined with VL's own testimony that intercourse in the first instances was motivated by a desire to get the appellant to convince VL's mother to permit VL to travel raises a reasonable doubt as to whether VL merely acceded to the appellant's sexual demands. We cannot conclude beyond a reasonable doubt that the appellant used parental compulsion to engage in intercourse with VL.<sup>3</sup>

## **Challenge For Cause**

### **1. Principles of Law**

A court member must be removed for cause when he should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007) (quoting Rule for Courts-Martial 912(f)(1)(N)). The rule covers both actual and implied bias. The test for actual bias is whether any bias is such that it will not yield to the evidence and the military judge's instructions. *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Implied bias exists when, "regardless of an individual member's disclaimer of bias, most people in the same position would be [biased]." *Briggs*, 64 M.J. at 286 (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). The presence of actual bias is a question of fact, causing us to give significant deference to the military judge who must make a determination as to whether it is present in a member. Because implied bias is measured by an objective standard, a military judge's ruling on implied bias is given less deference than a ruling on actual bias, although the review is not *de novo*. *Id.*

### **2. Discussion**

During *voir dire*, 1stLt M disclosed that his ex-girlfriend, whom he had dated for several years, was raped when she was in college. She never filed a report, and never told him why she did not report it. 1stLt M noted that he never asked her any

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<sup>3</sup> The appellant's first assignment of error is now moot. Having considered the appellant's second assignment of error (that the evidence is factually and legally sufficient to sustain appellant's conviction for false official statement), we find that the evidence is both legally and factually sufficient. *Turner*, 25 M.J. at 324-25. The appellant admitted to the underlying conduct, but contended that VL was over the age of 16. VL and TL convincingly recalled the events underlying the statement as occurring while VL was under the age of 16. Record at 277-78, 366-74.

questions about it, and that she only talked about it when she wanted to. He went on to say that he was angry that a friend was assaulted, but disagreed that his feelings of anger would infect his deliberations. Earlier, when asked what reaction he might have to finding out that the alleged crime involved the appellant's step-daughter, 1stLt M said it was a negative reaction, saying that someone having sex with a younger person or step-daughter is wrong, that it breaks a level of trust. When asked what he thought should be done about it, 1stLt M said "we're doing it right now. We're bringing him to trial, follow due course." Record at 208. 1stLt M also stated that he could separate any personal beliefs he might have from the law.

The defense challenged the member for cause, saying that the member had a close personal friend who was raped, and that 1stLt M had a noticeable reaction with the issue of sex with a step-daughter was raised. The military judge denied a challenge for cause against 1stLt M, noting that the defense failed to establish whether the member even knew his ex-girlfriend any longer. The military judge disagreed with counsel's description of the member for the record, saying that there was not a noticeable reaction from the member when it was disclosed that the victim was the appellant's step-daughter.

The military judge stated that he interpreted the challenge as one based on implied bias, that he was aware of the liberal grant mandate, and denied the challenge. Although defense counsel did not attempt to clarify whether the challenge was for actual or implied bias, we will address both.

The fact that a member was close to someone who had been a victim of a similar crime is not *per se* grounds for disqualification. *Terry*, 64 M.J. at 303. Regarding his indirect exposure to a prior similar crime, we find a number of factors reduce the potential significance of 1stLt M's exposure to the rape of a former girlfriend. First, while the parties at trial did not establish a clear factual basis for the challenge, we note that 1stLt M had been on active duty for three years by the time he filled out his questionnaire. Appellate Exhibit XXXVIII at 29. His statement during *voir dire* was that a former girlfriend was raped when she was in college. We cannot determine from this record whether 1stLt M's relationship with his ex-girlfriend ended while he was still in college, whether it predated his attendance at the Naval Academy, or whether it was more recent in time. As the military judge correctly noted, we cannot determine whether 1stLt M was even in contact with his ex-girlfriend any longer. What we can determine is that a former girlfriend claimed to have been raped at some point and, during the course of her relationship with 1stLt M, disclosed that allegation to 1stLt M. There is nothing to indicate that there were frequent, extensive, or even substantial discussions about the topic. We can divine that the rape was unreported for undisclosed reasons, that 1stLt M never asked any questions about it, and acted as a listener for his girlfriend when she decided

she wanted to talk about it. While 1stLt M disclosed that he was angry that she was sexually assaulted, 1stLt M stated that he was not angry that nothing was done about the rape, and that his anger would not creep into deliberations. On this record, we conclude that the matter was not a current issue for the member and provided no basis to suggest actual or implied bias on the part of 1stLt M.

Likewise, the fact that 1stLt M reacted negatively to the disclosure by the defense that the appellant was charged with having had sexual intercourse with his 17-year-old stepdaughter is not a basis on which to conclude there was bias - nor was the reaction entirely unexpected. Mere distaste for certain offenses is not automatically disqualifying, and there is nothing in this record to suggest 1stLt M presented either an actual or implied bias. *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999).

### **Conclusion**

For the reasons stated above, we affirm only the findings of guilt for Charge I and its specification, the false official statement. We set aside the finding of guilty for Charge II, its specification, and the sentence. Charge II and its specification are dismissed. A rehearing on sentence is authorized.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL  
Clerk of Court