

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION
	)	TO DISMISS PER RCM 917
DOUGLAS WACKER	)	
CAPTAIN	)	8 March 2011
U.S. MARINE CORPS	)	

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1. **Nature of Motion.**

The defense moves this court pursuant to RCM 917, to dismiss certain charges and specifications because the Government failed to offer evidence to prove all of the elements beyond a reasonable doubt.

2. **Facts**

1. The Government Charges Capt Wacker at Charge I with the rape of Jessica Brooder.

2. The elements of rape from MCM 2005 are:

- (a) *Rape.* Any person subject to this chapter who causes another person of any age to engage in a sexual act by—
  - (1) using force against that other person;
  - (2) causing grievous bodily harm to any person;
  - (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
  - (4) rendering another person unconscious;or
  - (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.

3.

4. Regarding Charge I, no evidence was presented that Capt Wacker rendered Jessica Brooder unconscious or Elizabeth Easley unconscious and then had sex with them.

5. Regarding Charge II, Spec 1, no evidence was presented that Capt Wacker straddled Ms. Easley.
6. Ms. Easley said that Capt Wacker either sat on top of her or sat beside her, she couldn't say which. Her journal entry, page 2 (that she confirms) is clear on this.
7. Regarding Charge II, Spec 1, no evidence was presented that Capt Wacker's interactions with Ms. Easley constituted indecent acts, let alone an assault.
8. From MCM 2005, indecent is defined as:
  9. *(3) Indecent.* In conduct cases, "indecent" generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave the morals with respect to sexual relations. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.
10. There was no evidence presented that Capt Wacker did anything to Ms. Easley that she did not consent to.
11. There was no evidence presented that Capt Wacker's alleged conduct with respect to Ms. Easley (even if it occurred as alleged) was grossly vulgar, obscene and repugnant to common propriety.
12. There was no evidence of violating community standards even if Capt Wacker had straddled Ms. Easley.
13. Before entering 1008, Liz Easley was standing and talking with Jessica Brooder, who was also standing, in the lobby as Capt Wacker ordered the room for three persons.
14. Liz Easley and Jessica Brooder then went up in the elevator past the 7<sup>th</sup> floor, where their own room was, and walked to room 1008.

15. Inside 1008, testimony was presented by Liz Easley that she was awake and decided to get out of bed in Capt Wacker's room on her own decision.
16. Liz Easley remembered her purse.
17. Liz Easley got dressed on her own.
18. Liz Easley left the room on her own accord after she said "I can't do this" to Capt Wacker and Jessica Brooder.
19. Ms. Easley then called her boyfriend Donald Cook.
20. Ms. Easley told Donald Cook that she had seen Jessica Brooder come out of the bathroom and get in bed with Doug Wacker.
21. Liz Easley also told her Donald Cook that she would never cheat on him.
22. Ms. Easley went to the elevator, pressed the right button, went to her correct floor (the 7th), walked to her correct room, took out her key card, correctly entered the room and was lucid when she spoke to Becky Barker.
23. Ms. Easley told Becky Barker that that "Jess was having sex with Doug."
24. Ms. Easley understood Barker's direction to go get her.
25. Ms. Easley decided to go get Jess Brooder, on her own.
26. When Ms. Easley saw Ms. Brooder, lying in bed by herself, she testified that she dressed her, walked her out, and accused Jess Brooder of having sex with Doug Wacker.
27. Later, Ms. Easley told Donald Cook that Jess Brooder would say that she was not having sex with Doug Wacker.
28. On her own power and decision, Ms. Easley walked Ms. Brooder out of Capt Wacker's room and they walked back down to the 7<sup>th</sup> floor room with Becky Barker.

29. In the room with Becky Barker, Jessica Brooder had the capacity to want to call her boyfriend right away once she got to Becky Barker's room.
30. Jessica had the capacity to not call her boyfriend though after listening to Becky Barker's advice to wait until morning to call him.
31. Jessica Brooder had the capacity to say "I'm out of town and I shouldn't have." while walking around Barker's room after coming from being with Doug Wacker.
32. Later in the evening, Ms. Easley returned alone to talk with Capt Wacker.
33. Later, Liz Easley told Jessica Brooder she had given Capt Wacker a back massage while in that room.
34. She also sent Capt Wacker a very coherent text message.
35. At all times, Ms. Easley had the capacity to remember the room she was in on the 7th floor and the room Capt Wacker purchased on the 10th floor at room 1008.
36. Substantially incapacitated in MCM 2005 is defined as:

- (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—
    - (A) appraising the nature of the sexual act;
    - (B) declining participation in the sexual act; or
    - (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.
- 37.

38. No evidence was presented that either Ms. Brooder or Ms. Easley was incapable of appraising the nature of the sexual act.
39. No evidence was presented that either Ms. Brooder or Ms. Easley was incapable of declining participation in the sexual act.

40. No evidence was presented that either Ms. Brooder or Ms. Easley was incapable of communicating an unwillingness to engage in the sexual act.
41. The toxicologist Dr. Jacobs testified that women that were passed out could not walk to the hotel from the daiquiri stand.
42. Dr. Jacobs testified that if drugs were used in this case, that both women would have been comatose at the bar and not capable of walking around or energetic in Becky Barker's room as they were reported to be.
43. OBGYN Dr. Leininger testified that a tampon can move in the vaginal canal on its own absent sexual intercourse.
44. Mr. Merrithew and Mr. O'Brien testified that both Ms. Easley and Ms. Brooder were intoxicated, as were the others that had been drinking that night, but they had their faculties about them and were aware of their surroundings.
45. During the USD hearing board, Capt Wacker did not tell the hearing board that he did not have sexual intercourse with Jessica Brooder on or about 3 April 2007.
46. Instead, while relaying what he had told Jessica Brooder, he said "And I basically said that it was kissing and petting. That there was sexual contact but there was no sexual intercourse." Transcript, p. 5.
47. In other words (and assuming for the sake of this motion Capt Wacker did have sex with Jessica Brooder), he truthfully relayed to the hearing board that he had told Jessica Brooder that he did not have sexual intercourse with her. "I basically told her that, "hey, we didn't have sexual intercourse." And I don't know if I- I don't think we went into detail as to the particulars but what had happened was basically she was masturbating me, and I was masturbating her. That was the extent of it.'" Transcript, p. 11.

### 3. Discussion.

RCM 917 states that “The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilty are announced if the evidence is insufficient to sustain a conviction of the offense affected.” The standard for granting this motion is that it shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence is to be viewed in the light most favorable to the prosecution.

For an application of RCM 917, see United States v. Parker, 59 M.J. 195, 201 (C.A.A.F. 2003). In Parker, CAAF held that a military judge improperly denied a RCM 917 motion in a rape case where the Government failed to prove sexual contact during the charged time period.

Before ruling on this motion, this court should read the attached NMCCA cases of US v. Collins and US v. Woods.

In Collins, p. 3., a mixed members case; the victim said she woke up with the appellant Collins on top of her and they were having sex. Later, she was seen playing video games. As similar to this case, there was a toxicology expert that testified that the victim in Collins had a BAC of between .18 and .23. In Collins, p. 6, the court held at sex had occurred because the victim said sex occurred. Collins's conviction was overturned because the appellate court had reasonable doubt that the victim was incapacitated at the time she and the appellate engaged in the sex.

In Woods, that rape by substantial incapacitation case was also overturned when the Navy Marine Corps Court of Criminal Appeals found that the conviction was not supported by

evidence to prove the incapacitation of the victim beyond a reasonable doubt. The Woods court held that victim's testimony about not remembering consenting and being too drunk to consent was not enough to support the conviction.

**A. Charge I should be dismissed.**

The elements for rape are that an Accused caused another person of any age to engage in a sexual act by:

1. Using force against that other person
2. Causing grievous bodily harm to any person
3. Threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
4. Rendering another person unconscious; OR
5. Administering to another person by force for threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape...

Here, there is no evidence of force used against Jessica Brooder to cause her to engage in a sexual act. Nor, is there any evidence of grievous bodily harm to Jessica Brooder. Nor, is there any evidence of threats or fear of placing Jessica Brooder in fear of bodily harm.

There is no evidence that Capt Wacker did anything to cause Jessica Brooder to be rendered unconscious. Nor, more importantly, is there any evidence that Jessica Brooder had sex with Capt Wacker while unconscious (but even if there were, there still is no evidence that Capt Wacker rendered her unconscious as required by the Article). Liz Easley saw Jessica Brooder come out of the bathroom and get in bed with Doug Wacker.

Finally, there is no evidence that Capt Wacker, without the permission of Ms. Brooder, gave her any drug or intoxicant. There was some testimony that he bought her a drink, but that she took that drink on her own consent. There was no evidence that Ms. Brooder had been drugged. On the contrary, two drug tests came back negative for date rape drugs. There was certainly no evidence that Capt Wacker gave anyone any drugs.

Thus, elements 1 to 5 of Charge I are missing and Capt Wacker cannot be convicted of rape as defined at MCM 2005 edition. That charge and its specification must be dismissed.

**B. Charge II, Spec 1 should be dismissed.**

The bill of particulars stated that the first element for Charge II, Spec 1 was “That on or about 3 April 2007, at or near New Orleans, Louisiana, the accused committed a certain wrongful act with Elizabeth Easley, to wit: straddling Elizabeth Easley by placing his legs on either side of her body.” Charge II, Spec 1 alleges that Capt Wacker was “straddling the said Elizabeth Easley.” The testimony of Elizabeth Easley was “in all honesty, I don’t know if he was straddling me or sitting next to me.” Journal, page 2. There was no testimony that Capt Wacker was straddling Ms. Easley for certain or if he was sitting next to her. Thus, the phrase “straddling the said Ms. Easley by placing his legs on either side of her body” cannot as a matter of law be proven beyond a reasonable doubt.

The second element alleges that Ms. Easley was “so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval service would have recognized that there was a substantial likelihood that she was incapable of knowingly and voluntarily consenting to any sexual contact.” Here, the testimony has come out that Ms. Easley was not significantly intoxicated and that a reasonable officer could not have known that she was incapable of consent. No one testified that Ms. Easley, aside

from being energetic and outgoing that night, showed any signs of extreme alcohol intoxication, let alone substantial incapacitation.

The third element of Charge II Spec 1 is “That the act was indecent.” From MCM 2005, for conduct to be indecent it “generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave the morals with respect to sexual relations.” Straddling a person as alleged in this specification cannot be found indecent. It was not grossly vulgar. It was neither obscene. Nor, was straddling a person repugnant to common propriety. We know this because a demonstration was done in the courtroom by the civilian defense counsel and the military judge allowed it and no one expressed any offense to one adult straddling another adult. The scene did not excite the lust or deprave the morals of anyone observing it, let alone to sexual relations. Thus, element three of Charge II, Spec 1 cannot be proven beyond a reasonable doubt, even if straddling occurred (Ms. Easley said she was unsure if Doug Wacker was sitting next to her or straddling her).

Finally, the Government cannot prove that the circumstances of sitting next to Ms. Easley, whom the evidence showed was not so significantly intoxicated and mentally and physically impaired; was beyond a reasonable doubt conduct unbecoming of an officer and a gentlemen.

None of the necessary elements of Charge II, Spec 1 can be proven beyond a reasonable doubt, even when the evidence is viewed in a light most favorable to the Government.

**C. Charge II, Spec 2 should be dismissed.**

The first element of this specification is that Capt Wacker engaged in sexual intercourse with Jessica Brooder. Ms. Johnson testified that she cannot say how semen from Capt Wacker

got on the shorts only that it was there. She conceded it was possible that sexual intercourse was the way that happened, but she also conceded that it was possible a semen transfer happened from mutual masturbation. She also said it was possible it happened from clothing transfer of Capt Wacker wiping himself and Jessica Brooder wiping herself with the same article. She also conceded that another transfer was possible. No witness said that they saw Capt Wacker engaging in sexual intercourse with Jessica Brooder. Even looking at this evidence in a light most favorable to the prosecution, it is impossible for the members to find beyond a reasonable doubt that Capt Wacker engaged in sexual intercourse with Ms. Brooder.

Element 2 required that the Government prove beyond a reasonable doubt that Capt Wacker knew or should have known that Jessica Brooder was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval Service would have recognized that there was a substantial likelihood that she was incapable of knowingly and voluntarily consenting to sexual intercourse. Even viewing the evidence in a light most favorable to the Government, they cannot prove that Capt Wacker knew that Jessica Brooder was so significantly intoxicated that she could not voluntarily consent to intercourse at the time they were at the hotel. This is because no witness testified to that effect. Ms. Barker testified that Jessica Brooder was erratic when she saw her in the hotel but she was responding to her directions and was walking, talking and was otherwise alert. Ms. Barker conceded that she could not say what Capt Wacker knew about the intoxication level of Ms. Brooder.

Element 3 required that Capt Wacker's conduct was unbecoming of an officer and a gentlemen under these circumstances of being in lawschool in the French Quarter of New

Orleans. There was no evidence presented that Capt Wacker's conduct with respect to Jessica Brooder was unbecoming of an officer and a gentlemen.

The elements of Charge II, Spec 2 were not met beyond a reasonable doubt and the specification should be dismissed.

**D. Charge II, Spec 3 should be dismissed.**

The first element of this charge was that Capt Wacker made a statement "he did not have sexual intercourse with Jessica Brooder on or about 3 April 2007." During the USD hearing, the transcript reflects that Capt Wacker said the following:

*I told them – they asked me if we had had sex and I said, "No." And I basically said that it was kissing and petting. That there was sexual contact but there was no sexual intercourse.*

Transcript, p. 5.

*I basically told her that, "hey, we didn't have sexual intercourse." And I don't know if I- I don't think we went into detail as to the particulars but what had happened was basically she was masturbating me, and I was masturbating her. That was the extent of it.*

Transcript, p. 11.

On its face, Capt Wacker never uttered the words to the hearing board that he did not have sexual intercourse with Jessica Brooder. He did say he had sexual contact and mutual masturbation with her, but he did not say what is alleged in the specification to the board. He did say that he had told Jessica Brooder that no sexual intercourse had occurred (which is what Jessica Brooder said he told her), but that is distinctly different than telling the board that no sexual intercourse occurred.

The second element of the specification requires that Capt Wacker knew the statement he made was false at the time he made it. The problem here is that Capt Wacker did not make the statement alleged, but assuming his statement “she was masturbating me, and I was masturbating her. That was the extent of it” was the statement at issue (this would constitute an unfair major change to the charge sheet); the Government has to prove that statement was false still. There has been no evidence offered that that statement as alleged was false. Neither Jessica Brooder, Elizabeth Easley or any other witness testified that Capt Wacker engaged in sexual intercourse with Jessica Brooder. All of the evidence was consistent with sexual contact and mutual masturbation, even when viewed in a light most favorable to the Government.

Element 3 requires that Capt Wacker knew the statement was false when he made it. There is no evidence that Capt Wacker ever told anyone that he had sexual intercourse with Jessica Brooder or believed that he had. Evidence supporting Element 3 is totally lacking.

Element 4 requires that Capt Wacker’s statement be made with the intent to deceive. Again, there is no evidence presented that Capt Wacker knew or remembered he had sex with Ms. Brooder, that sex even occurred or that Capt Wacker knew he was lying about sex occurring.

Element 5 requires that under the circumstances Capt Wacker’s conduct was unbecoming of an officer and a gentlemen. Capt Wacker was not under oath during the hearing, nor was his rights read to him. However, he did acknowledge sexual contact with Ms. Brooder and acknowledged placing his hand on her groin area and that she placed her hand on his groin area. This was consistent with the evidence. There is no evidence of deceit here; therefore Element 5 is not proved either.

4. **Relief requested**

That all charges be dismissed because even in a light most favorable to the Government, the Government failed to prove all of the essential elements for these offenses beyond a reasonable doubt.

5. **Evidence and Burden of Proof.**

a. **The defense requests production of the following witnesses by the Government in support of its motion:**

- Not applicable

b. **The following defense exhibits are provided:**

- A - US v. Collins
- B - US v. Woods
- C - Journal Entry page 2
- D - Bill of Particulars of the Government
- E - USD Transcript

c. **Burden of proof:** As the moving party of this motion, the burden of proof in proving all facts alleged in support of this motion falls upon the defense by a preponderance of the evidence.

See RCM 905(c).

6. **Argument.** The defense desires oral argument.

I served this pleading on the parties and the court on this date: 8 March 2011.

/s/

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Detailed Defense Counsel