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

Before
J.A. MAKSYM, J.R. PERLAK, M.W. PEDERSEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KYLE C. COLLINS
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201000020
GENERAL COURT-MARTIAL

Sentence Adjudged: 07 August 2009.
Military Judge: CAPT Keith Allred, JAGC, USN.
Convening Authority: Commanding General 3d Marine Aircraft Wing, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Maj A.L. Daly; USMC.
Addendum: Col K.J. Brubaker, USMC.
For Appellant: Mr. James Culp, Esq.; LT Michael Maffei, JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

17 February 2011

OPINION OF THE COURT

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

PEDERSEN, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault, burglary, and adultery in violation of Articles 120(c)(2)(B), 120(c)(2)(C), 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920(c)(2)(B), 920(c)(2)(C), 929, and 934. The appellant was sentenced on 7 August 2009 to a dishonorable discharge, confinement for three years, and reduction in rank to pay grade E-1. On 23 December 2009, the convening authority approved the sentence as adjudged.

The appellant raises three assignments of error, the second of which was withdrawn during oral argument:

I

WHETHER THE JUDGE ERRED IN ALLOWING EVIDENCE OF UNCHARGED CONDUCT UNDER MIL. R. EVID. 413 WHERE THERE WAS INSUFFICIENT STRENGTH OF PROOF THAT THE UNCHARGED CONDUCT HAD ACTUALLY OCCURRED AS WELL AS INSUFFICIENT EVIDENCE THAT THE UNCHARGED CONDUCT QUALIFIED AS SEXUAL CONTACT.

II

WHETHER THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT WHERE HIS DEFENSE COUNSEL FAILED TO IDENTIFY AND CALL WITNESSES WHO WERE EITHER PRESENT AT THE TIME OF THE ALLEGED UNCHARGED CONDUCT OCCURRED OR WHO HAD PERSONAL KNOWLEDGE OF THE COMPLAINING WITNESS' HISTORY OF FALSE REPORTING OF ALLEGED SEXUAL ASSAULTS.

III

WEHTHER THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR AGGRAVAGTED SEXUAL ASSAULT, WHERE THE EVIDENCE ADDUCED AT TRAIL DOES NOT SUPPORT A FINDING THAT THE ALLEGED VICTIM WAS SUBSTANTIALLY INCAPACITATED.

We have carefully considered the record of trial, the parties' briefs, and oral argument. We determine that, on the basis of the entire record, the finding of guilty of adultery is correct in law and fact and is affirmed. Arts. 59(a) and 66(c), UCMJ. For the reasons stated below, we set aside the convictions for aggravated sexual assault and burglary, and set aside the sentence.

Background

A barracks party took place on board Marine Corps Air Station Miramar on 22 November 2008; almost everyone there was drinking, playing beer pong and having a good time. The victim, Lance Corporal (LCpl) "S", was also drinking. Her friend, and later roommate, Private First Class (PFC) D, concluded that LCpl S was drunk and so PFC D took LCpl S to her barracks room, placed her on her bed fully clothed, and checked on her periodically. The third time PFC D checked on LCpl S, she saw that the appellant was in bed with her, in a spooning position, and both were stripped to the waist. PFC D testified that, "All I said was, 'oh, my bad.'" Record at 155-56. She then left the room, but the sight of the appellant in bed with her friend brought

back PFC D's own memories of being sexually assaulted amidst a drinking binge. Two Marines testified that PFC D then became hysterical and inconsolable. PFC D resolved to get the appellant out of LCpl S's room.

PFC D and one other Marine entered LCpl S's room and chased the appellant out. They noted he appeared surprised. One witness testified that the appellant said, "It's not my fault that I woke up to her sucking my dick." *Id.* at 184. According to PFC D, at that time LCpl S was awake and alert, and said that she felt like a slut, that she never hooked up with guys and stated, "I don't ever do this. I don't ever do this." Record at 171. Shortly after the appellant was removed from her room, LCpl S got dressed and tried to physically attack her assailant. Record at 172.

On cross-examination, LCpl S admitted that at the Article 32, UCMJ, hearing she testified that she remembered playing beer pong and "when I woke up in my room, [the appellant] was on-•he was on top of me and we were having sex. And my friend came in the room and she started yelling. I was really upset." Record at 215. LCpl S testified that the two Marines who entered her room were the people she worked with and spent a lot of time interacting with during the day and they had found her naked in bed with the appellant. *Id.* at 216. LCpl S also admitted that she lied when she testified under oath at the appellant's Article 32 hearing when asked about her underage drinking.

The members heard testimony from a military police sergeant that the appellant said he was helping LCpl S in some way and that she pulled him on top of her. *Id.* at 278. The appellant's roommate, who was not drinking that night, testified that the appellant told him a consistent story of consensual sex, then the victim "just snapped and started freaking out, asking [the appellant] what was going on . . . ." *Id.* at 283. A criminal investigator who interviewed LCpl S testified that she appeared sober and coherent, and told the investigator that she and another friend decided together they should report a rape. *Id.* at 302.

The Government also called a witness pursuant to MILITARY RULE OF EVIDENCE 413, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), SP, who stated that in 2004 or 2005, the appellant and she had been drinking, she was staying in his room and that she: "woke up and found him with his hands down my pants." Record at 289. Trial counsel followed up with the following questions to which SP gave the following answers:

> Q. Now, you say down your pants. Were they underneath your underwear as well?
> A. I assume so.

Q. I mean, do you recall?
A. I don't remember fully. I just remember his hand was there.

Q. Do you remember whether he was penetrating you with his fingers or anything like that?
A. No.

Q. No, you don't remember?
A. I don't remember.

. . . .

Q. How did you feel when you woke up to that?
A. Violated, so I ran outside and had a cigarette and calmed down and went back in after he fell asleep.

Id. at 289-90.

As its last witness, the Government called a toxicology expert, Jon Jemiomek, who testified that based on tests of LCpl S's blood, he estimated her blood alcohol content was approximately 0.18 to 0.23 at the time of the alleged rape. He testified extensively about alcoholic blackouts and stated that at 0.18 to 0.23 percent, persons may experience a fragmentary blackout where:

> they may totally forget or not remember events that occurred over a period of minutes to longer periods of time, half an hour, maybe an hour. They will only have patches, but they are not sure of the framework of how those pieces of information actually fold together. They may not have the sequential patterns down, but they can remember things having occurred.

Record at 362. Mr. Jemiomek also testified that in a blackout state, a person could still interact with others, appear conscious, and appear to be making active decisions, and that another person interacting with that person could not necessarily tell if the drinker was experiencing a blackout. *Id.* at 366. Finally, he testified that passing out occurs at 0.28 to 0.35 percent, a higher level than was involved in this case, and that a person with that amount of alcohol would not be able to dress quickly and play a video game, both of which LCpl S was able to do shortly after PFC D chased the appellant out from her room.

In the defense case, a witness testified that he saw the appellant and LCpl S flirting, and, after everyone had left, at about 2100 or 2200, he found them in a deep kiss with the appellant leaning on a table and LCpl S leaning on him. A military policeman testified that he overheard the questioning of the victim at the barracks shortly after military police arrived,

and recalled her saying that "she was on top and that she also stated that she definitely told him no at some point." *Id.* at 403, 406. Defense counsel read part of LCpl S's Article 32 testimony in which she stated: "I'm saying that the first thing I remember saying to-•well, that I remember saying in the room when everybody was in there was 'oh, my God. I'm such a slut.'" *Id.* at 219. Another military police officer, a female, testified that the victim did not appear to be in any pain and did not complain of any pain. Further, she testified that she repeatedly asked LCpl S if she had been drinking, and LCpl S responded, approximately three times, that she had not. *Id.* at 419.

The appellant was interviewed by a Naval Criminal Investigative Service (NCIS) agent, who recorded the entire interview, and described the appellant as cooperative. The defense played that video recording for the members. The appellant's rendition of events in the interview was that he had gone to the victim's room to retrieve a shirt she had obtained when purchasing liquor, and which was wanted by someone else. While there, he noticed LCpl S was sleeping on top of her blankets, so he took the shirt to the person who wanted it, then returned to the room to cover her, and that was when she pulled him down on top of her, eventually removing her own clothing, and they had sexual intercourse.

The Government's evidence was far from conclusive. In closing, the trial counsel relied heavily on propensity evidence admitted under MIL. R. EVID. 413:

> As a starting off point, it's important to put this case in its proper perspective as the military judge instructed you. There's one witness who came in here, didn't know any of the parties. She's not a friend of [LCpl S]. She's not a co-worker of [LCpl S]. She didn't have any connection to the events of that night.
>
> Now, her testimony was short and the cross-examination of her was minimal, but she provides a very important insight into the character of the accused. She explained for us a little bit about this man. He has a propensity to commit sexual assault especially against an intoxicated victim.

Id. at 454. Trial counsel's discussion of this propensity evidence continues for two additional paragraphs and ends with: "He's done it before. It is through that lens that you should view the elements in this case." *Id.* at 455. Later in his closing, the trial counsel reminded the members: "Once again, we're still viewing this under the lens of what [SP] told us, that she was passed out, when she was drunk he did this to her." *Id.* at 464-65. Still later, he said: "[The appellant] went back in there to take advantage of [LCpl S] just like he did with

[SP]." *Id.* at 466.

Factual and Legal Sufficiency of the Evidence

Under Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), this court has the duty to determine, *inter alia*, the sufficiency of the evidence. As we recently stated:

> 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (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.

United States v. Spicer, No. 201000241, 2010 CCA LEXIS 397 (N.M.Ct.Crim.App. 21 Dec 2010). On the aggravated sexual assault charge, the Government had the burden to show that the accused engaged in a sexual act with LCpl S and that LCpl S was substantially incapacitated. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(3)(c). No question exists that the appellant engaged in a sexual act with LCpl S. We have a reasonable doubt that LCpl S was incapacitated at the time she and the appellant engaged in sexual intercourse.

As outlined above, PFC D discovered LCpl S in bed naked with the appellant and after leaving the room PFC D became hysterical and inconsolable. According to LCpl S, when PFC D entered her room to chase out the appellant, PFC D started yelling. LCpl S's reaction was "that she felt like a slut, that she never hooked up with guys and, 'I don't ever do this. I don't ever do this.'" Not long after this confrontation, LCpl S got dressed, left her room and tried to physically attack the appellant. The Government's toxicologist established that although LCpl S may have consumed enough alcohol to experience fragmentary blackouts, she could still have interacted with others, appeared conscious, and appeared to be making active decisions. He also testified that someone in the appellant's position could not necessarily tell if LCpl S was experiencing a blackout. Finally, as stated above, he testified that passing out occurs at 0.28 to 0.35 percent, a higher level alcohol than was involved in this case, and that a person with that amount of alcohol would not be able to dress quickly and play a video game, both of which LCpl S was

able to do shortly after PFC D chased the appellant out from the room.

In his closing, trial counsel relied heavily on SP's testimony, asking the members to conclude that since the appellant had committed a sexual assault in the past on SP, he must be guilty of sexual assault in this case. SP's testimony, however, was weak, and only minimally established that the appellant had sexual contact with her. *See* MIL. R. EVID. 413(f).[1]

The appellant told the NCIS agent that he went to LCpl S's room to cover her after seeing that she was uncovered when he had been in the room earlier to retrieve a shirt. Though the appellant did not testify at trial, his entire NCIS-video-recorded statement was played for the members. The appellant's roommate testified that the appellant told him a story consistent with the one the appellant told NCIS. A witness overheard LCpl S state during questioning that "she was on top" and another witness testified that the appellant stated that he woke to LCpl S's performance of oral sex on him. The defense theory was that PFC D's reaction to finding the appellant and LCpl S naked in bed together presented a plausible avenue for LCpl S to avoid embarrassment in front of her peers by reporting a sexual assault. LCpl S's disregard of her oath at the Article 32 hearing makes her an unreliable witness. We cannot conclude beyond a reasonable doubt that LCpl S was incapacitated at the time she and the appellant engaged in sexual intercourse. The sexual assault conviction must be set aside.

Although not raised as an error, because of our setting aside of the sexual assault conviction, we must address the burglary charge. One of the elements of a burglary charge is that the breaking and entering was done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a, UCMJ. MCM, Part IV, ¶ 55b. Adultery is punishable under Article 134, UCMJ. MCM, Part IV, ¶ 62. Even if the appellant intended to commit adultery when he entered LCpl S's room, that offense is not encompassed under the burglary charge. The lesser included offense of housebreaking in Article 130, UCMJ, does not contain the same offense-specific limitation, MCM, Part IV, ¶¶ 55d(1) & 56c(1), and requires only that the accused

[1] Though not necessary to our decision in this case, we caution that a military judge should instruct the members on the proper use of MIL. R. EVID. 413 evidence. *See, e.g., United States v. Dacosta*, 63 M.J. 575, 582-83 (Army Ct.Crim.App. 2006)("Without guidance regarding the proper use of Rule 413 evidence of other sexual assaults, panel members would be left to guess how that evidence should impact their decision regarding findings on the offenses charged . . . An appellate court would also be unable to determine upon which evidence (*e.g.*, 'propensity') a panel based its findings of guilty. We find the duty to provide this guidance is included in the role of a military judge who 'is more than a mere referee, and as such [she] is required to assure that the accused receives a fair trial.')(internal citations and footnote omitted).

unlawfully entered a certain building or structure of a certain other person; and that the unlawful entry was made with the intent to commit a criminal offense therein. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 56b. With regard to intent, the Manual further states: "If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry." *Id.* at ¶ 56c(2). However, the Manual does not require that the inference be made, *see United States v. Smith*, No. 200900079, 2010 CCA LEXIS 25, *8 (N.M.Ct.Crim.App. 9 Mar 2010), and the only evidence of the appellant's intent upon entering LCpl S's room was to retrieve a shirt, then cover her with a blanket. Therefore, we also have a reasonable doubt as to the appellant's intent to commit an offense when he entered LCpl S's room.

Conclusion

Accordingly, we affirm only the finding of guilty as to adultery Charge III and its specification. We set aside the findings of guilty for aggravated sexual assault and burglary dismiss Charges I and II and the specifications thereunder, and set aside the sentence. The record of trial is returned to the Judge Advocate General for remand to the same or a different convening authority, who may order a rehearing on the sentence. If a rehearing on the sentence is deemed impracticable, a supplemental court-martial order should be issued reflecting that determination and the convening authority may approve a sentence of no punishment, in accordance with R.C.M. 1107(e)(1)(C)(iii) and *United States v. Montesinos*, 28 M.J. 38, 47 (C.M.A. 1989).

Senior Judge MAKSYM and Judge PERLAK concur.

R.H. TROIDL
Clerk of Court

Judge PEDERSEN participated in the decision of this case prior to detaching from the court.