

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**PALANKA R. ROUMER
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100081
GENERAL COURT-MARTIAL**

Sentence Adjudged: 15 October 2010.

Military Judge: Col Michael Richardson, USMC.

Convening Authority: Commanding General, 3d Marine Aircraft
Wing, Marine Corps Air Station Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Maj B.M. Wilson,
USMC.

For Appellant: LT Jentso Hwang, JAGC, USN; CAPT Michael
Berry, JAGC, USN.

For Appellee: Capt Paul Ervasti, USMC.

31 January 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

MAKSYM, Senior Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault and one specification of forcible sodomy in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C.

§§ 920 and 925. The members sentenced the appellant to a bad-conduct discharge and a letter of reprimand. The convening authority (CA) approved the sentence as adjudged.¹

The appellant assigns two errors: (1) the evidence was factually and legally insufficient to prove beyond a reasonable doubt that the appellant was guilty of aggravated sexual assault and sodomy; (2) the military judge erred to the prejudice of the appellant when he failed to instruct on the affirmative defense of "advanced consent."

We have examined the record of trial, the appellant's assignments of error, and the 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 was a Marine Corps corporal temporarily assigned to complete cold weather mountain training at Creech Air Force Base, Las Vegas, Nevada. On the evening of 14 February 2009, the appellant went to a bar where, after consuming a number of drinks, he met the female victim, Air Force Senior Airman JC, and danced with her for some time. JC had also been drinking that night. The appellant and JC eventually left the bar together, went to the appellant's room, where the appellant had a sexual encounter with JC. At some point during the encounter, JC pushed the appellant off of her, got dressed, and ran from the room. JC claimed the encounter was not consensual.

Legal and Factual Sufficiency

In his first assignment of error, the appellant alleges that the convictions for aggravated sexual assault and forcible sodomy were not factually or legally sufficient. We disagree.

In accordance with Article 66(c), UCMJ, this court reviews issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011)

could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991).

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, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)

The elements of aggravated sexual assault the Government was required to prove in this case were: (1) that the appellant engaged in a sexual act with JC; and (2) that JC was substantially incapacitated. Art. 120, UCMJ. The elements of forcible sodomy that the Government was required to prove were: (1) that the appellant engaged in unnatural carnal copulation with JC; (2) that the act was done by force and without consent of JC. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person, or to place that person's sexual organ in the mouth or anus of another person. Art. 125, UCMJ.

We find that a rational trier of fact could have found that the essential elements of aggravated sexual assault and forcible sodomy were satisfied, and we are convinced beyond a reasonable doubt of the appellant's guilt.

The Government produced the testimony of JC, who stated she did not remember large parts of the evening, but that she remembered dancing with the appellant, walking down a hallway, and then waking up without any clothes on with the appellant on top of her having sex with her. Record at 506. She also remembers pushing the appellant off of her, getting dressed, and running to a flight of stairs, making calls on her cell phone seeking help, and once she got an answer from Sergeant KE, a service member who was staying in the hotel, and running to his room. *Id.* at 506-08.

The Government produced the testimony of KE, a former Marine who knew both the appellant and JC and was with both at the bar in the night in question. KE testified that he saw the two dancing together at the bar earlier in the evening. *Id.* at

483-85. KE also testified that JC had called him in distress and that he had witnessed JC running down the hall towards his room in a frantic state. *Id.* at 486, 488.

The Government also produced the typed confession of the appellant. In it he admits to having sex with JC during a approximately 15-minute period of time after he believed she had passed out, was not moving, was not speaking, and did not say or do anything. Prosecution Exhibit 1. The appellant also admitted to putting his penis in her mouth. *Id.* The confession included the following question and answer exchanges with Special Agent (SA) Tommervik of NCIS:

SA Tommervik : Was [JC] unconscious when you initially inserted your penis into her vagina?

Appellant: Yes, she was unresponsive.

SA Tommervik : Did you know it was wrong to put your penis inside [JC]'s vagina while she was unconscious?

Appellant: Yes.

SA Tommervik : On a scale of 1 to 10, what was [JC]'s intoxication level in your opinion?

Appellant: 8

SA Tommervik : With Jessica's intoxication level [at] an 8, is she coherent enough to give consent for you to have sexual intercourse with her?

Appellant: No.

PE 1.

There was evidence produced at trial that JC had previously lied about being raped by another man. Record at 509, 535. Other evidence indicated that she returned to the same bar to drink and dance on two occasions during the week following the incident at bar. *Id.* at 526-27. There was also evidence of inconsistencies in the various statements JC gave regarding the pertinent evening's events. Finally, the defense produced an expert who testified that based on JC's own statements concerning the number of drinks she consumed on the night in question, she would not have been rendered intoxicated to the point of unconsciousness. *Id.* at 694-702. However, there were varying accounts from different witnesses relative to the number and types of drinks JC drank that evening. It is well-settled that proof beyond a reasonable doubt does not mean that the evidence must be free of conflict. *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).

Ultimately, while the record betrays the existence of some conflicting evidence as to the victim's level of intoxication, we note that the appellant confessed in detail to having sex with JC and placing his penis in her mouth after she had passed out and without her consent. Moreover, the behavior of JC after regaining consciousness, corroborated by several witnesses, is wholly consistent with her substantive version of events. We have considered the appellant's argument that his confession was the result of manipulation, and we find that the record fails to support his contention. After reviewing the record, we find that a rational trier of fact could have found that the essential elements of aggravated sexual assault and forcible sodomy were satisfied, and we are ourselves convinced beyond a reasonable doubt as to the appellant's guilt.

Instruction on "Advanced Consent"

In the appellant's second assignment of error, he asserts the military judge erred to his prejudice when he failed to give a requested instruction on "advanced consent." We disagree.

We review allegations of instructional error *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). When evidence is adduced during the trial which "reasonably raises" an affirmative defense or a lesser included offense, the trial judge must instruct the court panel regarding that affirmative defense or lesser included offense. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire. *Id.* Any doubt whether an instruction should be given should be resolved in favor of the accused. *Id.*

The appellant states that his position is that "JC gave him advanced consent to have sex with her while she was in an intoxicated state, but far short of unconsciousness - drunk". (Appellant's Brief of 13 May 2011 at 24). However, the appellant was not convicted of having a sexual encounter with someone who could consent, he was convicted of having a sexual encounter with someone who could not consent or withdraw consent because they were substantially incapacitated. In *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011), the Court of Appeals for the Armed Forces rejected a similar argument remarking that the assertion that consent given before a victim

became substantially incapable continues to be valid throughout the period of incapacity runs counter to the definition of consent in Article 120(t)(14), UCMJ. The court also noted "Consent requires a freely given agreement by a competent person". *Id.* Here the appellant asks us to recognize an affirmative defense that is not supported by recent military case law.

Even if an affirmative defense of "advanced consent" does exist, we find no evidence that reasonably raises such a defense. The appellant's own confession establishes he initiated the sexual encounter after JC passed out and was not moving or speaking, and that JC was not coherent enough at the time to give consent. PE 1. The appellant's brief does not argue that he received advanced consent to have sex with JC while she was passed out or unconscious. Appellant's Brief at 24.

Conclusion

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

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court