UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSHUA B. HILYARD
United States Air Force

ACM 35241

17 February 2005

Sentence adjudged 8 May 2002 by GCM convened at Tyndall Air Force Base, Florida. Military Judge: Ann D. Shane.

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MALLOY, Senior Judge:

We have examined the record of trial, the three assignments of error, and the government's response thereto, and conclude no relief is warranted. The appellant argues that the evidence is legally and factually insufficient to support his conviction for rape and burglary. Legal sufficiency is a question of law that the Court reviews de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). 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 elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Here,

there is sufficient competent evidence in the record of trial to find legal sufficiency to support the member's finding that (1) the appellant raped Airman First Class AR as she lay in her bed incapacitated by alcohol, and (2) he did so after entering her locked dormitory room, in the dark of night, through a partially opened (but screened) window with the intent to commit the offense of rape.

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, as did the trial court, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). Applying this standard, we are convinced of the appellant's guilt beyond a reasonable doubt of all three of the offenses of which he was convicted.

We also hold that the military judge did not err in refusing to give instructions on the defenses of mistake of fact and voluntary intoxication in respect to the rape specification. *See United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003), *cert. denied*, 539 U.S. 928 (2003). It is firmly established that rape is a general intent crime. *Id*. at 72. Mistake of fact is an affirmative defense to rape if the mistake is both honest and reasonable. *Id*. In this case, the military judge correctly determined that neither the defense of voluntary intoxication nor the defense of mistake of fact was raised by the evidence in respect to the rape charge. *See Hibbard*, 58 M.J. at 75-77; Rule for Courts-Martial (R.C.M.) 916(j)(1) and 916(l)(2). There is not a scintilla of evidence in the record to support the proposition that the appellant honestly and reasonably believed the victim was consenting to sexual intercourse after he surreptitiously removed the screen from her window under the cover of darkness, entered her locked room, placed his hand on her lower back with sufficient force to leave a bruise, penetrated her vagina with his penis from the rear as she lay face down on her bed impaired by alcohol, and then left after ejaculating, without a word to the victim. The appellant's defense at trial was actual consent based on the incapacitated victim's lack of resistance and not mistake of fact. *See United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995) ("mistake-of-fact instruction is not warranted where the evidence raises and the parties dispute only the question of actual consent"). Here, the members were properly instructed on the elements of rape and determined that the victim did not consent.

Finally, we hold that the record of trial was not rendered incomplete based on the military judge's decision not to attach a government pretrial discovery motion and the defense response to the record of trial. Although the military judge was provided with copies of these documents before trial, the parties resolved the matter without her intervention and, therefore, the matter was never raised before the court. Both counsel

agreed that there was no need to address the matter raised in the motion and no need to attached the documents to the record.

We review de novo the question of whether a record of trial is complete. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). Counsel are, of course, expected--indeed obligated--to cooperate before trial and engage in reciprocal discovery without the need for judicial intervention. It appears that is precisely what happened in this case. There is no requirement that every piece of paper exchanged between trial and defense counsel during the pretrial discovery process be attached to the record of trial. *See* R.C.M. 1103. We hold there was no substantial omission from the record of trial as a result of the military judge's decision. The record of trial is both verbatim and complete. The appellant's assertion to the contrary is without merit.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court