UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RICHARD L. JACKSON
United States Air Force

ACM 36482

17 July 2007

Sentence adjudged 4 August 2005 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Bruce T. Smith.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BRAND, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of rape and assault consummated by a battery, in violation of Articles 120 and 128[1], UCMJ, 10 U.S.C. §§ 920, 928. His approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to the grade of E-1.

The appellant alleges three errors. The first error is whether the evidence is legally and factually insufficient to sustain the appellant's conviction for the rape of

---

[1] This is the subject of the second assigned error, which is discussed later in this opinion.

Airman (Amn) CS where the prosecution failed to prove Amn CS was incapacitated to the point where she lacked the ability to consent to sexual intercourse with the appellant.

Amn CS testified as to the events in question. The trial defense counsel called an expert witness to discuss the effects of Motrin 800. Motrin 800 was the only substance Amn CS took that night before she fell asleep, and she did not awaken again until the appellant was inserting his penis into her. In addition, the appellant provided a written statement to investigators in which he stated, "I did notice that she really didnt (sic) move or say anything so maybe she is asleep ..." and "I said to myself if your (sic) gonna do this here is your chance so I put the condom on and right before I got a little penetration I hear a wimper (sic) ..."

We carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for rape. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

The second error raised is that it was plain error for the military judge to read an erroneous definition of proof beyond a reasonable doubt to the court members, where the definition the military judge read to the members lowered the burden of proof required to prove the appellant's guilt. The definition the military judge read was verbatim from Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (1 Jul 2001). There was no objection to the instruction given by the military judge.

The question of whether the members were properly instructed is a matter of law we review de novo. *United States v. Green,* 62 M.J. 501, 503 (A.F. Ct. Crim. App. 2005), (citing *United States v. Maxwell,* 45 M.J. 406, 424 (C.A.A.F. 1996)). A failure to object to an instruction prior to commencement of deliberations waives the objection absent plain error. Rule for Courts-Martial 920(f); *United States v. Simpson,* 56 M.J. 462, 465 (C.A.A.F. 2002). The instruction given, although not the standard Air Force instruction, was a correct statement of the law, and even if there was any error in the instruction, it was definitely not plain error.

Finally, the appellant avers that the appellant's conviction of Charge II[2] must be set aside where the members acquitted the appellant of every specification of the charge but nevertheless found him guilty of the charge, and the error was not corrected, thereby resulting in an erroneous court-martial order. Although the assertion is technically correct, it is also clear the members found the appellant not guilty of Specification 2 of

[2] Actually, the brief says Charge III; however, there were only two charges.

Charge II, but guilty of assault consummated by a battery, in violation of Article 128, UCMJ.

The announcement of a verdict "is sufficient if it decides the questions in issue in such a way as to enable the court intelligently to base judgment thereon and can form the basis for a bar to subsequent prosecution for the same offense." *United States v. Perkins,* 56 M.J. 825, 827 (Army Ct. Crim. App. 2001) (quoting *United States v. Dilday,* 47 C.M.R. 172, 174 (A.C.M.R. 1973)). Informalities or inaccuracies in a verdict are immaterial if the court members' intent is clear. *United States v. King,* 50 M.J. 686, 688 (A.F. Ct. Crim. App. 1999) (citing *United States v. McCready,* 17 C.M.R. 449 (A.B.R. 1954)).

It is apparent that the members, although following the incorrectly prepared findings worksheet, misspoke when they announced the finding as to Charge II. The clear intent of the members was to find the appellant not guilty of a violation of Article 134, UCMJ, 10 U.S.C. § 934, but guilty of a violation of Article 128, UCMJ. We clarify this issue by finding the appellant not guilty of Charge II, a violation of Article 134, UCMJ, but guilty of the lesser included offense in violation of Article 128, UCMJ. As the findings of the members are clear, there is no reason for reassessment of the sentence in this case. *See* Article 59 (a)-(b), UCMJ, 10 U.S.C. §859.

The findings, as modified, and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator