UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CALVIN L. NOLAN
United States Air Force

ACM 36632

13 September 2007

Sentence adjudged 16 September 2005 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Nancy J. Paul.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

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

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

The appellant was tried at Nellis Air Force Base (AFB), Nevada, by a general court-martial composed of officer and enlisted members. Contrary to his plea, the appellant was found guilty of rape in violation of Article 120, UCMJ, 10 U.S.C. § 920. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends that (1) the evidence is legally and factually insufficient to sustain his conviction; and (2) the military judge erred by failing to give a

mistake of fact instruction.[1] We have examined the record of trial, the assignments of error, and the government's response. We find no merit in the assignments of error and affirm.

The appellant also notes that the General Court-Martial Order, dated 27 January 2006, incorrectly states that the sentence was adjudged by a panel of officers. We order that a new court-martial order be accomplished to correctly reflect the composition of the court-martial.

Legal and Factual Sufficiency

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the elements of the offense proven beyond a reasonable doubt. For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The record is legally and factually sufficient to establish the appellant's guilt. The offense of rape consists of just two elements: (1) an act of sexual intercourse committed by an accused; and (2) execution of the act of sexual intercourse by force and without consent of the victim. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45b(1) (2005 ed.). Airman First Class (A1C) KB, the victim, testified that on the evening of 9 October 2004 she was with her boyfriend, Airman (Amn) M. They decided to spend the evening with the appellant and A1C W, who were suitemates with Amn M. The group went to the Shoppette on Nellis AFB, where the appellant, being the only one over the age of 21, purchased the alcoholic beverages. They returned to the dormitory and began playing drinking games. A1C KB testified that during the evening she did not flirt with the appellant and did not give him any indication that she was interested in him in any way. A1C KB related that she was not a regular drinker, and at one point she began to feel nauseous, light-headed, and she described having tunnel vision. She went to lie down on Amn M's bed, but ended up lying down on the floor next to the bed. A1C KB testified that the next thing she remembered was waking up in Amn M's bathroom. She said the appellant was on the floor with her with his pants down, and he was thrusting his penis into her vagina. She screamed for her boyfriend, and the appellant tried to put his hand over her mouth. The appellant then took a towel or cloth and wiped A1C KB's genital area. She related that the appellant then got up, turned the bathroom

[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

light off and left. Shortly thereafter she said she heard the appellant saying, "She doesn't know what she's talking about. She's drunk." And then, "It was just a bad dream." The Security Forces arrived on the scene, and A1C KB was transported by an ambulance to a local hospital, where an examination revealed a small tear in her vaginal wall. A semen sample taken during the exam matched the DNA profile of the appellant.

A1C W, who described himself as a friend of the appellant, testified that although he saw A1C KB and the appellant dancing together, he saw no indication that she was flirting with the appellant. He stated that during the evening he and the appellant went outside, leaving A1C KB in the dorm. When A1C W and the appellant went back inside to check up on the others, they found A1C KB passed out on the bathroom floor, curled up by the toilet. A1C W said it looked as though she had been vomiting, that her eyes were closed, and that she was not saying anything. The appellant and A1C W carried A1C KB into a bedroom and placed her on a bed. When she began to make motions as if she were going to vomit again they carried her back into the bathroom. The appellant was sitting down and holding A1C KB's head up to the toilet bowl. A1C W described A1C KB as being limp, dead weight, and not having any control over her body. During the process of getting A1C KB back into the bathroom, her eyes never opened and she never said anything. A1C W said that he began to feel sick himself, and left the appellant and A1C KB in the bathroom.

The appellant asserts that the evidence is legally and factually insufficient to support a conviction because the government did not prove the intercourse was by force and without the consent of A1C KB. Appellant's argument rests on the inability of A1C KB to remember parts of what happened during the evening. For example, A1C KB said she did not remember dancing with the appellant, and did not remember going into the room of an Airman Basic (AB) K, although AB K testified that she did so during the evening. In his brief the appellant points out that A1C KB had no recollection of what happened between the time she passed out on the floor next to Amn M's bed and waking up to find the appellant having sex with her. He asserts the possibility exists, therefore, that A1C KB could have consented, or might have given the appellant the impression that she consented.

We have carefully reviewed the record of trial and conclude there is no question that the government presented legally sufficient evidence to support the findings in this case. The appellant's argument is pure speculation, and unsupported by the evidence, which indicates A1C KB was unconscious and incapable of consenting. We find that reasonable court-members, having heard all the evidence, and having been properly instructed by the military judge, could have found beyond a reasonable doubt that the appellant raped A1C KB. Furthermore, after reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of rape.

Mistake of Fact Instruction

The appellant alleges that the military judge erred by not *sua sponte* instructing the members on the mistake-of-fact defense. The appellant again maintains, as he did above, that because A1C KB did not know what happened between the time she passed out and when she awoke to find the appellant having sex with her there is a possibility that she consented to the sex, or gave the impression to the appellant that she was consenting.

An "honest and reasonable mistake of fact as to the victim's lack of consent" is an affirmative defense to a rape charge. *United States v. True*, 41 M.J. 424, 426 (C.A.A.F. 1995). A military judge must instruct the court members on an affirmative defense if there is some evidence in the record to which the members may attach credit if they desire. An affirmative defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. Rule for Courts-Martial 916(b), Discussion.

We are convinced that there was no evidence admitted from which reasonable court members could infer that A1C KB consented to having sexual intercourse, and no evidence to support that the appellant had a reasonable and honest belief as to consent. Therefore, a mistake-of-fact instruction was not required.

Conclusion

Preparation of a corrected court-martial order, properly reflecting the composition of the court-martial is hereby directed. The 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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court