UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant TRAVIS M. WINNINGHAM
United States Air Force

ACM 36033

26 July 2006

Sentence adjudged 22 May 2004 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: Barbara E. Shestko.

Approved sentence: Dishonorable discharge, confinement for 6 months, and reduction to E-3.

Appellate Counsel for Appellant: William E. Cassara, Esq. (argued), Colonel Carlos L. McDade, Colonel Nikki A. Hall, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Major Lane A. Thurgood (argued), Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Michelle M. McCluer, and Major Jin-Hwa L. Frazier.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

Contrary to his plea, the appellant was convicted of one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. A general court-martial consisting of officer members sentenced the appellant to a dishonorable discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-3. The convening authority approved the findings and sentence as adjudged except for the forfeitures.

The appellant raises three errors for our consideration: (1) Whether the evidence adduced at trial is legally and factually sufficient to sustain the appellant's conviction for rape; (2) Whether the government failed to fulfill its obligation to disclose exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and, (3) Whether the convening authority erred by refusing to order a post-trial 39(a), UCMJ, 10 U.S.C. § 839(a), session to resolve the issues posed by the government's denial of the appellant's due process rights under *Brady*. Having found error, we set aside the findings and sentence.

Background

On 23 August 2003, Mrs. LM (the victim) hosted a farewell party for Technical Sergeant (TSgt) DE and his wife, Mrs. JE, in her on-base residence at Goodfellow Air Force Base, Texas. The appellant and his wife, Mrs. SW, who lived next door, were invited and attended the party. TSgt JT and his wife Mrs. PT, Master Sergeant (MSgt) LH and her daughter, and MSgt JH also attended the party. The party started at 1800 hours and lasted until approximately 0045 hours the next morning. During dinner, Mrs. LM consumed one strawberry daiquiri. At approximately 2100 hours, Mrs. LM went upstairs to put her children to bed. In her absence, the group decided to play a drinking game. When Mrs. LM returned to the party, she participated in the drinking game and began to drink strawberry daiquiris pretty heavily.

Throughout the evening, many of the guests danced with one another. Mrs. LM asked the appellant to teach her how to dance, so they danced together for a couple of songs. The appellant was also seen talking one-on-one with Mrs. LM outside on the patio for approximately ten minutes.

Within an hour of putting her children to bed, Mrs. LM became very intoxicated. Mrs. JE, Mrs. LM's best friend, testified Mrs. LM's head was bobbing, her speech was slurred, she was bumping into furniture and running into objects, and even knocked over a plate of food. In light of Mrs. LM's intoxicated state, Mrs. JE[1] decided to take Mrs. LM to her bedroom. Mrs. PT and Mrs. JE escorted Mrs. LM upstairs to her bedroom. They removed Mrs. LM's shorts and her bra, but left her shirt and underwear on. They placed a bowl on the bed near her arm in the event Mrs. LM had to vomit. When they left her room, they met the appellant on the stairway landing. He inquired about Mrs. LM's well-being. Mrs. JE told him Mrs. LM was all right. In spite of her assurances, the appellant peeked into Mrs. LM's bedroom, then closed the door and checked on the children. He, Mrs. JE, and Mrs. PT all went back downstairs to the party. At that point, Mrs. JE announced to the guests that she was going to leave Mrs. LM's backdoor unlocked so she could get in, in case of an emergency. Before leaving Mrs. LM's house

[1] According to TSgt JT, the only sober person at the party, he noticed that the alcohol had taken effect on Mrs. LM and that she could no longer stand up. He told his wife and Mrs. JE to put Mrs. LM to bed.

that night, the appellant twice asked Mrs. JE whether she was going to leave the back door unlocked.

The next morning, Mrs. LM awoke in her bed without her underwear on. She also noticed a bowl and a towel[2] on the floor. Upon realizing all this, she immediately wondered what had happened. Due to the amount of alcohol that she had consumed, Mrs. LM testified she blacked out that night and could not recall many of the details from that evening. The last memory she recalled was seeing a man whom she believed was her husband.[3] This man however was not her husband and instead was the appellant. He was standing in her bedroom apologizing to her.

After getting out of bed, she first called Mrs. JE, and after a while, called her father and a friend in Kansas. Mrs. JE came right over and explained how she and Mrs. PT put her to bed and had left the back door unlocked the previous night. Mrs. LM then asked Mrs. JE to go upstairs to the bedroom with her so she could walk her through how she woke up. That was when she realized there was a stain on the bed sheet where she had previously laid.

Later that morning, the appellant's wife, Mrs. SW, came over to Mrs. LM's house. They started talking and that is when Mrs. SW told Mrs. LM that the appellant had made an odd statement to her. The appellant had asked his wife, "How are you going to be able to look at [Mrs. LM]?" Mrs. SW also said the appellant slept on the couch that night. While the ladies were discussing this matter, Mrs. LM saw the appellant watching them from a distance. She decided to confront him and ask what had happened the previous night. When she asked him, he avoided making eye contact. She asked whether he was in her room last night. He said nothing. When she repeated her question, he uttered under his breath something like, "No, were you?" She then asked, "If you weren't in my room, then why the hell were you in my room apologizing to me?" He nodded three times, looked at the ground, and shrugged his shoulders.

Later that afternoon, Mrs. LM went to the hospital and a nurse conducted a sexual assault examination and collected evidence, to include: oral swabs, an oral smear, hair combings, a vaginal smear, a vaginal swab, anal swabs, an anal smear, saliva swabs, blood tubes, and her panties. A blood sample was subsequently taken from the appellant to compare with the deoxyribonucleic acid (DNA) evidence from Mrs. LM's sexual assault kit. DNA was extracted from the vaginal swab (Mrs. LM) and the blood sample (the appellant). The vaginal swab contained semen, but no sperm. The extracted DNA was analyzed to determine if the blood sample donor could be the donor of the semen

[2] There is much controversy over the location of the towel. Apparently, Mrs. LM and her husband routinely used a towel on the bed when they engaged in sexual intercourse so as not to stain their sheets. Mrs. LM was adamant that the towel was on the floor. The defense maintains the towel was on the bed which is indicia that Mrs. LM consented to the sexual intercourse.

[3] Her husband was on a temporary duty at a fire chiefs' conference at the time and was not present at the party.

found on the vaginal swab. The forensic expert testified, "[t]he ultimate conclusion is that [the appellant] is not excluded as a donor of the genetic material coming from the semen identified on the vaginal swab."[4]

Factual and Legal Sufficiency

The appellant asserts the evidence is legally and factually insufficient to sustain a conviction for rape. Specifically, he alleges there was no direct evidence introduced to prove sexual intercourse took place. As the appellant points out, the nurse who performed the sexual assault examination of Mrs. LM and the forensic expert who analyzed the sexual assault kit, testified that vaginal swabs were examined, but both failed to testify as to the origin of the vaginal swabs, i.e. whether the swabs were taken from within the vagina or from around it. Further, Mrs. LM testified she did not know whether she had had sexual intercourse that night. In fact, she testified that she was "clueless" when asked whether it felt like she had had sex. In addition to the lack of direct evidence, Mrs. LM's credibility was attacked at trial. She emphatically maintained when she awoke the next morning, that she was naked below the waist, that there was a stain on the bedsheets, and a towel on the floor. However, the nurse testified that Mrs. LM told her the towel was on the bed.

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, 324-25 (C.M.A. 1987). 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, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. After reviewing the entire record, we are convinced of the appellant's guilt beyond a reasonable doubt.

We agree with the appellant's assertion that there is no direct evidence of rape. However, *direct* evidence of sexual intercourse is not required to sustain a rape conviction. "As in virtually all factual matters, we are free to rely on circumstantial evidence alone." *United States v. Sanchez*, 59 M.J. 566, 569 (A.F. Ct. Crim. App. 2003), *aff'd*, 61 M.J. 330 (C.A.A.F. 2005). The circumstantial evidence in this case is overwhelming. The nurse testified that she used a speculum to conduct the internal genital examination. She collected samples for testing using a vaginal swab. The DNA evidence from the vaginal swab was examined and compared to a DNA sample from the appellant and he was not excluded as a donor. Moreover, on the night in question, the appellant showed a peculiar interest in "checking up" on the victim after she was put to

[4] There are three possible results for such tests: (1) inconclusive (a comparison could not be made); (2) "the individual IS excluded as a donor of the genetic material"; or (3) "the individual is NOT excluded as a donor of that genetic profile."

bed. Also, there was testimony that Mrs. LM was so intoxicated that she had to be taken upstairs in light of her condition, and that she was "dead weight" and had to be picked up and put on her bed by her two friends. After having been put to bed with underwear on, the victim woke up the next morning without any; she found them later mixed in with her bed covers. Finally, there was a stain on the bed sheets that was whitish in color and in the location where Mrs. LM's vaginal area would lie, which we find consistent with sexual intercourse.[5]

Furthermore, we are convinced that consent is not at issue in this case. Based on the testimony provided by witnesses at the party, as well as the forensic toxicologist who testified at trial, Mrs. LM was intoxicated to the point that she was "unable to resist because of the lack of mental or physical faculties." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45c(1)(b) (2005 ed.).[6]

Before the court members deliberated, the military judge directed them to weigh and evaluate the evidence and to utilize their common sense, their knowledge of human nature, and the ways of the world. Further, he instructed, "Evidence may be direct or circumstantial. . . . circumstantial evidence is evidence, which tends to directly prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. In the absence of evidence to the contrary, court members are presumed to have followed the military judge's instructions. *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006) (citing *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993)).

Finally, despite the attack on Mrs. LM's credibility, "[p]roof beyond a reasonable doubt . . . does not mean that the evidence must be free of conflict." *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). Thus, taking into consideration the overwhelming circumstantial evidence, as well as making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt that the appellant raped Mrs. LM. Therefore, we find the evidence adduced at trial is legally and factually sufficient to sustain the appellant's conviction for rape. *See Turner*, 25 M.J. at 324-25.

Exculpatory Evidence

The appellant also asserts the government failed to disclose exculpatory evidence in violation of *Brady*, 373 U.S. at 83. The evidence at issue are the statements Staff Sergeant (SSgt) KQ made to the prosecutor about his conversation with Mrs. LM several months after the rape. The defense alleges Mrs. LM asked SSgt KQ whether he had

[5] Not only were the panel members convinced beyond a reasonable doubt that sexual intercourse had taken place, even the trial defense counsel practically conceded the fact in his closing argument: "Now they may have proven the first element, that sexual intercourse occurred."

[6] This provision is the same as that contained in the 2002 edition that was in effect at the time of trial.

heard what had happened to her at the August 2003 party. SSgt KQ said he had not. According to SSgt KQ, Mrs. LM told him that she was dancing with the appellant and sitting on someone's lap. Additionally, she told SSgt KQ that she awoke the next morning without her underwear and that there was a towel on the bed.

The government concedes that had SSgt KQ had a conversation with Mrs. LM some months after the rape, the evidence could have been potentially exculpatory and would have had to have been disclosed to the defense. However, the prosecutor who interviewed SSgt KQ, as well as the victim, emphatically deny SSgt KQ's version of events.[7] Mrs. LM avers in a post-trial affidavit that she did not tell SSgt KQ that she remembered dancing with the appellant or sitting on some man's lap. In addition, the trial counsel also provided his notes from his interview of SSgt KQ. His notes indicated SSgt KQ spoke with the appellant about the incident soon after the appellant had met with agents from the Air Force Office of Special Investigations. According to SSgt KQ, the appellant told him that he and Mrs. LM engaged in consensual sexual intercourse and that she was awake throughout it. The government did not identify SSgt KQ or provide the appellant's counsel with statements the appellant made to SSgt KQ.

Even if we decide SSgt KQ did not provide details concerning Mrs. LM dancing with the appellant or sitting on someone's lap to the trial counsel, we still must determine whether the government violated *Brady* when it failed to inform the defense of SSgt KQ's identity or provide the statements the appellant made to SSgt KQ. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Rule for Courts-Martial (R.C.M.) 701(a)(6) requires:

> [T]he trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
>
> (A) Negate the guilt of the accused of an offense charged;
>
> (B) Reduce the degree of guilt of the accused of an offense charge; or
>
> (C) Reduce the punishment.

While we find no evidence of bad faith, the government possessed evidence that should have been provided to the defense. The appellant's statements to SSgt KQ were

[7] This testimony, if true, would be relevant in that it would cast doubt on Mrs. LM's assertion that she suffered an alcohol induced blackout that night which caused her to not remember many of the details, to include the actual act of sexual intercourse.

evidence of a defense to the charged offense of rape – consent. *See MCM*, Part IV, ¶ 45c(1)(b) ("[I]f the victim consents to the act, it is not rape").

Having determined that the identity of SSgt KQ, as well as the statements he made to the prosecutor should have been disclosed to the defense, we must now review the materiality of the erroneous nondisclosure. The applicable test for "determining materiality with respect to the erroneous nondisclosure of discoverable evidence,"

> applies to those cases in which the defense either did not make a discovery request or made only a general request for discovery. Once the appellant demonstrates wrongful nondisclosure under those circumstances, the appellant will be entitled to relief only by showing that there is a "reasonable probability" of a different result at trial if the evidence had been disclosed.

United States v. Roberts, 59 M.J. 323, 326-27 (C.A.A.F. 2004) (citations omitted). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990)).

Knowledge of the existence of this information pertaining to SSgt KQ could have dramatically altered the manner in which the defense tried their case. We find the failure to disclose the evidence resulted in prejudice to the defendant in that the evidence was material to the appellant's guilt and there is a "'reasonable probability' of a different result at trial if the evidence had been disclosed." *See Roberts*, 59 M.J. at 326 (quoting *Bagley*, 473 U.S. at 682).

Conclusion

Accordingly, the findings and sentence are set aside. Having set aside the findings and the sentence, we need not reach the remaining assignment of error. The record of trial is returned to The Judge Advocate General. A rehearing is authorized.

Judge JOHNSON authored this opinion prior to her reassignment.

JACOBSON, Judge (dissenting):

As articulated by the majority, 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, we, the appellate court, are ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 324 (citing *Jackson*, 443

U.S. at 319). After carefully reviewing the record and applying this test, I am not so convinced of the appellant's guilt. Because I would find the appellant's conviction factually insufficient, I would set aside the conviction and thus not reach the remaining assignments of error.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator