

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRADLEY O. TEMPLE
United States Army, Appellant

ARMY 20090883

Headquarters, Fort Carson
Debra Boudreau, Michael Hargis, and Mark Bridges, Military Judges
Lieutenant Colonel R. Tideman Penland, Jr., Acting Staff Judge Advocate (pretrial)
Colonel Randy T. Kirkvold, Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Jonathan F. Potter, JA (argued); Major Laura R. Kesler, JA; Lieutenant Colonel Jonathan F. Potter, JA (on brief); Major Richard E. Gorini, JA.

For Appellee: Captain Bradley M. Endicott, JA (argued); Major Amber J. Williams, JA; Major Ellen S. Jennings, JA; Captain Bradley M. Endicott, JA (on brief).

13 July 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SIMS, Senior Judge:

A military panel composed of officers and enlisted members, sitting as a general court-martial, convicted appellant, contrary to his pleas, of conspiracy to commit rape, rape, indecent conduct, and forcible sodomy in violation of Article 81, 120, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 920, and 925 (2006) [hereinafter UCMJ]. Appellant was sentenced to a dishonorable discharge, confinement for fifteen years, total forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved twelve years of confinement, credited appellant with 123 days of confinement credit against the sentence to confinement, and otherwise approved the adjudged sentence.

This case is before our court for review pursuant to Article 66, UCMJ. Appellant has raised four assignments of error, all of which merit brief discussion, but none of which merits relief.

FACTS

On a single occasion in early March 2008, appellant and Private First Class (PFC) AM engaged in a consensual sexual encounter after meeting at a party. Approximately three weeks later, numerous soldiers, to include appellant, Private (PV2) Steven Montiel, and PFC AM attended an impromptu party on the second floor of the barracks in which PFC AM resided. After drinking some beer and a vodka drink and talking with several of the attendees, to include appellant, PFC AM decided to return to her room on the third floor. She was tired, menstruating, and not feeling very well. Upon returning to her room, she felt dizzy and sat on the floor. According to PFC AM's testimony at trial, the following events took place in her room after she sat down.

Appellant and PV2 Montiel entered her room uninvited. She told them she was going to go to sleep and asked them to leave her room. Instead of leaving as requested, PV2 Montiel sat down next to her and started to kiss her. This prompted PFC AM to tell him "no" and to ask them both again to leave her room. As PV2 Montiel continued to kiss her, appellant joined them on the floor and began tugging at her shorts. Private First Class AM continued to say "no" to the kissing, pushed away from PV2 Montiel, kicked her legs at appellant, and told them to "stop." After overpowering her and removing her shorts and underwear, appellant repeatedly told her to "give [PV2 Montiel] head." Although she did not want to fellate PV2 Montiel, she "felt so pressured" that she "finally . . . did it for a couple of seconds" before stopping because she "didn't want to do it" and she "never gave consent to any of it."

At some point thereafter, PV2 Montiel ejaculated on PFC AM's face. Appellant and PV2 Montiel then lifted PFC AM and placed her on her bed. Private Montiel then held her down as appellant tried to put his penis into her vagina. Although she initially struggled and "screamed," PFC AM stopped resisting and went limp after PV2 Montiel told her to "be quiet" and to "stop or something bad is going to happen."¹ The appellant then vaginally penetrated her with his penis as PV2 Montiel continued to restrain her, pulled up her shirt, and fondled one of her breasts. Thereafter, the appellant and PV2 Montiel dressed and departed. Immediately thereafter, PFC AM went into her bathroom, washed her face, called her former supervisor, and told him "he needed to come over." As she was waiting for him to arrive, another noncommissioned officer entered her room and found her crying hysterically whereupon she told him she had been raped.

¹ Private First Class AM's suitemate, who was in the room next door at the time of the incident, testified that she heard no struggle or scream. However, the suitemate also admitted that she may have been asleep or listening to her ipod at the time.

The trial defense counsel vigorously cross-examined PFC AM at trial and highlighted numerous inconsistencies between her in-court testimony and her prior statements. Using permissibly leading questions, the trial defense counsel elicited responses from PFC AM that indicated that she had reluctantly, but consensually, initially engaged in the fellatio of PV2 Montiel as a result of "peer pressure."

In addition to PFC AM's testimony, the government presented medical and scientific evidence that corroborated PFC AM's version of events.² The trial counsel also called a sergeant who testified that appellant, while awaiting the arrival of law enforcement personnel, spontaneously made incriminating statements such as "[w]e ruined a girl's life," I "ruined my life," and "I could go to jail." Additionally, in response to a member question, PFC AM's suitemate testified that appellant admitted to her that "Montiel had forced himself" on PFC AM.

The trial defense team called several witnesses who contradicted some of PFC AM's testimony as to events immediately preceding the incident in her room. One of these defense witnesses, Specialist (SPC) S, testified that she was at the party, but was not drinking. She testified that she saw PFC AM leave arm-in-arm with appellant and PV2 Montiel and thereafter commented "[t]here goes a threesome." On cross-examination, the trial counsel attempted to attack the credibility of SPC S by making use of a DA 2627-1, Summarized Record of Proceedings under Article 15, UCMJ [hereinafter Summarized Article 15] which contained her signature and which indicated that she had been punished for underage drinking. Although SPC S freely admitted she had received a Summarized Article 15, she insisted that she had been punished for possessing and serving alcohol, not for consuming it. The trial counsel responded to her explanation with the words "fair enough."

Prior to closing arguments, the military judge discussed instructions with counsel. The trial defense team requested "mistake of fact" instructions as to the rape and forcible sodomy specifications, but affirmatively waived the "consent" instructions as to those same offenses. The military judge provided the panel with the requested mistake of fact instructions as to the rape and forcible sodomy. The military judge also discussed consent as part of the standard forcible sodomy instructions.

In closing argument, the trial counsel argued, *inter alia*, that it belied common sense that a tired person who was menstruating and who was not feeling well would consent to the sexual acts in question. Likewise, he noted that the statements made by appellant after the report of the offense were "not the words of a man who just had consensual sex with a woman." The trial defense counsel responded by arguing that appellant was entitled to the defense of mistake of fact because he objectively

² Although the government successfully litigated the admissibility of a sworn statement marked as Prosecution Exhibit 2 for Identification wherein appellant admitted both to having inserted his penis into PFC AM's vagina and mouth and to having "watched her get raped" by PV2 Montiel, the government did not seek to admit that statement at trial.

and subjectively believed that PFC AM consented to “all of these acts.” As examples of why appellant objectively believed PFC AM had consented to the sexual acts, trial defense counsel noted the previous sexual relationship, testimony that they left the party together, and PFC AM’s admission that she initially consented to oral sex under “peer pressure” alone.

The panel returned with verdicts of guilty as to conspiracy to commit rape, rape, indecent conduct, and forcible sodomy. The following week, PV2 Montiel was tried on similar charges and acquitted. Approximately one month after the verdict in appellant’s case, the military judge convened a post-trial session to address appellant’s request for a new trial. In support of the request, the trial defense counsel alleged that the government counsel had committed “fraud on the court” when he attacked the credibility of SPC S by using a Summarized Article 15 for underage drinking when at least one of the trial counsel was aware that a prior administrative investigation conducted in accordance with Army Reg. 15-6, Procedures for Investigating Officers and Boards of Officers (2 October 2006) [hereinafter AR 15-6], had failed to substantiate that SPC S had consumed alcohol. In support of this argument, trial defense counsel presented the court with a recently-signed memorandum from the commander who imposed the Summarized Article 15 wherein he stated “[d]uring the Summarized Article 15 Proceeding it was determined that [SPC S] was guilty of underage possession of alcohol.”

After verifying that the defense team possessed a copy of the administrative investigation at the time of trial and did not object to the trial counsel’s use of the Summarized Article 15, the military judge found there was no fraud on the part of the government. Assuming arguendo that there was fraud, the military judge further found that the effect of any such fraud would have been harmless beyond a reasonable doubt. Accordingly, he denied the petition for a new trial.

LAW AND DISCUSSION

Legal and Factual Sufficiency

Article 66, UCMJ, requires this court to conduct a de novo review of the legal and factual sufficiency of each case. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, a reasonable fact finder could have found the essential elements beyond a reasonable doubt. In conducting our analysis we are required “to evaluate not only the sufficiency of the evidence but also its weight.” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Article 66(c), UCMJ states that “we should recognize that the trial court saw and heard the witnesses.” 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 court is convinced of appellant’s guilt beyond a reasonable doubt. *Id.*

Sufficiency of the Rape Conviction

In one of his assignments of error, appellant argues that the evidence is legally and factually insufficient to support his conviction for rape because appellant's co-accused was acquitted at a later court-martial and because some of PFC AM's testimony was contradicted by defense witnesses. We disagree.

Our superior court has long held that the fact that a co-accused facing similar charges at a separate court-martial may have been acquitted does not in and of itself provide a basis for challenging a conviction. See *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983). As evidenced by the Defense Request for Post-trial 39a and Petition for New Trial, (App. Ex. LII), PV2 Montiel's trial defense counsel had the benefit of having observed appellant's trial and was able to make different, and ultimately successful, tactical decisions based upon those observations.

Furthermore, in a case such as this where there is conflicting testimony, we are hesitant to substitute our judgment for that of the panel members who heard and saw the testimony of the witnesses. We are even less likely to do so where there is other evidence such as the appellant's own incriminating statements, medical testimony, and scientific evidence which corroborates the victim's testimony. Accordingly we find that the appellant's rape conviction is both legally and factually sufficient.

Sufficiency of the Forcible Sodomy Conviction

In the same allegation of error, appellant also contends that his forcible sodomy conviction is neither legally or factually sufficient because PFC AM indicated on cross-examination that she initially "consented" (albeit only for a few seconds) to PV2 Montiel's penis being inserted into her mouth prior to telling him "no" and prior to him ejaculating on her face. If this was the sum total of the evidence as to the forcible sodomy charge in this case, this court might be inclined to agree with appellant. However, there was other evidence that countered appellant's claim of consent. For example, the members heard PFC AM testify that she "never consented to any of it." They also heard her testify that she took PV2 Montiel's penis in her mouth only after repeatedly having refused PV2 Montiel's kisses; having physically struggled with PV2 Montiel and appellant on the floor; having had appellant forcibly remove her shorts and underwear; and having been ordered repeatedly by appellant to fellate PV2 Montiel. Private First Class AM's testimony, taken as a whole, and evaluated in light of the other evidence presented, to include the presence of PV2 Montiel's semen in her mouth, provide no valid basis for this court to second-guess the panel's finding as to the forcible sodomy charge.

Accordingly, based upon our review of the evidence contained in the record, we are satisfied that the evidence is both legally and factually sufficient as to the forcible sodomy specification.

Absence of Consent Instruction

Appellant also alleges that the military judge erred in not sua sponte providing the panel with an instruction on the affirmative defense of consent as to the offense of rape. We disagree.

It is well-settled in our jurisprudence that a military judge “has a sua sponte duty to give certain instructions when reasonably raised by the evidence, even though the instructions are not requested by the parties.” *United States v. Guitierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007)(citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). “In other words, a military judge must instruct on a defense when, viewing the evidence in the light most favorable to the defense, a rational member could have found in the favor of the accused in regard to that defense.” *United States v. Behenna*, __ M.J. __, 2012 WL 2684980, at *6 (C.A.A.F. 5 Jul. 2012)(citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007))(quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

The record, however, lacks sufficient evidence that PFC AM ever consented to vaginal intercourse on the night in question. Although the defense presented several witnesses who testified that they saw PFC AM depart the party with appellant and PV2 Montiel, such testimony is not indicative of whether or not PFC AM ever consented to having sexual intercourse with either appellant or PV2 Montiel, or both, in her room. The only evidence of PFC AM's consent as to any of the sexual acts stems from trial defense counsel's skillful cross-examination and pertained only to the sodomy charge. All of the other favorable defense evidence supported, at most, a mistake of fact defense.

It is also well established that arguments made by counsel are not evidence. *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) (citing *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983)). The mere fact that the trial defense counsel argued to the panel that PFC AM consented to all of the acts as part of the trial defense counsel's more specific legal argument that appellant was under an honest and reasonable mistake of fact as to that consent cannot in and of itself serve to raise the affirmative legal defense of consent.

“[E]ven if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense.” *Guitierrez*, 64 M.J. at 376 (citing *United States v. Barnes*, 39 M.J. 230, 233 (C.M.A. 1994)). That is precisely what happened in this case. The defense team clearly and unambiguously told the military judge that they did not want him to give the consent instruction. This affirmative waiver, coupled with the paucity of evidence as to consent, provide this court with no reason to find that the military judge erred in not providing the panel with such an instruction.

Assistance of Counsel

Appellant also alleges that his trial defense team provided him with ineffective assistance of counsel when they affirmatively waived instructions as to consent as an affirmative defense to the rape and sodomy specifications.

Neither this court nor our superior court will "second guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009)).

We first note that we need not address whether the trial defense team's decision to waive that instruction amounted to ineffective assistance in relation to the forcible sodomy charge because the military judge actually instructed the panel on consent as part of the standard instructions on forcible sodomy. Accordingly, we will address only the trial defense team's affirmative waiver as it pertains to the rape charge.

The standard instruction as to consent contained in Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (1 Apr. 2001)(IC3, 15 Jan. 2008) [hereinafter Benchbook] reads as follows:

The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of rape, as alleged in (the) Specification(s) (_____) of (the) (Additional) Charge (_____).

Consent is a defense to (that) (those) charged offense(s). Consent means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent.

Benchbook, para. 3-45-3

The standard Benchbook instruction as to mistake of fact as to consent reads as follows:

The evidence has raised the issue of mistake on the part of the accused whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of rape, as alleged in (the

Specification(s) (_____) of (the) (Additional) Charge (_____).

Mistake of fact as to consent is a defense to (that) (those) charged offense(s). Mistake of fact as to consent means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.)

Id.

As noted in our discussion in the previous section, there was no evidence presented to reasonably indicate that PFC AM ever consented to vaginal intercourse on the night in question. Private First Class PFC AM provided un-contradicted testimony as to what happened in her room. At most, there was an inference that PFC AM invited appellant and PV2 Montiel into her room which could be drawn from testimony that they were seen leaving the party together.

As pointed out by government appellate counsel, the consent instruction is less “defense-friendly” than is the mistake of fact instruction. Under the consent instruction, it would have been very easy for the government to prove there was no consent because (1) there was no evidence that PFC AM “freely” gave her agreement to the sexual conduct and (2) PFC AM unambiguously expressed her “lack of consent through [her] words and conduct” from the moment that PV2 Montiel and appellant entered her room until the point in time that she was threatened by PV2 Montiel. Additionally, as would have been highlighted in the consent instruction, the fact that appellant and PFC AM may have had a one-time “previous dating relationship” would not have constituted consent.

The mistake of fact defense required the government to prove that appellant’s belief that PFC AM consented was neither subjectively present nor objectively reasonable. The prior sexual relationship between appellant and PFC AM, when coupled with testimony that PFC AM left the party with appellant and PV2 Montiel and thereafter took PV2 Montiel’s penis into her mouth in appellant’s presence, could arguably have indicated to a reasonable person that PFC AM had consented to sexual intercourse with appellant.

The defense team in this case made a reasonable tactical decision to pursue the affirmative defense of mistake of fact instead of, or in addition to, the affirmative defense of consent. In making this choice, the defense team selected a

defense that was clearly raised by the evidence and which placed the greatest burden of proof on the government.

Appellant has not overcome the presumption that his defense team acted competently. We therefore conclude that the tactical decision of the trial defense team to affirmatively waive the consent instruction did not constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Denial of Request for a New Trial

Lastly, appellant urges this court to find that the military judge erred in not granting his request for a new trial. According to appellant, the military judge should have granted a new trial based upon the allegation that the trial counsel committed fraud on the court by improperly using a Summarized Article 15 to impeach SPC S, the defense witness who testified that she saw PFC AM leave the party arm-in-arm with appellant and PV2 Montiel.³ After carefully examining the record and reviewing the pertinent appellate exhibits, we see no reason to believe that the Summarized Article 15 is anything other than what the trial counsel purported it to be. Specialist S admitted that the document contained her signature and there is no evidence that the Summarized Article 15 was forged. Accordingly, we see nothing that would have precluded the trial counsel from using it to impeach SPC S. We find no abuse of discretion in the military judge's denial of appellant's petition for a new trial as there is simply no evidence of fraud in this case. *See United States v. Johnson*, 61 M.J. 195 (C.A.A.F. 2005).⁴

³ It is entirely possible that the Summarized Article 15 was initiated as being for “wrongfully consuming alcohol,” but that SPC S was thereafter determined by her commander to be guilty of possessing and distributing alcohol to other minors. If that is indeed what happened, the wording of the Summarized Article 15 would not necessarily have been changed because as a legal matter SPC S could have been guilty as charged under an aider and abettor theory. Furthermore, contrary to appellant's assertions, the AR 15-6 investigating officer, for whom one of the trial counsel had served as legal advisor, did not actually find that SPC S had not been drinking. Instead, his findings reflect that one soldier stated that she saw SPC S drinking alcohol; that SPC S admitted to filling up “shoot glasses,” but denied having consumed alcohol; that other statements “back up” the statement of SPC S, and that no one saw her intoxicated. Based upon his findings, the investigating officer recommended that six soldiers, not including SPC S, “be held accountable for under age consumption of alcohol.” These six soldiers included appellant, PV2 Montiel, and four other soldiers who admitted to the investigating officer that they consumed alcohol.

⁴ Although we need not reach the issue in this case, we also agree with the military judge's finding that the effect of the trial counsel's use of the Summarized Art 15 in the impeachment of SPC S was harmless beyond a reasonable doubt.

CONCLUSION

On consideration of the entire record and the submissions of the parties, to include the affidavit of appellant and those matters raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we hold the findings of guilty and the sentence as approved by the convening authority to be correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Judge COOK and Judge GALLAGHER concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court