UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
M.D. MODZELEWSKI, R.G. KELLY, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAMES D. THOMAS
SENIOR CHIEF CULINARY SPECIALIST (E-8), U.S. NAVY

NMCCA 201200203
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 February 2012.
Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.
For Appellant: LCDR Brian L. Mizer, JAGC, USN.
For Appellee: Maj David N. Roberts, USMC.

31 January 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MODZELEWSKI, Senior Judge:

A panel of members with enlisted representation, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of failure to obey a lawful general order, two specifications of wrongful sexual contact, and three specifications of assault consummated by a battery in violation of Articles 92, 120, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 928. The convening

authority (CA) approved the adjudged sentence of reduction in rate to pay grade E-1 and a dishonorable discharge.

The appellant, CSCS Thomas, now alleges four errors. First, he asserts that the evidence was factually and legally insufficient to sustain convictions for wrongful sexual contact as alleged in Specifications 2 and 3 of Charge II. Second, he argues that the military judge erred in denying his request for an instruction on mistake of fact with regard to wrongful sexual contact and assault consummated by battery. Third, CSCS Thomas claims that the military judge erred in granting the Government's challenge for cause of a panel member, Senior Chief N. Finally, CSCS Thomas contends that the military judge erred by admitting evidence of a victim's prior consistent statements.

After considering the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and no errors materially prejudicial to the substantial rights of the appellant were committed. Arts. 59(a) and 66(c), UCMJ.

Background

In the fall of 2010, CSCS Thomas was assigned as the Command Master Chief (CMC) of Naval Base Kitsap. As the CMC, CSCS Thomas worked in the command suite with a staff that included two more junior enlisted females, Yeoman Seaman (YNSN) H and Machinist's Mate Second Class (MM2) H.

YNSN H and MM2 H testified that, between October 2010 and March 2011, CSCS Thomas made sexually suggestive comments to them, touched them in an offensive manner, and, in the case of YNSN H, touched her in a sexual manner. In addition, CSCS Thomas rubbed both women's legs, touched or slapped their buttocks, made suggestive comments about YNSN H's body, showed YNSN H a naked picture of another woman, and informed both women that he had a bet with another chief about which of them could be the first to get a topless photo of the two female Sailors. Additional facts are recited below to address the particular assignments of error.

I: Factual and Legal Sufficiency

The defense claims that YNSN H's testimony was insufficient to sustain convictions for Specifications 2 and 3 of Charge II, which allege that CSCS Thomas rubbed his pelvic area on YNSN H's "leg and buttocks" on divers occasions (Specification 2) and

that CSCS Thomas rubbed his pelvic area on YNSN H's inner thigh on another occasion (Specification 3). We disagree and find this assignment of error without merit.

A. Law

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty,* 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991)). In contrast, when we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our factual sufficiency review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The elements of wrongful sexual contact are: 1) that the accused had sexual contact with another person; 2) that the accused did so without that other person's permission; and 3) that the appellant had no legal justification or excuse. Art. 120(m), UCMJ. Sexual contact includes the intentional touching, either directly or through the clothing, of the inner thigh or buttocks of another person with intent to arouse or gratify the sexual desire of any person. Art. 120(t)(2), UCMJ.

B. Discussion

Although YNSN H's testimony may not have been a model of clarity, after carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder could indeed have found all the essential elements beyond a reasonable doubt. *See Dobson*, 63 M.J. at 21. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt. *See Turner*, 25 M.J. at 325.

YNSN H testified that, on three different occasions, the appellant pinned her to his desk and simulated having sex with her. On two of those occasions, she was face down on the desk (Specification 2) and on one occasion she was face up on the desk (Specification 3). Record at 514, 540. With regard to Specification 2, YNSN H testified that CSCS Thomas bent her over his desk, twisting one of her arms behind her back, and that her face "hit his desk." While holding her in this position, the appellant straddled her and thrust himself against her. Although YNSN H testified that she "didn't feel his privates," she said he was thrusting back and forth, "motioning what to me was sex," while asking whether she "liked it rough." *Id.* at 498. On one of those occasions, when YNSN H left the appellant's office, she appeared near tears, and said to MM2 H: "I can't believe what just happened. Senior Chief Thomas just bent me over his desk and . . . pretended to f*** me from behind." *Id.* at 790.

Although YNSN H did not articulate with precision that the appellant was rubbing his pelvic area against her buttocks, any fact-finder could reasonably infer, based on the position in which CSCS Thomas placed the victim, his statements to her, her statement to MM2 H, and her testimony at trial that sexual contact did occur. Drawing every reasonable inference from the record in favor of the prosecution and considering the evidence in the light most favorable to the prosecution, we conclude that a reasonable fact-finder could have found all of the elements of wrongful sexual contact for Specification 2 beyond a reasonable doubt.

With regard to Specification 3, YNSN H testified that CSCS Thomas pinned her to the desk on her back, holding her torso down with one hand and holding one of her legs in the air with his other hand, while he made "thrusting" motions. She stated that she felt appellant's hips thrusting against her leg, and the record indicates that she gestured to her inner thighs. Record at 500-01. Considering the evidence in the light most favorable to the prosecution, we find that a reasonable fact-finder could have found all of the elements of wrongful sexual contact for Specification 3.

Considering the entire record, we too are convinced of the appellant's guilt of Specifications 2 and 3 beyond a reasonable

doubt. Recognizing that we did not personally see the victim's testimony or that of the other percipient witnesses, we are persuaded both as to the plausibility of her account, and as to the appellant's guilt beyond a reasonable doubt. We therefore find the evidence to be both factually and legally sufficient to sustain the convictions for Specifications 2 and 3 of Charge II.

II: Mistake of Fact Instruction

CSCS Thomas next claims that the military judge erred in denying his request to instruct the panel on the affirmative defense of mistake of fact as to consent with regard to Charge II, wrongful sexual contact, and Charge III, assault consummated by a battery. Record at 1058-61.

The civilian defense counsel's request for a mistake instruction was baffling, rambling, and inartfully phrased: to the extent that he ever specifically mentioned a particular mistake of fact instruction, he made a passing reference to the wrong one, referencing the benchbook instruction on ignorance or mistake on a knowledge or intent element. *Id.* at 1058. In the ensuing confusing colloquy between the military judge and civilian defense counsel, the military judge appears to have eventually recognized that the defense counsel was actually requesting a mistake of fact as to consent instruction. But the civilian defense counsel still never articulated what evidence put mistake of fact in issue, and for what specifications. Read most generously to the defense, the record suggests that counsel may have requested an instruction on mistake of fact as to consent on all specifications of wrongful sexual contact and assault consummated by a battery. *Id.* at 1058-60.

When asked, trial counsel took the position that "the evidence doesn't support ignorance or mistake-of-fact instruction as to the . . . offenses." *Id.* at 1060. The military judge then denied the request for the instruction, stating that "the instruction is not, as a matter of law, warranted in this case." *Id.* at 1061. He specifically highlighted that the defense was free to argue that the touching and simulated sex acts were consensual, which would constitute a failure of proof as to either battery or wrongful sexual contact. It is not entirely clear from the record whether the military judge mistakenly believed that mistake of fact as to consent could not be an affirmative defense to the offenses, or whether he concurred with the trial counsel's position that it was simply not raised by the evidence.

CSCS Thomas was subsequently found guilty of Specifications 2 and 3 of Charge II for wrongful sexual contact (as discussed *supra*), and of Specifications 4, 7, and 8 of Charge III. Specification 4 alleges that CSCS Thomas slapped YNSN H on the buttocks, Specification 7 alleges that CSCS Thomas grabbed MM2 H and pulled her towards him, and Specification 8 alleges that CSCS Thomas touched MM2 H on the legs and arms.

Whether a panel was properly instructed is a question of law we review *de novo*. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011); *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). We hold that the military judge did not err by excluding the instruction because that affirmative defense was not in issue for either Charge II or Charge III.

A. Law

A military judge has a duty to instruct members on any affirmative defenses placed "in issue." *United States v. Stanley*, 71 M.J. 60, 61 (C.A.A.F. 2012); Rule for Courts-Martial 920(e)(3), Manual for Courts-Martial, United States (2012 ed.). A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they chose. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007); R.C.M. 920(e), Discussion; *see also United States v. Wolford*, 62 M.J. 418, 422(C.A.A.F. 2006) (noting a military judge is "duty bound" to give an instruction if there is "some evidence"). We review the military judge's decision to give or not give a particular instruction, as well as the substance of any instructions given, "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citation and internal quotation marks omitted).

B. Discussion

In *Hibbard*, the military judge denied a defense request for the mistake of fact instruction where the defense did not seek to establish a mistake of fact defense, instead claiming that no sexual intercourse took place. The court found that the instruction was not warranted based solely on the defense's argument that it was unclear from the evidence whether the victim communicated her non-desire. *Hibbard*, 58 M.J. at 76. The court also noted that it was objectively unreasonable for the appellant to have a mistaken belief that the victim consented where he used his position as her supervisor to

pressure the victim to spend time with him alone, and then used his physical strength to accomplish the rape. *Id.* at 75-76.

The defense trial strategy in this case, while not dispositive, involved both discrediting the Government witnesses and attempting to paint a picture of a relaxed command environment. No evidence was presented that either of the victims consented to the assaults or the wrongful sexual contact. Nor was there any evidence presented that would indicate that CSCS Thomas could have entertained an objectively reasonable mistake that YNSN H and MM2 H were consenting to the sexual contact and assaults. CSCS Thomas was an E-8 in a direct supervisory relationship with both victims, who at the time were an E-3 and an E-5. As the senior enlisted man in the command, CSCS Thomas used the official duty relationship and command environment to perpetrate the sexual contact.

No evidence was presented that either victim reciprocated the appellant's behavior or responded positively to him. YNSN H manifested her discomfort by crying and reporting his behavior to MM2 H and Yeoman First Class (YN1) F. The sexual contact of YNSN H was accomplished by physical dominance, size, strength, and aggressive comments. YNSN H admittedly participated in roughhousing with CSCS Thomas, but that conduct was not of a sexual nature. There was no evidence that MM2 H voluntarily participated in any contact or roughhousing whatsoever with CSCS Thomas. The relationships and circumstances between the victims in this case and CSCS Thomas are quite similar to those in *Hibbard,* and we likewise find no evidence of an objectively reasonable mistake of fact.

Additionally, no evidence was presented at trial that CSCS Thomas had a subjectively honest belief that the women consented. In *United States v. Jones,* the court concluded that the mistake of fact instruction was not in issue where evidence was presented that a rape victim kissed the appellant and did not say "no" to oral sex. 49 M.J. 85 (C.A.A.F. 1998). The court found that those circumstances "tended to show objective circumstances upon which a reasonable person might rely to infer consent. However, they provided no insight as to whether appellant actually or subjectively did infer consent based on these circumstances." *Id.* at 91 (quoting *Willis*, 41 M.J. at 438); *see also People v. Williams*, 841 P.2d 961, 967 (1992) (third-party testimony of absence of screams or other sounds of struggle "sheds no light" on accused's state of mind). Similarly, here there was no evidence presented as to the appellant's state of mind to place this matter in issue.

Finally, the confusion surrounding civilian defense counsel's request for the instruction, and whether he even requested the appropriate instruction for the specifications now in issue, is certainly not dispositive of this issue, as the military judge has a *sua sponte* duty to instruct on affirmative defenses. *Stanley*, 71 M.J. at 61; *McDonald*, 57 M.J. at 20. Nevertheless, the defense's inability to articulate how the affirmative defense was placed in issue is illuminating, as it actually reflects the state of the evidence. The testimony and evidence before the members simply did not suggest that the appellant was mistaken that the victims consented to his various crimes against them.

We conclude that the military judge did not err in denying the defense request for the mistake of face instruction as mistake of fact as to the victims' consent was not placed in issue.

III. Challenge for Cause of Senior Chief N

The defense next complains that the military judge improperly applied the liberal grant mandate to the Government challenge of Senior Chief N for cause. We disagree and find that the military judge properly granted the challenge for cause based on actual bias, and not because of any misapplication of the liberal grant mandate.

Senior Chief N was the subject of a Naval Criminal Investigative Service (NCIS) investigation for child abuse that lasted for five years. Record at 425. The Government challenged Senior Chief N for cause based on actual bias, after he stated during *voir dire* that NCIS had tried to strong arm him into confessing to something he did not do, that they acted unprofessionally, and that he harbored hard feelings for NCIS. *Id.* at 429-37.

In opposing the Government's challenge for cause, civilian defense counsel pointed out that the liberal grant mandate did not apply to Government challenges. In ruling on the challenge for cause, the military judge replied briefly to counsel's point, noting that the principle underlying the mandate was that each party is entitled to a member free from actual or implied bias. *Id.* at 438. The appellant now seizes on that professorial comment from the military judge to assert that he improperly gave the Government the benefit of the liberal grant mandate.

The military judge granted the challenge "in the interest of justice and fairness" without specifying whether he found actual or implied bias. *Id.* at 439. However, the military judge noted that Senior Chief N went through "paroxysms" while he was discussing his investigation, and noted "his obvious and palpable anger at the way he was treated." *Id.* at 438. The military judge also noted that there was one NCIS agent on the Government's witness list, and that the defense had law enforcement personnel on its witness list. *Id.* at 438.

We review a military judge's ruling on a challenge for cause for abuse of discretion. *United States v. McLaren,* 38 M.J. 112, 118 (C.M.A. 1993).

A. Law

A member may be removed for cause if it is shown that he or she should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (citation and internal quotation marks omitted). Because a challenge based on actual bias involves judgments regarding credibility, and because "the military judge has an opportunity to observe the demeanor of court members and assess their credibility during *voir dire*," a military judge's ruling on actual bias is afforded great deference. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996); *see also United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999) (noting that actual bias is viewed "subjectively, 'through the eyes of the military judge or the court members'") (quoting *Napoleon*, 46 M.J. at 283).

B. Discussion

The liberal grant mandate encourages military judges to "liberally grant" defense challenges for cause because in the military justice system the CA selects the panel of members and has more opportunity to influence the make-up of the panel than the defense. *United States v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). Our review of the record reveals that the military judge was perfectly aware that the liberal grant mandate did not apply to Government challenges and that he did not apply it to the Government challenge of Senior Chief N.

The *voir dire* of Senior Chief N displayed a clear bias against NCIS. He stated that merely driving by NCIS brought up hard feelings for him. Record at 426. His experience with NCIS negatively colored his entire opinion of NCIS and that opinion would carry over if an agent were to testify. *Id.* at 427. Civilian defense counsel attempted to rehabilitate Senior Chief N by asking if he could follow the judge's instructions, to which he responded: "I will do so to the best of my ability" and "I could probably do it." *Id.* at 429. His hesitation and internal conflict are apparent in the record.

We hold that the military judge did not err in granting the Government's challenge for cause of Senior Chief N based on actual bias.

IV: Prior Consistent Statement of YNSN H

Finally, CSCS Thomas complains that the military judge erred by permitting YN1 F to testify to prior consistent statements made by YNSN H because the statements did not predate the motive to fabricate as required by MILITARY RULE OF EVIDENCE 801(d)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). We disagree and find no error.

The Government called YN1 F to rehabilitate YNSN H after her credibility was attacked on cross-examination. The military judge permitted YN1 F to testify that YNSN H told her about an encounter with CSCS Thomas in October 2010 in which the appellant informed her that he had a bet with another chief petty officer "something about getting a picture of her breasts." Record at 587. The military judge found the statement admissible because the defense impeached YNSN H's credibility by questioning her failure to report CSCS Thomas higher up the chain of command and implying she had a motive to fabricate. *Id.* at 584-85. YN1 F also testified that she recommended that YNSN H address her concerns with the chiefs involved. *Id.* at 586. The military judge also permitted the trial counsel to elicit testimony concerning a second prior consistent statement: that YNSN H had also told YN1 F that CSCS Thomas slapped her on the buttocks. *Id.* at 588. After initially permitting that testimony from YN1 F, the military judge instructed the members to disregard that particular question and answer. *Id.*

We review a military judge's ruling admitting evidence for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010); *see also United States v. Powell*, 22 M.J.

141, 145 (C.M.A. 1986) (noting that a trial judge has considerable discretion in determining the trustworthiness of a statement).

A. Law

Under MIL. R. EVID. 801(d)(1)(B), a prior consistent statement of a witness is not hearsay when offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Because such a statement is defined as nonhearsay under the rule, if it is otherwise admissible, it comes into evidence on the merits, as well as to rehabilitate a witness's credibility. *United States v. McCaskey*, 30 M.J. 188, 191 (C.M.A. 1990). To qualify as admissible nonhearsay under the rule, the statement must predate the alleged recent fabrication or the improper influence or motive. *Tome v. United States*, 513 U.S. 150, 158 (1995); *McCaskey*, 30 M.J. 188 at 192.

When the evidence raises more than one improper motive or influence, to be admissible, the "statement need not precede all such motives or inferences; but only the one it is offered to rebut." *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998) (citations omitted). Thus, the military judge must determine when the alleged motive to fabricate occurred and whether the offered statement rebuts the recent fabrication or improper influence. *United States v. Toro*, 37 M.J. 313, 315 (C.M.A. 1993). Even if the statement qualifies as a prior consistent statement, the military judge should apply the balancing test under MIL. R. EVID. 403. *Id.* at 315-16.

B. Discussion

Because the military judge did not fully articulate his analysis on the record, we first address whether YNSN H's statement to YN1 F concerning the appellant's bet rebuts a charge by the defense counsel of fabrication.[1] The trial defense counsel repeatedly attacked the veracity of YNSN H's testimony based on the manner in which she reported the behavior of CSCS Thomas. Additionally, trial defense counsel implied that YNSN H welcomed the attention of CSCS Thomas and that she was lying about her level of discomfort. YNSN H's statement to YN1 F

[1] The military judge excluded YN1 F's testimony about the second prior consistent statement. Because panel members are presumed to follow military judge's instructions, *United States v. Jenkins,* 54 M.J. 12, 20 (C.A.A.F. 2000), we find any issue with regard to that prior consistent statement mooted by the curative instruction and concern ourselves here only with the prior consistent statement regarding the bet between the two chiefs.

about the bet rebuts both the implication that YNSN H was lying about the incident and the implication that she was simply not bothered enough by the incident to report it to her chain of command.

We next turn to whether the statement to YN1 F preceded the charged motive to fabricate. Although the civilian defense counsel did not neatly enumerate the victim's motives to lie, he implied at least two distinct motives to fabricate the allegations against CSCS Thomas. First, he implied that YNSN H was angry at the Navy due to complications with her pregnancy. Second, he implied that YNSN H made up the allegations because she did not want to return to sea after the birth of her child and thought that a sexual harassment allegation would keep her ashore. When asked to pinpoint when YNSN H formed a motive to fabricate, the civilian defense counsel asserted that the motive arose between the first Article 32 hearing, in October of 2011, and the second Article 32 hearing, held in January 2012. Civilian defense counsel asserted that it was at the January 2012 hearing that YNSN H first started using the term "hostile work environment." Record at 530. YNSN H made the statement at issue to YN1 F in October 2010, a full year before the motive to fabricate allegedly arose.

Because the statement offered predates the charged motive to fabricate and rebuts the charge of recent fabrication, we find that YNSN H's statement to YN1 F concerning the topless photo bet was properly admissible as a prior consistent statement. Moreover, the probative value was not substantially outweighed by any of the dangers enunciated in MIL. R. EVID. 403. We therefore conclude that the military judge did not abuse his discretion in admitting the prior consistent statement.

Conclusion

We affirm the findings and the sentence as approved by the CA.

Judge KELLY and Judge JOYCE concur.

For the Court

R.H. TROIDL
Clerk of the Court