IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Daniel A. BAHIRU
Fireman (E-3), U. S. Navy

NMCCA 200201645 Decided 26 January 2006

Sentence adjudged 14 May 2001. Military Judge: J.W. Rolph. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to his pleas, the appellant was convicted of conspiracy to commit rape, rape, indecent assault, and obstruction of justice, in violation of Articles 81, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 920, and 934. A general court-martial comprised of officer and enlisted members sentenced the appellant to confinement for one year, reduction to pay grade E-1, total forfeiture of pay, and a dishonorable discharge. The convening authority approved the sentence and ordered it executed, including the dishonorable discharge.

The appellant contends that: (1) the military judge abused his discretion by admitting evidence of the presence of gamma hydroxybutyrate (GHB) in the alleged victim's body; (2) the evidence is insufficient for all charges except indecent assault; and (3) the trial counsel committed plain error during closing argument on findings when he compared the appellant to a rat.

We concur that the evidence of conspiracy is insufficient and will dismiss that charge and reassess the sentence. As modified, we conclude that the findings and sentence are correct

in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

On 25 January 2000, Seaman (SN) JO and several shipmates left their ship and rented a room at the Navy Lodge for an impromptu party. They ate pizza, drank alcoholic beverages, played cards, watched television, and listened to music. Over the course of the day and evening SN JO drank 5-6 beers, 4-5 shots of Bacardi Limone, and a rum and coke.

During the party, SN JO and SN Charles C. Pace went into the bathroom and engaged in consensual sexual relations. At some point, the appellant entered the hotel room and began videotaping. Prosecution Exhibit 3. Among other things, the videotape shows SN JO, naked from the waist down, and SN Pace, simulating or attempting to have sexual intercourse on one of the two beds in the room. SN JO is holding a bottle of beer during this encounter and drinks from the bottle after the simulated intercourse. She appears to be intoxicated but is aware of what is happening, as she later testified. That was the last thing she remembered until waking up in bed with Private (Pvt) Richard J. Huestis the next morning.

After SN JO and SN Pace simulated intercourse, the videotape shows SN Jabari A. Lawrence having sexual intercourse with SN JO on one of the beds. SN JO is lying on her side with her eyes closed. She is apparently asleep or incapacitated. SN Pace is lying next to her, also apparently asleep or incapacitated. On the other side of SN JO, SN Lawrence penetrates SN JO's vagina from behind with his penis. SN JO does not react to this. At the end of the videotape, SN Lawrence inserts his finger in SN JO's anus. Another finger is shown penetrating her vagina. The parties agree that the finger in the vagina belongs to the appellant.

While the appellant filmed SN Lawrence's vaginal penetration of SN JO, he said, "f--- a dead body" and "I know you f----- a dead body," or words to that effect, in conversation with SN Lawrence. Record at 780, 785, 800; Prosecution Exhibit 3. SN Lawrence turned and smiled at the appellant, apparently in response to the appellant's comments, and continued with the intercourse. SN Rhiannon Watkins noticed what was happening and said "you guys can cut that out." Record at 589; Prosecution Exhibit 3. She also told the appellant and SN Lawrence that "they were nasty and that was uncalled for." Record at 590.

Pvt Huestis had been in and out of the room during the evening. He returned to the room about midnight. SN Watkins told him that while SN JO was sleeping, SN Lawrence got on top of her and it looked like he was having sex with her. This was apparently a reference to the sexual intercourse depicted in the

videotape. Pvt Huestis and others left to rent another room at the Navy Lodge. At this point, the only people left in the party room were the appellant, SN Gregory R. Bateman, SN Pace, and SN JO. SN Pace and SN JO were both passed out, according to SN Bateman's testimony.

Pvt Huestis returned to the party room, and tried to rouse SN JO, to no avail. Having failed to rouse her, he wrapped her in a blanket, picked her up and carried her to another room. Her body was completely limp.

After hearing that the appellant wanted to see her, SN Watkins returned to the party room and witnessed the appellant pull the tape out and try to tear it. Then SN Bateman stepped on it. The tape was later recovered from a dumpster behind the Navy Lodge. It was reconstructed and played for the members at trial.

Pvt Huestis watched SN JO the rest of the night until she came to her senses the next morning. He then related to her SN Watkins' account of what had happened to SN JO while she was asleep or incapacitated.

A medical examination conducted the next day revealed that SN JO suffered seven tears in her vaginal tissue and one tear in her anal tissue. A sexual assault nurse examiner testified that she had never seen that many vaginal tears in performing thousands of obstetrical/gynecological examinations. She also testified that such tears are uncommon in the case of consensual sexual intercourse.

As part of SN JO's medical exam, blood and urine samples were tested. The lab report showed GHB was in her urine at 3.25 micrograms per milliliter. A toxicologist testified that GHB is a clear, water-soluble, odorless, tasteless sedative that is naturally produced by the body at low levels. GHB is also ingested by some individuals, either voluntarily or involuntarily. It can rapidly render a person unconscious and cause loss of memory. Having viewed the videotape, the toxicologist opined that SN JO was completely unconscious and incapacitated when SN Lawrence is depicted penetrating her.

DNA tests of swabs taken during SN JO's exam indicated the presence of the appellant's semen on an external genitalia/ thigh swab. The tests also indicated that the appellant's DNA was mixed with SN Lawrence's DNA on an anorectal swab.

The appellant was charged with conspiring with SN Lawrence to rape SN JO. He was also charged with raping SN JO despite the absence of direct evidence of such a rape by the appellant. To prove the rape charge, the Government presented three theories of culpability to the members: perpetrator, vicarious liability, and aiding and abetting. The indecent assault charge was based on the appellant's digital penetration of SN JO's vagina. The

obstruction of justice charge was based on the destruction of the videotape.

Sufficiency of Evidence

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

1. Conspiracy - The appellant contends that the evidence of conspiracy to commit rape is insufficient because the Government failed to prove an agreement between the appellant and SN Lawrence. The Government responds that there is ample circumstantial evidence of such an agreement.

At trial, the prosecution marshaled the following evidence in arguing that the two Sailors conspired to rape SN JO:

a. The presence of GHB in SN JO's urine coupled with her obvious incapacitation during her sexual intercourse with SN Lawrence, suggesting that the appellant and/or SN Lawrence drugged SN JO to facilitate rape;

b. The videotaping of the intercourse and digital penetration;

c. Comments made by the appellant and SN Lawrence during the videotaping; and

d. A mixture of the two Sailors' semen in the anorectal swab.

In summary, the prosecution argued that the appellant and SN Lawrence decided to rape SN JO by drugging her with GHB, then videotaped the ensuing sexual assault.

We are not convinced beyond a reasonable doubt of such an agreement. There was no evidence that either the appellant or SN Lawrence was responsible for the GHB found in SN JO's body. Moreover, in our minds, the fact that a rape is videotaped does not logically lead to the conclusion that a conspiracy preceded the rape. We note that the appellant videotaped the consensual intercourse of SN Pace and SN JO before SN Lawrence sexually assaulted SN JO. Nor do the other matters advanced by the Government persuade us. We conclude that the evidence of conspiracy is factually insufficient.

2. Rape - The prosecution presented these alternative theories of guilt of rape:

a. The appellant personally committed forcible and non-consensual sexual intercourse with SN JO after SN Lawrence's videotaped intercourse. This happened when most of the others had left the party room, leaving behind only the appellant, SN Bateman, SN Pace, and SN JO. SN Pace and SN JO were both incapacitated and could not remember what happened, if anything, during this brief period. SN Bateman testified that he didn't see the appellant do anything to SN JO, but implied that he should have been more protective of her.

b. As SN Lawrence's co-conspirator, the appellant is vicariously liable for SN Lawrence's rape of SN JO.

c. The appellant is liable for rape as a principal because he verbally encouraged SN Lawrence and videotaped the incident.

We now address these theories. First, the vicarious liability theory is of no moment because we have concluded that the Government failed to prove the existence of a conspiracy. Second, the notion that the appellant perpetrated an act of forcible intercourse rests primarily upon the presence of his semen on swabs taken from SN JO. The Government offered no specific evidence of how the swabs were taken or what area of her body was swabbed. Moreover, we are not satisfied with the failure of the Government to discount the possibility that the appellant masturbated around or upon SN JO. In the end, the Government asks us to affirm on this theory based largely on these swabs. Such a slender reed does not support the conviction.

However, we are persuaded by the Government's argument of aiding and abetting. The MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) lists the elements of liability for aiding and abetting:

> (i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and
>
> (ii) Share in the criminal purpose of design.

MCM, Part IV, ¶ 1b(2)(b). Taken together, the appellant's failure to intervene to protect a shipmate from rape, his act of videotaping SN Lawrence's rape of SN JO, his vocal encouragement of SN Lawrence while videotaping, and SN Lawrence's smiling acknowledgement of that encouragement combine to demonstrate beyond a reasonable doubt that the appellant shared SN Lawrence's criminal intent and actively encouraged and assisted him. *See generally United States v. Thompson*, 50 M.J. 257 (C.A.A.F. 1999).

3. Obstruction - We have considered the appellant's argument that the evidence of obstruction of justice is deficient. Based on our review of the record, we conclude that the evidence is legally and factually sufficient.

Admission of Evidence of GHB

The appellant contends that the military judge abused his discretion by admitting evidence of GHB in SN JO's body. Specifically, he complains that the members should not have been instructed that they could consider that evidence to conclude that the alleged conspiracy existed.

The military judge instructed the members that they could consider this evidence for three purposes, namely its tendency, if any, to:

> prove that the alleged sexual acts occurred with or without the consent of [SN JO] . . . prove the existence of a conspiratorial agreement between the accused and [SN] Lawrence to commit the offense of rape against [SN JO] [and] . . . explain [SN JO]'s lack of memory concerning specific aspects of the evening in question and inability to remember certain events of that evening.

Record at 933. The appellant only attacks the admission of the evidence and associated limiting instruction as to the second purpose identified by the military judge. In view of our conclusion that the evidence of conspiracy was insufficient, this assignment of error is now moot.

Conclusion

We have considered the remaining assignment of error regarding the prosecution's argument on findings and find it lacking in merit. Although not assigned as error, we note that the convening authority approved the sentence, then purported to execute the dishonorable discharge. Pending appellate review, that latter part of the convening authority's action is a nullity. *United States v. McGee*, 30 M.J. 1086, 1088 (N.M.C.M.R. 1989). Additionally, the court-martial order erroneously states that the sentence included forfeiture of all allowances. In fact

that portion of the sentence was limited to forfeiture of all pay.

The findings of guilty of Charge I (conspiracy) and its sole supporting specification are set aside. That charge and specification are dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Upon reassessment, we affirm the sentence as adjudged and approved. We direct that the supplemental court-martial order correctly state the adjudged and approved sentence, as well as our decision on the findings.

To assist the court in reviewing Prosecution Exhibit 3, an 8mm videotape (including audio), a CD copy was made of that exhibit. We direct that the Clerk of Court enclose the CD copy with the record of trial to facilitate any additional review.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court