

2006 CCA LEXIS 249, *

UNITED STATES v. Derek D. **BELL**, Fireman Apprentice (E-2), U. S. Navy

NMCCA 200401099

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2006 CCA LEXIS 249

October 12, 2006, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

SUBSEQUENT HISTORY: Review denied by [United States v. Bell, 2007 CAAF LEXIS 142 \(C.A.A.F., Feb. 7, 2007\)](#)

PRIOR HISTORY: Sentence adjudged 13 December 2002. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, HQ, Naval District Washington, Washington DC,.

COUNSEL: Capt P.H. [GRIESCH](#) ▼, USMC, Appellate Defense Counsel.

Maj KEVIN HARRIS, USMC, Appellate Government Counsel.

CAPT F.E. MATTHEWS, JAGC, USNR, Appellate Government Counsel.

JUDGES: BEFORE J.D. HARTY, K.K. THOMPSON, R.G. KELLY. Senior Judge HARTY and Judge KELLY concur.

OPINION BY: K.K. THOMPSON

OPINION

THOMPSON, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial composed of officer and enlisted members, of rape in violation of Article 120, Uniform Code of Military Justice, [10 U.S.C. § 920](#). The appellant was sentenced to confinement for 18 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's sole assignment of error asserting that the evidence offered against him was factually insufficient, and the Government's response. We conclude that the findings and sentence [*2] are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. [Arts. 59\(a\)](#) and [66\(c\)](#), UCMJ.

Sufficiency of the Evidence

The appellant contends that the evidence is factually insufficient to support his conviction for rape. He bases his argument in part on the fact that the victim is an admitted liar, calling into question her credibility. He also points out that she delayed reporting the incident to authorities for almost a year after it occurred. At trial, the defense argued there was not sufficient evidence to support the offense of rape, but that, if the members believed it did, there was insufficient evidence to establish lack of consent. We find the evidence is factually sufficient. ¹

FOOTNOTES

¹ The appellant does not raise the issue of legal sufficiency.

HN1 ¶ The test for factual sufficiency is whether, after weighing the evidence in the record of trial and recognizing that we did not personally observe the witnesses, as did the trial court, we **[*3]** are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ. In reviewing factual sufficiency, we give no deference to the verdict or factual determinations made at the trial level. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). We must make our own independent determination "as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Id.*

HN2 ¶ Article 120, UCMJ, defines rape as "sexual intercourse, by force and without consent." Manual for Courts-Martial, United States (2002 ed.), Part IV, P 45c(1)(a). As to consent, the victim must "make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances. . . ." *Id.*, Part IV, P 45c(1)(b); see *United States v. Tollinchi*, 54 M.J. 80, 82-83 (C.A.A.F. 2000) (holding evidence legally insufficient where victim did not reasonably manifest lack of consent under the circumstances). The required measures of resistance can be verbal, physical or a combination of both. For example, "a verbal 'no' can **[*4]** manifest the necessary lack of consent for the offense of rape. In such a context, physical resistance is not required . . . It may, however, be probative on the issue of consent." *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (citing *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996); *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990)). The required element of force may be actual or constructive force. We will limit our discussion to actual force. Actual force is physical force used to overcome a victim's lack of consent. *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991). Actual force requires "more than the incidental force involved in penetration." *Bonano-Torres*, 31 M.J. at 179. The record supports a finding that the victim, Airman Apprentice (AA) J, reasonably manifested her lack of consent to sexual intercourse and that more than the incidental force involved in penetration was used to overcome her lack of consent.

The record establishes that AA J had been friends with the appellant since boot camp, and they were both assigned to the Ceremonial Guard. Prior to the **[*5]** rape, there had been no sexual contact or intimacy between them. Both the appellant and AA J lived on the fourth floor of their barracks and saw each other frequently. AA J indicated that the appellant often went overboard when making comments and jokes of a sexual nature. On or about the date of the rape, the appellant exposed his penis to AA J while riding on a bus, however, she assumed he was joking and did nothing about it.

On the night of the rape, AA J and the appellant went with others to find a party off-base, without success. They all ended up at an apartment where she drank a small amount of alcohol and the appellant had several drinks. While at the apartment, the appellant kissed AA J. Although surprised by his action, AA J did not resist the appellant's kiss. Upon their return to the barracks, the appellant accompanied AA J into the common area of her room where, after a few minutes, he started to kiss her again. They then moved into her bedroom, where the appellant attempted to remove her shirt.

When AA J realized the appellant wanted to progress to a sexual encounter, she resisted, repeatedly telling him she did not want to have sex and pushed his hands away with her [*6] hands. The appellant continued in his efforts to remove her shirt and was successful in doing so. The appellant pushed AA J onto the bed and got on top of her. She told the appellant that she did not want to have sex several times, and pushed him away with her hands. The appellant, however, removed her pants and moved her to the floor where he climbed on top of her and removed her underpants. Although AA J tried to prevent the removal of her underpants by trying to push the appellant's hands away, the appellant threw her hands up toward her shoulders. The appellant then wedged himself between her legs. She pushed on the appellant's abdomen just prior to penetration. The appellant then held her hands, above her shoulders, and penetrated her vagina with his penis. AA J broke her hands free and again tried to push the appellant away, and told him not to ejaculate inside her. The appellant grabbed her hands again, and she finally surrendered. The appellant withdrew his penis from AA J's vagina and masturbated until he ejaculated on her stomach. AA J then immediately went to the bathroom, locked the door and took a long shower.

Although AA J did not immediately report the rape to authorities, [*7] she did tell her roommate about the rape the following day and told others later. She reported the rape to her commanding officer approximately one year later, when she was facing captain's mast for underage drinking. She told her commanding officer that her drinking stemmed in part from her experience with the appellant and the fact that she had to face him at work every day. She chose to mention it then because she had heard the appellant had similarly assaulted other females.

The defense called no witnesses, but attacked AA J's credibility based on her raising the issue before her commanding officer at captain's mast and the delay in reporting the incident, as well as pointing out that she had a history of telling lies to her friends. While AA J's credibility was vigorously attacked by the defense counsel, we find her testimony both credible and compelling.

Although AA J admitted to embellishing to her friends how she resisted the appellant, her sworn testimony at trial was consistent with her prior sworn testimony at the Article 32, UCMJ, investigation hearing, pretrial motion, and statements she made under oath to authorities concerning the details of the incident. She candidly [*8] admitted and explained her tendency to lie about minor things in order to gain approval and attention from her peers, but no evidence was adduced at trial to show that she lied about the fact that the rape occurred.

After weighing all the evidence in the record of trial and recognizing that we did not personally observe the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge HARTY and Judge KELLY concur.
