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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Fernando CEPEDA
Cryptological Technician Second Class (E-5), U. S. Navy

NMCCA 200400992 Decided 19 April 2006

Sentence adjudged 24 July 2003. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Recruiting Command, Millington, TN.

LT RICHARD MCWILLIAMS, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
Maj ROBERT FUHRER, USMCR, Appellate Government Counsel

CARVER, Senior Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of four specifications of violating a lawful general order, false official statement, and forcible sodomy, in violation of Articles 92, 107, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 925. The appellant was sentenced to hard labor without confinement for 90 days, reduction to pay grade E-3, and a bad-conduct discharge. The convening authority disapproved the hard labor without confinement, but otherwise approved the sentence as adjudged.

The appellant alleges that the evidence is factually insufficient to sustain his conviction on the sodomy and false statement charges, that the military judge failed to clarify the findings of the court-martial regarding the date of the alleged sodomy offense, and that the sodomy conviction is multiplicious with one of the orders violations. *See* Appellant's Brief and Assignments of Error of 30 Sep 2005.

We have carefully considered the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply brief. We conclude that the findings and the sentence 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 test for legal sufficiency is whether, considering the evidence in a light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant asserts that the evidence is factually insufficient to sustain the convictions for sodomy and false official statement. The appellant, a recruiter, was convicted of forcible sodomy upon Pvt S, who at the time was a Delayed Entry Program (DEP) recruit.[1] The false official statement charge was based upon the appellant's initial statement to agents of the Naval Criminal Investigative Service (NCIS) that he had never made any sexual advances toward Pvt S. The appellant later recanted that statement in two subsequent interviews with NCIS, admitting that he engaged in sodomy but that the conduct was consensual. At trial, the appellant maintained that his first statement was true, and that he only admitted to consensual sodomy because he believed such a charge would be handled at nonjudicial punishment rather than court-martial.

Members may believe one portion of a witness's testimony but disbelieve others. *See United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). In this case, there was some confusion regarding the precise date of the offense and the circumstances surrounding the victim's visit to the appellant's office when the sodomy occurred. At trial, the appellant offered an alibi defense for the specific date alleged in the specification, and evidence that it would have been impossible for him to commit the act two nights earlier, which was the date the appellant gave NCIS.

We have reviewed Pvt S's testimony and find her testimony on the relevant facts surrounding the forcible sodomy, to be

[1] At the time of trial, Pvt S had enlisted in the U.S. Army.

compelling and detailed. Her testimony is essentially corroborated by the appellant's own statements to NCIS. Significantly, the NCIS agents who took the second and third statements from the appellant indicated that they provided the appellant very few factual details about the offense.

We do not find the appellant's alibi defense persuasive. The only witness establishing an alibi was the appellant's wife. She claimed that the appellant never missed a weekly wrestling television show and that he was at the family home watching the couple's children on the night in question. We find that the evidence is factually sufficient. Making allowances for the fact that the members saw and heard the witnesses at trial, we are convinced beyond a reasonable doubt that the appellant is guilty of both offenses.

Findings of the Court-Martial and Variance

The appellant contends that the military judge erred by not clarifying ambiguous findings of the court-martial. He further argues that this court cannot conduct an appropriate review under Article 66(c), UCMJ, as a result. We disagree.

A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly to the offense alleged in the charge. *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). Minor variances, such as the date upon which an offense is allegedly committed, "do not necessarily change the nature of the offense and in turn are not necessarily fatal." *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) (citations omitted). An appellant must show that the variance was material and that it substantially prejudiced him in order to obtain relief. *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993).

The facts of this case are strikingly similar to those in *Hunt*. As in this case, "on or about" language modified the date in the specification, and the accused offered a defense of alibi for that precise date. *Id*. at 346-47. The Government's proof at trial suggested the actual date of offense was likely three weeks earlier. *Id*. Our superior court held that, as a matter of law, there was no material variance because the "on or about" language sufficiently encompassed the relevant time period. *Id*. at 347. When a charge employs "on or about" language, the Government is not required to prove the specific date alleged in the charge. The appellant has essentially conceded this point in his brief. Appellant's Brief of 30 Sep 2005 at 11. The appellant's attempt to distinguish *Hunt* in light of *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003) is unpersuasive. *Walters* addressed a variance issue arising out of "on divers occasions" language, and was expressly limited to those facts. *Id*. at 396. Therefore, we hold *Hunt* to be controlling, and that no material variance is present.

Even if we were to find a variance on these facts, the appellant was not prejudiced. An appellant can show prejudice from a material variance in a number of ways. *Teffeau*, 58 M.J. at 67. He may show that the variance puts him at risk of another prosecution for the same conduct. *Id*. (citing *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)). He may show that his due process protections have been violated where he was misled to the extent that he has been unable adequately to prepare for trial, or where the variance at issue changes the nature or identity of the offense and he has been denied the opportunity to defend against the charge. *Id*. (citations omitted). We find that the specification did not mislead the appellant, that he was able to prepare adequately for trial, and that the specification as drafted protects the appellant against double jeopardy.

The specifications indicated the crime was committed on or about 29 August 2002. The victim testified she thought the offense occurred on 29 August 2002. The appellant's allegations of surprise at trial regarding the date are not well taken, considering *his own statements* to NCIS indicated he committed the crime on 27 August 2002. The appellant clearly was on notice that Pvt S might have been incorrect about the exact date of the offense. *Cf. United States v. Parker*, 59 M.J. 195, 201 (C.A.A.F. 2003)(holding that two year change in date was fatal variance when the victim and accused engaged in a consensual relationship during the later time period). We note that the Article 92, UCMJ, offense relating to the same conduct alleged only "on or about August 2002," without objection by the appellant at trial. There was no motion for a bill of particulars on the forcible sodomy offense, and no motion for a continuance after the Government suggested that the offense could have occurred on 27 August. *See Hunt*, 37 M.J. at 348. We find no prejudice on these facts.

Multiplicity

The appellant also alleges that the sodomy charge is multiplicious with the specification alleging violation of a lawful general regulation. We disagree.

"If a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct, the court violates the Double Jeopardy Clause of the Constitution." *United States v. Roderick*, `__ M.J. __, No. 05-0195, 2006 CAAF LEXIS 269, at *17 (C.A.A.F. Mar 8, 2006)(quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Appellate courts review multiplicity claims *de novo*. *See United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Because neither Article 92, UCMJ, nor Article 125, UCMJ, expressly discuss the question of multiple convictions, we must discern Congress' intent using the "separate elements" test established in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See Roderick*, 2006 CAAF LEXIS 269, at *19; *Teters*, 37 M.J. at 376-77. Accordingly, we look at both the statutes and

the specifications to determine the essential elements of each offense. *See United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995).

As the appellant points out, the violation of the regulation was, at least in part, based upon the same facts as the forcible sodomy. We find, however, that the two offenses are not multiplicious. First, each offense contains an element the other does not. It is entirely possible to commit either offense without committing the other. No element of force, or even penetration, is required for the Article 92, UCMJ, violation. Consensual sodomy between a recruiter and a recruit would clearly violate the same regulation, as would sexual contact other than sodomy. Similarly, forcible sodomy would not violate this particular regulation if there were any question as to the person's status as a recruit at the time of the offense. *See* Commander, Navy Recruiting Command Instruction 5370.1B (18 Sep 2001).

We hold that the two statutes are directed at separate and distinct criminal acts. Article 92, UCMJ, and by implication the underlying general regulation, punish disobedience. The regulation in this case was promulgated to protect recruits from exploitation by their recruiter and prevent erosion of proper senior-subordinate relationships. Engaging in any type of sexual activity with a recruit compromises the recruiter's position and diminishes public confidence in the Navy personnel working in the community. By contrast, Article 125, UCMJ, prohibits a particular sexual act, in this case one initiated against the will of the victim. We hold that Congress' intent was to permit separate charges and convictions for these two offenses as alleged.

Moreover, the Government conceded, and the military judge ruled, that these charges were to be considered one offense for sentencing purposes. The military judge instructed the members accordingly. The trial defense counsel did not object to this disposition of the issue or to the military judge's corresponding instructions. On this record, we find no double jeopardy violation or prejudice to the appellant. Although not raised by the appellant, we have also considered unreasonable multiplication of charges under *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). After thoroughly considering the five factors, we also conclude that the two offenses are not an unreasonable multiplication of charges.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority below, are affirmed.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court