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

BEFORE

W.L. RITTER **J.F. FELTHAM** **E.S. WHITE**

UNITED STATES

v.

Bold R. HOOD III
Lieutenant Commander (O-4), Medical Corps, U. S. Navy

NMCCA 200300827 Decided 27 December 2006

Sentence adjudged 27 June 2002. Military Judge: J.V. Garaffa, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, NAS, Jacksonville, FL.

LCDR JASON S. GROVER, JAGC, USN, Appellate Defense Counsel
FRANK J. SPINNER, Civilian Appellate Defense Counsel
Maj KEVIN HARRIS, JAGC, USMC, Appellate Government Counsel
LtCol PAUL D. KOVAC, USMCR, Appellate Government Counsel

RITTER, Senior Judge:

Contrary to his pleas, a general court-martial composed of officer members convicted the appellant of failing to obey a lawful general regulation and fraternization, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to confinement for 5 months, total forfeitures, and a dismissal. The convening authority approved the sentence as adjudged, but in an act of clemency, suspended confinement in excess of 38 days for a period of 6 months.

After carefully considering the record of trial, the appellant's three assignments of error, and the Government's response, 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 was committed. See Arts. 59(a) and 66(c), UCMJ.

Insufficiency of Evidence

The appellant was a lieutenant commander serving as a physician in the emergency room at Naval Hospital Jacksonville, Florida. He was convicted of disobeying the Navy's fraternization instruction[1] by engaging in an unduly familiar relationship with Ensign (ENS) C, a female nurse who worked with him in the emergency room. He was also convicted under Article 134, UCMJ, of fraternization with Hospital Corpsman Third Class (HM3) Dominick, a male member of his emergency room watch team, by drinking with him and allowing him to stay at the appellant's off base house until approximately 0500. He now contends that there is insufficient evidence to support both convictions. We disagree.

Facts

The appellant supervised a watch team that normally consisted of three officer nurses and three petty officer corpsmen on the night shift. The appellant and his watch team decided to socialize off-duty and watch a college basketball game on television together. ENS C and her roommate, ENS Duffy, arrived at a local restaurant where the appellant, HM3 Dominick, and another petty officer were already eating, drinking alcohol, and watching the basketball game. It was a relaxed atmosphere, and ENS C testified that the appellant and the two petty officers were calling each other by their first names. The two ensigns joined the party at the table, and with some urging, began drinking alcoholic beverages. While sitting at the table together, the appellant began rubbing his leg up and down ENS C's leg under the table. She was uncomfortable with this, and shifted her position to avoid his reach. A third, more senior female nurse joined the party later, near the end of the basketball game.

Later, the group moved to a dance club where they encountered more enlisted service members whom they knew from the hospital. This larger group continued drinking alcohol and began dancing. At one point, ENS C and HM3 Dominick danced together and kissed on the dance floor. As the club was preparing to close, one of the petty officers suggested they

[1] Chief of Naval Operations Instruction (OPNAVINST) 5370.2B of 27 May 1999, entitled "Navy Fraternization Policy," attached to the record as Appellate Exhibit III.

move their party over to the appellant's off-base house. The appellant did not object, and the group continued drinking alcohol and dancing there. Several participants, including ENS C and HM3 Dominick, got into the appellant's outdoor hot tub. ENS C and ENS Duffy got in the hot tub in their bras and underwear, as they did not have swimsuits. At one point, civilian police warned the party participants that they were too loud and needed to quiet down. Finally, ENS C felt that she was about to pass out and accepted HM3 Dominick's suggestion that she sleep in one of the bedrooms.

HM3 Dominick led ENS C to a bedroom and they engaged in open-mouth kissing. ENS C fell asleep with the light on just after HM3 Dominick left the room. She was awakened later by someone on top of her who persisted in taking off her pants and underwear, and having sexual intercourse with her in the dark, despite her protests. ENS C was drunk, unable to resist, and did not know the identity of her assailant. After she passed out again, she awoke to find the light on and the appellant lying on top of her, kissing her. He "tried to put his tongue down (her) throat" and ENS C turned her face away. Record at 192. The appellant stopped kissing her and asked where her pants and underwear were. She said she did not know, and the appellant picked her underwear up off the floor and put them back on her. ENS C then passed out again, and the next time she awoke, the appellant was not in the room.

When ENS C next awoke, she realized what had occurred and began crying. She told HM3 Dominick what had happened and asked him if he had had sex with her. He replied that he had not, and said he was going to go talk to "Bold," referring to the appellant by his first name. He returned later and said that "Bold didn't do it." Record at 194. Sometime after daylight, HM3 Dominick took ENS C back to her apartment. Later the next evening, ENS C was taken to a civilian hospital and she submitted to a rape examination.

A stipulation of fact admitted at trial states that a vaginal swab taken from ENS C found sperm. The DNA from the sperm was compared with the appellant's DNA from a blood sample. The probability that the sperm came from someone other than the appellant is one in 80 trillion. Prosecution Exhibit 2.

Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, a

rational fact finder could have found all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Failure to Obey a Lawful General Regulation

The appellant argues that: (1) the members did not receive clear guidance as to what conduct constitutes fraternization; (2) his conduct with ENS C did not violate the Navy's fraternization instruction because no evidence was presented that he wrote her performance evaluation or supervised her in such a way that she might gain a benefit by socializing with him; and (3) it is not clear from the specification precisely what actions constituted undue familiarity.

We first find the military judge's instructions to the members concerning the offense of fraternization constituted a clear and accurate statement of law. Moreover, the defense made no objection to the military judge's instructions and declined the offer to propose additional instructions. Second, the Navy's fraternization instruction (OPNAVINST 5370.2B) does not require that an accused be in the position to write official evaluations on another before the instruction can be violated. Appellate Exhibit III. Third, using the Article 134 offense of fraternization by analogy, we find no requirement in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) that the specification must list the actions that constitute undue familiarity. Moreover, we note the appellant is not claiming on appeal that he lacked notice of an essential element of the offense. Nor did he do so at trial, either by making a motion to dismiss for failure to state an offense or by requesting a bill of particulars.

While the offense of fraternization is fact-specific, and the Navy's instruction frankly admits that "[i]t is impossible to set forth every act that may be prejudicial to good order and discipline or that is service discrediting[,]"[2] this is not a close case. The appellant supervised ENS C as a part of his emergency room watch section. He also exercised military

[2] OPNAVINST 5370.2B at 3.

authority over her as a senior officer and as a Navy physician. Yet, during the course of one evening, he rubbed his leg against hers in a suggestive manner under the table at a restaurant, invited her along with others to his off-base house to continue drinking alcohol at an all-night party, and then lay on top of her, kissing her, while she was drunk, at least partially unclothed, and asleep. And although the appellant was found not guilty of rape, both DNA evidence and a stipulation of fact add the strong possibility of sexual intercourse between the appellant and ENS C to the other evidence of an unduly familiar relationship.

Considering the evidence in the light most favorable to the Government, we have no difficulty in finding that a rational fact finder could have found all the necessary elements of the offense beyond a reasonable doubt. *See Turner*, 25 M.J. at 325 (citing *Jackson*, 443 U.S. at 319). After weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is also convinced of the appellant's guilt beyond a reasonable doubt. *Id*.

Fraternization With HM3 Dominick

Similarly, we find no lack of evidence with regard to the offense of fraternization with HM3 Dominick. While the appellant points out that there were other petty officers besides HM3 Dominick at the party who enjoyed a similar intimacy with the appellant that evening, this merely highlights a decision involving the command's prosecutorial discretion and does not in any way impact the sufficiency of the evidence supporting this offense. Likewise, the appellant's suggestion that the legal standards for fraternization are too vague to apply to his actions is not well taken.

The record clearly demonstrates that the appellant fraternized with HM3 Dominick on terms of military equality. As the senior officer present, the appellant engaged in and hosted an all-night drinking party, beginning at a restaurant and continuing until HM3 Dominick and others spent the rest of the night at the appellant's off-base house. This was clearly not a command-sponsored social event. HM3 Dominick and others soaking in the appellant's hot tub were loud enough to draw a warning from the local police. ENS C testified that when she arrived at the restaurant, the appellant, HM3 Dominick and the other petty officer who were present referred to each other by their first names. Before the night was over, HM3 Dominick was referring to

the appellant by his first name while discussing a rape allegation with ENS C. Considering all the surrounding circumstances, we have no doubt that these actions had a tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of the appellant. *See* MCM, Part IV, ¶ 83c(1).

Sentence Severity

We have considered the appellant's contention that the sentence to a dismissal was inappropriately severe, and find it wholly without merit. We find the appellant's offense against ENS C was egregious behavior against a subordinate officer, and although fairly characterized as fraternization, it was clearly a one-sided unduly familiar relationship. In addition, the court members properly considered the appellant's prior special court-martial conviction, his civilian conviction, and his unusually poor military record in arriving at the sentence. Having considered all the relevant facts in the record, we find that the sentence -- including the dismissal -- is appropriate for this offender and his offenses. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

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

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court