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

BEFORE

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

UNITED STATES

v.

Michael L. WITHERSPOON
Aviation Ordnanceman Third Class (E-4), U. S. Naval Reserve (TAR)

NMCCA 200400012 Decided 14 November 2006

Sentence adjudged 15 November 2002. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Reserve Forces Command, New Orleans, LA.

Capt PETER GRIESCH, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
CAPT PAUL D. LOCHNER, JAGC USNR, Appellate Government Counsel

RITTER, Senior Judge:

The appellant pled guilty, before a military judge sitting as a general court-martial, to making a false official statement, sodomy, and adultery, in violation of Articles 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 925, and 934. The appellant was then tried before officer and enlisted members, who found him guilty, contrary to his pleas, of conspiracy to commit indecent acts and willfully disobeying a lawful order, in violation of Articles 81 and 91, UCMJ. The members sentenced the appellant to confinement for 30 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's sole assignment of error, and the Government's response. We find merit in the appellant's contention. Following our remedial action, we conclude that the remaining findings and the sentence are correct in law and fact and that

no other error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

The appellant contends that the evidence is legally and factually insufficient to support his conviction of conspiracy with Aviation Ordnanceman First Class (AO1) Langford to commit indecent acts. He argues that: (1) there was no agreement between the appellant and AO1 Langford; and (2) any agreement between the appellant and AO1 Langford to arrange an opportunity for the latter to have sexual intercourse was not a criminal conspiracy because it involved consensual sexual activity that was "substantially private" and thus not indecent. We disagree with the appellant's first argument, but find merit in the second contention because the evidence fails to prove that the object of the agreement was the commission of an indecent act.

Facts

The appellant set up a party in which he and a few male friends would watch football play-off games at a friend's apartment. The appellant also invited Aviation Ordnanceman Airman (AOAN) B, a 19-year-old female who had recently reported to his military unit. The appellant spoke with his leading petty officer, AO1 Langford, by phone on at least two occasions during the evening of the party. The appellant later told Petty Officer Moody that, in one of these discussions, he asked AO1 Langford whether the latter "was looking to have sex." Record at 383.

As a result of these phone conversations, AO1 Langford arrived at the apartment where the party was being held sometime after the appellant and AOAN B had engaged in sexual activity. AO1 Langford walked into the bedroom where AOAN B had just finished having sexual intercourse with another person from the party. He engaged in sexual intercourse with AOAN B. No one else was in the bedroom during this sexual activity, and the door was closed. The appellant and at least one other male were still in the apartment. AOAN B had not known AO1 Langford was coming to the party until he walked into the bedroom for sexual intercourse. AO1 Langford was married, and was also AOAN B's leading petty officer at the time of the party.

In the sole specification under the Additional Charge, the appellant was charged with conspiracy to commit an indecent act. The specification does not allege that the object of the

conspiracy included adultery, fraternization, or any other offense.

Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *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 is whether, after weighing 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. *Id.*; *see* Art. 66(c), UCMJ.

An otherwise lawful sexual act may violate Article 134, UCMJ, if it is committed "openly and notoriously." *United States v. Sims*, 57 M.J. 419, 421 (C.A.A.F. 2002)(citing *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956)). Sexual acts are open and notorious when committed "in such a place and under such circumstances that it is reasonably likely to be seen by others even though others actually do not view the acts." *Id*., (citing *United States v. Izqui*erdo, 51 M.J. 421, 423 (C.A.A.F. 1999)).

A conspiracy exists "if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 5c(2). The object of a conspiracy must involve the commission of one or more offenses under the UCMJ. *Id*. at ¶ 5b(1).

Discussion

First, we view the evidence as clearly establishing the existence of an agreement between the appellant and AO1 Langford. Petty Officer Moody's testimony concerning the substance of the appellant's cell phone conversations with AO1 Langford, together with the conduct of AO1 Langford later that evening, indicate that the appellant arranged, with AO1 Langford's agreement, for the latter to have sexual intercourse with AOAN B. Specifically, AO1 Langford's arrival at the apartment, prompt entry into the bedroom where AOAN B had just had sexual intercourse with another person, and his engaging in sexual intercourse with AOAN B himself clearly indicate that he knew where, when, and with

whom he could engage in sexual intercourse. He was clearly taking advantage of an opportunity set up during the earlier conversation, wherein the appellant asked if he was "looking to have sex."

But we have little evidence from which to infer that AO1 Langford's agreement with the appellant contemplated sexual activity to be performed in such a manner as to constitute an indecent act. That is, the available details concerning the appellant's discussion with AO1 Langford about a chance to "have sex" fail to establish that the object was sexual activity to be conducted in a place and under such circumstances that it was reasonably likely to have been seen by others, or in other words, in an "open and notorious" fashion.

The only credible evidence offered at trial that specifically addressed the substance of the appellant's discussions with AO1 Langford was Petty Officer Moody's testimony.[1] Petty Officer Moody's testimony clearly indicates that AO1 Langford "having sex" was the goal of the agreement. But it does not include details, such as who else might participate in sexual activity with AOAN B, where within the apartment it would take place, and who else might be present for the sexual activity.

We find that the evidence of the agreement provides insufficient detail to allow a rational trier of fact to infer, beyond a reasonable doubt, that the object was sexual activity to be conducted in a place and under such circumstances that it was reasonably likely to have been seen by others; that is, open and notoriously. Likewise, we are not certain beyond a reasonable doubt that the appellant and AO1 Langford's plans contemplated sexual acts that would be conducted in a place and under such circumstances that it was reasonably likely to be seen by others. Since the agreement was only proven to relate to AO1 Langford having sexual intercourse, a lawful activity when conducted in private between consenting adults, and the specification under the Additional Charge does not allege that the sexual intercourse also constituted adultery or some other offense under the UCMJ, the evidence of the agreement lacks a criminal object and cannot support a conviction for conspiracy.

[1] The only other evidence consisted of the appellant's and AO1 Langford's statements to agents of the Naval Criminal Investigative Service. These statements were clearly self-serving and false, as demonstrated in part by the appellant's guilty plea to the offense of making a false official statement.

We therefore set aside and dismiss the Additional Charge and its sole specification. With this modification, we affirm the findings. Upon reassessment, we are convinced that the sentence would have been no less even without the conviction for the conspiracy offense. *United States v. Cook*, 48 M.J. 434, 438 (1998); *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We thus conclude that the sentence is appropriate for the remaining offenses, and affirm the sentence, as approved by the convening authority. The supplemental promulgating order shall note our dismissal of the Additional Charge and its sole specification.

Judge FELTHAM and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court