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

**BEFORE**

**W.L. RITTER** **D.A. WAGNER** **R.W. REDCLIFF**

**UNITED STATES**

**v.**

**Barry D. BEEBE**
**Aviation Structural Mechanic (Structures) Airman (E-3), U.S. Navy**

NMCCA 200100194 Decided 20 April 2005

Sentence adjudged 24 April 2000. Military Judge: W.K. Lietzau. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Warfare Center Aircraft Division, Patuxent River, MD.

FRANK J. SPINNER, Civilian Appellate Counsel
LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel



REDCLIFF, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial, composed of officer and enlisted members, of conspiracy to commit housebreaking, rape, housebreaking, and indecent acts, in violation of Articles 81, 125, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 925, 930, and 934. The trial was a "joint trial" involving the appellant and one of his two co-conspirators, Airman (AN) Tilman. Following the announcement of the verdict, the military judge, sua sponte, found the indecent acts offense multiplicious with the rape offense and dismissed the indecent acts offense. The appellant was sentenced by the members to a dishonorable discharge, confinement for 2 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority (CA) approved the sentence as adjudged.

In his first and second allegations of error, the appellant claims that the evidence is legally and factually insufficient to support the findings of guilty to the offenses of housebreaking, conspiracy to commit housebreaking, and rape. In his third

allegation of error, the appellant claims that the CA failed to provide relief after the military judge rejected the guilty plea of his co-conspirator, Petty Officer Kepler, concerning the housebreaking offense and its related conspiracy.

After carefully considering the record of trial, the appellant's 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. Arts. 59(a) and 66(c), UCMJ.

**Facts**

The appellant, along with two other male sailors (AN Tilman and Petty Officer Kepler), attended a party together at the apartment of a female Sailor, AN "B," to celebrate her 21st birthday. During the course of the party, AN B became very intoxicated after consuming a bottle of wine, beer and other alcoholic beverages. Over the course of the evening, she jested about having an "orgy." The appellant and his co-actors participated in these discussions involving group sex. The appellant and Petty Officer Kepler also engaged in some amorous contact with AN B during the course of the party, involving kissing and fondling. A female friend of AN B ended the party after she discovered her kissing the appellant and his co-actors and sent all the party participants home. She did so due in part to the gross inebriation of AN B and, in part, due to AN B's activities with the appellant and Petty Officer Kepler. After the appellant and his companions took their leave of the party, several Sailors assisted AN B, then stumbling-drunk, to her bed and departed, locking the front door and turning off the lights to her apartment.

Upon their return to their barracks, AN Tilman informed his companions, including the appellant, that AN B had invited them to return and stated she would leave the door open and a light on for them. The trio then decided they would return and attempt to continue their activity with her. When they arrived at the apartment at about 0130 hours, the three Sailors found the door locked. They boosted AN Tilman onto the balcony of the second floor apartment and he entered the apartment through an unlocked balcony door. Shortly afterwards, he unlocked and opened the front door for his two companions.

AN B was discovered by the trio sound asleep on her bed. After 2-3 unsuccessful attempts, the appellant and his co-actors were able to wake her by shaking her shoulder. She asked if her friends had left and was told that they had. She was described as "mumbling" and made no eye contact with the trio. The appellant sat her up in the bed and helped her stand. She stood on her own for only about 2-3 seconds, then fell into Petty Officer Kepler's arms. Obviously drunk, Airman B was unable to stand up without assistance. Record at 398. She then leaned on

the appellant, who laid her on her back on the bed. The appellant and his companions, variously, engaged in sexual intercourse and/or oral copulation with AN B. These acts were done at the same time and in each other's presence. Her initial resistance to performing oral sex on the Sailors waned quickly, as did her level of consciousness. As AN Tilman tried to fondle her vagina, AN B tried to push his hand away several times but he grabbed her hand and held it against her stomach. *Id.* at 406. When AN B suddenly said, "I want to ride you, Jeff," the Sailors, none of whom were named "Jeff," decided she didn't know what was going on and they departed. *Id*. at 407-08.

Several days later, the appellant called Petty Officer Kepler and told him that AN B was "crying rape." The appellant then asked Petty Officer Kepler not to tell anyone they had gone back to her apartment that night. When Petty Officer Kepler said he would tell the truth, the appellant sounded unhappy, upset, and scared. Later that day, the appellant again called Petty Officer Kepler and asked him not to tell anyone they went back to the apartment. Petty Officer Kepler agreed to honor the request so that the appellant would stop calling him, but later that day, made a statement to the Naval Criminal Investigative Service concerning some of the events at Airman B's apartment. *Id*. at 410-11.

**Factual and Legal Sufficiency of the Evidence of Housebreaking and Conspiracy to Commit Housebreaking**

In his first assignment of error, the appellant contends that the evidence was insufficient to support findings of guilty to housebreaking and conspiracy to commit housebreaking. Specifically, he asserts that the evidence failed to establish beyond a reasonable doubt that the appellant and his co-actors unlawfully entered a structure with the intent to commit a criminal offense therein. We disagree.

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 elements of the crime beyond a reasonable doubt. *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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* 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 also* Art. 66(c).

The elements of housebreaking are:

> (1) That the accused unlawfully entered a certain building or structure of a certain other person; and
>
> (2) That the unlawful entry was made with the intent to commit a criminal offense therein.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 56b. "If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry." MCM, Part IV, ¶ 56c(2). An accused's mistake of fact as to consent to the entry must be "both subjectively held and reasonable in light of all the circumstances." *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997).

The uncontroverted testimony of one co-conspirator, Petty Officer Kepler, established that he and his cohorts, including the appellant, discussed and agreed on to a plan to return to AN B's apartment for the express purpose of engaging in sexual activities with her. Many witnesses testified that the discussions about sex that occurred during the party involved group sex, or orgies. There was also testimony that the appellant participated in these discussions during the party. We have no difficulty concluding that the appellant entered the apartment to carry out a criminal purpose, at the very least, to include indecent acts.

The only evidence regarding consent to the entry into the apartment was Petty Officer Kepler's testimony that AN Tilman told him and the appellant that AN B had invited them to return later. However, AN B testified that she did not give anyone permission to enter her apartment that night. Other witnesses testified at length regarding the conversations that went on during the party, but none heard any discussion regarding an invitation for the appellant and his co-actors to return to AN B's apartment. To the contrary, there was uncontroverted testimony that by the end of the party, AN B was incapable of inviting anyone to return due to her gross intoxication.

We hold that the evidence at trial was legally sufficient to prove beyond a reasonable doubt that the appellant was a conspirator to housebreaking wherein the conspirators intended to commit a crime and subsequently entered the apartment unlawfully and without consent in furtherance of the criminal purpose. Moreover, we are convinced beyond a reasonable doubt of the appellant's guilt of the offense.

**Factual and Legal Sufficiency of the Evidence of Rape**

The appellant contends in his second assignment of error that the evidence was insufficient to support finding him guilty of rape because it failed to establish beyond a reasonable doubt that AN B did not consent, or, alternatively, that the evidence failed to prove that the appellant did not possess an honest and reasonable mistake of fact with respect to her consent to engage in sexual intercourse. We disagree as to both contentions.

Applying the legal principles above to the facts, we hold that the evidence of lack of consent presented at trial was legally and factually sufficient to support the guilty findings. The appellant's act of intercourse with AN B was stipulated as fact by the parties at trial. Thus, we must decide only the related issues of lack of consent and absence of mistake as to the act.

It is beyond dispute that during, and well after, the party at her apartment, AN B was grossly intoxicated. We are firmly convinced that the evidence reflects obvious physical indicators that she was not capable of coherent and rational thought at the time the appellant entered her bedroom. Her communications with the appellant and his co-conspirators during the incident were mumbled and indicative that she was surprised by, and confused over, their presence in her bedroom. She testified that she was unable to manifest her lack of consent due to her intoxication. Even so, she made an effort on at least two occasions to stop AN Tilman from engaging in sexual acts with her. Based on a thorough review of the evidence adduced at trial, we find beyond a reasonable doubt that AN B did not consent, and was not capable of consenting due to her intoxication, to the act of sexual intercourse with the appellant.

Rape is a general intent offense. Where mistake of fact as to consent is fairly raised by the evidence, the government must prove either that the mistake was not honest or that it was not reasonable. RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see also United States v. Langley*, 33 M.J. 278 (C.M.A. 1991).

Assuming arguendo that the evidence was insufficient to prove that the appellant's mistake of fact was not honest, the evidence clearly shows that the mistake of fact was not a reasonable one under the circumstances. No reasonable person, observing the physical condition of AN B immediately before and during this offense, would believe that she was capable of making a rational and coherent decision to engage in group sex acts. Nor would a reasonable person conclude that the flirtatious behavior by AN B toward the appellant and others at the party translated into her consent to sexual intercourse and group sexual activities later. This is especially true in view of the following circumstances: (1) the appellant and his co-actors had

been ushered from the party after AN B's friend told them she felt they were taking advantage of AN B's intoxicated condition, (2) the appellant and his co-actors returned at an early morning hour, only to find AN B's front door locked and her apartment dark, (3) the appellant and his co-actors gained entry into the locked apartment by boosting AN Tilman through a second floor balcony, (4) the appellant and his co-actors had to repeatedly shake AN B to awaken her from a drunken stupor and support her efforts to sit up and stand, and, (5) AN B resisted the sexual assault of the appellant's co-actors, as best she could under the circumstances.

AN B testified unequivocally that she neither invited the trio to return to her apartment nor consented to their sexual advances thereafter. Neither the appellant nor his co-accused, AN Tilman, testified on this matter. Finally, we note that the appellant, unlike many at the party, did not consume alcohol that evening, and there is no evidence of record to suggest that his mental faculties were impaired. We are further convinced that any mistake he purportedly held as to consent was patently unreasonable.

Thus, we hold that the evidence at trial was legally sufficient to prove beyond a reasonable doubt, that the appellant raped AN B. We also are convinced beyond a reasonable doubt that the appellant raped AN B.

**Remaining Assignment of Error**

The appellant asserts in his third assignment of error that the convening authority erred by not setting aside the findings and sentence because the military judge rejected Petty Officer Kepler's guilty plea to conspiracy and housebreaking in a separate proceeding. We have carefully considered this assignment of error and find no merit in it. We simply note, as did the military judge, that his decision was based on differing standards pertaining to the providence of guilty pleas and thus, does not cast substantial doubt on the fairness or reliability of this appellant's conviction.

**Conclusion**

Accordingly, the findings of guilty and sentence, as approved below, are affirmed.

Senior Judge RITTER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court