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

BEFORE

C.L. CARVER **D.A. WAGNER** **E.B. STONE**

UNITED STATES

v.

John J. HUMPHREYS
Aviation Machinist's Mate Airman (E-3), U.S. Navy

NMCCA 200300750 Decided 29 December 2005

Sentence adjudged 21 February 2002. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silversale, WA.

Capt J.D. VALENTINE, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of sodomy with Yeoman Seaman (YNSN) JMB and assault consummated by a battery on Aviation Maintenance Administrationman Third Class (AZ3) SJR, in violation of Articles 125 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 928. In accordance with his pleas, the appellant was also convicted of one specification of attempted sodomy and two specifications of carnal knowledge with PDB, a child under 16 years of age, in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 880 and 920. PDB was 15 years old at the time of her relationship with the appellant.

The appellant was sentenced to confinement for 12 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant alleges that his conviction for sodomy violates his constitutional right to privacy, that the evidence was factually insufficient to sustain a conviction for battery, that his sentence is inappropriately severe, and that the

military judge erred by not declaring a mistrial. *See* Appellant's Brief and Assignments of Error of 31 Aug 2004.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the first assignment of error has merit, and we will grant appropriate relief. Following our corrective action, the remaining findings and the sentence are correct in law and fact and no error remains that is materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Constitutionality of Sodomy Conviction

A. Facts

The appellant was initially charged with forcible sodomy and rape of YNSN JMB, a female Sailor who had recently reported aboard the appellant's squadron, but was found guilty only of the lesser included offense of sodomy. YNSN JMB testified that after she met the appellant, they occasionally went to a movie or ate together on a social basis.

On 18 November 2000, they went to the appellant's barracks room and watched television. The appellant's male roommate was also in the room for about 45 minutes before he left. The appellant and YNSN JMB playfully wrestled. Then the appellant bit her on the arm and hand. She asked him to stop, but he bit harder. As a result, she had bruises for a couple of weeks afterward. He then lifted her up, put her on the bed, held her down, and removed her clothes. She tried to resist, but could not. He handcuffed her to the bed and raped her. The appellant then removed the handcuffs and went to the bathroom for several minutes. YNSN JMB put her sweater on, but did not have time to put the rest of her clothes on before he returned. He took her sweater back off, flipped her over on the bed, and sodomized her. She yelled out that it hurt and he eventually stopped. Then he flipped her back over and had vaginal sex with her again. They both got dressed. The appellant then drove her to the Enlisted Club where they stayed about 45 minutes, greeting a number of people. She finally left and walked home. She did not report the incident until March or April of the next year.

One of YNSN JMB's co-workers testified that she observed bite marks on YNSN JMB's neck and bruises on her wrists shortly after the incident. The appellant did not testify, but in pretrial statements to the Naval Criminal Investigative Service (NCIS), he indicated that he and YNSN JMB engaged in a variety of consensual, albeit rough, sexual activity, including sodomy.

B. Discussion

The appellant contends that a conviction for this conduct violates his constitutional right to sexual privacy. On the specific facts of this case, we agree.

The landscape of sexual privacy has changed significantly in the past few years, in both the military and civilian contexts. Historically, sodomy was a military crime even if purely consensual. As our superior court held more than a quarter century ago:

> By its terms, Article 125 prohibits every kind of unnatural carnal intercourse, whether accomplished by force or fraud, or with consent. Similarly, the article does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend in the nature of the act.

United States v. Scoby, 5 M.J. 160, 163 (C.M.A. 1978); *see also United States v. Fagg,* 34 M.J. 179 (C.M.A. 1992); *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992). These cases were consistent with jurisprudence of the U.S. Supreme Court at that time. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

The Supreme Court, however, retreated from *Bowers* in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003), ruling that, with a few exceptions, criminalizing consensual sodomy, whether homosexual or heterosexual, violated the right to liberty under the due process clause of the 5th and 14th Amendments to the Constitution. *Id*. at 578. Faced with this significant shift in the arena of sexual privacy, the Court of Appeals for the Armed Forces recently addressed the impact of *Lawrence* on prosecutions under Article 125, UCMJ. *See United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

CAAF concluded that we must determine the constitutionality of Article 125 as it applies to an individual appellant by considering three questions:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Marcum, 60 M.J. at 206-07; *see also United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004). We address each of these factors in turn.

The Government contends that no liberty interest is implicated because the conduct occurred in a military barracks

room, where the military has a right to regulate otherwise permissible sexual conduct. We disagree. This court recently held that consensual sexual conduct in military married housing qualifies for the protected liberty interest defined in *Lawrence*. *See United States v. Bart*, 61 M.J. 578, 582 (N.M.Ct.Crim.App. 2005). The Government's assertion that the appellant's roommate or "any other tenant" of the barracks could have walked in and observed this conduct is purely speculative. No one observed the appellant and YNSN JMB engaging in this activity. The record reflects that this conduct occurred in private quarters, presumably with the door closed. Although the military clearly has a greater interest in regulating conduct on board a military installation, there is no indication in the record that all sexual relations were prohibited or discouraged in the barracks. Therefore, the Government cannot claim a heightened interest in controlling the specific sexual acts between the appellant and YNSN JMB merely because those acts took place in a barracks room.

The second *Marcum* factor is more complex in this situation. *Lawrence* excepted from its holding conduct involving minors, coercion, public conduct and prostitution, although it is unclear whether those exceptions were an exclusive list or merely examples. *See Marcum*, 60 M.J. at 203. The court members in this case determined that the Government did not prove beyond a reasonable doubt that the sodomy between the appellant and YNSN JMB was achieved "by force and without consent." That does not necessarily mean the conduct was purely consensual or free from coercion. *See Stirewalt*, 60 M.J. at 305 (Crawford, C.J., concurring in part and in the result). An egregious example of this scenario is *United States v. Thompson*, 47 M.J. 378 (C.A.A.F. 1997). In *Thompson*, the appellant was engaged in behavior that could only be described as brutal. During a violent argument with his wife, he produced a loaded handgun, held it to his wife's head, and pulled the trigger. *Id*. at 379. Fortunately, the gun jammed. Mrs. Thompson, in an effort to distract her husband while he attempted to reload the gun, performed fellatio on him. *Id*. Although charged with "consensual" sodomy, it would be hard to characterize the act as free from coercion. As CAAF stated, "[u]nder the circumstances of this case, appellant is in no position to claim the protection of a constitutional right that is intended to protect the interests of the marital relationship." *Id*.

Similarly, in the more recent CAAF decision in *Stirewalt*, the appellant's conviction for forcible sodomy was reversed on evidentiary grounds on appeal; at a rehearing, he pled guilty to sodomy. 60 M.J. at 298-99. CAAF assumed, without deciding, that the first and second prongs of *Marcum* were met. In her separate opinion, then-Chief Judge Crawford indicated that, because there was probable cause to believe the act was by force, that was sufficient to remove the case from the *Lawrence* analysis. 60 M.J. at 305 (Crawford, C.J., concurring in part and in the result). However, none of the other four judges at CAAF joined in that opinion.

We find *Stirewalt* and *Thompson* to be distinguishable. In this case, the element of force was specifically charged and resulted in an acquittal by the trier of fact. For purposes of our constitutional analysis, we hold that the verdict at trial in this case resolves the issue of force in the appellant's favor. As none of the other *Lawrence* exceptions are present, we find that the second question in the *Marcum* analysis must be answered in the negative.

Likewise, we answer the third *Marcum* factor in the negative. The Government argues that the "spectacle" of a court-martial, and the resulting adverse impact upon morale, justify a departure from *Lawrence* by reason of the military's unique nature. Government Brief of 31 May 2005 at 8-9. We do not agree. Whether the appellant would have been referred to a court-martial regarding YNSN JMB absent the allegations of force and rape of which he was acquitted is a matter for speculation. To hold as the Government urges would elevate the allegations and pretrial charging decisions to greater significance than that of the ultimate determination by the trier of fact.

In addition, we will not speculate about the impact on morale within the unit. Other than the testimony of YNSN JMB's co-worker, who counseled YNSN JMB about having visible "hickeys" on her neck, the record is sparse at best regarding how many people knew of the appellant's brief relationship with YNSN JMB, let alone the intimate details of it. There is no evidence that the appellant bragged about the act of sodomy, or that anyone learned of it until YNSN JMB came forward with her allegations several months after the incident. There is no evidence that YNSN JMB was unable to do her job, or of any other significant impact on the unit's mission or readiness. Again, such an exception would render *Lawrence* essentially inapplicable to servicemembers, which is not a result consistent with *Marcum*.

The cases involving consensual sodomy that have been affirmed in the aftermath of *Lawrence* have involved adulterous relationships, senior-subordinate relationships, public conduct, or some other situation where prejudice to good order and discipline are readily apparent from the record. *Cf. Marcum*, (recruiter-recruit relationship), *Stirewalt* (officer-enlisted), and *Bart* (servicemember with married co-worker in unit). In this case, we have no such evidence before us. The finding of guilt against the appellant criminalizes a brief, single act of sodomy with a fellow junior enlisted Sailor, occurring off-duty in the appellant's barracks room. It was not observed by a third party or carried out in an open and notorious manner, nor did it have any discernible impact on the military mission. The members' verdict nullifies any issue of force or lack of consent. We can thus find no rational basis to divest that act of the

constitutional protections set forth in *Lawrence*. We will thus take corrective action in our decretal paragraph.

Sufficiency of the Evidence

The appellant contends that the evidence is factually insufficient to sustain his conviction for assault consummated by a battery on AZ3 SJR. He points out various perceived inconsistencies in the victim's testimony, essentially repeating the unsuccessful arguments of his trial defense counsel before the members. Like the members at trial, we are convinced beyond a reasonable doubt that the appellant committed this offense.

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. *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); 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).

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, the members acquitted the appellant of indecent assault, but found him guilty of assault consummated by a battery. AZ3 SJR testified that, while in the appellant's barracks room, the appellant threw her on his bed, held her down, and simulated sexual intercourse while both of them were fully clothed. We have reviewed AZ3 SJR's testimony and find the inconsistencies addressed in the appellant's brief to be relatively minor, and her testimony as a whole to be compelling.

The appellant asserts that the testimony of AZ3 SJR is incredible since she did not report the offense until questioned by NCIS agents regarding the allegations of YNSN JMB. We find it ironic that the appellant initially listed AZ3 SJR as a character witness, but hardly exculpatory. The members' findings appear to indicate a belief, supported by the evidence, that the offensive touching was more offensive and excessive horseplay than sexual in nature. 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 assaulted and committed a battery upon AZ3 SJR.

Sentence Appropriateness

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). Courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Thus, a sentence should not be disturbed on appeal "unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.M.C.M.R. 1980).

After carefully considering the providence inquiry, and the evidence in aggravation, including the appellant's prior nonjudicial punishment, and mitigation, including the appellant's unsworn statement, we conclude that the appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ. The appellant faced maximum confinement of more than 65 years and a dishonorable discharge. His callous treatment of PDB, a 15-year-old girl who lost her virginity with the appellant after believing his expressions of love and commitment, is a legitimate reason why carnal knowledge remains an offense under the UCMJ. PDB testified that her attitudes toward men, and Navy men in particular, were adversely affected by the appellant's actions. AZ3 SJR, on the other hand, was a fellow Sailor who considered the appellant a friend. His actions betrayed that friendship, and in his own words, took advantage of their friendship. Record at 522.[1] Because of our disposition of the first assignment of error, we are already required to reassess the appellant's sentence; however, we nonetheless hold that the adjudged sentence is not inappropriately severe.

Mistrial

In a summary assignment of error, the appellant alleges that the military judge erred by not declaring, *sua sponte*, a mistrial because the prosecutor informed the members that the case involved allegations of "carnal knowledge." Appellant's Brief at 9. We disagree.

The appellant pled guilty to carnal knowledge at an Article 39(a), UCMJ, session outside the presence of the members. The appellant requested that the court members not be informed of those offenses until after trial on the remaining allegations. Nonetheless, the trial counsel erroneously brought this charge to the members' attention when he stated the general nature of the

[1] Interestingly, neither the trial counsel nor the trial defense counsel made mention of the sodomy conviction or YNSN JMB during their respective arguments on sentencing.

charges. The military judge recognized this error and specifically inquired whether the appellant wished to move for a mistrial. Record at 152. The appellant did not do so, and thus affirmatively waived this issue.

Moreover, we do not believe this error was sufficiently significant to warrant a mistrial. A mistrial is a drastic, unusual, and disfavored remedy. *See United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003)(quoting *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)). A mistrial should be granted only to prevent manifest injustice to an accused. *Id.* A military judge has "considerable latitude in determining when to grant a mistrial." *Id.* (quoting *United States v. Seward*, 49 M.J. 369, 371 (C.A.A.F. 1998)). We will not reverse the military judge's decision absent clear evidence of abuse of discretion. *Id.* (citations omitted). Given the lack of a defense motion for a mistrial, the fact that the error occurred prior to the presentation of evidence, and the appellant's acquittal on several offenses, we find no error.[2]

Conclusion

Accordingly, the findings of guilty to Charge II and its sole specification are set aside and that charge is dismissed. The remaining findings, as approved by the convening authority, are affirmed. Reassessing the sentence, we affirm a sentence of confinement for 10 months, forfeiture of all pay and allowances for 10 months, and reduction to pay grade E-1. *See United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Senior Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] We also note that the military judge went into considerable detail, at the start of the sentencing proceedings, as to why the members were not informed of the appellant's guilty plea. In context, it would appear that some of the members expressed surprise when they were so informed. That further supports a finding that the trial counsel's erroneous remark did not make an indelible impression upon the members.