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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Johnny W. HIGHFILL
Engineman Fireman Apprentice (E-2), U.S. Navy

NMCCA 200300834 Decided 18 August 2005

Sentence adjudged 8 May 2002. Military Judge: T.K. Leak. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS THOMAS S. GATES (CG 51).

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

CARVER, Senior Judge:

The appellant was convicted, contrary to his pleas, at a special court-martial composed of officer and enlisted members, of two specifications of violating written orders and one specification of indecent assault, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 4 months, forfeiture of $737.00 pay per month for 4 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

The appellant claims that (1) the evidence of indecent assault was factually insufficient and (2) one of the order violation specifications failed to state an offense.

After carefully considering the record of trial, the appellant’s assignments of error, and the Government’s response, we conclude that one of the order violation specifications must be dismissed and that the sentence must be reassessed. We

further find 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. Arts. 59(a) and 66(c), UCMJ.

Factual Sufficiency

In his first assignment of error, the appellant contends that the Government failed to prove beyond a reasonable doubt that he committed an indecent assault. We disagree and decline to grant relief.

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. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. We must conduct a *de novo* review of the record, giving no deference to the decision of the trial court except that we must take into account the fact that the trial court saw and heard the witnesses. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Reasonable doubt does not require that the evidence presented be free from conflict. *United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

Upon review of the record, we are ourselves convinced beyond a reasonable doubt of the guilt of the appellant. The appellant claims that the victim consented to his actions. But we find the great weight of the evidence is to the contrary. In particular, we are persuaded by the testimony of the victim, who immediately shouted for help and chased after the appellant, finally cornering him until others arrived; the testimony of several witnesses who corroborated portions of the victim's story; and the appellant's confession, even though he testified that he was under stress and, therefore, falsely confessed.

Failure to State an Offense

In his second assignment of error, the appellant claims that the military judge erred by failing to dismiss a specification alleging that he violated the ship's instruction

not to drink alcohol underage for failure to state an offense. We agree.

The specification of which the appellant was convicted reads in pertinent part:

> In that [the appellant] . . . having knowledge of a lawful order issued by Commanding Officer . . . to wit: "No personnel below age 21, shall *not* consume, possess or purchase any alcoholic beverages in any state or territory in which the legal age to drink is 21 or older" . . . an order which it was his duty to obey, did, at . . . fail to obey the same by wrongfully consuming alcoholic beverages.

Charge Sheet (emphasis added). At trial, the appellant moved to dismiss the specification for failure to state an offense. A copy of a portion of the instruction, including the charged language quoted above, was admitted as Prosecution Exhibit 8. The trial counsel also introduced Prosecution Exhibit 9, a one-page document from the appellant's service record, signed by the appellant, entitled PERSONAL CONDUCT WHILE ON LIBERTY ASHORE. This document does not refer to, or mention, the charged instruction. But the paragraph entitled CONSUMPTION OF ALCOHOL, states in part that "Consuming alcohol under the legal age is also forbidden . . . ." Prosecution Exhibit 9.

Thereafter, the military judge denied the motion to dismiss and explained his ruling as follows:

> It's [the charged language and instruction] not very artfully drafted, obviously. But it's clear from the court's view that, in light of Prosecution Exhibit number . . . 9, and in light of the absurdity which would have to be derived if we were to follow the defense's contention of paragraph 1(a), that is that all personnel under the age of 21 would have to consume alcohol, it's pretty clear what the intent of the instruction was. Again, the court concurs that it's not artfully drafted and may be somewhat difficult to understand, but in light of Prosecution Exhibit 9, which indicates that [the appellant] did read that and did sign that, which clarifies Prosecution Exhibit 8, the court is going to deny the defense motion.

Record at 412-13. The appellant testified that he drank alcohol on the night in question, but he did not testify concerning his knowledge or understanding of the instruction regarding underage alcohol consumption. We must review the wording of the charged instruction to determine if it sets forth a clear and specific mandate such that it is specific, definite, and certain:

> Although general orders and regulations are not in and of themselves statutes, when a violation occurs and is charged under Article 92, UCMJ, such orders and regulations are subject to the same rules of construction as are statutes and the punitive articles of the UCMJ. *See United States v. Womack*, 29 M.J. 88, 91 (C.M.A. 1989)(evaluating the validity of military order on grounds of specificity and overbreadth). To be valid, a military order "must be a clear and specific mandate . . . worded so as to make it specific, definite, and certain." *Id*. at 90 (citations omitted); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 14c(2)(d).
>
> . . . "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

United States v. Cochrane, 60 M.J. 632, 634 (N.M.Crim.Ct.App. 2004), *rev. denied*, 60 M.J. 308 (C.A.A.F. 2004). Upon review, we find and conclude that the charged instruction is not sufficiently clear or certain to support a criminal charge. Further, we find that the appellant's conduct did not violate the instruction as charged.

Thus, we grant relief and dismiss Specification 1 of Charge I. Nonetheless, we find no prejudice to the appellant. Upon reassessment, in light of our dismissal of the specification alleging that he violated an order not to drink alcohol while underage, we find that the sentence received by the appellant would not have been any lighter even if he had not been charged with that specification. We further find that the adjudged sentence is appropriate for this offender and the remaining offenses. *See United States v. Peoples*, 29 M.J. 426, 428

(C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Conclusion

Accordingly, Specification 1 of Charge I is dismissed. The remaining findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court