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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Christopher A. BARR
Operations Specialist Second Class (E-5), U.S. Navy

NMCCA 200201530 Decided 28 January 2004

Sentence adjudged 9 January 2002. Military Judge: K.E. Grunawalt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northeast, Naval Submarine Base New London, Groton, CT.

LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
LT C. C. BURRIS, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Faced with a single charge of forcible sodomy, the appellant pleaded guilty to the lesser included offense of consensual sodomy and not guilty to the additional element of force and lack of consent. The Government then presented extensive evidence on the element of force and lack of consent. A military judge sitting as a general court-martial convicted the appellant of forcible sodomy, in violation of Article 125, Uniform Code of Military Justice, § 925. The adjudged and approved sentence consists of confinement for nine months, reduction to pay grade E-1, forfeiture of $250.00 pay per month for nine months, and a bad-conduct discharge.

In a single assignment of error, the appellant contends that the evidence is factually and legally insufficient to support the conviction of forcible sodomy. We have carefully considered the assignment of error, the Government's response, and the record of trial. 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 victim in this case, Electronics Technician Seaman Apprentice (ETSA) BAJ, and his friend, Seaman (SN) Kevin Smith, both U.S. Navy, went out on the town one evening. After eating dinner, they went to a bar, at which were the appellant and some of his friends. ETSA BAJ drank beer and socialized with the others. ETSA BAJ did not know the appellant and had no conversation with him at the bar. When ETSA BAJ and SN Smith left the bar, one of the appellant's friends invited the two Sailors back to the appellant's apartment. They accepted the invitation.

At the apartment, the appellant, ETSA BAJ, and SN Smith were joined by several other people. They were drinking and talking. During the conversation, some people showed off their tattoos. ETSA BAJ removed his shirt to show his tattoo. He drank more beer, then became sick and vomited. Over the course of about five hours that evening at the restaurant, the bar, and the appellant's apartment, ETSA BAJ consumed a large quantity of beer. By the time he vomited, he was very intoxicated. Soon thereafter, he asked the others if he could lie down somewhere and sleep. He was directed to a room where the appellant slept, although it is not clear that ETSA BAJ understood that fact. ETSA BAJ soon fell asleep in that room. Inasmuch as ETSA BAJ was a heavy sleeper who was also tired and intoxicated, we find that it was a deep sleep.

We now quote the appellant's account, from the providence inquiry, of what happened next:

> It all started as--he asked to go lay down in my bedding area, and then about 15 to 20 minutes after he laid down in my bedding area, I went to lay down. And I started kissing him on his chest. And he was moaning. And then I slowly worked my way down, down to his navel area. I was kissing him for about 2 to 3 minutes, and his moans became--seemed like more pleasurable, so I continued. I unbuttoned his pants and unzipped his zipper. I gave his pants a slight tug, and he lifted his hips up and his buttocks off the floor and assisted me on pulling his pants down to his knees.

Record at 18. When asked why he committed this act, the appellant responded:

> Just by the signs that he was showing me. I am bi-sexual, and just, like the way he was looking at me, and he took off his shirt earlier in the night, and he had a nice--you know, nice body, and I just thought that he was that way.

Id. at 20. Later in the providence inquiry, the appellant told the military judge that he thought he had permission to sodomize ETSA BAJ "by the moans and he never told me to stop." *Id.* at 21.

We now turn to the Government's evidence on the contested element. When ETSA BAJ awoke, he looked down, saw the appellant performing fellatio on him, and shouted "What the f---?" The appellant quickly rolled over and pretended to be asleep. ETSA BAJ pulled his pants up and went out and found SN Smith. He sat down next to SN Smith and told him what happened. ETSA BAJ was agitated and shaking, unlike his normal demeanor. According to SN Smith, ETSA BAJ said, "I woke up and that guy was sucking my dick." *Id.* at 83. They left the apartment and headed back to the base in SN Smith's truck.

Back at the apartment, a few hours later, one of the appellant's friends, Ms. Jessica Raffield, asked the appellant where the two Sailors were. The appellant told her what he had done to ETSA BAJ. Ms. Raffield then asked, "Didn't the kid stop you?" *Id.* at 148. The appellant answered, "Not until- -" or "He didn't react until it was over." *Id.*

When ETSA BAJ returned to base, he tried to sleep, but couldn't. He told his class leader what happened at the apartment. He next told his petty officer, who directed him to the legal office. ETSA BAJ ended up in the office of Special Agent (S/A) Beth Iorio, who interviewed him. ETSA BAJ was agitated, angry and upset when he appeared at S/A Iorio's office.

After concluding that interview, S/A Iorio interrogated the appellant. Having waived his rights, the appellant initially denied any knowledge of the incident. After further interrogation, the appellant admitted that he had sodomized ETSA BAJ. He also admitted that he did not

know ETSA BAJ and had very little conversation with him before the incident. In his first account of the incident, an account very similar to what he told the military judge during the providence inquiry, the appellant claimed that ETSA BAJ assisted him in removing ETSA BAJ's pants. S/A Iorio responded that she did not believe him, or words to that effect. After the appellant recounted ETSA BAJ's profane exclamation, S/A Iorio asked the appellant what he thought of that reaction. The appellant said that he thought ETSA BAJ didn't want him to do that.

When typing up the statement moments later, S/A Iorio asked the appellant if he pulled down ETSA BAJ's pants. The appellant answered in the affirmative, without adding that ETSA BAJ assisted him. S/A Iorio testified that she understood this to mean that the appellant had changed his story about that fact and was coming clean with the truth. After taking an oath that the written statement was true and correct, the appellant signed the statement, which was admitted as Prosecution Exhibit 1.

Factual and Legal Sufficiency of the Evidence

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> [U]nder Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in

> the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

The appellant contends that the Government failed to prove beyond a reasonable doubt that ETSA BAJ did not consent to sodomy, or in the alternative, failed to prove beyond a reasonable doubt that the defense of honest and reasonable mistake of fact did not exist. He relies principally upon his uncorroborated statements to S/A Iorio and the military judge that ETSA BAJ moaned and helped the appellant remove his pants. On the other hand, ETSA BAJ's testimony and NCIS statement, supported by testimony of other witnesses, clearly indicates that he did not consent and that there were no reasonable grounds upon which the appellant could have relied in concluding that ETSA BAJ consented to sodomy.

The appellant did not know ETSA BAJ and had not talked with him, beyond perfunctory conversation. ETSA BAJ was obviously intoxicated and tired when he went to lie down, and told the others in the apartment that he just wanted to sleep. The appellant knew that when he went to lie down next to ETSA BAJ. As to the appellant's claims that ETSA BAJ moaned and assisted the appellant in removing ETSA BAJ's pants, we find that the appellant was less than truthful on those points. We think the appellant's spontaneous remark to Ms. Raffield that ETSA BAJ did not react until it was over tells the true story.

We conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant committed the offense of forcible sodomy. Moreover, after careful consideration, we are convinced beyond a reasonable doubt that the appellant committed that offense. Accordingly, we decline to grant relief.

Conclusion

The findings and the sentence, as approved by the convening authority, are affirmed.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court