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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Malvin L. STEGER II
Chief Navy Counselor (E-7), U.S. Navy

NMCCA 200300840 Decided 21 April 2004

Sentence adjudged 10 September 2002. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Reserve Force, New Orleans, LA.

LT ELYSIA NG, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

RITTER, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial, before a military judge alone, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. He was sentenced to confinement for 3 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence, except for the forfeitures of pay, and waived automatic forfeitures for 6 months.

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

The appellant contends that the evidence is legally and factually insufficient to prove he raped Yeoman Second Class

(YN2) R. He also contends that the military judge erred in admitting victim-impact testimony at the merits stage, and that there was ineffective assistance of counsel at trial. We must also address the appellant's petition for a new trial on the basis of newly discovered evidence. Understanding this petition and the assignments of error requires a fairly comprehensive statement of the facts. We will then address the petition for new trial, followed by each assignment in succession.

Facts

The appellant, a Navy chief petty officer, was the zone supervisor of the recruiting district in which YN2 R's recruiting office was located. YN2 R was in charge of the office, and supervised Fire Controlman Second Class (FC2) Daniel McKenna and several other petty officers. In mid-December 2001, FC2 McKenna invited YN2 R to join him, some of his friends, and the appellant, at a New Years' Eve party being held at a hotel. After repeated encouragement over a period of a week or more by both FC2 McKenna and the appellant, YN2 R agreed to attend. At that point she was informed that, since there were no more rooms left at the hotel, she would have to share a room with the appellant. Believing this to be a command-sanctioned event, and in order to cut down the cost of the party, YN2 R agreed to do so.

On 31 December 2001, YN2 R rode with the appellant and FC2 McKenna to the hotel. There YN2 R paid $100 for her share of the room. When she and the appellant discovered that their room had only one bed, they were able to switch rooms with FC2 McKenna, who, along with his girlfriend, had rented a room with two beds. With a couple of hours to go before the party, the four began drinking alcoholic drinks in the appellant's and YN2 R's shared room. By all accounts, YN2 R consumed at least four strong alcoholic drinks and ate no food. After an hour or so, they all changed clothes and went down to the hotel party.

At the party, YN2 R ate a light buffet dinner, and consumed another 5 or 6 "Whiskey Sours" and at least a couple of shots of other hard liquor. She also danced several dances with the appellant, as well as with FC2 McKenna and at least one other person. Both she and FC2 McKenna testified that there was no intimate contact between YN2 R and the appellant, either at the party or during the events leading up to the party. By 2230 hours, with her vision blurring, YN2 R realized that she was overly intoxicated, and asked the appellant to take her to her room, concerned that she could not get there by herself. The

appellant escorted her to the room, where she fell flat on her face on the bed, and slept while fully clothed. The appellant went back to the party, and returned to the room at some point after 0030 hours the next morning.

YN2 R testified that she awoke around 0200 hours, on her back, with the appellant on top of her. The appellant was ripping off her pants, hose, and panties, and his fingernail scratched her thigh, thereby awaking her. She felt his penis inside her vagina. Although heavily intoxicated and sleepy, she struggled by repeatedly hitting the appellant and telling him to get off of her. She testified that she kept passing out during the struggle, and when awake, asked him "Why are you doing this? Why are you on me?" and reminded him that his ex-wife was her friend. Record at 129-30. After about 20 minutes, YN2 R's cell phone rang. Remembering that her son was supposed to call her when he returned home from his own New Year's festivities, she found the strength to get out from under the appellant, who then let her retrieve her phone. She spoke with her son briefly, and with the appellant now apparently willing to leave her alone, fell back asleep and slept until morning.

The next morning, FC2 McKenna came to the room and they all went to breakfast. YN2 R was unusually quiet. FC2 McKenna suggested they all stay longer, as they had the rooms until early afternoon. The appellant responded, "I don't think (YN2 R) wants to. She looks pretty antsy, so we should leave." *Id*. at 138. As soon as she got home, YN2 R threw the torn clothes into the trash and showered. After making some phone calls in which she did not report the incident to anyone, she slept most of that day.

The next day at work, YN2 R brought FC2 McKenna to the back room and told him she was upset about what the appellant did. She testified that she confronted FC2 McKenna about the incident, without going into specifics, because she suspected that he had been complicit in the event. Her suspicion was based on the fact that FC2 McKenna was the appellant's roommate, and the two of them had encouraged her to go to the hotel party. FC2 McKenna acted surprised, insisted on telling the appellant in general terms about YN2 R being upset, and wanted to advise the appellant that he should talk to her about it. YN2 R told FC2 McKenna that she did not want him to report the event to the chain of command. YN2 R testified that the appellant called her that evening and apologized. She asked him "What were you thinking? . . . I don't even like you like that. Why would you . . . do that to me?" The appellant responded something to the

effect that "[W]ell . . . we [were] having such a good time, and I assumed, you know, but maybe I was wrong." *Id*. at 147.

The next day, YN2 R learned that the appellant had been recently reassigned to another recruiting zone, and was therefore no longer her zone supervisor. She immediately called her new zone supervisor and provided a professional explanation as to why she did not want the appellant to use her recruiting station as a base office any longer. The new zone supervisor agreed with YN2 R, and took action to stop the appellant from using a desk in YN2 R's recruiting office.

YN2 R testified that she did not intend to report the incident for several reasons. She considered herself a strong person, and as a Sailor, she felt she should be able to handle it alone. She also felt embarrassed about having gotten into the situation at all, and was concerned that if she reported it, the inevitable speculation would hurt her reputation. However, her professional relationship with FC2 McKenna began to deteriorate, and YN2 R testified that FC2 McKenna stated his belief that she was holding a grudge against him because of the incident with the appellant. In late February 2002, YN2 R finally reported the incident to her superiors, believing that they were informed of her allegation by FC2 McKenna in a private counseling session he had just received.

The appellant was charged with rape and indecent assault, and alternatively, violation of a lawful order for committing fraternization. At trial, the Government offered the testimony of YN2 R, FC2 McKenna, two senior chief petty officers who testified concerning the events surrounding YN2 R's eventual report of rape, and the appellant's ex-wife Navy Counselor First Class (NC1) Steger. NC1 Steger testified as to her friendship with YN2 R, and to her knowledge of the professional and social relationship between YN2 R and the appellant. The defense brought out inconsistencies in YN2 R's testimony, and other evidence through FC2 McKenna's testimony suggesting either that nothing happened or that any sexual contact between YN2 R and the appellant was consensual. After the Government rested its case, the defense presented no evidence on the merits.

During the presentencing hearing, the defense called one witness, a retired senior chief petty officer, who testified as to the appellant's good military character. The defense also offered 131 pages of award citations, fitness reports, recruiting awards, and letters of commendation, as well as other documentary evidence. The military judge noted the strong

evidence of good military character, and the defense counsel assured the military judge that not offering it on the merits was a tactical decision rather than an oversight. The appellant then gave a short unsworn statement, explaining his family background and expressing "a lot of remorse for what has taken place . . ." *Id*. at 400.

Petition for New Trial

As a preliminary matter, we must address the appellant's motion for a new trial, based on a claim of newly discovered evidence. The appellant has submitted a statement from now-FC1 McKenna in which the latter states that, in his conversation with YN2 R the day after the incident, he specifically asked her whether there had been sexual intercourse between her and the appellant on the night of 31 December 2001 – 1 January 2002. FC1 Mckenna now states that, although he does not recall the exact words, YN2 R told him that there was no sexual intercourse, but that there had been "oral sex." Based on this statement, the appellant argues that YN2 R's statement to then-FC2 McKenna contradicts her testimony at trial, and undermines her credibility.

A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Petitions for a new trial are "'generally disfavored.'" *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998)(quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). "They should be granted 'only if a manifest injustice would result absent a new trial ... based on proffered newly discovered evidence.'" *Id*. A reviewing court will judge the credibility and materiality of the new evidence, and in so doing will weigh the "'testimony at trial against the' post-trial evidence 'to determine which is credible.' . . . " *United*

States v. Sztuka, 43 M.J. 261, 268 (C.A.A.F. 1995)(citing *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982), quoting *United States v. Brozaukis*, 46 C.M.R. 743, 751 (N.C.M.R. 1972)).

In this case, FC1 McKenna's post-trial statement clearly falls short of the second requirement, that the statement would not have been discovered by the petitioner at the time of trial in the exercise of due diligence. FC2 McKenna first made a statement to the Naval Criminal Investigative Service (NCIS). The appellant's trial defense counsel then interviewed FC2 McKenna at least twice prior to trial, and FC2 McKenna testified and was subject to cross-examination at both the Article 32, UCMJ, hearing in this case and at the court-martial. Furthermore, the appellant himself was in a unique position to have *personal* knowledge of everything that FC2 McKenna knew, because the two men continued to share an apartment for well over a month after the incident. This "new evidence" involves an often-canvassed subject -- YN2 R's discussion with FC2 McKenna the day after the rape –- and clearly could have been discovered by the appellant at the time of trial in the exercise of due diligence.

We further find the "newly discovered evidence" incredible for two reasons. First, it is inconceivable to us that this statement, if true, would not have been mentioned earlier by FC2 McKenna in one or more of his earlier interviews with counsel, his statement to the NCIS, and his testimony before the Article 32, UCMJ, investigation and the general court-martial. Moreover, he testified in detail concerning his 2 January 2002 conversation with YN2 R at trial, yet never said either that YN2 R told him that she had not been raped or that there had been "oral sex." Second, we view Petty Officer McKenna as having a motive to support the appellant, his friend and roommate, against YN2 R, his immediate supervisor with whom he clearly did not get along.

We also find it improbable that this new evidence would produce a substantially more favorable result for the appellant at a new trial. If now-FC1 McKenna were to testify in accordance with his post-trial statement, his testimony would not indicate that there was no sexual contact, or that the appellant and YN2 R engaged in consensual sex. Rather, in context, it suggests that a serious indecent assault did in fact take place, namely, forcible sodomy. Secondly, any effect this "new evidence" might have in undermining YN2 R's credibility at a new trial would be *de minimus* because of now-FC1 McKenna's own

credibility problem in belatedly claiming as fact an obviously important detail that he never mentioned before.

Accordingly, we find that: (1) FC1 McKenna's post-trial statement involves evidence that could have been discovered by the appellant prior to trial in the exercise of due diligence; and (2) it is not probable that this new evidence, if considered by a court-martial in the light of all other pertinent evidence, would produce a substantially more favorable result for the appellant. The evidence falls short of two of R.C.M. 1210(f)(2)'s three requirements. We therefore deny the appellant's petition for a new trial.

Insufficiency of Evidence

In his first assignment of error, the appellant contends that the evidence is legally and factually insufficient to support his rape conviction. We disagree.

Military courts of criminal appeals must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Id*. The term "reasonable doubt" does not mean the evidence must be free of conflict. *United States v. Reed*, 51, M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

After carefully reviewing the record, we are convinced that a reasonable fact-finder could find the appellant guilty of rape based on the evidence presented at trial. YN2 R's testimony was corroborated by FC2 McKenna in important respects, and satisfactorily explained the lack of physical evidence and the lateness of the report. The trial defense counsel pointed out minor inconsistencies in YN2 R's account of the rape itself, but nothing that is not reasonably accounted for by the fact that she was awakened in the early morning hours and remained heavily intoxicated throughout the incident. The appellant's contention

on appeal, that any sexual contact between the appellant and YN2 R was consensual, was not even argued at trial, much less supported by credible evidence admitted at trial. Thus, we find the evidence in support of the appellant's rape conviction to be legally sufficient.

Furthermore, we are convinced beyond a reasonable doubt that the appellant raped YN2 R. YN2 R's testimony was uncontroverted by any significant evidence at trial. There the defense simply argued that alleged deficiencies in the Government's case suggested that no sexual contact occurred between the appellant and YN2 R. Record at 360.

On appeal, the defense theory has changed from "nothing happened" to "it was consensual." In an R.C.M. 1105 submission, the appellant provided the convening authority with a lengthy statement. He claimed, for the first time, that he had consensual oral sex with YN2 R, and that she fabricated her story out of a dual concern that she would lose the appellant's ex-wife as her best friend, and might also get in trouble for fraternization if it was discovered that she and the appellant had engaged in consensual oral sex. Citing the appellant's R.C.M. 1105 submission and the "new evidence" provided by FC1 McKenna's post-trial statement, the defense now argues that this court "should not believe that [YN2 R] resisted Chief Steger's sexual advances or that she otherwise did not consent. YN2 [R's] behavior is inconsistent with a finding that she did not consent and that she manifested this lack of consent." Appellant's Brief of 8 Dec 2003 at 10.

It is undisputed that YN2 R became so drunk that she left a New Year's Eve party well before midnight, and needed assistance to get to her room. She then fell asleep with her clothes on, face down on the bed. We are now urged to believe that only a few hours later, in the midst of this alcohol-induced stupor, YN2 R found the clarity and desire at around 0200 to consent to some kind of sex with a man she had never shown any sexual interest in before, disregarding both the law and her close friendship with the appellant's ex-wife. However, having considered all of the evidence, we find YN2 R's sworn testimony to be credible, and partially corroborated by FC2 McKenna's testimony recounting the events surrounding the rape. We thus find the evidence both legally and factually sufficient to support the appellant's conviction.

Victim-Impact Evidence on the Merits

The appellant next contends that the military judge committed prejudicial error by admitting in evidence, without objection, testimony concerning the impact of the rape on YN2 R, during the Government's case-in-chief on the merits. Under the facts of this case, we disagree.

During the trial counsel's direct examination on the merits, YN2 R testified, without defense objection, that the rape negatively affected her ability to perform her job as a recruiter. She said that she was now unable to tell female applicants that women are treated fairly in the Navy, adding that she could no longer trust anyone in the Navy. Later, after the Government recalled YN2 R for further testimony during its case-in-chief, the military judge questioned YN2 R at length, including several questions that probed further into matters raised on direct examination. In response, YN2 R testified that she could no longer honestly tell parents of female applicants that their daughters would be safe. She also stated that she no longer desired that her own daughter join the military, as a result of being raped herself. The appellant argues that the military judge erred by not *sua sponte* limiting YN2 R's testimony on direct examination. The appellant also contends that the military judge displayed bias and abandoned his role as an impartial party when he asked YN2 R leading questions about the effect the rape had on her job.

Admission of Victim-Impact Evidence During Trial Counsel's Direct Examination

We share the appellant's concern with the admission in evidence of testimony regarding the impact on a victim of an alleged offense offered during the guilt stage of trial. Absent expert testimony explaining how a purported victim's post-incident behavior is affected by the alleged crime, such evidence is not obviously related to guilt or innocence, and its admission prior to findings on the merits might appear to suggest that the trier of fact had already determined guilt before hearing all of the evidence. However, as this was a trial before a military judge alone, it is not a case in which members might be unduly influenced by such evidence, and a military judge is presumed to know the law and weigh the evidence accordingly. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994). Moreover, as there was no defense objection to this testimony during trial, the admission of this testimony

is forfeited on appeal, absent plain error. MIL. R. EVID. 103(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

We do not find plain error in the military judge's failure to *sua sponte* prohibit YN2 R from testifying as to the impact of the rape on her ability to perform recruiting duties. Since there was no objection, the record was not developed as fully as it might otherwise have been, but our review of the record indicates that the military judge was interested in YN2 R's answers as they related to her credibility as a witness.

An alleged victim's behavior after the offense may be relevant in weighing the credibility of the victim's allegations, such as when there is the absence of a fresh complaint. In this case, YN2 R told only one person about the sexual assault in a reasonably timely fashion, and she specifically asked him not to report it to the chain of command. This fact, combined with YN2 R's professed desire not to inform her family members about the rape, and her statement that she had destroyed her torn clothes because she "wanted it all to go away," suggested that this 35-year-old veteran Sailor reacted somewhat unusually to being raped. Record at 139. In the absence of a defense objection, the military judge appears to have considered YN2 R's claim of being impacted by the rape only as additional relevant evidence of her thought process in assessing the overall credibility of her testimony as a whole.

Assuming *arguendo* that this testimony was error, we are convinced that the error was not plain. Moreover, we presume that the military judge gave the evidence no more weight than it was entitled to. We therefore find that YN2 R's victim impact testimony did not materially prejudice a substantial right of the appellant. As a result, this issue was forfeited by the defense failure to object at trial.

The Military Judge's Questions Concerning Victim Impact

As to the military judge's own questioning of YN2 R on the impact of the rape on her ability to recruit, we must also determine whether the military judge maintained his impartiality.

A military judge has wide latitude to ask questions of witnesses. *United States v. Acosta*, 49 M.J. 14, 17 (C.A.A.F. 1998). However, "a military judge must not become an advocate for a party but must vigilantly remain impartial during the trial." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F.

1995). The failure of the defense to challenge the impartiality of a military judge may permit an inference that the defense believed the military judge remained impartial. *United States v. Hill*, 45 M.J. 245, 249 (C.A.A.F. 1996). When a military judge's impartiality is challenged on appeal, the test is "whether, 'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions." *Ramos*, 42 M.J. at 396 (quoting *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987)). Our standard of review is abuse of discretion. *United States v. Rivers*, 49 M.J. 434, 444 (C.A.A.F. 1998).

In this case, not only did the defense fail to object to the military judge's perceived lack of impartiality, but there was also no objection to any of his questions of YN2 R. The military judge's questions and YN2 R's answers only expanded upon testimony already introduced by the trial counsel on direct examination, which itself had not been objected to, and was subjected to cross-examination. Moreover, we are convinced by our review of the record that the military judge was merely testing the credibility of YN2 R's claim to being adversely affected during the performance of her duties as an additional factor in assessing the credibility of her rape allegation. We see no indication that the military judge shed his impartiality, either in the course of his questioning of YN2 R or at any other point during trial. As we are confident that a reasonable person observing this court-martial would not doubt the military judge's impartiality, we hold that the military judge did not abuse his discretion in questioning YN2 R.

Ineffective Assistance of Counsel

Finally, we have considered the appellant's contention that he was denied the effective assistance of his trial defense counsel. His four bases for this contention are that his defense counsel: (1) advised him not to testify in his own defense; (2) failed to object to YN2 R's victim impact testimony during the Government's case on the merits; (3) failed to investigate and cross-examine YN2 on "key issues regarding her credibility;" and (4) failed to offer good military character evidence to rebut the charge of rape. We find no merit in this assignment.

In order to show ineffective assistance of counsel, an appellant must show that his counsel's performance was so deficient that (1) he was not functioning as counsel within the meaning of the Sixth Amendment, and (2) that his counsel's

deficient performance rendered the results of the trial unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668 (1984). Trial defense counsel enjoys a "strong presumption" that he was competent, rendered adequate assistance at trial, and made all significant decisions in the exercise of reasonable professional judgment. *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987); *United States v. Lowe*, 50 M.J. 654, 656 (N.M.Ct.Crim.App. 1999). Courts of appeal normally should not second-guess the strategic or tactical decisions made at trial by defense counsel. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000); *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993).

In this case, the appellant and his trial defense counsel made tactical decisions not to have the appellant testify in his own defense and not to submit evidence of good military character to rebut the Government's evidence on the merits. That these were deliberate choices and not the result of oversight was specifically stated on the record. Record at 295-96, 393. We can conceive of several plausible reasons for these tactical decisions. For example, as previously noted, the defense sought a full acquittal at trial by arguing that there was no sexual contact at all between the appellant and YN2 R. It would have been inconsistent with that strategy to have the appellant testify in accordance with his later statement submitted under R.C.M. 1105; that is, that he performed oral sodomy on a subordinate petty officer who had just awakened and who had been obviously drunk only a few hours before. Regarding the decision not to offer evidence of the appellant's good military character, we will not speculate as to possible impeachment or prior acts evidence that the trial defense counsel may have weighed in this decision. We note, however, that since the appellant's ex-wife testified as a Government witness, it would be reasonable to believe that the trial counsel was aware of such evidence, if it existed. The fact that the appellant lost his all-or-nothing gamble does not invalidate the strategy and make his counsel's assistance ineffective.

The same can be said for the defense failure to object to YN2 R's testimony regarding the impact of the incident on her ability to recruit. It appears clear from the record that the military judge was weighing the alleged victim's credibility in every way possible, and the defense strategy rested on the military judge finding her incredible. We view the failure to object to this testimony as consistent with both the defense strategy and their theory of the case.

Finally, while the appellant makes a general assertion that his trial defense counsel failed to investigate "key issues" of YN2 R's credibility, the only specific deficiency noted in the Appellant's Brief in support of this allegation is that he did not question FC2 McKenna thoroughly enough to elicit the "new evidence" cited as the basis for the petition for a new trial. As previously noted, we find that evidence incredible. Even if it were true, we do not find the trial defense counsel deficient for failing to elicit from FC2 McKenna what he would tell no one in the course of many interviews and examinations under oath.

Having given due deference to the trial defense counsel's decisions, we are convinced that the trial defense counsel's performance did not fall below "prevailing professional norms." *See Morgan*, 37 M.J. at 410 (citations omitted).

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court