UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ERIC J. LEONARD
United States Air Force

ACM 35444

28 February 2005

Sentence adjudged 8 August 2002 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Thomas W. Pittman.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer thereto. The appellant first asserts that the military judge erred by denying the trial defense counsel's challenges for cause against two panel members. We disagree. Even if it is later determined that the military judge should have granted one or both of the challenges for cause, the appellant is not entitled to any relief because the trial defense counsel peremptorily challenged one of the members. Additionally, the trial defense counsel did not state on the record that he would have exercised a peremptory challenge on another member but for the military judge's ruling. As a result, the issue is waived. *See* Rule for Courts-Martial (R.C.M.) 912(f)(4). We are also not convinced that under these facts, the trial defense counsel's failure to preserve this issue for later review supports the appellant's assertion that he received ineffective assistance of counsel. *See*

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also United States v. Quick*, 59 M.J. 383 (C.A.A.F. 2004).

The appellant next asserts that the military judge misapplied Mil. R. Evid. 412 and improperly suppressed defense evidence. We review a military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 129-30 (C.A.A.F. 2000). "His or her decision to admit evidence will not be overturned on appeal 'absent a clear abuse of discretion.'" *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997) (quoting *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986)). We hold that the military judge did not abuse his discretion by not allowing the trial defense counsel to present evidence to the members of the victim's sexual history with persons other than the appellant.

The appellant further asserts that the military judge erred because he denied a defense motion to suppress the appellant's statement to agents of the Air Force Office of Special Investigations (AFOSI). After telling two of his friends and the victim, Airman First Class (A1C) CH, that he had sexual intercourse with A1C CH while she was sleeping, the four of them went to the hospital so that the appellant and the victim could be medically examined. While the appellant was waiting to be examined, he noticed that agents from the AFOSI had arrived and were conducting interviews. The appellant told a medical technician that he did not want to talk to the AFOSI agents who were at the hospital without a lawyer present. The medical technician relayed the appellant's message to an AFOSI agent. The military judge made essential findings of fact and ruled that the appellant's "oral and written admissions were both voluntary and lawfully obtained." We agree.

While the appellant may have indirectly informed the AFOSI agents that he wanted a lawyer present during questioning, his assertion was anticipatory because at the time he made his assertions, the AFOSI agents had not read him his rights or asked him any questions. Our superior court has held that *Miranda*[1] rights may not be invoked anticipatorily outside the context of custodial interrogation. *United States v. Schroeder* 39 M.J. 471, 473-4 (C.M.A. 1994) (citing *McNeil v. Wisconsin*, 501 U.S. 171, 182, n.3 (1991)). Consequently, the appellant's third-party anticipatory invocation of his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel was insufficient. Once the AFOSI agents took the appellant into custody, they advised him of his rights. Before the AFOSI agents questioned the appellant, he stated in writing that he waived his rights to remain silent and to counsel. Therefore, we are convinced that the military judge did not abuse his discretion by admitting the appellant's oral and written statements.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The appellant further argues that the evidence is legally and factually insufficient to support his conviction for rape. Legal sufficiency is a question of law that the Court reviews de novo. *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000). 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. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Here, there is sufficient competent evidence in the record of trial to find legal sufficiency to support the court members' finding that the appellant had sexual intercourse with A1C CH as she lay in her bed sleeping and, therefore, incapable of giving consent.

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, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; Article 66(c), UCMJ, 10 U.S.C. § 866(c). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). Applying this standard to the appellant's conviction for rape, we are convinced of his guilt beyond a reasonable doubt.

We also hold that the military judge did not err in refusing to give instructions on the defense of mistake of fact in respect to the rape specification. *See United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003), *cert. denied*, 539 U.S. 928 (2003). It is firmly established that rape is a general intent crime. *Id*. at 72. Mistake of fact is an affirmative defense to rape if the mistake is both honest and reasonable. *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (citing *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991)). In this case, the military judge correctly determined that the defense of mistake of fact was not raised by the evidence. *See Hibbard*, 58 M.J. at 75-77; R.C.M. 916(j)(1) and 916(l)(2). There is no evidence in the record to support the proposition that the appellant honestly and reasonably believed the victim was consenting to sexual intercourse. The appellant's version of the incident is that he woke up next to A1C CH, slid his pants down, removed her shorts and underwear, and penetrated her vagina with his penis. After he ejaculated, he washed his hands, put his shoes on, and then left without saying a word to the victim. The appellant eventually acknowledged to both the victim and AFOSI agents that she was asleep during the incident. In fact, the appellant's trial defense counsel did not object to the military judge's ruling that a mistake of fact defense was not raised.

The appellant's defense at trial was that A1C CH was not a credible witness because it is unlikely that she could have slept through at least five minutes of sexual intercourse. Therefore, she consented by inference because she did not reasonably

manifest her lack of consent. A mistake of fact is not warranted when the parties dispute only the question of actual consent. *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995). In the instant case, the members were properly instructed on the elements of rape and determined that the victim did not consent.

And finally, we find the appellant's remaining assertion that the military judge's decision to stop a defense sentencing witness mid-testimony warrants a new sentencing hearing to be without merit. *See United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court