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United States Navy - Marine Corps
Court of Criminal Appeals

Before
HOLIFIELD, STEWART, and HACKEL
Appellate Military Judges

UNITED STATES
Appellee

v.

Samuel B. LONDON
Lance Corporal (E-3), U.S. Marine Corps
Appellant

No. 202100307

Decided: 5 May 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Michael D. Zimmerman

Sentence adjudged 18 June 2021 by a general court-martial convened at Marine Corps Base Quantico, Virginia, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to E-1, confinement for 65 months, forfeiture of all pay and allowances, and a dishonorable discharge.¹

¹ Appellant was credited with 321 days of pretrial confinement credit.

United States v. London, NMCCA No. 202100307
Opinion of the Court

For Appellant:

Mr. Don C. King, Esq.

Mr. David M. Harrison, Esq.

Lieutenant Aiden J. Stark, JAGC, USN

For Appellee:

Captain Tyler W. Blair, USMC

Lieutenant Gregory A. Rustico, JAGC, USN

Senior Judge STEWART delivered the opinion of the Court, in which Chief Judge HOLIFIELD and Senior Judge HACKEL joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

STEWART, Senior Judge:

Appellant was convicted, contrary to his pleas, of one specification of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice [UCMJ].²

Appellant asserts five assignments of error (AOEs): (1) the evidence is legally and factually insufficient to support Appellant's conviction; (2) trial counsel committed prosecutorial misconduct; (3) the military judge abused his discretion by denying the Defense motion for mistrial; (4) the military judge erred by prohibiting Appellant from cross-examining government witnesses about a motive to fabricate based on a Massachusetts grand jury "no bill" finding; and (5) that cumulative error deprived Appellant of a fair trial. We find merit in Appellant's first AOE and set aside the findings and sentence. Because we find merit in Appellant's first AOE, we do not reach the remaining AOEs as they are moot.

² 10 U.S.C. § 919.

I. BACKGROUND

1. Appellant and his friends get in a fight with the Emerson College lacrosse team

On the night of 27 September 2019, Mr. Hotel, the decedent in this case, was a sophomore at Emerson College in Boston, Massachusetts, where he played on the men’s lacrosse team.³ That evening he was socializing with other members of the lacrosse team at an apartment where a few of the players lived. The crowd that night consisted of members of the men’s and women’s lacrosse teams.

Mr. Hotel and the other players had been drinking that night. A few of the lacrosse players, including Mr. Hotel, had also been smoking marijuana. As the socializing wound down into the early morning, Mr. Hotel and some of the others went outside to smoke cigars. They were smoking on the brick walkway outside the apartment building when a stranger, later identified as Mr. Romeo, approached the group and asked for a lighter. Mr. Delta, one of the lacrosse players, offered Mr. Romeo a lighter. As they stood there smoking, Mr. Romeo’s two friends—Appellant and Sergeant [Sgt] Papa, U.S. Army—approached the group. At this point the group consisted of six lacrosse players (Mr. Hotel, Mr. Dakota, Mr. Charlie, Mr. Delta, Mr. Mike, and Mr. Montgomery), Appellant, Mr. Romeo, and Sgt Papa.

The group stood around in the entranceway of the apartment smoking and talking for a few minutes without incident. Mr. Golf and Ms. Mu (also lacrosse players) were leaving the gathering and walked through the group without incident as they exited the apartment and turned left to walk down the street. As Appellant and his group began to leave, Mr. Romeo said, “see you later, ladies.”⁴ Mr. Dakota replied, “see you later, grandma.”⁵ In response to the comment, Appellant turned around and asked, “what did you say?”⁶ As the groups confronted each other and their words became more heated, Appellant was standing in the center of the walkway facing the lacrosse players with Sgt Papa to his right and Mr. Romeo to his left.

³ All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

⁴ R. 1386.

⁵ R. 952.

⁶ R. 952.

The testimony conflicts as to exactly how the physical fight started and how each actor participated. The lacrosse players claimed that Sgt Papa escalated the situation, while Sgt Papa and Mr. Romeo claimed that one of the lacrosse players shoved Sgt Papa, who then slapped the lacrosse player.⁷ No one claimed that Appellant threw the first punch. No witness from the fight testified that he saw Appellant or anyone else punch Mr. Hotel—although one witness claimed to have heard a punch just before seeing Mr. Hotel fall.

At the beginning of the fight, Mr. Romeo and Sgt Papa were both pushed from the brick entranceway onto the sidewalk. Appellant and Mr. Dakota were facing each other in the center of the fight and were focused on each other until Mr. Hotel fell to the ground. In that moment of the fight, Appellant was bent at the waist and his sweatshirt was pulled over his head and ripped down the front. Mr. Dakota testified that Appellant punched him in the nose, but admitted it was not the first punch of the fight.

The witnesses disagree about exactly what happened, who was throwing punches, and where each person was standing. Various witnesses placed Mr. Hotel at the back of the crowd with multiple people between him and Appellant. However, other witnesses placed him on the right side of the crowd, and still others put him in the center of the action, either tangled up with Appellant or attempting to separate Appellant and Mr. Dakota.

Sergeant Papa and Mr. Romeo testified that during the fight Appellant was bent at the waist as three or four of the lacrosse players hit him. While he was bent over, Appellant's sweatshirt was pulled up over his head in a hockey-fight style, and ripped. Photos of Appellant from that night both before and after the fight corroborate this account showing that his sweatshirt was not ripped earlier in the night but was ripped after the fight. Additionally, after the fight Appellant had a ligature mark on his neck consistent with being strangled.

What is not in dispute is that during the fight Mr. Hotel fell backwards and hit his head on the brick entranceway, fracturing his skull. As the lacrosse players realized Mr. Hotel was injured they yelled for everyone to stop fighting. Appellant, Sgt Papa, and Mr. Romeo left the scene while continuing to yell at the lacrosse players. Mr. Charlie testified that after Mr. Hotel fell down, Appellant punched him in the side of the head.

Mr. Montgomery immediately called the police and Mr. Hotel was transported to the hospital where he received emergency surgery. Despite the best

⁷ The witnesses on either side of the altercation did not know each other and identified each other at trial in a variety of ways, including physical descriptions and by the clothing worn on the night in question.

efforts of medical professionals, Mr. Hotel died as a result of blunt force head trauma resulting in a skull fracture.

In addition to Mr. Hotel's skull fracture, several lacrosse players suffered minor injuries from the altercation: Mr. Dakota had a bloody nose; Mr. Montgomery had a black eye; and Mr. Charlie had a bruise on his cheek. On the other side, Sgt Papa had a bruise on his cheek and Appellant had a ligature mark on his neck, a bruise on his face, and a fractured bone in his thumb.

While police were still on the scene responding to Mr. Montgomery's call, Appellant, Sgt Papa, and Mr. Romeo returned to where the fight took place in search of Appellant's hat and Sgt Papa's necklace, both of which had been dropped during the fight. When they approached the scene, Mr. Golf, who had turned back when the fight started, identified them to Officer Davis of the Boston Police Department, who stopped Appellant and his friends and took them in for questioning and photographs.

2. Appellant misstated how he broke his hand and expressed remorse about the fight

Approximately two weeks after the fight, Appellant sought medical treatment for his hand. Specifically, he had broken a bone at the base of his right thumb. When asked about the nature of these injuries, he claimed that he had punched an object while angry, but declined to explain further.

A few months later, Appellant went out for a drink with a friend. He expressed to the friend that he had been involved in an altercation and that someone had gotten seriously hurt. Appellant appeared sorrowful and upset about it.

3. Charges and Findings

Appellant was charged with the murder of Mr. Hotel for causing his death by punching him in the head, as well as the lesser included charges of voluntary manslaughter and involuntary manslaughter. He was also charged with two specifications of assault consummated by battery for punching Mr. Charlie and Mr. Dakota during the fight, and one specification of the wrongful use of cocaine on the night in question.⁸ Appellant pleaded not guilty to all charges

⁸ Mr. Charlie testified that Appellant, Sgt Papa, and Mr. Romeo appeared to be on cocaine. Specialist Foxtrot, U.S. Army, testified under a grant of immunity that he was with Appellant's group earlier in the evening at a friend's apartment and that he brought cocaine to the gathering. However, he testified that he did not personally witness Appellant use cocaine. Additionally, Sgt Papa testified that Appellant did not use cocaine.

and was tried before a panel of officer and enlisted members. He was found guilty of involuntary manslaughter, but not guilty of the remaining charges.

4. Expert Testimony

At trial, the Government argued that Mr. Hotel's injuries proved that he had been punched in the head by Appellant. The Defense argued that Appellant did not punch Mr. Hotel, that Mr. Hotel's fall was not caused by Appellant, and that all of Mr. Hotel's injuries were explained by his fall and the various medical procedures he underwent, including three surgeries. Multiple expert witnesses testified at trial for both the Government and the Defense regarding the medical evidence.

a. Dr. Sierra

The Government called Dr. Sierra, an expert in forensic pathology, to testify about Mr. Hotel's injuries. Dr. Sierra performed the autopsy of Mr. Hotel and noted that he died from blunt force trauma to the head from falling and striking his head on something broad, consistent with striking his head on the brick entranceway. She noted that the nature of Mr. Hotel's injuries were primarily internal, with few external injuries to note. Specifically, he suffered a scalp hemorrhage, skull fractures, bleeding in the layers of the brain, skull bruising, and swelling of the brain. Dr. Sierra also testified regarding the various injuries caused by the attempted lifesaving medical procedures Mr. Hotel underwent, including incisions to remove a portion of his skull in order to alleviate the pressure on his brain due to swelling. She also testified that the lack of scrapes on his palms suggests that he did not attempt to catch himself as he fell.

Dr. Sierra explained that Mr. Hotel's head injury was consistent with an "accelerated fall."⁹ An accelerated fall occurs when the body is moving then goes down, compared to a simple fall where the body falls backwards from a standing position. She explained that an accelerated fall requires movement resulting from forces that are more than mere gravity. An accelerated fall could occur from being shoved or impacted, or from falling while backing up from something. An accelerated fall is consistent with pulling on something and tripping and falling backwards.

Dr. Sierra testified that she could not confirm that Mr. Hotel was punched in the head from examining the medical evidence. She explained that Mr. Hotel did not have any evidence of an injury that would have resulted in a loss of consciousness except the wound from hitting his head on the ground. She also

⁹ R. 1628.

testified that the injuries to Mr. Hotel's right hand were consistent with punching someone.

b. Dr. Gamma

The Government also called Dr. Gamma, a neurosurgeon who cared for Mr. Hotel after he came out of surgery. Dr. Gamma testified that it is possible for someone to suffer a blow to the head or face that does not leave an outwardly visible injury but still renders the victim unconscious. He further testified that some of the small bruises on Mr. Hotel's head could have been caused by trauma prior to the surgery on his skull.

Dr. Gamma testified that Mr. Hotel's skull injury would have required a force greater than a push to result in such a severe fracture. He also testified that there must have been some alteration of consciousness prior to Mr. Hotel hitting the ground. Finally, he testified that Mr. Hotel's injuries were inconsistent with a fall due to drunkenness. Taken together, according to Dr. Gamma, the medical evidence as a whole could constitute evidence of a punch.

Dr. Gamma also testified that a bloody nose is a common result from a skull fracture. He explained that a bloody nose from a punch would normally include external signs of injury such as a broken nose or swelling, though these symptoms were not observed in this case. However, he did testify that he believed the initial radiological scan made some mention of a small nasal fracture.

Dr. Gamma admitted on cross-examination that the emergency room intake records contain no evidence that Mr. Hotel was punched in the face. He further conceded that Mr. Hotel's injuries were consistent with a backwards fall, that all of the injuries he personally evaluated could be traced back to the injury over the occipital bone, and that the autopsy photos were taken after Mr. Hotel had undergone three major surgeries.

c. Dr. Bravo

The Defense called Dr. Bravo, a forensic pathologist. Dr. Bravo testified that pictures of Appellant from the night of the incident show that he sustained trauma to the face, and that there are ligature marks on his neck from an object being placed around his neck and pressure being applied. She testified that the marks on his neck were consistent with his sweatshirt being pulled over his head and strangling him. In her opinion, Appellant was strangled.

Dr. Bravo testified that, in her opinion, all of the bruising she observed on Mr. Hotel in the autopsy photos was surgery-related. She explicitly testified that she did not believe that any of the bruises on Mr. Hotel constituted evidence of a punch.

d. Dr. Smith

The Defense called Dr. Smith, a forensic toxicologist. The Government and Appellant stipulated to the blood test results showing Mr. Hotel's blood alcohol content [BAC] level at 2:16 AM on September 28, 2019, was 0.14 and that he had tetrahydrocannabinol [THC] in his system. Dr. Smith testified as to the effects of alcohol and THC, and specifically that a BAC level of 0.1 to 0.15 will result in an individual having decreased inhibitions, slower reaction time, diminished sensory skills to include staggering, and impairment of judgment and control. At a BAC level of 0.14, he would expect the individual's ability to balance to be seriously diminished.

Dr. Smith also testified that studies show that the effects of alcohol are more pronounced when the BAC level is still rising compared to when it is coming down. He further explained that driver simulator studies involving alcohol and marijuana use show that the combination of alcohol and THC results in greater impairment than when only one substance is present.

Additional facts will be set forth as necessary to resolve Appellant's assignments of error.

II. DISCUSSION

A. Appellant's Conviction is Factually Insufficient

Appellant asserts that the evidence is legally and factually insufficient to support his conviction for involuntary manslaughter. We review such questions de novo.¹⁰

To determine legal sufficiency, we ask 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."¹¹ In conducting this analysis, we must "draw every reasonable inference from the evidence

¹⁰ Article 66(d)(1), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

¹¹ *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

of record in favor of the prosecution.”¹² In doing so, we are mindful that “[f]indings may be based on direct or circumstantial evidence.”¹³

In evaluating factual sufficiency, we determine “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the [appellant’s] guilt beyond a reasonable doubt.”¹⁴ In conducting this unique appellate function, we take “a fresh, impartial look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt” to “make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.”¹⁵ Proof beyond a “[r]easonable doubt, however, does not mean the evidence must be free from conflict.”¹⁶

To convict Appellant of involuntary manslaughter, the Government was required to prove that: (1) Mr. Hotel was dead; (2) that his death resulted from the act of Appellant punching Mr. Hotel in the head with his hand on or about 28 September 2019, at or near Boston, Massachusetts; (3) that the killing was unlawful; and (4) that, at the time of the killing, Appellant was perpetrating the commission of the offense of battery directly affecting the person of Mr. Hotel.¹⁷

Appellant argues that the Government failed to prove that he punched Mr. Hotel, that the testimony and forensic evidence failed to prove that Mr. Hotel was punched, and that the forensic evidence showed that Mr. Hotel’s injury was consistent with falling backwards from pulling on Appellant’s sweatshirt rather than being punched.

The Government here argues that there are three ways in which the circumstantial evidence in this case proves Appellant’s guilt. First, the medical expert testimony eliminated other potential causes for Mr. Hotel’s injuries. Second, the combination of medical evidence and witness testimony show that Appellant punched Mr. Hotel, while Appellant’s false explanation to a physi-

¹² *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

¹³ *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021).

¹⁴ *Turner*, 25 M.J. at 325.

¹⁵ *Washington*, 57 M.J. at 399.

¹⁶ *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

¹⁷ Art. 119(b)(2), UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [MCM] pt. IV, para 57.a.(b)(2).

cian about his broken hand and his expression of remorse over the fight demonstrate consciousness of guilt. And third, the evidence shows that Appellant was the only one of his party close enough to Mr. Hotel to cause his injuries.

Assuming *arguendo* that the evidence is legally sufficient, we find the evidence factually insufficient to support Appellant's conviction for involuntary manslaughter.

We are not convinced by the Government's argument that the medical evidence eliminated other potential causes of Mr. Hotel's injuries. While the medical experts agreed that Mr. Hotel's skull fracture required him to fall with accelerated force, they also agreed that a punch was not the only possible cause of an accelerated fall. At trial, the Defense argued that rather than being punched, Mr. Hotel could have been pulling on Appellant's sweatshirt and fallen backwards when it ripped. Indeed, the evidence is not in dispute that Appellant's sweatshirt was ripped that night. Further, the expert testimony at trial supports the theory that the ligature mark on Appellant's neck was the result of his sweatshirt being pulled against his neck until it ripped.

Additionally, of the three medical experts who testified regarding Mr. Hotel's injuries, only Dr. Gamma testified that the bruising on Mr. Hotel's forehead was not the result of medical intervention, that Mr. Hotel was probably unconscious before he hit the ground, and that Mr. Hotel's injuries were inconsistent with a fall due to drunkenness. However, when asked if the medical evidence taken together as a whole could constitute evidence of a punch he answered, "I guess it could. I'm not – not really an expert at that."¹⁸ Dr. Sierra and Dr. Bravo both testified that they did not observe any medical evidence that Mr. Hotel was punched and that the bruising could all be explained by medical intervention. Far from eliminating other potential causes of Mr. Hotel's injuries, the medical evidence in this case merely established that Mr. Hotel's injuries *could have* resulted from a punch.

The Government's argument that the medical evidence and witness testimony demonstrate that Appellant punched Mr. Hotel similarly fails. The witness testimony at trial clearly proved that Appellant was the only person of his party who could have punched Mr. Hotel. However, as we just explained, the medical evidence does not prove that Mr. Hotel was actually punched. Nor did any witness testify that they observed Mr. Hotel get punched. One witness testified that he *heard* a punch and saw Mr. Hotel fall. This observation is not dispositive as witness testimony also indicates that multiple punches were exchanged between the participants during the brawl. The Defense presented an

¹⁸ R. 1887.

equally plausible theory that Mr. Hotel's injuries could have resulted from him pulling on Appellant's sweatshirt and falling backwards when it ripped. The medical experts agreed that a fall in this fashion would still be considered "accelerated," and that this theory is also supported by Mr. Hotel's state of intoxication, due to the seriously diminished ability to balance associated with a BAC of 0.14.

Finally, the Government's claim that Appellant's false statement about his broken hand and his statement of remorse about the fight do not convince us otherwise. While misstating the cause of his injury can be considered in evaluating Appellant's guilt, it is not an admission that he either punched or otherwise killed Mr. Hotel. Similarly, the remorse Appellant expressed could indicate merely that he was sorry Mr. Hotel died, not that he was confessing that he killed Mr. Hotel. As with the other evidence presented by the Government in this case, it certainly could be considered evidence of guilt, but it does not eliminate other reasonable explanations.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are not convinced of Appellant's guilt beyond a reasonable doubt. We take action in our decretal paragraph.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the evidence is factually insufficient to support Appellant's conviction.¹⁹

The findings and sentence are **DISMISSED WITH PREJUDICE**.



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

¹⁹ Articles 59 & 66, UCMJ.