

DEPARTMENT OF THE NAVY  
CENTRAL JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY  
GENERAL COURT-MARTIAL



UNITED STATES

v.

DARIN G. LOPEZ  
IS2/E-5

USN

SPECIAL FINDINGS

28 JUNE 2014

1. Introduction.

a. Trial by Military Judge alone in this case was conducted 25-26 June 2014, on board Naval Station Norfolk, Virginia. After the return of a general verdict of guilty on the Charge and Sole Specification of Sexual Assault, Accused, through counsel, requested the Court make special findings pursuant to R.C.M. 918(b).

b. Although noting the request is untimely,<sup>1</sup> the Court, in its discretion, now enters special findings as a supplement to its general verdict of guilty. In reaching both its general finding and the special findings contained herein, the Court applied its own reason and common sense; considered the applicable law, the credible testimony presented at trial, the documentary evidence received in the form of Prosecution Exhibits 1-6 and Defense Exhibit A; and has drawn all reasonable inferences from the evidence. Additionally, from its observations of the testimony and demeanor of LCpl E.H. and Ms. Tamara Ruiz, the Court notes it found the testimony of these two witnesses to be highly credible.

2. Applicable Law.

a. Accused was charged with sexually assaulting then PFC E.H. (hereafter LCpl E.H.) on or about 24 November 2012, at or near Sierra Vista, Arizona, in violation of Article 120(b)(3)(A), Uniform Code of Military Justice, 10 U.S.C. § 920(b)(3)(A).

b. To establish guilt, the United States had the burden to prove Accused committed each of the following elements of the charged offense beyond a reasonable doubt:

<sup>1</sup> R.C.M. 918(b) reads, in pertinent part: "Special findings may be requested at any time before general findings are announced." (emphasis added).

(1) On or about 24 November 2012, at or near Sierra Vista, Arizona, Accused committed a sexual act upon LCpl E.H., that is, the penetration of her vulva with his penis; and

(2) Accused did so when LCpl E.H. was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by Accused.

c. The following definitions<sup>2</sup> apply to the alleged offense:

(1) "Sexual act" means the penetration, however slight, of the vulva by the penis.

(2) The "vulva" is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. "Labia" is the Latin and medically correct term for "lips."

(3) "Consent" means a freely given agreement to the conduct at issue to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent.

3. Special Findings.

a. In November 2012, LCpl E.H., United States Marine Corps, was in a duty status at Ft. Huachuca near Sierra Vista, Arizona.

b. In November 2012, Accused was in a duty status in Sierra Vista, Arizona.

c. Sometime before 24 November 2012, LCpl E.H. was outside a shopping mall in Sierra Vista waiting for a taxi. Accused approached LCpl E.H. and offered her a ride. She accepted. LCpl E.H. did not know Accused prior to this time. Accused gave LCpl E.H. a ride to the barracks at Ft. Huachuca, they exchanged telephone numbers, and communicated thereafter. At some point, Accused and LCpl E.H. also went out for dinner together.

d. On Saturday, 24 November 2012, LCpl E.H. had plans to meet up with fellow Marines for a birthday party at the Peacock Lounge in Sierra Vista. LCpl E.H. arrived at the Peacock Lounge later in the evening but did not meet up with her friends because they were not there. LCpl E.H. called Accused and invited him to join her. Accused did so.

e. While together at the Peacock Lounge, both LCpl E.H. and Accused consumed alcohol. LCpl E.H. remembers having two mixed drinks containing coconut rum and pineapple juice and one shot of goldschlager. LCpl E.H. had eaten earlier in the evening and had not had

<sup>2</sup> See Article 120(g), Uniform Code of Military Justice, 10 U.S.C. § 920(g).

any other alcohol prior to arriving at the Peacock Lounge. It is unclear how much alcohol Accused consumed. LCpl E.H. and Accused mutually ordered their drinks together directly from the bar. LCpl E.H. remembers going to the restroom on one occasion and then returning to the bar where she continued to drink.

f. 24 November 2012 was not the first time LCpl E.H. had consumed alcohol. During the time frame leading up to this incident, LCpl E.H. would drink alcohol once or twice per week, having "a few" mixed drinks on those occasions. LCpl E.H. has been intoxicated on alcohol in the past.

g. After drinking alcohol at the Peacock Lounge on 24 November 2012, LCpl E.H. began to feel dizzy and experienced a level of intoxication more intense than she had upon drinking in the past. Her last memory of the Peacock Lounge was "just standing there." LCpl E.H. does not remember leaving the bar or going to any other location.

h. At some point in the evening LCpl E.H. and Accused left the Peacock Lounge. They ultimately ended up together at Accused's apartment in Sierra Vista. Accused lived in an upstairs apartment which was accessed by stairs.

i. LCpl E.H.'s next memory is of waking up with Accused on top of her. She was unable to move and unable to say anything. Accused's penis was inside her vagina. Accused said to LCpl E.H.: "don't worry, I used a condom." LCpl E.H. again passed out.

j. Sometime thereafter, LCpl E.H. again woke up. She was alone in bed in the same place she remembers Accused being on top of her. LCpl E.H. was sick to her head and her stomach. Her head hurt and was spinning. She was laying in her own vomit and urine. She was still wearing the black dress she had on the night before. One sleeve was pulled down and the bottom of her dress was bunched up around her waist.

k. LCpl E.H. got out of bed, found a shower, and climbed in with her dress still on. While in the shower, she discovered a bite mark on her breast and scratch marks on her lower back. These marks were not there prior to meeting Accused at the Peacock Lounge. LCpl E.H. did not know when or how she got these marks. At some point LCpl E.H. wrote "I'm in hell, help me" on the steamed up mirror in the bathroom. After showering, LCpl E.H. wrapped herself in a towel and put her dress in a clothes dryer. She did not wait for the dress to completely dry, put the dress on, and left the apartment. It was daylight the next day.

l. There was a taxi cab waiting outside and it was driven by Tamara Ruiz. LCpl E.H. does not know who called the cab and does not remember any interaction with Accused that morning. She does remember hearing and recognizing Accused's voice in the apartment prior to leaving. LCpl E.H. did not know Ms. Ruiz.

m. Ms. Ruiz had been dispatched to Accused's apartment complex to pick up a male. She did not see anyone waiting for a taxi when she first arrived, but after confirming the call



with her dispatch and driving around the complex, she spotted a male waving her down from the second floor of the complex. LCpl E.H. come down and got in Ms. Ruiz' cab.

n. From her initial observations of LCpl E.H.'s demeanor, Ms. Ruiz immediately concluded something was wrong with LCpl E.H. LCpl E.H. appeared confused, desperate, and looked as though she had been crying. Based upon these observations and her interactions with LCpl E.H., Ms. Ruiz asked LCpl E.H. if she wanted to be taken to the police or to a hospital. LCpl E.H. declined both offers. Ms. Ruiz spent significant time with LCpl E.H. during this time period, including stopping at a convenience store where LCpl E.H. bought a soda for herself and cigarettes for Ms. Ruiz. At some point during their interaction, LCpl E.H. grabbed and hugged Ms. Ruiz. Ms. Ruiz eventually dropped LCpl E.H. off at Ft. Huachuca.

o. LCpl E.H. ultimately reported this matter to the authorities and Army CID began an investigation. As part of their investigation, Army CID Special Agent Chad Hallett was able to locate Accused's apartment and conduct a search. This search took place on 12 December 2012. During the search, law enforcement seized a trash bag from the deck just outside Accused's apartment. Two used condoms were found in this trash bag and submitted to USACIL for forensic testing. Both condoms contained DNA on one side, the profile of which matched that of Accused. The other side of both condoms contained DNA, the profile of which matched LCpl E.H. One of the condoms contained semen, the profile of which matched Accused. Accused stipulated the DNA found on these condoms were a match for both himself and LCpl E.H.

p. From the credible evidence presented at trial, and the facts set forth above, the Court finds beyond a reasonable doubt that on or about 24 November 2012, at or near Sierra Vista, Arizona, Accused committed a sexual act upon LCpl E.H., that is, the penetration of her vagina with his penis when LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant, a condition that was known or reasonably should have been known to Accused.

(1) In finding a sexual act had taken place, the Court relies upon the credible testimony of LCpl E.H. where she said Accused's penis was in her vagina, coupled with the corroborating physical and forensic evidence found during a search of Accused's apartment, that is, the two condoms and the DNA contained on those condoms matching both Accused and LCpl E.H.

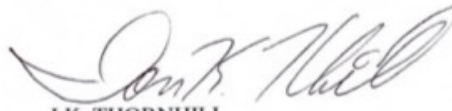
(2) In finding LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant and that this condition was known or reasonably should have been known to Accused, the Court relies upon the credible testimony of LCpl E.H. and Ms. Ruiz supporting the facts outlined above. Critically significant here is the statement made by Accused to LCpl E.H. when she became conscious and discovered Accused on top of her with his penis inside her vagina. The statement "don't worry, I used a condom," not only corroborates the finding a sexual act took place, but is also key in establishing the following pivotal facts:

(A) LCpl E.H. was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication. Therefore, she was unable to consent to the act; and

(B) By attempting to 'comfort' her anticipated fears upon discovering he was performing sexual intercourse on her, Accused's statement, including the word "used" in the past tense, illustrates Accused was aware LCpl E.H. was not able to consent, and in fact did not consent, to the sexual act from its outset.

4. Conclusion.

**THEREFORE**, pursuant to R.C.M. 918(b), **THE COURT** hereby enters these Special Findings.



L.K. THORNHILL  
CDR, JAGC, USN  
Military Judge