

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JACOB D. NEVANDRO  
AVIATION BOATSWAIN'S MATE (H) AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000641  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 21 July 2010.

**Military Judge:** CAPT James Redford, JAGC, USN.

**Convening Authority:** Commander, Naval Air Force Atlantic,  
Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR F.T. Katz, JAGC,  
USN.

**For Appellant:** LT Michael Torrisi, JAGC, USN.

**For Appellee:** Maj Elizabeth Harvey, USMC.

**30 August 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, pursuant to mixed pleas, of one specification of unauthorized absence, one specification of making a false official statement, one specification of aggravated sexual assault, and one specification of wrongful sexual contact, in violation of Articles 86, 107 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, and

920. The members sentenced the appellant to confinement for three years and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises five assignments of error: (1) that the judge's failure to instruct the members to consider evidence of consent in determining if the elements of aggravated sexual assault had been proven beyond reasonable doubt was error; (2) that the appellant's convictions for aggravated sexual assault and wrongful sexual contact are factually and legally insufficient; (3) that the judge erred by not instructing on the defense of mistake of fact as to the offenses of aggravated sexual assault and wrongful sexual contact; (4) that the judge's intentional avoidance of the statutory language of Article 120 in his instructions was a violation of the separation of powers; and (5) that Article 120(c) is facially unconstitutional and unconstitutional as applied. 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.

### **Background**

The appellant and Airman (AN) "W" were friends, both assigned to the USS GEORGE H.W. BUSH (CVN 77). AN W was married to another service member who lived in Pensacola. In mid-April 2009, AN W attended a party at the appellant's house that he shared with a number of other shipmates. While at the house, AN W drank, became intoxicated, and finally went to sleep at about 0100. The next morning, AN W awoke around 0430 and returned to work by 0615. After working the entire day, she returned to the appellant's home around 1700-1800. She drank a few beers, but did not get drunk. She was, however, very tired. She began watching television, and fell asleep on the couch. She awoke some time later on the couch with the appellant having intercourse with her. Her tight-fitting jeans and underwear were around her ankles, her lower back was suspended off the couch, and her feet were beneath her on the floor. Another shipmate was also asleep on the couch some feet away from her.

When she awoke, AN W "whisper-screamed" to the appellant "what the f\*\*\* are you doing?" The appellant immediately got off, rolled over, and "acted" like he was asleep. AN W felt liquid on her lower body, and concluded that the appellant ejaculated. AN W got up, pulled up her pants, and went outside for 10 minutes to smoke a cigarette. She was shocked, confused, and unsure what had happened. She then returned to the couch,

saw that the appellant had left the room, and went back to sleep. The roommate who had been on the couch was still fast asleep. Later that morning, AN W got up, went to the bathroom, got ready for work, and noticed that the zipper on her jeans was broken. She then got a ride back to the ship with one of the roommates. She disclosed to the roommate that she woke up with the appellant on top of her and that she pushed him off. Despite the roommate's suggestion that she report the assault, AN W, a married service member, feared getting in trouble for committing adultery. AN W did not report the event until she learned that the appellant was telling people he had sex with her.

AN W's report prompted an investigation, leading to an interrogation of the appellant. The appellant denied any sexual relations with AN W. During a second interrogation, the appellant again denied involvement, but after being confronted with a DNA report from AN W's jeans, the appellant admitted to having consensual sex. He claimed that he lied about it previously to avoid getting in trouble for adultery.

### **Discussion**

We address the appellant's assignments of error out of order. We will first discuss his challenges to the instructions, then his challenge to the statute, and finally, his claims regarding sufficiency of proof.

The appellant first claims that the judge's failure to instruct the members to consider evidence of consent in determining if the elements of aggravated sexual assault had been proven beyond reasonable doubt was error. We disagree with the Government's assertion that the issue of consent was not raised by the evidence. Irrespective of the other evidence offered at trial bearing on consent, in an attempt to convey to the members that the appellant lied to the special agents investigating the sexual assault, the Government elicited testimony from the special agents that the appellant eventually admitted having consensual intercourse with AN W. Having made the tactical decision to offer this belated admission of consensual sex in order to argue that an innocent person would not initially lie, the Government itself raised the issue of consent. We review the adequacy of the judge's instructions regarding consent *de novo*. *United States v. Prather*, 69 M.J. 338, 341 (C.A.A.F. 2011); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). We evaluate the instructions "in the context of the overall message conveyed to the jury." *Prather*, 69 M.J. at 344 (citation and internal quotation marks omitted).

The military judge instructed the members that the Government was required to disprove AN W's consent beyond a reasonable doubt. He did not instruct in accordance with the burden allotment found in Article 120, and provided no reasoning for his departure from the statute. While the Court of Appeals for the Armed Forces found this lack of analysis to be error in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011), the court concluded that the error was harmless beyond a reasonable doubt because the instruction given "was clear and correctly conveyed to the members the Government's burden." *Medina*, 69 M.J. at 465 (citing *Martin v. Ohio*, 480 U.S. 228, 234 (1987)). We likewise conclude no prejudice to this appellant. The military judge instructed the members that consent was raised as to the alleged offenses against AN W, and that the Government had the burden to disprove that consent beyond a reasonable doubt. The judge's error in not disclosing the rationale for departing from the statute was harmless beyond a reasonable doubt. *Medina*, 69 M.J. at 466.

The appellant takes his argument regarding evidence of consent one step farther, invoking the required "dual use" instruction from *Prather* to support his claim that the judge's instruction fell short. In *Prather*, the Court of Appeals for the Armed Forces noted that where there is an overlap between the evidence pertinent to an affirmative defense and evidence negating the prosecution's case, the judge has a duty to convey to the members that all of the evidence, including that going to the affirmative defense, must be considered in deciding whether there was a reasonable doubt as to the sufficiency of proof on all elements. *Prather*, 69 M.J. at 344. While the "dual use" instruction has great applicability where a judge limits consideration of evidence of an affirmative defense in some manner, that is not the case here. The judge did not limit the use of evidence of consent. *Prather* is not the applicable and controlling case for this appellant; *Medina* is.

Regarding the third assigned error, that the judge erred by not instructing on the defense of mistake of fact as to the offenses of aggravated sexual assault and wrongful sexual contact, we disagree with the appellant's claim that it was error not to instruct regarding mistake of fact as to AN W. Recognizing that a military judge has a *sua sponte* duty to instruct when a defense is reasonably raised, nothing in the record suggests mistake of fact as to consent regarding AN W. *McDonald*, 57 M.J. at 20. While the evidence may have provided the defense with a basis to question the believability of the victim's claim of nonconsensual sex, consent and mistake of fact

as to consent are not the same. The judge's duty to instruct on mistake of fact was not triggered, as no evidence of mistake was presented to which the members might have attached credit if they so desired. *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988).

The appellant, in his fourth assigned error, argues that the judge's "intentional avoidance of the statutory language of Article 120" in his instructions was a violation of the separation of powers. Appellant's Brief of 17 Feb 2011 at 19. However, the record is not so clear. As in *Medina*, the judge made no statement regarding how he concluded that an instruction that did not comport with the statute should be given. We do not know whether the judge interpreted the statute, misinterpreted the statute, severed<sup>1</sup> a portion for legally correct reasons, or simply made a mistake. Ultimately, the appellant was not convicted "using a framework created by the unelected military attorneys who drafted the Army Benchbook." Appellant's Brief at 20. Rather, he was convicted of a statutory crime, with statutory elements, passed by an elected Congress, with instructions offered by a military judge that were harmless beyond a reasonable doubt where they departed from the statutory framework.

Addressing the appellant's fifth assignment of error, that Article 120(c) is facially unconstitutional and unconstitutional as applied, these challenges have already been resolved in large part by both *Prather* and *Medina*. Both opinions address the circumstances presented in those cases. Indeed, even the concurring opinion in *Medina* noted that the court in *Prather* did

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1 Notwithstanding the appellant's argument to the contrary, there is ample authority for a court to sever unconstitutional portions of a statute from its constitutional whole without running afoul of the separation of powers doctrine. The touchstone for any decision about the remedy for a constitutionally defective statutory provision is legislative intent. As the Supreme Court noted, "a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006)(quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979)(Powell, J., concurring in part and dissenting in part)). However, had the judge found a portion of the statute unconstitutional, we would not necessarily be powerless to address the defect. Instead, we would ask whether the legislature would have "preferred what is left of its statute to no statute at all?" *Id.* at 330. We do not have the benefit of the judge's reasoning to determine if, in fact, he intentionally avoided the statute through a severance. If and when a case presents itself in which a judge severs a portion of the statute on constitutional grounds, we will then answer, as best we can, the question of whether Congress would "prefer[] what is left of its statute to no statute at all" in the area of sexual offenses.

not find the statute unconstitutional on its face. *Medina*, 69 M.J. at 466 (Baker, J., concurring in the result). Viewing the question of the constitutionality of the statute *de novo*,<sup>2</sup> we likewise find the statute facially constitutional. As for the appellant's "as applied" challenge, for the reasons discussed *supra*, we are satisfied that the judge's instructions cured any infirmity in the statute.

As for sufficiency of the evidence and the appellant's second assignment of error, the tests for factual and legal sufficiency are well-known, as is the ability to rely upon circumstantial evidence of guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). We need not recite them again here. The Government submitted evidence sufficient to sustain convictions for the aggravated sexual assault of and wrongful sexual contact with AN W. In his brief, the appellant makes much of the fact that the Government proved its case through the testimony of a complaining witness whose credibility was at issue. Reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006)(citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

After reviewing the evidence, we find that a "rational trier of fact could have found the essential elements of the crime[s of which the appellant was found guilty] beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007)(quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). In this regard, we note that the judge, after the members returned with their findings, noted for the record that AN W came across as a "truth teller," and that such would be "patently clear to anyone neutrally observing the testimony." Record at 510. He further stated that "[t]his is a person who is candidly observing what happened the day she was violated by the defendant." *Id.* at 510-11. The judge's comments remind us, as does the law, that we are to "recognize[] that the trial court saw and heard the witnesses." Article 66(c).

Considering the entire record, we too are convinced of the appellant's guilt beyond a reasonable doubt. A young AN, conditioned to sleep through the noise on an aircraft carrier and exhausted after a long night of drinking followed by a day of working on the ship, fell sound asleep on a friend's couch. She awoke to find the appellant had pulled her tight pants and underwear down around her ankles and was atop her having sex.

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<sup>2</sup> *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).

Notwithstanding the appellant's argument to the contrary, and recognizing that we did not personally see the victim's testimony described by the trial judge, we are persuaded both as to the plausibility of the victim's account under these circumstances, and as to the appellant's guilt beyond a reasonable doubt. Likewise, AN W's motive to fabricate was not so great as to cause us to question her believability. If her concern for being caught committing adultery was so great, it would be odd in the extreme for her willingly to engage in the encounter a few feet away from a sleeping shipmate. We find that the evidence is sufficient to sustain the convictions on the specifications challenged by the appellant.

### **Conclusion**

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court