

**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.

**JAMES A. SCHNELL
MACHINIST'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100204
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 December 2010.

Military Judge: CAPT Moira D. Modzelewski, JAGC, USN.

Convening Authority: Commander, Navy-Region Mid-Atlantic,
Norfolk, VA.

Staff Judge Advocate's Recommendation: CDR F.D. Hutchison,
JAGC, USN.

For Appellant: Maj Jeffrey R. Liebenguth, USMC.

For Appellee: Capt Mark V. Balfantz, USMC.

29 November 2011

OPINION OF THE COURT

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

PAYTON-O'BRIEN, Judge:

The appellant was convicted by officer and enlisted members at a general court-martial, contrary to his pleas, of one specification of forcible sodomy, a violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925. He was sentenced to confinement for 10 years, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable

discharge. The convening authority approved the adjudged sentence.¹

The appellant was charged with, and found guilty of, forcible sodomy on divers occasions. He avers that the military judge committed error by failing to instruct the members on what he terms are "lesser included offenses." The crux of the appellant's argument is that the sole lesser included offense instruction provided by the military judge concerning consensual sodomy is interpreted as "consensual sodomy on one occasion." (Emphasis added). Therefore, the appellant claims the military judge erred by failing to instruct the members on the lesser included offenses of "consensual sodomy on divers occasions" and "forcible sodomy on one occasion." We disagree. Given the facts of this case and the entirety of the instructions provided to the members, we find the members were properly instructed.

Factual Background

Prior to enlisting in the Navy, while a preteen and living in his childhood home, the appellant commenced sexual offenses against his younger brother, S. Over time, these sexual offenses escalated in severity. The acts included touching and fondling S's penis and anus, masturbation, and forcible oral and anal sex with S. S was approximately six years old when this sexual activity with his older brother began; it continued throughout S's childhood.

After the appellant joined the Navy and found himself stationed in Norfolk, VA, he would often return to his family's homes in Virginia and North Carolina while on leave.² During a two-week period when the appellant was home on holiday leave in late December 2005 and early January 2006, he committed numerous forcible sexual acts of violence against S, including oral and anal sodomy. At the time, S was less than 16 years old. The appellant continued the sexual violation against S through the

¹ Although the court-martial order does not mention deferral of forfeitures, the convening authority agreed, pursuant to a request from the appellant, to defer automatic and adjudged forfeitures for the benefit of the appellant's dependents, contingent upon the establishment of an allotment to the appellant's wife. The deferral is in effect until the date of convening authority's action. See COMNAVREGMIDLANT letter of 15 Dec 2010.

² S testified that his family moved often and had numerous different homes in Virginia and North Carolina. Due to allegations of physical abuse of S by his mother, S was removed from his mother's home and relocated to his father's home. S testified to instances of sexual abuse by the appellant at no less than five different locations. Pursuant to MILITARY RULE OF EVIDENCE 413, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) the appellant's pre-Navy sexual misconduct against S was admitted into evidence at trial.

middle of 2006, during various trips to the family home. These post-enlistment acts form the basis for the charge of which the appellant was found guilty.

S testified at trial to several sexual violations by the appellant from Christmastime 2005 through the middle of 2006. During his testimony, although S described specifically at least five occasions of forcible oral and anal sex by the appellant, S also testified that the appellant's sexual abuse of him occurred "multiple" times, "about two to three" times a day, "two to three, four times a day" and "three to four times" when the appellant was home on leave. Record at 909, 916, 925.

1. Instructions Conferences

Extensive discussion and consultation occurred between the military judge and the counsel concerning the findings instructions, during RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) sessions and Article 39(a), UCMJ sessions. We note the following specific exchanges took place between the military judge and the counsel. Since she had determined that the evidence raised the issue of consent as to the element of force, the military judge indicated that a lesser included offense instruction for consensual sodomy was proper. Record at 1196. The military judge stated to both trial and defense counsel, "I'm going to instruct on the LIO of sodomy with a child under the age of 16 as to the Specification under Charge II. Do both counsel concur with that?" *Id.* The assistant defense counsel responded, "Yes, ma'am." *Id.* After discussing a lesser included offense instruction for the Article 120 offenses, the military judge asked counsel, "Do you all see any other LIOs, as to any of these charges that I've missed." *Id.* at 1197. The assistant trial counsel responded, "No, ma'am," but the defense counsel and assistant defense counsel both remained silent.

After recessing for in excess of three hours to finalize the instructions, the parties went back on the record for an Article 39(a) session, during which time the military judge summarized the two R.C.M. 802 sessions she had had with the counsel. At that time, the military judge indicated she had provided her proposed instructions to both sides and then asked, "Defense counsel, any objections to my findings instructions or requests for further instructions?" Record at 1202. Defense counsel registered an objection only to the instructions pertaining to spillover and the MIL. R. EVID 413 evidence. *Id.* at 1202-03. After discussion between the parties and the military judge as

to the MILITARY RULE OF EVIDENCE 413, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) issue, the military judge again asked, "Okay, and let me ask the defense then, any other objections or requests for instructions not given?" *Id.* at 1205. The defense counsel stated, "No, ma'am, well . . ." and then the discussion continued again as to the MIL. R. EVID. 413 issue. *Id.* The military judge then discussed the defense's request for an instruction pertaining to their client's right to not testify and the defense registered an objection to the "constructive force" portion of the Article 120 instruction. *Id.* at 1206-08. When asked again by the military judge, "Anything else?", the defense counsel stated, "Nothing else, ma'am." *Id.* at 1209. Additionally, the defense registered no objection to the findings worksheet, Appellate Exhibit LXXIX, provided to the members prior to deliberations. *Id.*

After the conference with counsel, the military judge called the members back into open court and, prior to instructing them on the findings, provided them with a new cleansed charge sheet, AE LXXX.³ While explaining changes she had made to the charges, the military judge informed the members that "divers occasions" means "more than once." Record at 1211-12.

2. Members' Findings Instructions

When orally instructing the members on the substantive offenses, the military judge gave the following instruction:

Now, members, I'm going to turn your attention to another what we call "lesser-included-offense." If you have no reasonable doubt that the accused committed an act of sodomy with [S], who was a child under the age of 16, but you do have reasonable doubt that the act was by force or was without consent, you may find the accused guilty of non-forcible sodomy with a child under the age of 16. The Findings Worksheet that I'll give you shortly includes a form for announcing such a finding. Neither force, nor lack of consent, is required to make this finding as to the lesser-included offense. Said another way,

³ The military judge informed the members that she had eliminated the language "on divers occasions" and "Pelham, North Carolina" from Specification 1 under Charge I (pursuant to a defense motion under R.C.M. 917). Charge I was an Article 120 offense for which the appellant was ultimately acquitted by the members.

neither lack of force or consent is a defense to this Charge.⁴

Record at 1224-25.

The military judge defined "divers occasions" during her oral instructions to the members, as "two or more occasions." *Id.* at 1227. The written instructions provided later to the members for use in deliberations also defined "divers occasions" as "two or more occasions." AE LXXVIII at 6.

As to evidentiary matters, the military judge provided the members with an instruction regarding exceptions and substitutions as follows:

And finally with regard to evidentiary instructions, if you have a doubt about the time or place, but you're satisfied beyond a reasonable doubt that the offense, or lesser-included offense, was committed at a time or place that differs slightly from the exact time or place in the Specification, you may make minor modifications in reaching your findings by changing the time or place described in the Specification, provided that you do not change the nature or identity of the offense or the lesser-included offense.⁵

Id. at 1231.

The defense did not object to the two foregoing instructions. Nor, when given the opportunity to do so, did the defense request any further specific instructions as to any "lesser included offenses" relative to the offense of forcible sodomy or consensual sodomy. Record at 1194, 1196, 1202, and 1205.

Discussion

The issue before us is whether the military judge was required to provide any further instructions as to lesser included offenses. Whether a jury was properly instructed is a

⁴ This instruction was apparently derived from the Department of the Army's Military Judges' Benchbook, Dept. of the Army Pamphlet (DA PAM) 27-9, Paragraph 3-51-2, Note 18 (1 Jan 2010).

⁵ This instruction was apparently derived from the Department of the Army's Military Judge's Benchbook, DA PAM 27-9, Paragraph 7-15.

question of law reviewed *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). A military judge has a *sua sponte* duty to instruct the members on any and all lesser included offenses reasonably raised by the evidence admitted at trial. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008); *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999). See generally, R.C.M. 920(e)(2). The military judge's findings as to when an offense is a lesser included offense is likewise reviewed *de novo*. *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009).

R.C.M. 920(f) states that failure to object to the omission of an instruction before members close to deliberate constitutes waiver of the objection in the absence of plain error.⁶ To establish plain error, the appellant "must demonstrate that there was error, that the error was obvious and substantial, and that the error materially prejudiced his substantial rights." *Smith*, 50 M.J. at 456 (citation omitted).

We note that the military judge provided the standard Benchbook instructions on forcible sodomy and consensual sodomy. She then provided a general instruction on exceptions and substitutions. However, when providing the instruction on the lesser offense of consensual sodomy, she mistakenly referred to the sodomy "acts" at issue in the singular rather than the plural, stating that if the members had no reasonable doubt that the appellant committed *an act* of sodomy with S, but did have a reasonable doubt as to whether *the act* was without consent, the members could find the appellant not guilty of nonforcible sodomy. This failure to pluralize the conduct, the appellant argues, gave rise to a need to instruct on various other forms of the charged offense, to include the charged offense of forcible sodomy on divers occasions and the "lesser" offense of forcible sodomy on one occasion and consensual sodomy on divers occasions. The appellant suggests that the military judge's instructions somehow misled the members.

The Court of Appeals for the Armed Forces has recognized that there are no "magic words" that constitute waiver. *Id.* The lengthy exchange between the military judge and the defense counsel, summarized herein, leaves us with no doubt that defense counsel made a purposeful decision to forego any further instructions on what the appellant now calls the "lesser included offenses" of "consensual sodomy on divers occasions" and "forcible sodomy on one occasion." Accordingly, we hold

⁶ Although referred to as "waiver," it is actually forfeiture under current case law.

that defense counsel affirmatively waived any required further instruction. See *United States v. Pasha*, 24 M.J. 87, 91 (C.M.A. 1987) (affirmative waiver of instructions on lesser included offenses stemmed from counsels' expressed satisfaction and agreement with the determination of the military judge that certain lesser included offense instructions did not apply).

More importantly, when reviewing the record as a whole, particularly the instructions in their entirety, the extensive discussions between counsel and the military judge concerning the instructions, as well as the evidence in this case, it is clear to us that the appellant takes the lesser included offense instruction he now challenges for the first time on appeal out of context and misinterprets its meaning. As stated, the military judge gave a standard Military Judges' Benchbook instruction on the lesser included offense of consensual sodomy, which utilized the phrases "an act of sodomy" and "the act." While the military judge could have tailored this instruction more appropriately to the factual circumstances of this case by referring to "acts of sodomy" and "the acts" since the evidence indicated the appellant committed multiple acts of sodomy, we do not find her failure to do so to be error.

In the context in which this particular instruction was given, coupled with the other substantive and evidentiary instructions, particularly the instruction on exceptions and substitutions and the definition of "divers occasions," we find the appellant's interpretation of the instruction illogical. We do not find that this lesser included offense instruction implies to the members that consensual sodomy occurred on one mere occasion. The appellant's interpretation of the instruction is neither reasonable nor persuasive, given the evidence in this case and the context in which the instruction was given. Thus, no additional instruction as to a lesser included offense of "consensual sodomy on divers occasions" was necessary.⁷

Furthermore, the record betrays that which the appellant fails to acknowledge. The evidence in this case, and the arguments of the parties, clearly refer to multiple acts of sodomy between the appellant and S, both oral and anal. S testified to various acts of forcible sodomy, and at no time during his testimony did he indicate that there was a sole act

⁷ Even if the appellant's interpretation of this instruction is correct, the instruction would have been beneficial to him as the members would have been required to find him not guilty of forcible sodomy of *all* acts if they determined only one act was nonconsensual.

of sodomy with the appellant. Of paramount importance, we note the appellant's own statements to criminal investigators acknowledge multiple acts of sodomy with S. Thus, an additional instruction for "forcible sodomy on one occasion" was not fairly raised by the evidence, and thus, not warranted. *United States v. Wells*, 52 M.J. 126, 129 (C.A.A.F. 1999). Moreover, since the military judge gave the members an instruction that allowed for exceptions and substitutions, indicating if they "ha[ve] a doubt about the time or place," there was no need for a separate instruction for "forcible sodomy on one occasion" as the exceptions and substitutions instruction already informed the members they could make modifications to the specification.

Finally, we note the members were given proper procedural instructions by the military judge in which they were instructed to vote on the more serious offenses first. Since they found the appellant guilty as to the forcible sodomy, it was then unnecessary for them to consider a vote on the lesser included offense of consensual sodomy. Absent evidence to the contrary, members are presumed to follow the judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). We find there is no ambiguity in the members' finding of guilt to the greater offense of forcible sodomy on divers occasions, where the members made no modifications to the specification. *United States v. Walter*, 58 M.J. 391 (C.A.A.F. 2003).

Assuming, *arguendo*, that the military judge erred in not providing the two instructions, we find that such error did not materially prejudice the substantial rights of the appellant. The evidence presented to the members established beyond a reasonable doubt that the appellant committed forcible sodomy on divers occasions. At trial, S, who was a minor child when the offenses occurred, testified that the forcible oral and anal sodomy occurred on multiple occasions.

The members received Prosecution Exhibit 2 into evidence, in which the appellant not only acknowledged multiple occasions of oral sex and attempted anal sex with S, but he indicated he would like to apologize to S for sodomizing him. Notwithstanding the appellant's written statement suggesting that he and S engaged in consensual sodomy, the members concluded that the appellant forcibly sodomized S on divers occasions. We conclude that the evidence adduced at trial was sufficient to convict the appellant of forcible sodomy on divers occasions; even if the military judge failed to instruct the members properly, it did not materially prejudice a substantial right of the appellant.

Court-Martial Order Error

Although not raised as error by the appellant, we note that the court-martial order incorrectly states that Specification 2 under Charge 2 was dismissed, when a finding of not guilty was actually entered. We have not found any prejudice to the appellant from this error. Nonetheless, because service members are entitled to records that correctly reflect the results of court-martial proceedings. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We shall order the necessary corrective action in our decretal paragraph.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority, are affirmed. Arts. 59(a) and 66(c), UCMJ. The supplemental court-martial order shall correctly reflect that the appellant was found not guilty of Specification 2 under Charge II.

Chief Judge REISMEIER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court