

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

**Before
F.D. MITCHELL, J.A. MAKSYM, R.A. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JORDAN J. ESCOCHEA-SANCHEZ
FIREMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201000093
GENERAL COURT-MARTIAL**

Sentence Adjudged: 6 Nov 2009.

Military Judge: CAPT Bruce MacKenzie, USN.

Convening Authority: Commander, Navy Region Midwest, Great Lakes, Ill.

Staff Judge Advocate's Recommendation: LT J.R. Brooks, JAGC, USN.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: Capt Mark Balfantz, USMC.

19 April 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT**

MITCHELL, Senior Judge:

A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault, attempted aggravated sexual assault, two specifications of indecent acts, indecent exposure, wrongful sexual contact, and two specifications of obstruction of justice in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to confinement for 15 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant has submitted three assignments of error: (1) the statutory scheme of Article 120, UCMJ, violates due process of law by placing the burden on the accused to disprove an element of the Government's case; (2) the military judge erred by failing to instruct the members on the proper application of the Article 120, UCMJ, affirmative defenses, violating his right to due process; and (3) that the appellant's conviction for indecent acts violates his right to due process of law because indecent acts is not a lesser included offense of forcible sodomy and the appellant was therefore not put on notice that he had to defend against that charge. We find merit in the appellant's third assignment of error and will take corrective action in our decretal paragraph. Otherwise, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Factual Background

At approximately 1100 on 3 July 2009, a group of 5-7 Sailors, including the appellant, were at a hotel in Waukegan, Illinois drinking in Seaman Apprentice (SA) G's room. SA G, who was an 18-year-old female, was drinking a mixture of Patron and Pina Colada from a clear plastic bottle. She was also observed drinking "Bacardi O" straight from the bottle and playing "quarters" with the appellant. As a result, SA G became extremely intoxicated. At some point, Engineman Fireman Recruit (ENFR) A told the others that he and SA G "were going to do something with each other." The others then left the room to go outside to smoke, leaving SA G and ENFR A alone in the room. The hotel room was located on the first floor and the window was open. Engineman Fireman Apprentice (ENFA) S peered through the window, saw ENFR A and SA G having sex and reported to the others what he had seen. The group of Sailors then discussed who was going to have sex with SA G next and in what order. When ENFR A exited the room without SA G, the appellant left the group and went back into the room. ENFA S again went to the window and this time witnessed the appellant having sex with SA G. Shortly thereafter, the rest of the group entered the room and also witnessed the appellant having sex with SA G. The appellant also placed his penis in SA G's mouth. A total of four Sailors had sex with SA G, one after the other, with the appellant reportedly having sex with her twice. SA G indicated that she did not remember anything until she woke up naked at approximately 2200, still drunk from all the alcohol she had consumed.

Constitutionality of Article 120, UCMJ

In his initial assignment of error, the appellant argues that Article 120(c)(2), UCMJ, is facially unconstitutional, because it shifts the burden to the defense to disprove an element before the appellant could raise a defense to the charge.

To the extent that the appellant mounts a facial challenge to the constitutionality of the scheme of Article 120, his argument fails. See *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011). See also *United States v. Medina*, 68 M.J. 587 (N.M.Ct.Crim.App. 2009), *aff'd*, 69 M.J. 462, 2011 CAAF LEXIS 196 (C.A.A.F. 2011).

Constitutional Challenge to Article 120 as Applied

In his next assignment of error, the appellant contends the military judge erred by failing to instruct the members to consider all of the evidence, including evidence of consent, when determining whether the Government had proven guilt beyond a reasonable doubt. He further contends that the application of the affirmative defenses provided by Article 120 without the aforementioned instruction violated the appellant's right to due process of law. The Government concedes that the military judge failed to follow the statutory language, but argues that it was harmless error. We agree.

The evidence adduced at trial clearly established that the appellant had sexual intercourse with SA G. Fireman (FN) R-V, Fireman Apprentice (FA) S, FN M, and FN R each testified that they saw the appellant having sex with SA G.¹ Additionally, Fireman Recruit (FR) O, testified that the appellant told him the day after the sexual conduct with SA G that he knew he "f***ed up." Record at 776. Based upon all of the testimony and evidence presented at trial, the defense adequately raised consent and mistake of fact as to consent as defenses and the members should have been properly instructed accordingly. The issue we are faced with in the case at bar is whether the military judge's instructions omitting the appellant's statutorily prescribed burden, when read in context of the full instructions, constitutes an error that may amount to a denial of due process, or a legitimate exercise of judicial discretion.

"The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003); see also RULE FOR COURTS-MARTIAL 920(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). A military judge's "[f]ailure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process." *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (citation omitted). Instructional errors involving mandatory instructions are reviewed *de novo*. *United States v. Forbes*, 61 M.J. 354, 357 (C.A.A.F. 2005). Erroneous instruction

¹ FN R-V testified that although he did not see the appellant penetrate SA G's vagina with his penis, he did see the appellant on top of SA G, both were naked from the waist down; SA G lay on the bed with her legs spread, feet resting on the bed; and that the appellant was thrusting into her consistent with a person having sexual intercourse with another. Record at 509-10. FN R-V also indicated that SA G was making "sexual moans" while the appellant was having sexual intercourse with her. Record at 510, 527.

on an affirmative defense has constitutional implications, and "'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *Wolford*, 62 M.J. at 420 (quoting *United States v. Kreuzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (citation and internal quotation marks omitted).

The appellant suggests that the military judge may have somehow confused the members by his instructions. The military judge instructed the members, *inter alia*, that "[a]n expression of lack of consent through words or conduct means there was no consent." Record at 1113. He also instructed the members that they "must be convinced beyond a reasonable doubt that . . . [SA G] did not consent." *Id.* at 1114. The appellant argues that when the military judge later gave the "standard spillover instruction", and stated, "each offense charged must stand on its own and you must keep the evidence of each offense separate", and that "[t]he burden is on the [G]overnment to prove each element of each offense by legal and competent evidence beyond a reasonable doubt," this implied that the members should separate the inquiry into SA G's incapacitation from the inquiry into whether or not she consented. *Id.* at 1155. The appellant argues that this instruction implied that the members should separate the inquiry into SA G's incapacitation from the inquiry into whether or not she consented. Appellant's Brief of 5 May 2010 at 15. The appellant further contends that the members should have been instructed regarding the affirmative defense of consent when determining whether the Government proved the victim's incapacity beyond a reasonable doubt, and that failure to do so was error. *Id.* at 16. While we find that the military judge's deviation from the statutory scheme without legally sufficient explanation to be error, we also find that that the appellant was not prejudiced by that error. See *Medina*, 2011 CAAF LEXIS 196 at 9.

The military judge instructed the members that the defense raised the issue of consent and that the prosecution had the burden to prove, beyond a reasonable doubt, that SA G was effectively incapable of communicating and did not express or communicate consent by words or acts. Record at 1113-14. The military judge determined that the defense also raised the issue of mistake of fact as to consent and similarly instructed the members. *Id.* at 1114-15. Finally, in the spillover instruction, the military judge instructed the members to keep the evidence of each offense separate and that proof of one offense carries with it no inference that the accused is guilty of any other offense. *Id.* at 1155.

The military judge did not instruct the members that they could not consider evidence to either affirmative defense when determining whether the Government had proved incapacitation

beyond a reasonable doubt. Nothing in the record suggests the military judge instructed the members to consider the evidence in a vacuum as the appellant suggests. Additionally, his instructions effectively burdened the prosecution with, proving, beyond a reasonable doubt, that the victim did not consent to the sexual activity and that there was no mistake of fact. Even assuming the military judge's instructions did not adhere to the statutory requirements on the affirmative defense of consent and constituted error, the instructions not only failed to prejudice the appellant, but actually inured to his benefit by alleviating him of any burden of production or proof with respect to the affirmative defense of consent. See *Medina*, 68 M.J. at 592.

Finally, the evidence of the appellant's guilt was overwhelming. Notwithstanding the instructions that were beneficial to the appellant at trial, the members concluded, beyond a reasonable doubt, that the victim was incapacitated at the time of the incident and that she did not consent to the sexual activity. They similarly concluded that either the appellant did not mistake the victim's words or actions for consent; that if he did make such a mistake, the mistake was not objectively reasonable; or that her actions did not objectively manifest consent.

Accordingly, we are convinced beyond a reasonable doubt that the instructions "did not contribute to the [appellant's] conviction or sentence." *Wolford*, 62 M.J. at 420; see also *United States v. DiPaola*, 67 M.J. 98, 102-03 (C.A.A.F. 2008).

Fair Notice

At trial, the military judge instructed the members that they may consider that indecent conduct,² a violation of Article 120, as a lesser included offense [hereinafter LIO] of forcible sodomy. Record at 1137. The members convicted the appellant of the LIO.³ In his final assignment of error, the appellant asserts that his conviction for indecent acts, as an LIO of forcible sodomy, violates his right to due process of law because he was not given fair notice that he would have to defend against this charge. Appellant's Brief at 17. We agree.

² Article 120 does not delineate a separate violation for "indecent conduct." The record reflects, and the conduct described by military judge in the members' instruction suggests, that the military judge meant to say "indecent acts," in violation of Article 120(k), vice indecent "conduct." As we set aside the finding of guilty as to that specification, this issue is moot.

³ Although the appellant was found not guilty of forcible sodomy, but guilty of the LIO of indecent conduct (acts), a violation of Article 120(k), UCMJ, for purposes of this case, we still refer to the charge and specification as Charge IV.

A. Principles of Law

"The Constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court." *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)) (additional citations omitted). In general, fair notice has two key facets. First, the accused must have fair notice his conduct is subject to criminal sanction. *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003). Second, the accused must have fair notice of the elements against which he must defend. *Id.* at 9. Consonant with these Constitutional principles, the Uniform Code of Military Justice provides that an accused "may be found guilty of an offense necessarily included in the offense charged[.]" Article 79, UCMJ; see also *Miller*, 67 M.J. at 388. Where comparison of the elements of two distinct offenses reveals that one of those offenses is not a necessarily included offense of the other, "the requirement of notice to an accused may be met if the charge sheet 'make[s] the accused aware of any alternative theory of guilt.'" *Miller*, 67 M.J. at 389, n.6 (quoting *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008)). It is the latter aspect of the fair notice concept that gives this court pause for concern in this case.

B. Application and discussion.

It is well-settled that a specification "must contain words of criminality and provide the accused with notice of the elements of the crime alleged." *Sanders*, 59 M.J. at 9 (citing *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003)). In this particular case, the appellant was charged with forcible sodomy in that he placed his penis into SA G's mouth by force and without her consent. The military judge instructed the members that they could also consider the lesser included offense of indecent conduct in violation of Article 120, UCMJ.⁴ In detailing the elements of indecent conduct, the military judge informed the members that they would have to find, beyond a reasonable doubt that the appellant: "On or about 3 July 2009, at or near Waukegan, Illinois, . . . engaged in certain wrongful conduct, to wit: Insert his penis into the mouth of [SA G] in the physical presence of [others listed in the specification] and that the conduct was indecent." Record at 1137.

The appellant's charged misconduct as reflected on the charge sheet, forcible sodomy, in violation of Article 125, does not contain the added language that he placed his penis in the

⁴ We note that the record reflects that the military judge indicated that indecent conduct was a violation of Article 20, UCMJ. We view this as a scrivener's error or misstatement by the military judge. Regardless, it is clear from the record that the military judge was referring to Article 120, UCMJ. Additionally, there is nothing in the record to suggest that the members were confused by the instruction and if this is error, it is harmless error.

mouth of SA G in front of others. The members obviously did not find that the appellant placed his penis in the mouth of SA G by force and without her consent as he was acquitted of that charge. The trial judge's instruction to the members on the LIO of indecent conduct not only added an element of which the appellant was not put on notice that he had to defend against, but it also altered the theory of criminality of which the appellant was not given notice prior to trial. We find the military judge's instructions to the members on this charge to be error. We find that the appellant was not provided fair and adequate notice of the misconduct against which he had to defend.⁵ The finding of guilty as to this specification is therefore set aside.

Sentence Reassessment

We must now reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). In reassessing the sentence, we find that there has not been a dramatic change in the sentencing landscape. The appellant remains convicted of aggravated sexual assault, attempted aggravated sexual assault, one specification of indecent acts, indecent exposure, wrongful sexual contact, and two specifications of obstruction of justice. He was sentenced by the members to 15 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. As reassessed, we conclude that the sentence is both appropriate and no greater than that which would have been imposed had the members found the appellant not guilty of this specification.

⁵ In addition to not being provided with fair notice, the appellant also argues that indecent acts is not an LIO of forcible sodomy and uses *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), to buttress his argument. In *Jones*, the court held that indecent acts with another, in violation of Article 134, was not an LIO of rape, a violation of Article 120, UCMJ. The court addressed, "whether an offense is 'necessarily included' in, a subset of, or an LIO of a charged 'greater' offense when it has no elements in common with the elements of the charged offense but is nonetheless either listed as an LIO in the MCM or has been held by this Court to be an LIO on some other ground." *Jones*, 2010 CAAF LEXIS 393 at 3 (citation omitted). The court answered this question in the negative. While, in the case *sub judice* we find the appellant wasn't given fair notice of the elements which he had to defend against, we need not and do not reach the seminal question as to whether an indecent act in violation of Article 120(k) is an LIO of forcible sodomy, a violation of Article 125, UCMJ.

Conclusion

The findings of guilty of Charge IV and its specification are set aside. The findings as to the remaining charges and specifications and the sentence as approved by the convening authority are affirmed.

Senior Judge MAKSYM and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court