

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

**Before
C.L. REISMEIER, F.D. MITCHELL, J.A. MAKSYM
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DUSTIN E. EVERHART
AVIATION ELECTRONICS TECHNICIAN AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000065
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 October 2009.

Military Judge: Col John Ewers, USMC.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: LT T.M. Brown, JAGC,
USN.

For Appellant: LT Michael Maffei, JAGC, USN; LT Michael
Hanzel, JAGC, USN.

For Appellee: LT Brian C. Burgtorf, JAGC, USN.

24 March 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:

The appellant, after entering mixed pleas, was convicted by a general court-martial composed of officer and enlisted members, of one specification of failing to obey a lawful general regulation by providing alcoholic beverages to a person under the age of 21, aggravated sexual assault, and committing an indecent act. The misconduct of which the appellant was found guilty violated Articles 92 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The appellant was sentenced to confinement for 48 months, 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 four 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; (3) the military judge erred by denying the defense's objection to the convening authority's removal of all women from the convening order without hearing any evidence from the Government that no impropriety occurred when selecting the court-martial members; and (4) the evidence is factually insufficient to sustain a conviction for aggravated sexual assault. 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Factual Background

After purchasing beer for himself and a bottle of Vodka for Aviation Maintenance Administrationman Airman Apprentice (AZAA) SB at the local Navy Exchange mini-mart, the appellant, AZAA SB, and Aviation Maintenance Administrationman Airman (AZAN) M went back to the appellant's room to drink.¹ When they got to the appellant's room, AZAA SB poured herself a 12-ounce drink consisting of equal parts vodka and Squirt soda. AZAA SB indicated that she consumed the drink in approximately 30 minutes and started to immediately feel the effects of the alcohol. After going outside for approximately 15 minutes to smoke, the three returned to the appellant's room at which time AZAA SB fixed herself another drink consisting of vodka and soda. After consuming about half of that drink, AZAA SB felt nauseated and went into the bathroom to vomit. After 20-30 minutes or so, the appellant and AZAN M gained entry to the bathroom and found AZAA SB on the floor with her arm around the toilet vomiting into it. AZAN M suggested that taking a shower may help sober her up. AZAA SB does not remember getting into the shower, but remembers waking up on the shower floor. After about 30 minutes or so, the appellant went into the bathroom to get AZAA SB out of the shower and she followed him into his barracks room clothed only in a towel that was wrapped around her body. AZAA SB came out of the bathroom, flopped down on the appellant's bed, face-first, and passed out. AZAN M indicated that he stayed in the room for about 20 minutes and during that time AZAA SB did not move. He testified at trial she was "passed out." Record at 397. After making a make-shift bucket for her to vomit into, AZAN M left the room, leaving the appellant alone with AZAA SB.

¹ The appellant purchased the vodka for AZAA SB because she was, at that time, less than 21 years of age and could not purchase alcohol on her own.

The testimony of AZAA SB and the appellant differed significantly concerning the events that followed AZAN M's departure. AZAA SB testified that she was awakened by the appellant who was digitally penetrating her vagina with his right hand and masturbating with his left. She told him several times to stop. He then climbed on top of her, spread her legs, and penetrated her vagina with his penis. AZAA SB indicated that at this point she grabbed the bed frame, pushed herself up and rolled the appellant off of her. She then put on her clothes and ran down to the first deck where she encountered AZAN M, who testified that during this encounter she was crying and upset. The appellant, on the other hand, contends that after AZAN M left the room, he got into bed with AZAA SB and asked her if she wanted to have sex. The appellant indicated that she said "yes" and after about 5-10 minutes of having intercourse, AZAA SB said she wanted to go to her room and he stopped having sex with her.²

Facial Constitutional Challenge to Article 120

In his first assignment of error, the appellant mounts what appears to be a facial challenge to at least a portion of Article 120, alleging that the way in which the affirmative defense of consent relates to the Government's obligation to prove the elements of Article 120(c) creates a Due Process violation by requiring the defense to disprove an essential element of the Government's case. We note at the outset that the provision of the statute purporting to require the defense to establish, by a preponderance of the evidence, that the victim manifested consent, was never employed by the military judge. Rather, he instructed the members that the evidence raised the defense of consent; he instructed as to the components of the defense, and further instructed the members that it was the Government's burden to prove, beyond a reasonable doubt, that the defense did not exist. It appears that the appellant's challenge seeks to nullify a statute based on a provision that, in his case, was not employed.

Regardless, 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

² In Charge III, the appellant was charged with two specifications of violating Article 120. The first specification alleged that the appellant had sexual intercourse with AZAA SB by force. The appellant was found not guilty of this specification. In the second specification, the appellant was charged with committing a sexual assault upon AZAA SB, who was substantially incapacitated, by inserting his fingers and penis into her vagina. At the conclusion of the Government's case in chief, the military judge struck the words "and penis" from the specification as the evidence reflected that after the appellant digitally penetrated AZAA SB, she awakened, told him to stop, and was aware of what the appellant was doing and actively resisted. The military judge determined that at this point, AZAA SB was not substantially incapacitated. Therefore, the members could only find the appellant guilty of the digital penetration.

(N.M.Ct.Crim.App 2009), *aff'd*, ___ M.J. ___, No. 10-0262, 2011 CAAF LEXIS 196 (C.A.A.F. Mar. 10, 2011).

Constitutional Challenge to Article 120 as Applied

In his next assignment of error, the appellant contends that 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 erred by failing to follow the statutory language, but argues that it was harmless error.

The evidence adduced at trial, including testimony by the appellant, established that he did digitally penetrate AZAA SB.³ That fact is not in controversy. The appellant, however, contends that AZAA SB consented to his actions. Record at 885, 887. AZAA SB claims that she felt dizzy, lay down on the bed, fell asleep from the drinking, and was awakened by the appellant digitally penetrating her vagina. *Id.* at 524-25. While it is clear that the appellant's version of the facts and the victim's are diametrically opposed, it is equally clear that the defense adequately raised consent and mistake of fact as to consent as defenses and that the members should have been properly instructed. 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 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. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "The inquiry for determining whether constitutional error is harmless

³ The appellant contends that after he asked AZAA SB if she wanted to have sex and she answered in the affirmative, he did digitally penetrate her prior to having sex with her. Record at 887.

beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.* (citations and internal quotation marks omitted).

Article 120 allocates burdens, with respect to the affirmative defense of consent, as follows: "The accused has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist." Art. 120(t) (16), UCMJ. The military judge's instructions on the affirmative defense of consent departed from the plain language of the statute by omitting the initial allocation of burdens prescribed by statute -- the appellant's burden of proving the affirmative defense of consent by a preponderance of the evidence.

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 is no consent." Record at 998. He also instructed the members that they "must be convinced beyond a reasonable doubt that . . . [AZAA SB] was effectively not capable of communicating and did not express or communicate consent by words or overt acts". *Id.* at 998-99. The appellant argues that when the military judge later gave the "spillover" instruction, and stated, "each offense must stand on its own and you must keep the evidence of each offense separate", this implied that the members should separate the inquiry into AZAA SB's incapacitation from the inquiry into whether or not she consented. 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 failure to do so is error. Appellant's Brief of 26 Apr 2010 at 17-18. 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 had raised the issue of consent and that the prosecution had the burden to prove, beyond a reasonable doubt, that AZAA SB was effectively incapable of communicating and did not express or communicate consent by words or acts. Record at 998-99. The military judge determined that the defense had also raised the issue of mistake of fact as to consent and similarly instructed the members. *Id.* at 999-1000. Finally, in the spillover instruction, while instructing the members to keep the evidence of each offense separate, he additionally instructed the members that ". . . if evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant." *Id.* at 1007.

We find the appellant's contention that the military judge's instructions may have impermissibly limited the members' consideration of evidence relevant to both the elements of the offense and the affirmative defenses unpersuasive for two reasons.

First, the military judge's instruction neither stated nor implied that the members could not consider the evidence relevant to consent or mistake of fact as to consent in determining whether the Government had sustained its burden of proving the element of incapacitation beyond a reasonable doubt. There is nothing in the record to suggest that the military judge instructed the members to consider the evidence in a vacuum as the appellant suggests.

Second, the military judge's instruction to consider the defenses of consent and mistake of fact as to consent effectively removed any requirement to establish those affirmative defenses by a preponderance of the evidence, and advanced the members' consideration along the statutorily prescribed scheme. The military judge's instruction 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. Despite the military judge's deviation from the statutory language, those 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 accused 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 error in the instructions given in this case "did not contribute to the [appellant's] conviction or sentence." *Wolford*, 62 M.J. at 420; see also *Medina*, 2011 CAAF LEXIS 196 at 9; *United States v. DiPaola*, 67 M.J. 98, 102-03 (C.A.A.F. 2008).

Improper Panel Selection

The appellant, in his third assignment of error, contends that the military judge erred when he denied the defense's objection to the amended convening order which contained no female members. The civilian defense counsel intimated that the convening authority was attempting to systematically exclude women from the court-martial member selection pool. At trial,

after *voir dire* of the member pool and the exercise of two challenges by the trial counsel, the civilian defense counsel voiced an objection to the fact that female members had been removed from the original convening order.⁴ As a remedy, the civilian defense counsel asked that the panel be stricken. Record at 335. The military judge held that the defense had not made a *prima facie* showing of any impropriety by the convening authority and denied the defense's request. *Id.* at 338.

Whether a court-martial panel was subject to systematic exclusion is a question of law which we review *de novo*. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). We are bound by the findings of the military judge unless they are clearly erroneous. *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001). "The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process." *Kirkland*, 53 M.J. at 24 (citing *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999)). "Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting appellant's court-martial members." *Id.* (citation omitted).

R.C.M. 912(b)(1) requires the defense to raise any challenges to the member selection process by the convening authority, if the alleged impropriety was then known by the defense, before the examination of the members begins. Failure to make a timely motion under this section generally waives the improper selection. See R.C.M. 912(b)(3). The Government contends that since the appellant failed to comply with R.C.M. 912(b), he waived his challenge to the convening authority's selection of members. We conclude that the appellant has not met his burden of establishing improper member selection and we therefore do not decide whether he waived his right to challenge the selection of members. Although the appellant's civilian defense counsel alleged at trial that the court-martial convening order was modified to exclude women, he is required to make a *prima facie* showing of a violation of Article 25, UCMJ, or a systematic exclusion of otherwise qualified members based on gender. *United States v. Curtis*, 44 M.J. 106, 133 (C.A.A.F. 1996). See also R.C.M. 912(b)(2). The civilian defense counsel's oral supposition at trial, standing alone, falls short of the appellant's burden to show impropriety by the convening authority. Accordingly, we find this assignment of error to be without merit.

⁴ The record indicated that the convening authority twice amended the convening order, on 17 and 22 September 2009. The last general court-martial amending order reduced the membership from 15 to 12 names and excluded two females that were on the 17 Sep 2009 amending order. We note the apparent scrivener's error in listing the amendments as "1B" and "1C" rather than "1A" and "1B".

Legal and Factual Sufficiency

In his final assignment of error, the appellant contends that the evidence is factually insufficient to sustain a conviction for aggravated sexual assault. Specifically, the appellant avers that the evidence is insufficient to prove beyond a reasonable doubt that AZAA SB was substantially incapacitated during "the sexual encounter." Appellant's Brief at 25. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); see also Art. 66(c), UCMJ.

There are two elements to the offense of aggravated sexual assault (Article 120(c)): (1) that the accused engaged in a sexual act with another, and (2) that the other person was substantially incapacitated.

The evidence and the record reflect that the appellant and AZAA SB were the only people in the room when the sex act occurred. The appellant does not dispute that he engaged in the sexual act with AZAA SB, but his version of what happened differs significantly from that of AZAA SB. The evidence adduced at trial, however, corroborates AZAA SB's version of what happened. AZAN M testified that he witnessed AZAA SB drink a 12-ounce cup filled with vodka and soda in equal parts. Record at 372-73. He also witnessed her make herself another drink, this one less stout, and take sips of it. *Id.* at 378. Later in the evening, he saw AZAA SB in the bathroom with her arms draped around the toilet vomiting into it. AZAN M testified that in response to his suggestion that AZAA SB take a shower to sober her up, she got into the shower, curled up in the fetal position, and did not move for approximately 30-45 minutes. Prosecution Exhibit 2, a picture taken by the appellant of AZAA SB in the shower, depicts her lying on the shower floor in the exact position described by AZAN M. AZAN M described AZAA SB as being "passed out" after she got out of the shower and flopped down face-first on the appellant's bed. Record at 397. Prosecution Exhibit 3 is a picture of AZAA SB laying face down on the appellant's bed, draped only in a towel, just as AZAN M described. After AZAN M left the appellant's room, he did not see AZAA SB again until she came downstairs crying, visibly upset about what had just happened in the appellant's room.

After reviewing all of the evidence and the record, we too, are convinced beyond a reasonable doubt of the appellant's factual guilt to the aggravated sexual assault charge. Accordingly, we find this assignment of error to be without merit.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Chief Judge REISMEIER and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court