

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRANDON T. GATEWOOD
FIREMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201000142
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 December 2009.

Military Judge: CDR Tierney Carlos, JAGC, USN.

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

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

For Appellant: LT Ryan Santicola, JAGC, USN.

For Appellee: Capt Robert E. Eckert, Jr., USMC.

29 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.**

MAKSYM, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas of aggravated sexual assault, indecent conduct, and indecent exposure in violation of Article 120(c), (k), and (n), Uniform Code of Military Justice, 10 U.S.C. § 920(c), (k), and (n). The appellant was sentenced to confinement for seven years, reduction in pay grade to E-1, total forfeiture of pay and allowances, and a dishonorable discharge. In consideration for the appellant's testimony against another service member in an associated case, the convening authority reduced the confinement to five years, but otherwise approved the adjudged sentence.

The appellant raises four assignments of error.¹ After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we agree with the appellant's assertion that the specifications reflect an unreasonable multiplication of charges, and will order relief in our decretal paragraph. After taking corrective action, we conclude that no errors materially prejudicial to the substantial rights of the appellant remain. Arts. 59(a) and 66(c), UCMJ.

Facts

On 3 July 2009, Seaman (SN) LG (a female Sailor), the appellant, and six other young male Sailors, Engineman Fireman Recruit (ENFR) A, Fireman (FN) Romanosky, Fireman Apprentice (FA) Escocheasanchez, ENFR Rosado, Electrician's Mate Fireman Apprentice (EMFA) Smith, and ENFR McFatter, were all students training at Naval Station Great Lakes, Illinois.

SN LG rented a hotel room in Waukegan, Illinois with the intent of getting off base for the long weekend, getting a

¹ I. WHEN EVIDENCE RAISES THE AFFIRMATIVE DEFENSE OF CONSENT TO THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT UNDER THE UCMJ, THE MILITARY JUDGE MUST INSTRUCT THE MEMBERS TO CONSIDER THAT EVIDENCE BOTH ON THE AFFIRMATIVE DEFENSE AND ALSO IN DETERMINING WHETHER ALL OF THE ELEMENTS OF THE OFFENSE HAVE BEEN PROVED BEYOND A REASONABLE DOUBT. THE MILITARY JUDGE IN APPELLANT'S CASE FAILED TO INSTRUCT THE MEMBERS TO CONSIDER THE EVIDENCE OF CONSENT IN DETERMINING IF THE ELEMENTS OF THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT HAD BEEN PROVED BEYOND A REASONABLE DOUBT. THE MILITARY JUDGE'S INSTRUCTION DENIED APPELLANT DUE PROCESS OF LAW.

II. UNDER ART. 120, UCMJ, A PERSON WHO IS "SUBSTANTIALLY INCAPABLE" CANNOT CONSENT TO SEXUAL ACTIVITY. IN APPELLANT'S TRIAL, THE MILITARY JUDGE INSTRUCTED THE MEMBERS THAT A PERSON CANNOT CONSENT TO SEXUAL ACTIVITY IF "SUBSTANTIALLY INCAPACITATED," ONE OF THE ELEMENTS OF THE OFFENSE OF AGGRAVATED SEXUAL ASSAULT. THE MILITARY JUDGE'S INSTRUCTION WAS ERRONEOUS AND IT UNCONSTITUTIONALLY FORECLOSED THE MEMBERS' CONSIDERATION OF AN AVAILABLE AFFIRMATIVE DEFENSE IF THEY CONCLUDED THAT THE GOVERNMENT HAD MET ITS BURDEN ON THE SUBSTANTIAL INCAPACITY ELEMENT.

III. IN ORDER TO CONVICT AN ACCUSED FOR AGGRAVATED SEXUAL ASSAULT UNDER ARTICLE 120(C)(2), THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE VICTIM WAS SUBSTANTIALLY INCAPACITATED. ARTICLE 120 OF THE UCMJ PROVIDES AN AFFIRMATIVE DEFENSE IF THE ACCUSED CAN SHOW BY A PREPONDERANCE OF THE EVIDENCE, THAT THE VICTIM USED WORDS OR OVERT ACTS INDICATING AGREEMENT TO THE SEXUAL CONDUCT AT ISSUE AND WAS COMPETENT. THIS STATUTORY SCHEME VIOLATES DUE PROCESS OF LAW BY PLACING A BURDEN ON THE ACCUSED TO DISPROVE AN ELEMENT OF THE GOVERNMENT'S CASE.

IV. AN ACCUSED IS PROTECTED FROM MULTIPLE CONVICTIONS FOR THE SAME ACT OR COURSE OF CONDUCT UNDER BOTH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE PROHIBITION ON THE UNREASONABLE MULTIPLICATION OF CHARGES. APPELLANT WAS CONVICTED OF BOTH AGGRAVATED SEXUAL ASSAULT AND THE COMMISSION OF AN INDECENT ACT FOR A SINGLE SEXUAL EVENT. THE APPELLANT'S CONVICTION OF BOTH AGGRAVATED SEXUAL ASSAULT AND COMMISSION OF AN INDECENT ACT VIOLATES THE DOUBLE JEOPARDY CLAUSE AND THE PROHIBITION ON THE UNREASONABLE MULTIPLICATION OF CHARGES.

tattoo, and consuming alcohol beverages. She invited some of the above named Sailors to join her, and others just tagged along. On 3 July 2009, sometime between 0800 and 1000, SN LG began drinking her first mixed drinks of tequila, brandy and soda, of which approximately half constituted alcohol.² Over the course of that morning, SN LG consumed roughly two 32-ounce cocktails. She also drank about one half of a liter of rum while playing the drinking game "Quarters" with FA Esococheasanchez. She then drank several shots of 99-proof banana flavored rum.³ By 1130-1200 she had lost consciousness while sitting on the corner of the bed and staring at Harry Potter on television. Her next memory is of awakening at 2200 that night.

At some point, while still coherent enough to carry on a conversation and use the bathroom on her own, SN LG began flirting with ENFR A.⁴ Soon after the flirtation began, everyone else in the room – the appellant included – decided it was time for a smoke break and stepped outside to provide SN LG and ENFR A some privacy. EMFA Smith looked in a window and saw what he believed to be ENFR A and SN LG having sex. A few minutes later ENFR A emerged from the room and confirmed EMFA Smith's suspicions. In response to ENFR A's verification that he had had sex with SN LG, FA Esococheasanchez stated "I have seconds," the appellant claimed "thirds," and FN Romanosky stated "fourths."⁵

FA Esococheasanchez immediately re-entered the hotel room and began having sex with SN LG while she was unconscious. Shortly thereafter, everyone else entered the room and the appellant, ENFR A, and FN Romanosky circled around the bed to watch. When FA Esococheasanchez had finished, the appellant removed his pants and had sexual intercourse with SN LG while she remained unconscious.

Exactly what transpired after the appellant had intercourse with SN LG is difficult to discern with precision from the record before us. We know that after the appellant finished having sex with SN LG, he stood next to the bed, naked and touching himself,⁶ watching as FA Esococheasanchez (for the second time) and FN Romanosky took turns having sex with her. Meanwhile, another participant was trying to orally sodomize SN LG.⁷ We also note that EMFA Smith took a short video recording (later erased) of part of the event on his cell phone, which he later showed to two other service members. This video was so alarming

² Record at 658-59, 662, 720-22.

³ *Id.* at 662-63.

⁴ *Id.* at 664.

⁵ *Id.* at 480-81, 540, 665.

⁶ *Id.* at 606.

⁷ *Id.* at 544, 590.

to one of the viewers that she felt compelled to report the incident to her chain of command.

To establish the depth of SN LG's intoxication – and therefore the incapacity element of the crime of aggravated sexual assault – the Government presented evidence of the quantity of alcohol SN LG consumed prior to having sex with the appellant. Evidence was also presented that during these repeated acts of sexual intercourse, SN LG's eyes were rolled to the back of her head,⁸ she was not moving of her own volition,⁹ looked "like a ragdoll,"¹⁰ and appeared unconscious (or very nearly so) to multiple witnesses.¹¹ Eventually, while having sex with FN Romanosky, SN LG fell off the bed and lay on the ground, inanimate, until she was picked up and returned to the bed by FA Esococheasanchez.¹² The witnesses agreed that by the time this event was over, SN LG was completely unconscious.

The defense countered by eliciting on cross-examination that SN LG still appeared "sober" at 1200;¹³ that she appeared to be a willing participant to the sex with ENFR A;¹⁴ that she was making "sexual moans" throughout;¹⁵ that it was unclear at exactly what point she became substantially incapacitated; and that she put her arms around FN Romanosky while having sex with him, an act which followed SN LG's alleged contact with the appellant.¹⁶

What is clear from the record is that the appellant watched SN LG consume an excessive amount of alcohol, and then proceeded to have sex with her as she lay lifelessly upon a hotel bed only to comment flippantly thereafter to other Sailor's, "we ran a train on her."¹⁷

After the members had heard all the facts, the military judge instructed them on the law. He began by explaining that they must resolve the ultimate question of guilt based upon the evidence presented in court and the instructions that he (the

⁸ *Id.* at 496.

⁹ *Id.* at 413, 485, 605.

¹⁰ *Id.* at 487.

¹¹ *Id.* at 495, 590-91.

¹² *Id.* at 417-18, 547-50, 607.

¹³ *Id.* at 477.

¹⁴ *Id.* at 432.

¹⁵ *Id.* at 559.

¹⁶ *Id.* at 546.

¹⁷ *Id.* at 601-02.

military judge) would give them.¹⁸ The trial judge then informed the members that they may find the accused guilty only if they are "convinced as to guilt by legal and competent evidence beyond a reasonable doubt as to each and every element of that offense."¹⁹

The military judge further instructed the members on the affirmative defenses of consent and mistake of fact as to consent that they must consider when deliberating on Specification 1 of Charge I:²⁰

The evidence has raised the issue of whether [SN LG] consented to the sexual acts alleged in the [sic] Specification 1 of Charge One. Consent is a defense to specifications [sic] 1 of Charge One.

"Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. . . .

A person cannot consent if substantially incapacitated or substantially incapable of appraising the nature of the sexual act at issue or physically declining participation in the sexual conduct due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or sleep or a combination thereof or otherwise.

The prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of aggravated sexual assault alleged in specification 1 of Charge ONE you must be convinced beyond a reasonable doubt that, at the time of the sexual act alleged, [SN LG] did not consent.

The evidence has also raised the issue of mistake on the part of the accused concerning whether [SN LG] consented to the charged sexual act. Mistake of fact as to consent is also a defense to specification 1 of Charge I. The accused would not be guilty of these [sic] offenses if:

1. He mistakenly believed that Seaman [LG] consented to the charged sexual act; and,

¹⁸ Appellate Exhibit LXXIII at 1.

¹⁹ *Id.*

²⁰ *Id.* at 2-3.

2. That such belief on his part was reasonable.

To be reasonable, the belief must have been based on information, or a lack of it, which would indicate to a reasonable person that [SN LG] consented to the charged sexual act. Additionally, the mistake cannot be based on a negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. In other words, a mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the charged incident. You should consider the accused's age, education, and experience along with other evidence on this issue that you deemed relevant.

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that at the time of the charged offense the accused was not under the mistaken belief that [SN LG] consented to the charged sexual act, the defense of mistake of fact does not exist. Even if you conclude that the accused was under the mistaken belief that [SN LG] consented to the charged sexual act, if you are convinced beyond a reasonable doubt that the accused's mistake was unreasonable, the defense of mistake of fact does not exist.

You are advised that the possible defense of consent or mistake of fact as to consent apply only to specification 1 of Charge One.²¹

On these facts, and under these instructions, the members convicted the appellant of three specifications of violating Article 120, UCMJ.

Discussion

The appellant avers four errors, stated above, which we shall address in order.

Instructional Errors

A. Application of the Evidence

The appellant asserts that the military judge did not properly instruct the members on how to apply evidence presented by the appellant in support of the affirmative defense of consent. We review this question *de novo*. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006).

²¹ *Id.* at 2-4.

Erroneous instruction on an affirmative defense has constitutional implications, and "'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *Id.* 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 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. Although this subsection of the law is both illogical and, from a practicable view, not viable for execution, in this case the trial judge applied it in such a way to ensure that the appellant still received due process of law. See *United States v. Medina*, ___ M.J. ___, No. 10-0262 (C.A.A.F. Mar.10, 2011) (finding that although it was error not to instruct the members on the burdens laid out in Article 120(t)(16), that error is harmless); see also *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (holding that the statutory interplay among Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, resulted in a unconstitutional burden shift to an accused).

The military judge failed to provide the members with the statutorily devised guidance on how to apply the law (specifically, the unquestionably unworkable burden shift created under Article 120(t)(16), UCMJ) to the facts before them. See *Prather*, 69 M.J. at 343 n.8. Rather, he instructed the members that the "prosecution has the burden to prove lack of consent beyond a reasonable doubt. Therefore, to find the accused guilty of aggravated sexual assault alleged in Specification 1 of Charge I you must be convinced beyond a reasonable doubt that, at the time of the sexual act alleged [SN LG] did not consent."²² This instruction imposed upon the Government the added element of proving lack of consent beyond a reasonable doubt, while relieving the appellant of the burden of proving the affirmative defense to the members by a preponderance of the evidence. In other words, the instructions the military judge provided, which indicated that the appellant had no burden to prove the affirmative defense, though error, dispositively erred in favor of the appellant and was therefore harmless. See *Medina*, slip op. at 10; *Prather*, 69 M.J. at 338. The evidence of guilt in this case was nothing short of overwhelming, while evidence in support of the affirmative defense was essentially nonexistent.

²² *Id.* at 2-3.

B. Substantially Incapacitated

We turn to the appellant's second assignment of error, which alleges that the military judge's use of the phrase "substantially incapacitated" when describing a person who cannot consent to sexual intercourse constituted error.

As a matter of law, the affirmative defense of consent is unavailable where the putative victim is "substantially incapacitated," regardless of whether the victim used "words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person." Art. 120(t)(14), UCMJ. However, the statute provides an alternative affirmative defense in such a scenario, mistake of fact as to consent, if the accused reasonably and honestly held, as a result of ignorance or mistake an incorrect belief that the putative victim consented through words or deeds to the sexual conduct at issue. See Art. 120(t)(15), UCMJ. The court tendered this instruction in the case at bar. As such, the military judge's instructions, were legally accurate and informative to the members. We conclude that any error in these instructions was harmless beyond a reasonable doubt. *Medina*, slip op. at 10.

Constitutionality of Article 120, UCMJ

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 an affirmative defense to the charge.

It is now a matter of settled law in military jurisprudence that members can and must be instructed to apply Article 120(c)(2) and (t)(16), UCMJ, in such a way as to ensure that the accused receives a fair and constitutionally sufficient trial. Here, there was no confusion in the instruction that the military judge provided to the members on the defense of consent or on the Government's burden of proof related to that defense. The military judge advised the members that consent was a defense to the charge of aggravated sexual assault and the Government had the burden of proving beyond a reasonable doubt that consent did not exist. The members were not instructed of the statutory scheme that required an accused to prove by a preponderance of the evidence that the victim consented. The instruction that was given was clear and correctly conveyed to the members the Government's burden. Although failure to instruct the members in accordance with the statute may technically be error, we are thoroughly satisfied such error is harmless beyond a reasonable doubt. *Medina*, slip op. at 10 (citing *Martin v. Ohio*, 480 U.S. 228, 234 (1987)).

Multiplicity and Unreasonable Multiplication of Charges

Multiplicity and unreasonable multiplication of charges are distinct concepts. Multiplicity is a constitutional violation

under the double jeopardy clause, which occurs if, contrary to the intent of Congress, a court imposes multiple convictions and punishments under different statutes for the same act or course of conduct. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007) (quoting *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Even if offenses are not multiplicitous, the prohibition against unreasonable multiplication of charges allows courts-martial and reviewing authorities to address prosecutorial overreaching by imposing standards of reasonableness. *Id.* (citing *United States v. Rodderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)).

The first question is whether the indecent conduct and aggravated sexual assault committed by the appellant amount to the same act or course of conduct, or whether they are separate, distinct and discrete acts allowing separate convictions. Under the facts of this case, we conclude that for the purposes of determining criminal liability the conduct involved several distinct acts. The criminal act of committing aggravated sexual assault upon the substantially incapacitated person of SN LG is legally separate from the criminal act of having sexual intercourse in front of six other service members. We hold that these offenses are not multiplicitous as a matter of law.

The second question is whether the Government unreasonably multiplied the charges. In considering this question, we apply a five-part test: (1) did the accused object at trial; (2) is each charge and specification aimed at distinctly separate criminal acts; (3) does the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) does the number of charges and specifications unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

The first criterion favors the appellant. Although the appellant did not object at trial, counsel discussed the issue in an Article 39(a) hearing with the military judge, addressing specifically her concern that the appellant's convictions for Specifications 1 and 2 of Charge of I would be "multiplicitous for sentencing."²³ The concept of "multiplicity for sentencing" as a legal doctrine does not exist. Notwithstanding that fact, the military judge discerned counsel's meaning and instructed the members to consider only the greater offense when crafting an appropriate sentence.

We resolve the second and third criteria in favor of the appellant as well. Here, the act of having sex with SN LG while she was substantially incapacitated was, in fact, no different from the act of having sex with LG in front of six other service members. They are not separated by time, distance, or impulse,

²³ Record of trial at 835.

despite the obvious difference in intent elements between Specification 1 and 2. What was one transaction became the basis of two separate charges. The appellant also satisfies the fourth criterion: he faced five additional years of confinement once convicted of committing an indecent act. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 12. As to the last factor, it is neutral. The elements of the two subject specifications differ, suggesting no prosecutorial overreaching or abuse, but we recognize that this one transaction has been parsed into component parts in order to allege two offenses.

Conclusion

Accordingly, we dismiss Specification 2 of Charge I as an unreasonable multiplication of charges with Specification 1 of Charge I. We have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). "A 'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). Upon reassessment, we conclude that there has not been a dramatic change in the penalty landscape as a result of our action, and that the sentence as adjudged and approved is appropriate and no greater than would have been adjudged but for the error noted. *Id.* Accordingly, the findings, as modified herein, and the sentence are affirmed.

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court