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

Before
R.Q. WARD, J. MCFARLANE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICKY L. BROWN
AVIATION ELECTRONICS TECHNICIAN AIRMAN (E-3), U.S. NAVY

NMCCA 201300020
GENERAL COURT-MARTIAL

Sentence Adjudged: 31 August 2012.
Military Judge: CDR Douglas Barber, JAGC, USN.
Convening Authority: Commander, Naval Air Force, U.S. Atlanctic Fleet, Norfolk, VA.
Staff Judge Advocate's Recommendation: Capt F.D. Mitchell, JAGC, USN.
For Appellant: LT Carrie Theis, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC; LT Lindsay Geiselman, JAGC, USN.

31 October 2013

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.

WARD, Senior Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of abusive sexual contact, forcible sodomy, and unlawful entry, in violation of Articles 120(h), 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920(h), 925, and 934. The members sentenced him to two years confinement and a bad-conduct discharge. The convening authority approved the sentence as

adjudged, and, except for the punitive discharge, ordered the sentence executed.

On appeal, the appellant assigns three errors: first, that Article 125, UCMJ, is unconstitutionally vague; second, that the military judge's instructions on force rendered his conviction for forcible sodomy legally and factually insufficient; and third, that his conviction for unlawful entry was legally insufficient because there was no direct evidence of prejudice to good order and discipline at trial.

After carefully considering the record of trial, the submissions of the parties, and oral argument,[1] we are convinced that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to a substantial right of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

I. Background

On the evening of 11 March 2012, the appellant attended a party with the victim, Seaman (SN) Q. At approximately 2300, the appellant and several other Sailors assisted SN Q back to her barracks room due to her level of intoxication. Once there, SN Q became agitated and vomited several times before she got in bed and fell asleep. After making sure she was okay to be left alone, the group left.

Later that evening, the appellant returned and stood outside SN Q's window peering in at her asleep. After a few moments, he retrieved a steak knife from a nearby common area and pried off the screen to SN Q's bedroom window. He then crawled inside and lay in bed next to her for a few minutes before committing the subject offenses.

Further facts relevant to disposition of this case are developed below.

II. Validity of Article 125, UCMJ

The appellant first argues that *Lawrence v. Texas*[2] invalidated his conviction under Article 125, UCMJ, because the Supreme Court effectively struck down as unconstitutional all anti-sodomy statutes similar to the Texas statute. Appellant's

[1] On 14 August 2013, we heard oral argument on the appellant's first and second assigned errors.

[2] 539 U.S. 558 (2003).

Reply Brief of 1 Jul 2013 at 2. Although he acknowledges that *Lawrence* "does not spell out in simple terms the declaration of facial invalidity[,]" *id*. at 3, he urges us to join certain Federal circuits and legal scholarship in finding that *Lawrence* renders any anti-sodomy statute similar to the Texas statute facially unconstitutional. We decline to do so. The Court of Appeals for the Armed Forces (CAAF) addressed a similar challenge to Article 125, post-*Lawrence*, in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). There the CAAF declined to view *Lawrence* as invalidating Article 125 on its face, instead finding that within the military context *Lawrence* compelled an as-applied, contextual analysis. *Id*. at 203-05; s*ee also United States v. Castellano*, 72 M.J. 217, 223 (C.A.A.F. 2013) (holding that *Marcum* factors, which remove sexual activity from *Lawrence* protected interest scope, must be determined by the trier of fact).

"Under the doctrine of *stare decisis* a decision should not be overruled without examining intervening events, reasonable expectations of servicemembers, and the risk of undermining public confidence in the law." *United States v. Boyett*, 42 M.J. 150, 154 (C.A.A.F. 1995) (citation omitted). The Supreme Court notes that "[e]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (citations and internal quotation marks omitted). No such special justification applies here.

The appellant, in a novel theory, argues that "times have changed," and that the repeal of "Don't Ask, Don't Tell" constitutes intervening events and special justification for disregarding *Marcum.* Appellant's Brief of 22 Mar 2013 at 10. We decline to accept the appellant's invitation to disregard a binding decision from our superior court, especially in light of more recent precedent reaffirming *Marcum*.

III. Standing

The appellant also challenges the constitutionality of Article 125, UCMJ, as void for vagueness,[3] both facially and as-

[3] The 5th Amendment protects against vagueness in criminal statutes because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (citation omitted).

applied to the facts of his case. He argues that the statute is constitutionally infirm because recent changes make it unclear what actual conduct under the Article remains punishable.[4] Constitutionality of a statute is a question of law we review *de novo*. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

To make a constitutional challenge for vagueness in the military context, an appellant must first have standing, for one "to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974); *see also United States v. McGuinness*, 35 M.J. 149, 152 (C.M.A. 1992) ("If appellant is . . . one to whom the statute clearly applies, he has no standing to challenge successfully the statute under which he is charged." (Citations and internal quotation marks omitted). To determine whether a statute "clearly applies", we look not only to the plain language of the statute, but also to other sources, including the Manual for Courts-Martial. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

Here, the conduct at issue prohibited by Article 125, UCMJ, as specified in the elements promulgated by the President in the Manual and pled by the Government, is forcible sodomy committed upon a sleeping victim. This is conduct traditionally recognized as criminal – and remains so today. That others not so situated may raise a colorable claim of vagueness, *see Marcum*, 60 M.J. 198, does nothing to change that fact. No ordinary person of reasonable intelligence would confuse the appellant's conduct with legally permissible behavior. Thus, the appellant's conduct is that to which Article 125 clearly applies, as "an act of sodomy with a sleeping victim does not implicate constitutional protections or even arguably constitute permissible behavior." *United States v. Whitaker*, 72 M.J. 292, 293 (C.A.A.F. 2013); *see also Marcum*, 60 M.J. at 206 ("[c]learly, the *Lawrence* analysis is not at issue with respect to forcible sodomy.").

It is the appellant's specific conduct of forcible sodomy that now prevents him from mounting a vagueness challenge to Article 125, UCMJ. *See Parker,* 417 U.S. at 756; *McGuinness*, 35 M.J. at 152. We conclude, therefore, that he lacks standing to

[4] These specific changes are the repeal of "Don't Ask, Don't Tell," Pub. L. No. 111-321, 124 Stat. 3516 (2010) and the recent amendments to Article 120, UCMJ (2011 Amendments to the Manual for Courts-Martial, 76 Fed. Reg. 78451, 78461 (Dec. 16, 2011)). Appellant's Brief at 10-11.

challenge the constitutionality of Article 125, UCMJ.

IV. The Definition of Force under Article 125, UCMJ

In another assignment of error, the appellant argues that his conviction for forcible sodomy is legally and factually insufficient because "the term 'forcible' does not extend to acts performed on individuals who are incapable of appreciating the nature of the act because of alcohol consumption or being asleep." Appellant's Brief at 22.

Prior to 2007, the offense of rape, punishable under Article 120, UCMJ, listed as statutory elements both the act of sexual intercourse and that the act was by force and without consent of the victim. 10 U.S.C. §920(a) (2000). Exercising his authority under Article 36, UCMJ,[5] the President further defined this latter element of "by force and without consent" to include sexual intercourse in cases "where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice."[6]

While Article 125 did not include a statutory element of force or lack of consent, the President, using his delegated authority under Article 56, UCMJ to define limitations on punishment, included as an aggravating element sodomy occurring "by force and without consent." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶51b(4); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 (Revised ed.), Chapter XXVIII, ¶ 204. However, unlike Article 120, the President did not further

[5] *See United States v. Nerad*, 69 M.J. 138, 146 n.10 (C.A.A.F. 2010) (recognizing well-established authority of the President to interpret or clarify the UCMJ); *United States v. Mitchell*, 66 M.J. 176, 179 (C.A.A.F. 2008) (holding that although the President's interpretation of substantive offenses under Part IV of the Manual is not binding, military courts apply the President's guidance in the Manual when it reflects an accurate interpretation of the law).

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 45c(1)(b). This paragraph was enacted by Executive Order 12960, on 12 May 1995. An almost identical provision existed in the MANUAL FOR COURTS-MARTIAL (1969 ed.), Chapter XXVIII, ¶ 199a. The common law principle that "the force involved in penetration will suffice" in cases where consent is lacking due to a sleeping or unconscious victim existed under the UCMJ at least as far back as 1954. *United States v. Henderson*, 15 C.M.R. 268, 274 (C.M.A. 1954); *see also United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (discussing physical force, constructive force, and force when the victim is incapable of consenting).

define "by force and without consent" for purposes of Article 125.

In 2005, Congress amended Article 120 for offenses occurring on or after 1 October 2007.[7] Notably, Congress distinguished the crime of rape from the new crime of "aggravated sexual assault"; a crime encapsulating an area previously prosecuted as rape - sexual intercourse where the victim was incapable of consent due to sleep or intoxication.[8] At the same time, however, Congress chose not to disturb Article 125, and the President opted not to disturb the previously promulgated aggravating element of sodomy "by force and without consent."

The appellant now points to the 2005 amendments of Article 120 as evidence that Congress intended, at least within the context of sex crimes, to limit the element of "by force and without consent" to offenses involving physical force or threat thereof. We disagree.

Prior to 1 October 2007, the element of "by force and without consent," as it consistently appeared within the Manual for both Articles 120 and 125, developed a settled meaning over time.[9] *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) ("The offenses of rape and forcible sodomy both require proof that the act was committed by force and without consent."). Military courts have long applied the same definitions to both Articles 120 and 125. *See*, *e.g.*, *United States v. Morgan*, 24 C.M.R. 151, 153 (C.M.A. 1957) ("It has been said that sodomy and rape are 'kindred crimes' and that the

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[7] *See* H.R. Rep. No. 109-360, § 552 (2005); *see also* 151 Cong. Rec. H12739, H12774-H12776 (Dec. 18, 2005). The President signed these amendments to Article 120 into law on 6 January 2006. Pub. L. 109-163, 119 Stat. 3136 (Jan. 6, 2006).

[8] *See* 10 U.S.C. § 920(c)(2) (2006).

[9] *See United States v. Wells*, 519 U.S. 482, 491 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms . . . have accumulated settled meaning under . . . the common law and the statute [does not] otherwise dictate." (Citation and internal quotation marks omitted)); *United States v. Mott*, 72 M.J. 319, 324 (C.A.A.F. 2013) (applying the settled-meaning presumption that Congress intended the same definition for "wrongfulness" under both the federal Insanity Defense Reform Act of 1984, Title 18 U.S.C. § 17 (2006) and Article 50a, UCMJ, 10 U.S.C. § 850a(a) (2006)). This presumption equally applies to the President's explanations of offenses in the Manual considering "the relative ease in which the Manual can be amended." *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000).

principles of law governing the one also govern the other." (citations omitted)); *United States v. Barboza*, 39 M.J. 596, 598 (A.C.M.R. 1994) ("The offenses of rape and forcible sodomy both require that an accused commit an act of sexual intercourse or unnatural carnal copulation by force and without consent." (Citation omitted)); *United States v. Small*, 48 C.M.R. 170, 171 (A.F.C.M.R. 1974) ("The element of force and lack of consent is not discussed in [the] Manual provision [for Article 125], but such an element is discussed in paragraph 199a concerning the crime of rape."). As we previously noted: "[T]o prove rape and sodomy . . . [f]orce may be physical or constructive . . . . As to physical force, unless the victim is asleep, unconscious, or lacks mental capacity, more than the incidental force necessary to achieve penetration is required." *United States v. Cauley*, 1995 CCA LEXIS 441 at *14, unpublished op. (N.M.Ct.Crim.App. 1995).

Nevertheless, the appellant argues, that the settled meaning no longer applies to Article 125 due to the 2005 amendments to Article 120 and the crime of rape. At best, he posits, the phrase is unclear with respect to Article 125. But his argument implies that Article 120 as it existed prior to 1 October 2007 has since been repealed. To the contrary, the traditional crime of rape, i.e. sexual intercourse by force and without consent, still remains punishable under Article 120 for offenses occurring prior to 1 October 2007.[10] For those offenses, the traditional element of "by force and without consent" retains its settled meaning. That meaning is not lost simply because Congress chose to amend Article 120 for certain offenses occurring after 1 October 2007.

The fact remains that while Congress opted to revise Article 120 for future offenses, they chose not to do so for Article 125 despite having the opportunity to do so. The President similarly opted not to modify any of the aggravating elements under Article 125. "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S.

[10] Article 43(a), UCMJ, provides that "A person charged with . . . rape . . . may be tried and punished at any time without limitation." Thus, offenses occurring prior to 1 October 2007 are still punishable as the traditional crime of rape under Article 120, UCMJ. *But see* National Defense Authorization Act (NDAA) For Fiscal Year 1987, Public Law 99-661 (1986) (unlimited statute of limitations for crime of rape applicable only to offenses committed after 14 November 1986).

16, 23 (1983) (citations and internal quotation marks omitted.).[11] In the absence of any contrary indication, we must presume that Congress only intended to refine the concept of "force" as it applied to Article 120 and not by extension to Article 125. Similarly, we must presume that the President intended not to further refine the aggravating element of "by force and without consent" he previously established under Article 125.

Despite recent Congressional revisions to Article 120, UCMJ, we conclude that the phrase "by force and without consent," as used by the President in ¶51.b.(4) of the Manual retains its customary definition as illustrated by the model instructions contained in ¶ 3-51-2 of the Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at 602 (1 Jan 2010).

The evidence introduced at trial overwhelmingly established that the appellant committed the act of sodomy while SN Q was "incapable of consenting because she was asleep, unconscious, or intoxicated to the extent that she[] lack[ed] the mental capacity to consent" and therefore no greater force was required than that necessary to achieve penetration. Based on the foregoing, we find that a "rational trier of fact could have found the essential elements of the crime [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) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). We, too, are convinced of his guilt beyond a reasonable doubt.

V. Direct Testimony to Support the Article 134 Terminal Element

The appellant last argues that the evidence presented for his unlawful entry conviction is legally insufficient to support the requisite Article 134 terminal element pled: that his conduct was prejudicial to good order and discipline.

Citing *United States v. Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991), he argues that the Government "neither presented direct and palpable evidence that Appellant's conduct prejudiced good

[11] *See also United States v. Wilson*, 66 M.J. 39, 45-47 (C.A.A.F. 2008) (finding that although both Congress and the President took action in 1996 to add the affirmative defense of mistake of fact as to a child's age for the offense of carnal knowledge under Article 120, failure to take any such action for the offense of sodomy of a child under Article 125 "cuts against the suggestion that either Congress or the President intended to harmonize the [two statutes].").

order and discipline, nor elicited testimony from any witness to that effect." Appellant's Brief at 29. We disagree.

In *Guerrero*, the Court of Military Appeals announced the rule that "it is (1) the time, (2) the place, (3) the circumstances, and (4) the purpose [of the conduct], all together, which form the basis for determining if the conduct is to the prejudice of good order and discipline . . . ." *Guerrero*, 33 M.J. at 298 (citations and internal quotation marks omitted). In deciding the issue, the trier of fact is free to rely on either direct or circumstantial evidence. *United States v. Hart*, 25 M.J. 143, 147 (C.M.A. 1987); *see also United States v. Goings*, 72 M.J. 202, 206 n.5 (C.A.A.F. 2013) (stating that military courts are to apply "a low evidentiary threshold . . . applied to Article 134, UCMJ's terminal element").

Here, all of the *Guerrero* factors weigh against the appellant. While in theory breaking into another's barracks room may indeed have some reasonable explanation (as in cases of emergency), the time, place, circumstances, and purpose as shown by the evidence in this case all weigh against the appellant.

After following a group of concerned friends back to SN Q's room to help her to bed, the appellant initially resisted turning over SN Q's room key to her friend, SN L. Only after one of SN Q's friends insisted did he relent. Several hours later, he crept back to the window outside her bedroom only to find the window secured. Undeterred, he retrieved a steak knife and used it to pry off the window screen before climbing inside and sodomizing a sleeping victim. The members, with this evidence before them, and properly instructed, convicted appellant of this charge and its specification.

While no one witness specifically testified that the appellant's actions directly impacted good order and discipline, we find ample evidence in the record to convince us that the appellant's conviction on the sole specification of Charge III was legally sufficient.

VI. Conclusion

For the reasons stated above, the findings and the sentence are affirmed.

Judge MCFARLANE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court