

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
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, IL.

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

For Appellant: William E. Cassara, Esq.; Maj Kirk Sripinyo, USMC; LT Ryan Mattina, JAGC, USN.

For Appellee: Maj Crista Kraics, USMC.

14 February 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.**

MCFARLANE, Judge:

A general court-martial consisting of officer and enlisted representation convicted the appellant, contrary to his pleas, of aggravated sexual assault, attempted aggravated 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 members sentenced the appellant 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.

Procedural Background

On 19 April 2011, we issued an opinion in this case, dismissing Charge IV and its specification (indecent act) and affirming the remaining findings of guilty and the sentence. *United States v. Escochea-Sanchez*, No. 201000093, 2011 CCA LEXIS 77, unpublished op. (N.M.Ct.Crim.App. 19 Apr 2011). On 13 September 2011, the Court of Appeals for the Armed Forces (CAAF) granted the appellant's petition for review on whether Article 120(c), UCMJ, was unconstitutional as applied. *United States v. Escochea-Sanchez*, No. 11-0559, 2011 CAAF LEXIS 743 (C.A.A.F. 13 Sep 2011). On 8 May 2012, CAAF set aside our decision and returned the record of trial to the Judge Advocate General of the Navy for remand to this court for further consideration of the specified issue because it was not raised before us during our original Article 66(c), UCMJ, review. *United States v. Escochea-Sanchez*, 71 M.J. 316 (C.A.A.F. 2012). Consequently, the appellant's case is again before this court for review, and consideration of:

WHETHER ARTICLE 120(C) IS UNCONSTITUTIONAL AS APPLIED WHERE:
THE MILITARY JUDGE (1) REQUIRED APPELLANT TO PROVE THE
AFFIRMATIVE DEFENSES OF CONSENT AND MISTAKE OF FACT AS TO
CONSENT BY A PREPONDERANCE OF THE EVIDENCE; (2) DETERMINED
THAT THE DEFENSES HAD BEEN PROVED BY A PREPONDERANCE OF THE
EVIDENCE; AND THEN (3) FAILED TO DISMISS THE CHARGES *SUA*
SPONTE AS REQUIRED BY RULE FOR COURTS-MARTIAL 917.

A summary of the facts underlying the charges in the case is included in our earlier opinion.

After reviewing the record of trial, the submissions of the parties, and hearing oral argument, we find the findings of guilty and 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

The military judge recognized that the statutory language requiring a double burden shift with respect to the defenses of consent and mistake of fact as to consent in Article 120, UCMJ, was problematic and tried to rectify the issue in a number of

cases through what he deemed a "novel solution." The military judge devised a procedure wherein he required the defense to prove to him, by a preponderance of the evidence, that the members should be instructed on the defenses of consent or mistake of fact as to consent. Under this procedure, the defense was to be given an opportunity to make that showing during a pretrial motions hearing. If they failed to meet their burden at that hearing, the defense could still meet the burden based upon evidence presented during the trial proceedings. Lastly, if the defense met their burden at some point, either before or during the trial, the Government would be given a final opportunity at the close of the evidence to convince the military judge not to give the instructions.

In this case, the appellant's attempt to put the defenses at issue during the pretrial 39(a) session was unsuccessful. However, after hearing several of the Government's witnesses at trial, the military judge *sua sponte* reconsidered his earlier ruling, told the defense they had met their burden, and told the parties that he was going to instruct the members on both defenses.

At the close of the Government's case, the appellant moved for a finding of not guilty to all charges and specifications under RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The military judge, after hearing argument from counsel regarding each specification, denied the motion. In doing so, the military judge noted the "low standard" that the Government must meet to survive an R.C.M. 917 motion, and mentioned his responsibility to view the evidence, to include all reasonable inferences, in the light most favorable to the Government.

At the conclusion of the evidence, the military judge instructed the members on the defenses of consent and mistake of fact as to consent. Those instructions made no mention of any burden shifting to, or otherwise being placed upon, the appellant. Rather, the military judge instructed the members that the evidence had raised the defenses of consent and mistake of fact as to consent, and that the Government had the burden of disproving those defenses beyond a reasonable doubt.

Constitutional Challenge to Article 120 As Applied

We review a constitutional challenge to a statute *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). The appellant argues that Article 120(c), UCMJ, as applied, was

unconstitutional because the novel procedures the military judge used in this case had the effect of forcing him to disprove an element of the Government's case before the military judge would instruct the members on the affirmative defense of consent. We agree that the military judge erred by applying the aforementioned procedure in a case alleging substantial incapacity under Article 120(c). See *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011). However, assuming without deciding that this error has constitutional implications, we are convinced that the error had no impact on the findings or the sentence and was therefore harmless beyond a reasonable doubt. See *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

Despite any irregularities that may have preceded the military judge's instructions to the members, the fact remains that the members were properly instructed and that no burden was ever placed on the appellant for the members to consider. In this respect, the case at bar is identical to *Medina*. In *Medina*, the CAAF noted:

[T]here 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 the 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.

Id. at 465 (footnote and citation omitted). Just as they were convinced in *Medina* that the error was harmless beyond a reasonable doubt, so too are we convinced that the error in this case was harmless beyond a reasonable doubt. *Id.* at 466.

Legal Impossibility and Appellant's R.C.M. 917 Motion

The appellant next asserts that the military judge, having found by a preponderance of the evidence that the affirmative defenses of consent and mistake of fact as to consent were raised, should have *sua sponte* dismissed the charges against the appellant, as it was a "legal impossibility" at that point for

the Government to disprove those defenses beyond a reasonable doubt. We disagree.

While the appellant's argument has a certain logical appeal, it starts to break down when one considers the different legal standards that a military judge applies when determining whether an instruction should be given, vice determining whether to grant a motion for a finding of not guilty under R.C.M. 917, and the fact that the military judge was not the trier of fact in this case.

Under standard military practice, "[a]n affirmative defense is raised by the evidence when some evidence, *without regard to its source or credibility*, has been admitted upon which members might rely if they chose." *United States v. Stanley*, 71 M.J. 60, 62 (C.A.A.F. 2012) (emphasis added) (citations and internal quotation marks omitted). This standard is applied uniformly for all affirmative defenses, regardless of whether the burden is on the Government to disprove the defense beyond a reasonable doubt, or on the accused to prove the defense by either a preponderance or clear and convincing evidence. *See United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2006) (applying the "some evidence" standard for instructing on a defense where the Government had the burden to disprove the defense once raised); *United States v. Acosta-Zapata*, 65 M.J. 811, 815-16 (Army Ct.Crim.App. 2007) (applying the "some evidence" standard for instructing on a defense where the accused had the burden to prove the defense). As long as there is "some evidence" the members are instructed on the defense and it is up to them to make determinations regarding credibility, weigh the evidence, and decide whether the appropriate party has met their burden. *Cf. United States v. Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007) (discussing the members' "duty to weigh admissible evidence and assess credibility").

This case, however, was different. Here, based on what he thought was a Congressional mandate, the military judge eschewed the "some evidence" standard and required the appellant to prove to him "by a preponderance of the evidence" that the defenses were raised. Although the military judge stated that he was going to be "very liberal in listening to" the appellant's evidence, he did not clearly articulate what that meant. Given the standard typically applied, and the record before us, we believe that he viewed the evidence in the light most favorable to the appellant, without an evaluation of the credibility of the witnesses. However, since he did not explicitly state that, we will assume for the purposes of this opinion that the

military judge made determinations regarding credibility and weighed the evidence when deciding that the appellant met his burden of raising the defenses by a preponderance of the evidence. However, even after making that assumption, we still find the legal standard for granting an R.C.M. 917 motion sufficiently different to prevent the legal and logical impossibility the appellant claims in his pleadings.

As the military judge noted repeatedly while hearing argument on the R.C.M. 917 motion, the standard for surviving such a motion is very low. R.C.M. 917(d) states that a motion for a finding of not guilty "shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses." (Emphasis added). Accordingly, even if the military judge believed, based on his expert assessment of the various witnesses' credibility, and after weighing all the evidence, that the appellant had proven the defenses of consent and mistake of fact as to consent, as long as one witness took the stand - regardless of that witness's credibility - and presented "some evidence" that could "reasonably tend to establish every essential element of an offense charged," the military judge was required by law to deny the motion. It is for this reason that the appellant's "impossibility" argument fails.

Last, aside from the vastly different legal standards involved when deciding whether a defense is in issue and whether to grant an R.C.M. 917 motion, the fact remains that the military judge was not the trier of fact in this case. The members were free to make their own credibility determinations, and to weigh the evidence as they saw fit. Here, the members determined, beyond a reasonable doubt, that the victim did not consent to the sexual act, and that the appellant was not operating under a mistaken belief as to her consent at the time of the assault. Our review of the record in this case finds more than sufficient evidence to support those determinations.¹

¹ We note that the appellant has never raised an assignment of error before this court alleging that the evidence was legal or factually insufficient to support the members' findings. Nonetheless, the court notes that "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses" we are also "convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Accordingly, we find that the military judge did not err by denying the appellant's motion for a finding of not guilty under R.C.M. 917.

Conclusion

For the reasons set forth in our earlier opinion in this case, the findings of guilty to Charge IV and its specification are set aside. The findings as to the remaining charges and specifications and the sentence as reassessed and as approved by the convening authority are affirmed.

Senior Judge PAYTON-O'BRIEN and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court