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.

RONNIE G. OAKLEY, JR.
INFORMATION SYSTEMS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 201200299
GENERAL COURT-MARTIAL

Sentence Adjudged: 9 March 2012.
Military Judge: CDR Lewis Booker, JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.
For Appellant: Col Dwight Sullivan, USMCR; LT Kevin Quencer, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

26 March 2013

OPINION OF THE COURT

WARD, Judge:

A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of aggravated sexual assault and indecent act in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920.[1]

[1] The appellant originally was charged with four specifications alleging violations of Article 120, UCMJ: two specifications of aggravated sexual assault under Article 120(c); one specification of wrongful sexual contact under Article 120(m); and one specification of indecent act under Article 120(k). Additionally, the appellant was charged with one specification of attempted aggravated sexual assault under Article 80, UCMJ.

The members sentenced the appellant to confinement for three months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The appellant raises four assignments of error:

1. that the military judge erred when he instructed the members that the defense had the initial burden to prove consent by a preponderance of the evidence and only then would the burden shift to the Government to prove beyond a reasonable doubt that the defense of consent did not exist;

2. that the military judge erred by failing to instruct the members on the lesser included offense of assault consummated by a battery;

3. that the convening authority erred by approving total forfeiture of pay and allowances after the appellant was released from confinement; and

4. that the court-martial order incorrectly states the members' findings.

After carefully considering the record of trial, the parties' briefs, and oral argument,[2] we find merit in the appellant's first assigned error, set aside the findings and sentence, and authorize a rehearing. Our action moots the remaining assignments of error.

Factual Background

Prior to entry of pleas, the military judge dismissed one specification of aggravated sexual assault for failure to state an offense. Appellate Exhibit X. At the conclusion of evidence, the military judge entered a finding of not guilty to the language "on divers occasions" for each of the three remaining Article 120 specifications pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 681. The members found the appellant not guilty of wrongful sexual contact and attempted aggravated sexual assault. AE LVIII.

[2] On 13 February 2013, we heard oral argument at the George Washington University Law School as part of our Outreach program. We commend both parties on their exceptionally well-written briefs and outstanding oral argument on the unique and complex issues presented by this case.

The appellant's conviction arose from an incident with his 19-year-old stepsister, Culinary Specialist Third Class (CS3) FC on 29 April 2011. That evening, the appellant, CS3 FC, and other members of their family were drinking alcohol together for several hours in the home of the appellant's father and step-mother. Later that evening, CS3 FC fell asleep on a recliner in the den of the home. Sometime after she fell asleep, the appellant entered the den and digitally penetrated her vagina while he masturbated.

Following these events, agents from the Naval Criminal Investigative Service (NCIS) interrogated the appellant. During the interrogation, the appellant provided both a handwritten and typed statement detailing his recollection of the evening.[3] In his statements, he admitted that he may have digitally penetrated CS3 FC's vagina while she lay sleeping on the recliner; however, he also indicated that he thought she acquiesced when she "opened her legs wider." Prosecution Exhibit 12 at 1.

At trial, CS3 FC testified that the appellant entered the den three separate times while she lay in the recliner sleeping. However, she testified that he sexually assaulted her only during the first and third instances. As to the second, she testified that she awoke to the smell of smoke and observed the appellant sitting in a chair smoking a cigarette. Record at 438. When she asked why he was not smoking out on the "front stoop", the appellant replied "oh, I forgot" and left the room. *Id*. at 439. She also testified that, although she was under the influence of alcohol, she awoke each time he entered the room and could recall everything he did to her during both sexual assaults.[4]

At the close of evidence, the military judge held an Article 39(a), UCMJ, session with counsel to discuss findings instructions. Recognizing the recent holdings of the Court of Appeals for the Armed Forces (CAAF) in *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) and *United States v. Medina*, 69 M.J. 462, 463 (C.A.A.F. 2011), he deemed it was up to "the trial judge to figure out exactly what it is that Congress has intended [in Article 120, UCMJ] and try to give effect to the language of the statute." Record at 684. He explained that he

[3] Prosecution Exhibits 10 and 12.

[4] In light of CS3 FC's testimony, the military judge directed that, for the three Article offenses (aggravated sexual assault, wrongful sexual contact and indecent act), the findings worksheet specify findings for both instances with the "smoking of the cigarette as the focal point" in delineating the two instances. Record at 771-80; AE LVIII. The members found the appellant not guilty of any offense for the first instance and guilty of aggravated sexual assault and indecent act for the latter instance. AE LVIII.

believed Congress intended that the concepts of consent and the affirmative defense of consent be treated differently. *Id.* The military judge summarized this distinction as follows:

> [The] defense has the burden of proving it is more likely than not that [CS3 FC] did or said something that looked like consent. And then it is the government's burden to prove that [CS3 FC] was not competent when she said it or that she was substantially incapacitated or that the consent was not freely given and, therefore, the defense of consent does not exist: two distinctly different concepts . . . ."

Id. He then proposed to instruct the panel accordingly. The defense objected, arguing that his instruction would make Article 120 unconstitutional as applied and any distinction between the concepts of evidence of consent and the affirmative defense of consent "would be confusing to the members." *Id*. at 686-90. The military judge disagreed and ultimately instructed the members as follows:

> Consent is a defense to all the charged offenses. "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 that there is no consent. The Defense must prove consent by a preponderance of the evidence; in other words, you must be convinced that it is more likely than not that [CS3 FC] said or did something that would indicate a freely-given agreement to the sexual conduct by a competent person. The burden, then, is on the government to prove beyond a reasonable doubt that the defense does not exist.
>
> Please note that I say the defense does not exist, and not that consent does not exist because this is an important distinction. The prosecution has the burden to prove beyond a reasonable doubt that the defense of consent does not exist. Therefore, to find the accused guilty of the offenses alleged, you must find that even though [CS3 FC] may have said or done something that sounded or looked like consent, the government proved beyond a reasonable doubt that at the time she said or did those things, she did not give her agreement freely or that she was not

> competent. You may consider in this regard whether [CS3 FC] was substantially incapable of physically declining participation because she was asleep or unconscious or because she suffered some mental impairment due to consumption of alcohol, or because she was otherwise physically incapable of declining participation in the sexual conduct.

Id. at 738-39; Appellate Exhibit L at 4. The military judge also instructed on the affirmative defense of mistake of fact as to consent without placing any burden upon the appellant. Rather, he stated that "[t]he prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist." Record at 740; AE L at 5.

Discussion

In *Prather*, the CAAF held that burdening the accused with proving the affirmative defense of consent unconstitutionally shifts the burden to the accused to disprove an implied element or a fact essential under Article 120(c), UCMJ.[5] 69 M.J. at 339-40. Under an "as-applied" analysis, the CAAF found Article 120(c) unconstitutional whenever an accused raises the affirmative defense of consent because if "an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault - that the victim was substantially incapacitated." *Id.* at 343.

At the same time, however, the CAAF recognized that a military judge may craft an instruction curing this unconstitutional burden shift present in Article 120(c). One method may be by instructing the members that "all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Id*. at 344 (brackets in original) (quoting *United States v. Neal*, 68 M.J. 289, 299 (C.A.A.F. 2010)

[5] In *Prather*, the Article 120(c) offense alleged that the victim was "substantially incapacitated." The CAAF noted in dicta that although "there may exist an abstract distinction between 'substantially incapacitated' and 'substantially incapable,' in the context presented here we see no meaningful constitutional distinction in analyzing the burden shift." 69 M.J. at 343. Although the 120(c) offense here alleges "substantially incapable," we likewise see no meaningful distinction between that and "substantially incapacitated."

(quoting *Martin v. Ohio*, 480 U.S. 228, 234 (1987)) (internal quotation marks omitted). Or, a military judge can omit any burden allocation to the accused. *Medina*, 69 M.J. at 463 (holding that an instruction in an Article 120(c) case that omitted any burden on the appellant and instead burdened the Government with disproving the affirmative defense of consent, while error, was harmless beyond a reasonable doubt); *see also United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012) (per curiam) (holding that, in a prosecution for abusive sexual contact under Article 120(h), an instruction burdening the Government with disproving the affirmative defense of consent "correctly conveyed the Government's burden to the members.").

The issue presented in this Article 120(c) case is whether a military judge avoids the unconstitutional burden shift present in *Prather* by distinguishing between evidence of consent and the affirmative defense of consent. Despite the military judge's attempt to distinguish between the two concepts, we conclude that the instructions resulted in the same unconstitutional burden shift as occurred in *Prather*.[6] Moreover, under the facts of this case, we conclude that the military judge's error was not harmless beyond a reasonable doubt.

A. The Application of *Prather*

Because the military judge's instructions differ slightly from those present in *Prather*, we first must determine whether the holding in *Prather* even applies to this case. As in *Prather*, the appellant here mounts an as-applied constitutional challenge to Article 120(c), UCMJ, a matter which we review *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). To determine constitutionality in an as-applied context, we focus on, *inter alia,* the "content of instructions, sequence of instructions, and waiver of instructions." *Neal*, 68 M.J. at 304.

In his instructions, the military judge made several slight deviations from the instructions at issue in *Prather*. Specifically, he omitted the language from Article 120(t)(14)(B)(i) that "[a] person cannot consent to sexual activity if . . . substantially incapable of . . . appraising the nature of the sexual conduct at issue . . . ." In *Prather*, the CAAF held that this language from Article 120(t)(14) logically linked the affirmative defense of consent to the element of substantial incapacitation under Article 120(c). 69

[6] As discussed *infra*, we find the same unconstitutional burden shift applied to the 120(k), UCMJ, offense.

M.J. at 343. The CAAF concluded that "Prather could not prove consent without first proving a *capacity* to consent on the part of the victim as Article 120(t)(14), UCMJ, provides that 'a person *cannot consent* to sexual activity if . . . substantially incapable . . . .'" *Id*. (emphasis in original).

In the instant case, one could argue that by omitting this language from Article 120(t)(14) in his instructions, the military judge removed the very foundation of *Prather*. However, the military judge did not sever all links to Article 120(t)(14). Of note, he included the definition of consent – "words or overt acts indicating a freely given agreement to the sexual conduct by a *competent* person." Record at 735; Art. 120(t)(14), UCMJ (emphasis added). Thus, to prove CS3 FC consented, the appellant had to first prove that she was "competent" to consent. And in deciding whether CS3 FC was competent, the military judge advised the members that they could consider whether she was "substantially incapable of declining participation [in the sexual conduct]," a fact essential to an element of the crime. Record at 739.

Even with the deviation from the statutory language at issue in *Prather*, we find that the military judge's instructions still placed the appellant in the same untenable position as Prather. Proving a victim was "competent" to consent is no different qualitatively than proving a victim had capacity to consent. 69 M.J. at 343. We conclude, therefore, that the military judge's removal of this statutory language did not remove this case from the unconstitutional burden shift described in *Prather*.

B. Attempt to Cure the *Prather* Unconstitutional Burden Shift

We turn next to whether the remainder of the military judge's instructions cured this unconstitutional burden shift. We review whether a panel is properly instructed *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008).

The appellant argues that regardless of the military judge's attempt to distinguish between evidence of consent and the affirmative defense of consent, he still unconstitutionally shifted the burden to the appellant of disproving an element of the crime -- specifically that CS3 FC was substantially incapable of declining participation in the sexual act. The Government responds that the military judge's explanation distinguishing between evidence of consent and the defense of consent avoided any impermissible burden shift.

We find the military judge's attempt to distinguish between the concepts was confusing to the members, principally because both concepts relied upon a "competent" victim. And, irrespective of any distinction, we find that his instructions failed to properly convey to the members that *any* evidence of consent, including evidence pertinent to the affirmative defense, must also be considered in deciding whether the prosecution carried its burden of proving each element of the offense beyond a reasonable doubt.

"It is a 'basic rule that instructions must be sufficient to provide necessary guideposts for an "informed deliberation" on the guilt or innocence of the accused.'" *United States v. Dearing*, 63 M.J. 478, 479 (C.A.A.F. 2006) (quoting *United States v. Anderson*, 32 C.M.R. 258, 259 (C.M.A. 1962)); *see also United States v. Buchana*, 41 C.M.R. 394, 396-97 (C.M.A. 1970) (holding law officer must provide "lucid signposts" to enable the court members to apply the law to the facts). Any doubt as to how the members may interpret the instructions must be resolved in favor of the accused. *United States v. Tackett*, 41 C.M.R. 85, 87 (C.M.A. 1969); *see also United States v. Curry*, 38 M.J. 77 (C.M.A. 1993) (finding reversible error where military judge gave confusing and misleading instruction on defense of accident).

Before attempting to distinguish "evidence of consent" from the "defense of consent," the military judge first explained that the appellant must prove by a preponderance of the evidence that CS3 FC consented.[7] Thus, he required the appellant to prove some form of consent -- be it . . . apparent, actual, legal or otherwise -- before requiring the Government to carry *any* burden of disproving the defense of consent. Even if his attempted distinction carried legal significance,[8] the fact remains that both concepts of consent relied upon the same definition of a "competent" person. How to parse evidence of "consent" according to these varying concepts, weigh that evidence against the

[7] The military judge explained that "[t]he defense must prove consent by a preponderance of the evidence . . . you must be convinced that it is more likely than not that [CS3 FC] said or did something that would indicate a freely-given agreement to the sexual conduct by a competent person." Record at 738-39.

[8] It appears that the nuances of this distinction were not readily clear to the Government which argued in closing that "[t]he defense must show by a preponderance of the evidence – in other words more than 50-percent chance – that [CS3 FC] consented to [the sexual act and indecent conduct]. If they do this, then the government has to show beyond a reasonable doubt that [CS3 FC] did not consent. That's the law. That's what you're going to hear." Record at 701.

respective parties' burden, and render an informed verdict was simply too confusing for a panel of laymen.[9]

Even if this distinction carried significance and that significance was evident to the members, we note that the instructions linked any evidence of consent to a "competent" victim. To evaluate whether any evidence indicated consent, the members must first evaluate whether it was indicative of a competent person. In this regard, the military judge advised them that they could consider whether CS3 FC was "substantially incapable of declining participation [in the sexual conduct]," a fact essential to an element of the crime. Record at 739. By linking these factual determinations together, evidence indicating that CS3 FC was competent to consent to the sexual conduct could also tend to negate or disprove whether she was "substantially incapable of declining participation" in that same conduct.

Where proof of an affirmative defense may overlap with the prosecution's burden on an element, "the instructions to the jury must reflect 'sensitivity to th[e] dependent relationship between the two [distinct] factual issues.'" *Neal*, 68 M.J. at 299 (quoting *Humanik v. Breyer*, 871 F. 2d 432, 441 (3d Cir. 1989)). Such an instruction, absent in this case, must "convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Martin*, 480 U.S. at 234; *see also Prather*, 69 M.J. at 344; *Neal*, 68 M.J. at 299. Absent that charge, the instructions create the risk that members may disregard evidence of consent that might otherwise raise a reasonable doubt simply because it falls short of a preponderance.

Therefore, we conclude that the military judge's failure to instruct the panel per *Martin* was error, and that error failed to cure the constitutional infirmity described in *Prather*.

C. Application of *Prather* to the Article 120(k), Indecent Act Specification

[9] "Even if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *Curry*, 38 M.J. at 81. The nuances of the military judge's attempted distinction of various forms of consent and shifting burdens might be evident to seasoned jurists and military justice practitioners, but we are far less confident they were evident to the members.

Article 120(r), UCMJ, excepts the affirmative defenses of consent and mistake of fact as to consent from all offenses under Article 120 save those specifically listed. Because Article 120(k) is not among those listed, these affirmative defenses do not apply to Article 120(k) and lack of consent is ordinarily not an element.[10] At the same time, however, "all the facts and circumstances of a case including the alleged victim's consent, must be considered" to determine whether the conduct is indecent. *United States v. Baker*, 57 M.J. 330, 336 (C.A.A.F. 2002) (citations omitted).[11] Therefore, depending on the factual circumstances of each case, consent or lack thereof may be relevant in establishing whether the conduct is indecent.

In this case, the Government alleged that the act committed was without the consent of CS3 FC.[12] By doing so, the Government added lack of consent as a fact material to an element to be proven beyond a reasonable doubt: that the appellant's conduct was indecent.[13] But the military judge shifted this material fact from the Government's burden and instead placed proof of

---

[10] The elements of indecent act are: (a) that the accused engaged in certain conduct; and (b) that the conduct was indecent. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), App. 28, ¶ 45 b(11). Lack of consent is only included in the definition of "indecent conduct" in reference to observing or making a recording of another person. Article 120(t)(12), UCMJ.

[11] While *Baker* was decided under a prior version of indecent acts under Article 134, UCMJ, the language of both versions of the statute and the legislative history show that the term "indecent" in Article 120(t)(12) is "the same conduct that has been held to be indecent by military appellate courts" in the past. SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, 261 (2005).

[12] The specification read as follows:

> In that Information Systems Technician Third Class Ronnie G. Oakley, Jr., U.S. Navy, USS INGRAHAM, on active duty, did, . . . on divers occasions, on or about 30 April 2011, wrongfully commit indecent conduct, to wit: masturbating in the presence of [CS3 FC], U.S. Navy, *without the consent* of the said [CS3 FC], U.S. Navy.

Charge Sheet (emphasis added). We view lack of consent as a matter subsidiary to a fact borne by the prosecution to be proven beyond a reasonable doubt: that the conduct alleged was indecent. *Neal*, 68 M.J. at 299.

[13] The act alleged was masturbation. The Government alleged two circumstances making that act indecent: CS3 FC's presence and her lack of consent. Arguably, the former circumstance is implied in the latter. We view this latter circumstance as a material fact in determining whether the appellant's conduct was indecent.

the inverse, i.e., consent, on the appellant in the form of an affirmative defense not authorized by law.[14] Ordinarily, "a superfluous, exculpatory instruction that does not shift the burden of proof is harmless, even if the instruction is otherwise erroneous." *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (citation omitted).[15] But this error can hardly be superfluous when it effectively reduced the Government's burden in proving an element of the offense at the expense of the appellant. *Cf. United States v. Binegar*, 55 M.J. 1, 6 (C.A.A.F. 2001) (holding that in a larceny prosecution where specific intent in issue, an erroneous instruction requiring that mistake of fact be both honest and reasonable was not harmless as it lessened Government's burden in disproving defense and obtaining conviction).

Furthermore, the military judge's instructions placed the appellant in a position very similar to *Prather* —- proving that CS3 FC consented to the indecent conduct tends to disprove a fact on which the prosecution bears the burden; that the appellant's conduct was indecent due to its nonconsensual nature. *Neal*, 68 M.J. at 299. In that regard, the "instructions to the jury must reflect 'sensitivity to th[e] dependent relationship between the two [distinct] factual issues." *Id*. (quoting *Humanik*, 871 F.2d at 441). The appellant was entitled to, but did not receive, a *Martin* instruction that the members must consider all evidence of consent, including any relating to the affirmative defense, as to whether the Government proved the elements of indecent act beyond a reasonable doubt.

D. Prejudice Analysis

Having found error, we must now examine that error for prejudice. "If instructional error is found, because there are

[14] For reasons that are unclear in the record, the military judge omitted the phrase "without the consent of the said [CS3 FC], U.S. Navy" when instructing the members on the elements of this offense. Record at 735-36. Although court-martial findings do not expressly incorporate the text of a charge and specification, each finding is a decision whether the Government proved beyond a reasonable doubt the charged offense. *United States v. Alexander*, 63 M.J. 269, 273 (C.A.A.F. 2006). Regardless of the omission, the indecent act specification submitted to the panel alleged lack of consent, the Government's proof included the same, and the members' guilty finding included no exceptions. Consequently, the appellant stands convicted of indecent conduct committed without the consent of CS3 FC.

[15] We again review whether this panel was properly instructed *de novo*. *Ober*, 66 M.J. 393.

constitutional dimensions at play, [the error] must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (citation and internal quotation marks omitted). Whether error is harmless beyond a reasonable doubt is a question of law we review *de novo*. *Id*. (citation omitted). In this context, prejudice attaches if "there is a reasonable possibility that the [error] complained of might have contributed to the conviction." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman*, 386 U.S. at 24).

Here, the appellant argues that the members may have disregarded evidence of consent that otherwise could have raised a reasonable doubt that CS3 FC was "substantially incapable of declining participation in the sexual act" simply because such evidence fell short of a preponderance. The Government responds that any error was cured by the military judge's mistake of fact as to consent instruction; an instruction that removed any burden allocation to the appellant.

The Government's argument on the surface has some allure. At trial, the military judge instructed the panel that the Government must prove beyond a reasonable doubt that the mistake of fact defense did not exist.[16] Thus, he required the panel to

[16] Specifically, he instructed that

> Mistake of fact as to consent means the accused held as a result of ignorance or mistake an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused, and it must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information or the lack of it that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to uncover the true facts.
>
> . . . .
>
> The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. If you are convinced beyond a reasonable doubt at the time of the charged offenses that the accused was not under a mistaken belief that [CS3 FC] consented as to the sexual acts, then the defense does not exist. Even if you conclude that the accused was under a mistaken belief that [CS3 FC] consented to the sexual acts, if you are convinced beyond a reasonable doubt that at the time of the charged offenses the accused's mistake was unreasonable, the defense does not exist.

determine beyond a reasonable doubt whether 1) the appellant held an incorrect belief that CS3 FC consented to the sexual conduct; and 2) a reasonable sober person in the appellant's position would hold the same incorrect belief.

The Government argues that to form an incorrect belief, the appellant would have presumably observed some act or communication by CS3 FC indicating consent. But by rejecting any mistake of fact, the panel implicitly found that a reasonable sober person in the appellant's position observed no such indicia of consent. Concomitantly, if such a person observed no indicia of consent, then no actual consent existed.

As alluring as this argument may be, it overlooks the fact that there are several possible paths that could have led the panel to reject the mistake of fact defense. Perhaps they were firmly convinced that a reasonable sober person would not have believed that CS3 FC consented. Or, irrespective of CS3 FC's conduct, they may have concluded that the appellant himself held no such belief. Finally, the panel may have believed that neither the appellant himself nor a reasonable sober person in his position would have believed that CS3 FC consented.

On the face of this record, we cannot conclude beyond a reasonable doubt which path they chose. It is quite possible that, based on the appellant's NCIS statements and video-recorded interrogation, the panel concluded that the appellant thought CS3 FC was asleep at the time of the sexual conduct.[17] In that case, they could reject the defense with no consideration as to what a reasonable sober person may have believed. Faced with this uncertainty, we cannot conclude that the verdict forecloses the possibility that the panel may have disregarded some evidence of actual consent and convicted on evidence less than beyond a reasonable doubt.

Based on the foregoing, there exists a reasonable possibility that the military judge's erroneous instructions contributed to the appellant's convictions.

Conclusion

Record at 739-40. The military judge then explained how voluntary intoxication was not relevant to any mistake of fact by the appellant. *Id*. at 741.

[17] PE 10, 12, and 13. During trial, however, CS3 FC testified that she was awakened when the appellant entered the den, and remained awake and conscious but silent throughout the approximately five minutes that the sexual assault lasted. Record at 440-44.

Accordingly the findings and the sentence are set aside, and a rehearing is authorized.

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

For the Court

R.H. TROIDL
Clerk of Court