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

Before
M.D. MODZELEWSKI, F.D. MITCHELL, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

RICHARD M. PAYNE
CRYPTOLOGIC TECHNICIAN (INTERPRETIVE) THIRD CLASS (E-4)
U.S. NAVY

NMCCA 201200477
GENERAL COURT-MARTIAL

Sentence Adjudged: 20 July 2012.
Military Judge: CAPT John K. Waits, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: Capt David A. Peters, USMC.
For Appellee: LT Philip S. Reutlinger, JAGC, USN.

12 December 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.

PRICE, Judge:

Pursuant to his pleas of guilty, a military judge convicted the appellant of one specification of making a false official statement in violation of Article 107, Uniform Code of Military Justice, 10 U.S.C. § 907. A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault, in violation of Article 120(c), UCMJ (2011). The members sentenced the appellant to confinement for two years,

reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises two assignments of error: (1) that the military judge erred by failing to instruct the members on the affirmative defense of consent, and (2) that the military judge abused his discretion by allowing testimony regarding prior acts of assault under MILITARY RULE OF EVIDENCE 413, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

After consideration of the pleadings and oral arguments of the parties, and the record of trial, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

In August 2011, the appellant hosted a pool party at his off-base apartment complex. Approximately 10 people attended the party including MH. The appellant served as MH's mustering petty officer for three months prior to the party.

Over the course of several hours at the pool party, MH consumed 2-3 16 ounce cups of vodka mixed with a soft-drink. As darkness fell, MH displayed signs of intoxication including slurred speech, difficulty maintaining her balance, and complained that her head was spinning. Several party attendees assisted MH up the stairs to the appellant's second-floor apartment. During this timeframe, MH declared her desire to leave with JU, a male acquaintance she had invited to the party. Her male shipmates were not acquainted with JU and attempted to convince MH that she should not leave the appellant's apartment with JU in such an intoxicated state and that she should instead stay at the appellant's apartment. Record at 592, 642. One witness testified that the appellant appeared to be the most adamant advocate of this plan, and that the appellant and MH argued. *Id.* at 642. JU left without MH.

After some period of dispute over her desire to depart with JU, MH proceeded to the bathroom where she vomited. She subsequently staggered down the hallway, using the walls for support and went into the appellant's guest bedroom, where she fell asleep on the bed.

MH testified that her next recollection was "slowly coming awake" to the feeling of a penis penetrating her vagina. *Id.* at

381. She also testified that she "could feel his thighs hitting [her] bottom," that her bikini bottoms were down "between [her] hips and . . . knees," and that she "was kind of confused." *Id.* at 381-82. She testified that after being startled awake by a "shock of pain" she "reached [her] left hand behind her shoulder and . . . pushed his chest away." *Id.* at 383. She recognized the appellant's voice when he said "I'm sorry. I can't do this. I'm sorry." *Id.* at 383, 495. She then asked the appellant where her cell phone was and he responded that it was by her head. *Id.* at 384.

MH testified that she then texted JU "once or twice," waited an unspecified period of time for a response and "eventually got up." *Id.* After collecting her belongings, MH left the appellant's apartment and drove her car for approximately 35 minutes to the residence of Petty Officer P, a female friend with whom she had been staying. She also exchanged several texts with Petty Officer P prior to arriving at the residence. Defense Exhibit B.

When initially questioned by a criminal investigator, the appellant denied engaging in any sexual conduct with MH. Record at 721-22. DNA evidence developed during the investigation indicated otherwise. Appellate Exhibit XIII, XIV. The appellant pleaded guilty to making a false official statement to the criminal investigator, and during the providence inquiry, he admitted that he had lied to the investigator and "had sex with [MH]." Record at 89.

At trial, the civilian defense counsel extensively cross-examined MH regarding her lack of recollection, as well as conduct that might have occurred while she was unaware of her surroundings. *Id.* at 395-495, 502-08. She testified that she had "never been told that I was doing things while I sleep [sic], but it's possible." *Id.* at 471. In response to leading questions regarding possible sexual conduct with the appellant that she did not recall, MH acknowledged that she could "[n]ot with certainty" testify that it did not happen and that it was "possible" that it did. *Id.* at 471-72. The civilian defense counsel then responded:

> Q: Thank you. So what in actuality you're saying is it's possible, because of your condition at that particular point you were engaging in consensual sex with [the appellant], correct? That's possible? Yes or no?

A: It's possible.

Id. at 472-73.

During recross-examination, MH responded similarly. *Id.* at 506-07. On redirect examination, MH indicated that "[t]o the best of [her] knowledge" she did not fondle the appellant's genitals, flirt with or have any physical contact with the appellant that night. *Id.* at 507-08.

Additional facts necessary to resolve the assigned errors are included herein.

Instructions on Consent

The appellant alleges that his counsel "elicited statements from the alleged victim during cross-examination that raised the issue of consent," but that "the military judge erroneously concluded these statements did not qualify as 'some evidence'" and refused to instruct the members on the affirmative defense of consent. Appellant's Brief of 12 Apr 2013 at 7. The Government responds that the military judge did not err because the victim's responses to civilian defense counsel's questions presented no more than a "theoretic[al] possibility of consent." Government's Answer of 12 Jul 2013 at 14. We agree.

Consent and mistake of fact as to consent are statutorily defined as affirmative defenses to aggravated sexual assault in violation of Article 120(c)(2), UCMJ (2011). *See* Art. 120(r), UCMJ (2011). The constitutionality of the affirmative defense of consent in the context of aggravated sexual assault under Article 120(c) has been the subject of significant controversy. *See United States v. Prather*, 69 M.J. 338, 339-40 (C.A.A.F. 2011) (concluding that "when an accused raises the affirmative defense of consent to a charge of aggravated sexual assault by engaging in sexual intercourse with a person who was substantially incapacitated. . . . the statutory interplay between [Articles 120(c)(2) and 120(t)(16)] results in an unconstitutional burden shift to the accused." (Footnote omitted)). Instructions by the military judge that do "not employ the statutory provision regarding the defense's burden of proof on the affirmative defense of consent" have been affirmed. *United States v. Medina*, 69 M.J. 462, 463 (C.A.A.F. 2011).

A military judge is required to instruct on affirmative defenses, such as consent, "if the record contains some evidence to which the military jury may attach credit if it so desires."

United States v. DiPaola, 67 M.J. 98, 100 (C.A.A.F. 2008) (quoting *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003)) (additional citation and internal quotation marks omitted). When the defense has been raised by "some evidence," the military judge has a *sua sponte* duty to give the instruction. *Id.* In addition:

> [t]he defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered in determining whether the accused is entitled to a mistake of fact instruction . . . . Any doubt whether an instruction should be given should be resolved in favor of the accused.

Id. at 100-01 (quoting *Hibbard*, 58 M.J. at 73) (additional citation and internal quotation marks omitted).

> Once it is determined that a specific instruction is required but not given, the test for determining whether this constitutional error was harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 . . . (1967). Stated differently, the test is: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1, 18 . . . (1999).

DiPaola, 67 M.J. at 102 (quoting *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)).

Was there "some evidence" of consent?

We discern from this record no direct evidence that MH consented to any sexual conduct, much less to sexual intercourse with the appellant. In context, MH's responses to civilian defense counsel's cross-examination questions fall into one of three categories: (1) declarations of her lack of recollection of any conduct from the time she fell asleep in the appellant's guest bedroom until she was awakened by the appellant's penile penetration of her vagina; (2) acknowledgement of her inability to testify with certainty regarding what conduct, if any, occurred while she was asleep; and (3) acknowledgement that it was theoretically "possible" that she could have participated in sexual conduct that she does not recall while asleep and/or intoxicated.

MH's testimony that she had no recollection of any conduct from the time she fell asleep until she was awakened was not contested at trial. We also find MH's testimony that she could not testify regarding her conduct or that of the appellant during the period during which she was sleeping both factually consistent and logical. Notwithstanding extensive cross-examination, MH's responses remained consistent, uncontested, and uncontroverted by evidence. We conclude that these responses do not constitute evidence of consent.

We also find "no evidence" of consent in MH's responses to theoretical questions that it was possible that she could have participated in sexual conduct while incapacitated. *Cf. Williams v. Illinois*, 132 S. Ct. 2221, 2234 (2012) (quoting *Forsyth v. Doolittle*, 120 U.S. 73, 77 (1981) ("questions . . . are not evidence; they are mere statements to these [expert] witnesses . . . and, upon the hypothesis or assumption of these questions the [expert] witnesses are asked to give their [opinion]. . . . [t]he value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts") (internal quotation marks omitted)). Indeed, if candid responses to "isn't it possible" theoretical questions, standing alone, constitute "some evidence" of consent, then such "evidence" would seemingly be subject to development through persistent questioning of candid victim witnesses in most, if not all, incapacity cases.

The appellant has cited no precedent supporting his argument that a lack of memory, acknowledgement of an inability to testify with certainty about conduct occurring while asleep, or that acknowledgement of "theoretical possibilities" constitutes "evidence" of consent, and we have found none. Even considering the apparent defense theory that MH was not incapacitated as evidenced by her texting activity and operation of a vehicle following sexual intercourse, "as context for whether the entire record contains 'some evidence' that would support the instruction," we simply find no evidence of consent. *DiPaola*, 67 M.J. at 102 (citation omitted).

Prejudice

Assuming *arguendo*, that the military judge erred by not instructing the members on the affirmative defense of consent, we are convinced "beyond a reasonable doubt" that this assumed error "did not contribute to the verdict obtained." *Id.* Stated another way, we conclude that under the circumstances of this case it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [assumed] error." *Neder*, 527 U.S. at 18. We reach this conclusion for the following reasons.

First, there was no direct evidence that MH consented to any sexual conduct with the appellant, much less sexual intercourse. To the contrary, the evidence was overwhelming that MH had limited interaction with the appellant before and during the party at his apartment complex, was socially interested in another male, JU, who attended the party, and was unhappy that several male shipmates, particularly the appellant, prevented her from leaving the party with JU after her alcohol induced intoxication became evident.

Second, the appellant's actions include evidence of his consciousness of guilt. Prior to the sexual intercourse, the appellant led efforts to persuade MH to stay in his apartment after it was clear that she was intoxicated, and shortly after the sexual intercourse, he purportedly stated "I'm sorry. I can't do this. I'm sorry[,]" when MH woke up and pushed him away. *Id.* at 383, 495. Additional evidence of a consciousness of guilt included the appellant's denial of engaging in sexual intercourse with MH when questioned by a criminal investigator, and his phone call to MH from a public phone near his apartment during which he claimed that "he didn't know what he was doing" and "was scared." *Id.* at 389, 494-95.

Finally, by finding the appellant guilty of aggravated sexual assault, the members necessarily concluded, beyond a reasonable doubt, that MH "was substantially incapacitated" at the time of the sexual act alleged. Consistent with the military judge's instructions, this means that the members determined that at the time of the sexual act, MH suffered "that level of mental impairment due to consumption of alcohol, drugs or similar substance, while asleep or unconscious, or for other reasons, which rendered [her] unable to appraise the nature of the sexual conduct in issue, unable to physically communicate unwillingness to engage in [sexual intercourse], or otherwise unable to make or communicate competent decisions." Record at 960. Therefore, the members were convinced beyond a reasonable doubt that MH could "not consent to sexual activity" as

"consent" is defined in the 2011 definition of consent; since the members were not instructed as to the appellant's statutory burden to negate or disprove an element of the offense, the constitutional infirmity addressed in *Prather* was not triggered. *See* 69 M.J. at 343 (an accused "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 . . . .'").[1]

We therefore conclude that, even assuming error, the military judge's failure to instruct on the affirmative defense of consent "did not contribute to the verdict obtained" and "was harmless beyond a reasonable doubt[.]" *DiPaola*, 67 M.J. at 102 (citations omitted).

Admissibility of Testimony under MIL. R. EVID. 413

The appellant asserts that the military judge abused his discretion by allowing JT to testify regarding the appellant's alleged assault consummated by a battery upon her, an offense that resulted in acquittal at an earlier special court-martial. The appellant argues that JT's testimony that he "force[d] his hand down the front of [her] pants" while she displayed signs of intoxication during a party at the appellant's residence was admitted in violation of relevant case law, and that the military judge failed to inform the members of the appellant's acquittal of the aforementioned assault consummated by a battery upon JT. Appellant's Reply Brief of 19 Jul 2013 at 7-10; AE XI at 6. We disagree.

We conclude that the military judge did not abuse his discretion in allowing JT to testify. *See United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013). He explicitly cited the three threshold requirements for admitting evidence of similar offenses in sexual assault cases under MIL. R. EVID. 413 enumerated in *United States v. Wright*, 53 M.J. 476, 483 (C.A.A.F. 2000). He also cited the balancing test under MIL. R. EVID. 403 and weighed the non-exhaustive list of factors recently discussed in *Solomon*. 72 M.J. at 180 (citing *Wright*, 53 M.J. at 482). "When a military judge articulates his properly conducted M.R.E. 403 balancing test on the record, the decision will not

[1] We agree with the civilian defense counsel's concession at trial that "there was no evidence to support a mistake of fact [as to consent under Article 120(t)(15), UCMJ (2011)]." Record at 911.

be overturned absent a clear abuse of discretion." *Id.* (citation omitted).

The appellant concedes that he was "charged with an offense of sexual assault" which satisfies the first *Wright* threshold requirement. Reply Brief at 7; *Wright*, 53 M.J. at 483. We also conclude that JT's testimony was relevant under MIL. R. EVID. 401-402, satisfying the third *Wright* threshold requirement. *Wright*, 53 M.J. at 482.

The military judge's conclusion that appellant's alleged conduct that he was acquitted of having committed upon JT ("climbing on top of, and putting his hand down the front of [JT's] pants, amount[ed] to a sexual assault as defined by MRE 413" (AE XVIII at 4)) satisfied the second *Wright* threshold requirement. *Id.; see also* MIL. R. EVID. 413(d) ("For purposes of this rule, 'offenses of sexual assault' means . . . . contact, without consent of the victim, between any part of the accused's body . . . and the genitals . . . of another person . . . or . . . an attempt . . . to engage in conduct described [above]"). Similarly, we find that the military judge's conclusion that, notwithstanding the prior acquittal, "based on the standard of proof of beyond a reasonable doubt, a reasonable jury could find by a preponderance of the evidence that the acts" occurred as alleged by JT is supported by the record. AE XVIII at 4-5.

In addition, the military judge conducted an adequate MIL. R. EVID. 403 balancing test. After listening to a recording of JT's testimony, the military judge found that "the strength of proof of the prior act [wa]s persuasive, based upon [that testimony] . . . despite the fact that the [appellant] was acquitted." AE XVIII at 5; Record at 41-42. He noted that JT "reluctantly reported the acts" when investigation into other alleged misconduct led investigators to her, and that those allegations were not "exaggerated or fanciful[.]" *Id.* at 5-6. He also briefly analyzed both the potential for undue distraction and temporal proximity and concluded neither supported a conclusion "that the probative value of the evidence would be outweighed by the danger of unfair prejudice to the [appellant]." *Id.* at 6. As in *United States v. Roberts*, the military judge concluded that the appellant's acquittal related to his alleged acts with JT "a mere two months prior to the alleged sexual assault . . . 'may have strengthened the propensity of the accused'" exactly as where the accused had been retained following an administrative board finding of "no misconduct" related to a prior alleged sexual assault. *Id.* (citing *United States v. Roberts*, 55 M.J. 724, 730

(N.M.Ct.Crim.App. 2001)). He also provided an appropriate limiting instruction. Record at 512-14, 960-61.

Finally, although the military judge did not inform the members that the appellant had been acquitted of the assault consummated by a battery upon JT, we find no prejudice to the appellant. *Id.* at 512-13. We conclude that *Solomon* does not require that the military judge inform the members of a previous acquittal, only that he "address or reconcile Appellant's alibi evidence or give due weight to Appellant's acquittal" when conducting his 403 balancing analysis when determining the admissibility of evidence of similar crimes in sexual assault cases. 72 M.J. at 182. Here, the military judge did just that.

Moreover, the appellant's acquittal of the battery upon JT was not in controversy; in fact, JT herself testified that the appellant was acquitted at the earlier special court-martial. Record at 560-62. Both the civilian defense counsel and trial counsel also noted that the appellant was acquitted of that offense. *Id.* at 363-66, 992, 1032. And again, the military judge properly instructed the members on the limited and proper usage of JT's testimony.

Applying the appropriate deference to the ruling of a military judge, we conclude that in this case the military judge did not clearly abuse his discretion by allowing JT to testify regarding the appellant's alleged assault consummated by a battery upon her. *Solomon*, 72 M.J. at 180.

Conclusion

Accordingly, the findings and the sentence, as approved by the CA, are affirmed.

Chief Judge MODEZELEWSKI and Senior Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court