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

Before
E.E. GEISER, L.T. BOOKER, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL R. ROZMUS
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200900052
GENERAL COURT-MARTIAL

Sentence Adjudged: 12 September 2008.
Military Judge: CAPT Bruce MacKenzie, JAGC, USN.
Convening Authority: Commanding General, Training and Education Command, Quantico, Virginia.
Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.
For Appellant: LT Kathleen L. Kadlec, JAGC, USN; LT Michael Maffei, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

10 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Senior Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault in violation of Article 120(c), Uniform Code of Military Justice, 10 U.S.C. § 920(c). The appellant's approved sentence extended to confinement for 13 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant alleges two errors before us: first, that the underlying statute is unconstitutional facially and as applied; and second, that the military judge abused his discretion in admitting improper evidence of prior acts in violation of MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Having considered the parties' pleadings and the record of trial, we are satisfied that the findings and 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. We therefore affirm the findings and the approved sentence.

I. Article 120(c)(2)(b), UCMJ

A. Facial Constitutionality.

The appellant contends that Article 120(c)(2)(b), UCMJ, is facially unconstitutional because it "redefines consent as an 'affirmative defense,' and then puts the burden upon the Accused to prove that issue by a preponderance of the evidence." Appellant's Brief of 4 May 2009 at 12. We disagree.

In *United States v. Crotchett*, 67 M.J. 713 (N.M.Ct.Crim. App. 2009), we encountered a nearly identical facial challenge, albeit in a Government appeal under Article 62, UCMJ, to a closely related subsection of the same article - Article 120(c)(2)(c), UCMJ. In that case, we found that subsection (c)(2)(c) did not "mandate a shift to the defense of the burden of proof as to any element." 67 M.J. at 716. With our decision today, we explicitly extend our holding in *Crotchett* to subsection (c)(2)(b).

Article 120(c)(2)(b) does not require that the Government prove "lack of consent" on the part of the victim. *See United States v. Neal*, 67 M.J. 675, 678 (N.M.Ct.Crim.App. 2009), *certificate for rev. filed*, __ M.J. __ (C.A.A.F. May 15, 2009). Instead, the Government need only prove by legal and competent evidence, beyond a reasonable doubt, (1) that the accused engaged in a sexual act with another person, who is of any age, and (2) that the other person was substantially incapable of declining participation in the sexual act. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶¶ 45b(3)(c)(i) and (iv). The statute also provides the accused with the opportunity to raise affirmative defenses, including consent and mistake of fact as to consent. *Crotchett*, 67 M.J. at 715; MCM, Part IV, ¶ 45a(t)14-16.

Following *Crotchett*, we find that the elements of Article 120(c)(2)(b) are distinct from the affirmative defenses of consent and mistake of fact as to consent. 67 M.J. at 713. The statute, on its face, requires no unconstitutional assignment of burdens that would deprive an accused of his right to due process under the Fifth Amendment. *Id.; see also Neal*, 67 M.J. at 675.

B. Constitutionality As Applied.

The appellant also contends that Article 120(c)(2)(b) is unconstitutional "as applied," asserting that the accused was required to "shoulder part of the government's burden" when he attempted to raise the affirmative defense of consent. Appellant's Brief at 1, 10. Having carefully reviewed the record in this case, we agree with the military judge that the affirmative defenses of consent and mistake of fact as to consent were never properly put "in issue." The military judge correctly declined to instruct the members on either defense. Record at 506-07; *see* RULE FOR COURTS-MARTIAL 920(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

It is settled that R.C.M. 920(e) requires the military judge to instruct the members on any affirmative defense "in issue." A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. R.C.M. 920(e), Discussion. Put another way, an instruction is required when an affirmative defense is raised by the evidence, and failure to give the instruction in such a circumstance can be an error of constitutional magnitude. *E.g.*, *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The test of whether a defense is reasonably raised is whether the record "contains some evidence to which the military jury may attach credit if it so desires." *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995) (citation and internal quotation marks omitted). "There must be some evidence from which a reasonable inference can be drawn that the affirmative defense [is] in issue." *United States v. Taylor*, 26 M.J. 127, 129 (C.A.A.F. 1988); *see also United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008).

We turn now to the specifics of the affirmative defenses that the appellant asserts were raised at trial. The affirmative defense of consent requires an accused to persuade the finder of fact by a preponderance of the evidence that the victim used "words or overt acts indicating a freely given

agreement to the sexual conduct at issue by a competent person."[1] Art. 120(t)(14), UCMJ; *Crotchett*, 67 M.J. at 715. Article 120 does not require that the accused prove that the victim actually consented. *Crotchett*, 67 M.J. at 715. Rather, "[t]he plain language of this provision assigns to the defense only the burden of convincing the finder of fact by a preponderance of the evidence of two objective determinations: were the words uttered or the overt acts made? If so, could they indicate freely given agreement?" *Id*. These objective determinations serve as the jumping-off place for the affirmative defense of mistake of fact as to consent as well:

> If the answer to either question is "no," the statute additionally allows an honest and reasonable mistake of fact as to the objective determinations (in other words, did the accused honestly and reasonably believe that he heard the words or saw the overt acts, and did he hold an honest and reasonable belief that they indicated freely given agreement?).

Id.

"The question of whether a jury was properly instructed [is] a question of law, and thus, review is *de novo.*" *McDonald*, 57 M.J. at 20 (citation and internal quotation marks omitted). We find that the military judge correctly declined to instruct the members with regard to these affirmative defenses. The record is devoid of any evidence which would suggest that the victim consented to the alleged sexual acts. Critically, the appellant was able to point to no evidence of "words or overt acts indicating a freely given agreement" upon which the members could rely. The affirmative defense was never put in issue.

On the contrary, all of the evidence adduced at trial supports the conclusion that the victim was asleep on a couch at the time of the sexual act. She awoke when she felt pain in her vagina. Record at 420. At first, she believed that she was being touched by someone other than the accused. *Id.* After discovering that the appellant was penetrating her with his finger, the victim immediately became upset, kicked the appellant away, and covered herself with her blanket. *Id*. She subsequently got up from the couch, walked over to the appellant,

[1] "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). We do not address the constitutionality of this subsection today.

and punched him in the face. Record at 392, 420-21. Contrary to defense counsel's contention at trial, Record at 505, the fact that the victim testified that she at first believed that she was being penetrated by someone other than the appellant does not constitute evidence of "words or overt acts" that could possibly be construed as "indicating a freely given agreement." There was no evidence that she wanted the appellant to commit the act, or that she was anything but sound asleep. Absent any evidence that the victim consented, the military judge properly denied the defense attorney's request for an instruction on actual consent.

Similarly, there was no evidence offered at trial from which the members could have possibly drawn the inference that the appellant honestly and reasonably believed he witnessed words or acts signifying consent. Neither direct examination nor cross-examination raised any possibility that the appellant observed, or reasonably could have observed, some words or acts by the victim indicating a freely given agreement to the sexual act in question. Given the state of the evidence, the members were never in a position to receive instruction on the defense's initial burden of persuasion for the affirmative defense; the complained-of "burden shifting" believed to exist in Article 120 was therefore not implicated in this case.

II. MIL. R. EVID. 404(b)

The appellant's second assignment of error is that the military judge erred under MIL. R. EVID. 404(b) when he allowed the Government to introduce evidence going to the appellant's sexual behavior on the night of the alleged crime. Specifically, the military judge allowed eyewitness testimony that the accused hugged his hostess on two occasions in a way that she felt was not appropriate, Record at 332-34, and eyewitness testimony that the appellant walked into his hostess's bedroom while she was changing clothes, Record at 334-35. We review the military judge's ruling for an abuse of discretion. *United States v. Hays*, 62 M.J. 158, 163 (C.A.A.F. 2005)(citing *United States v. Grant*, 56 M.J. 410, 413 (C.A.A.F. 2002)).

MIL. R. EVID. 404(b) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation,

> plan, knowledge, identity, or absence of mistake or accident . . . .

When determining whether evidence of other acts is admissible, the military judge must apply the three-part analysis laid out in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). Under this test, the evidence must: 1) reasonably support a finding by the court members that an accused committed prior crimes, wrongs or acts; 2) make a fact of consequence more or less probable by the existence of this evidence; and 3) have probative value that is not substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109.

The military judge correctly and adequately addressed each of these prongs in his analysis. First, noting that three eyewitnesses were available to testify to defendant's behavior at the party, the military judge found that a reasonable finder of fact could have concluded that the acts occurred. Record at 119; *see Hays*, 62 M.J. at 164. Second, he found the proximity in time, and the surreptitious and nonconsensual nature of the contact, relevant to the appellant's intent and state of mind. Record at 296; s*ee Huddleston v. United States*, 485 U.S. 681, 685-86 (1988); *United States v. Humphreys*, 57 M.J. 83, 91 (C.A.A.F. 2002); *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986). Finally, he noted that the evidence was not necessarily prejudicial, and that in any case, the probative value of the evidence was not substantially outweighed by any unfair prejudice to the appellant. Record at 119-22.

We find that the military judge did not abuse his discretion in making these determinations. The evidence of defendant's behavior at the party was well-supported, made his later assault more probable, and was not so prejudicial as to warrant exclusion under MIL. R. EVID. 403.

III. Conclusion

The findings and the approved sentence are affirmed.

Chief Judge GEISER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court