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

Before
J.A. MAKSYM, E.E. GEISER, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ADRIAN L. JONES
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200900679
GENERAL COURT-MARTIAL

Sentence Adjudged: 24 July 2009.
Military Judge: CAPT Dennis G. Bengtson, JAGC, USN.
Convening Authority: Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.
For Appellant: Maj Kirk Sripinyo, USMC.
For Appellee: Capt Robert E. Eckert, Jr., USMC.

17 August 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A general court-martial with enlisted representation convicted the appellant, contrary to his plea, of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The approved sentence was confinement for 7 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

The appellant raises two assignments of error: (1) that the military judge committed plain error when he failed to instruct members on the defenses of consent and mistake of fact as to consent; and, (2) that Article 120(h), UCMJ, which incorporates

the relevant incapacitation language from Article 120(c)(2), is facially unconstitutional.[1]

After carefully considering the record of trial and the pleadings of the parties, we conclude that the military judge's failure to instruct the members on the affirmative defense of consent, combined with the failure of the military judge to provide a key definition in support of the elements of the offense, resulted in constitutional error which we cannot find harmless beyond a reasonable doubt. We take appropriate action in our decretal paragraph.

Background

In August 2008, the appellant and Corporal (Cpl) B had a farewell party for a fellow Marine stationed at the Combined Arms Training Center (CATC), Camp Fuji, Japan. The party began on base, where Cpl B testified that he had four or five beers.

The three Marines then went to a local bar off base. Witnesses indicated that Cpl B had "quite a few" drinks at this bar, although Cpl B testified that he only recalled having one. Record at 216. Cpl B testified that he did not remember leaving the bar or the manner in which he returned to the base. Other witnesses testified that he ran back to the base with the other Marines and that he hopped up on the appellant for a piggyback ride at one point along the way. Cpl B testified that his next memory was standing in the smoking pit outside his barracks on base with the appellant and the departing Marine. Cpl B testified that his next recollection was waking up in his bunk with the appellant performing oral sex on him. *Id.* at 219.

The appellant testified at trial and substantially corroborated Cpl B's account of the evening, with additional details, up to the smoking pit. The appellant testified that they went from there to Cpl B's room where Cpl B and the appellant sat together on Cpl B's bed. *Id.* at 421. Two other Marines initially present eventually left the appellant and Cpl B alone in the room.

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[1] In his Non-Consent Motion for Leave to File Supplemental Assignment of Error dated 12 April 2010, the appellant referenced this court's prior decision in *United States v. Crotchett*, 67 M.J. 713 (N.M.Ct.Crim.App. 2009), which held that Article 120(c)(2), UCMJ, (substantial incapacity of victim) is facially constitutional. Subsequently, the Court of Appeals for the Armed Forces (C.A.A.F.) denied a request for review. *United States v. Crotchett*, 68 M.J. 222 (C.A.A.F. 2009). On 30 March 2010, subsequent to submission of the appellant's brief in the instant case, C.A.A.F. granted review of the same question in *United States v. Medina*, 68 M.J. 587 (N.M.Ct.Crim.App. 2009). In view of this, the appellant requested to amend his pleadings to include an assertion that Article 120(h), insofar as it incorporates portions of Article 120(c)(2), is facially unconstitutional. We granted the appellant's motion. Consistent with the reasoning and holdings in the two decisions cited above, we adhere to *stare decisis* and find the supplemental assignment of error without merit.

The appellant testified that Cpl B eventually put his hands down the appellant's pants and fondled his penis. *Id.* at 423-24. The appellant testified that he became sexually aroused and that Cpl B performed oral sex on him until the appellant ejaculated. According to the appellant, Cpl B then lay back on the bed and began removing his own pants with the appellant's help. The appellant testified that he then performed oral sex on Cpl B. *Id.* at 424.

Instructional Error

The military judge did not provide the members an instruction on the affirmative defense of consent.[2] The question of whether or not the military judge erred by failing to instruct the members on the affirmative defense of consent is a legal question reviewed *de novo*. *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006).

A military judge has a *sua sponte* duty to instruct the members on an affirmative defense if it is reasonably raised by the evidence. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). Failure by the defense counsel to request the instruction does not waive the error. *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)(citing *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988). Failure by the military judge to instruct on an affirmative defense presents a constitutional error which must be tested for prejudice. For such an error to be deemed harmless beyond a reasonable doubt, the Government must prove that the members would have reached the same verdict absent the error. *Neder v. United States,* 527 U.S. 1, 19 (1999).

We agree with the appellant that the affirmative defense of consent was reasonably raised by the appellant's sworn testimony. As noted above, the appellant posited a scenario in which the purported victim, Cpl B, was an unambiguously willing participant in the sexual contact alleged, ostensibly even the instigator and aggressor.

While trial defense counsel failed to request, remind or insist upon an instruction relative to the affirmative defense of consent, it was not his burden to do so. Rather, it was the *sua sponte* duty of the military judge. *United States v. Guitierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007)(citing *McDonald*, 57 M.J. at 20).

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[2] The military judge asked the defense if the evidence raised the separate affirmative defense, *mistake of fact as to consent*, and the defense responded that it did not. *Id.* at 404. The appellant argues that the question and response occurred prior to the appellant's sworn testimony at a point in time when defense evidence had not yet been presented on the issue. At the close of the defense case, the military judge again raised the matter of instructions. He asked both sides if they desired "any other instructions." The Government replied in the negative and the record does not reflect any response from the defense team. *Id.* at 472. As we decide the assigned error on the basis of deficient instructions on the elements and consent, we need not address whether the state of the record supports affirmative waiver on mistake of fact.

The defense never told the military judge that consent was not at issue. There is no basis on the record before us to consider the prospect of affirmative waiver. *Id.* at 377. Rather, the record demonstrates that consent was the cornerstone of the defense theory of the case. We therefore find that the military judge erred when he failed to *sua sponte* give the members an instruction on the affirmative defense of consent. To affirm this conviction, we must conclude that the military judge's error did not contribute to the verdict, beyond any reasonable doubt. We cannot do so.

As noted above, the members were confronted with evidence supporting two conflicting versions of what occurred on the night in question. Cpl B testified that he was asleep after having consumed significant amounts of alcohol but was awakened by the appellant performing oral sex on him. The appellant testified that Cpl B was awake the entire time and in fact instigated the sexual acts. The appellant's testimony, if credited, could reasonably be interpreted as evidence of a freely given agreement to the sexual conduct at issue.

We find that the appellant, in presenting his case, properly raised the issue of consent, by offering evidence that the victim used words or overt acts indicating a freely given agreement to the sexual conduct at issue. *Id.*

However, the military judge never instructed the members on the affirmative defense of consent. The members were never given any standard to determine whether the affirmative defense of consent had been raised or, if so, whether it had been disproven. The members were also never told that the Government had a burden to prove beyond a reasonable doubt that the defense did not exist. Rather, the military judge simply instructed the members on the elements of Article 120(h). In order to convict, the second element requires the members to find, beyond a reasonable doubt, that the victim was "substantially incapacitated and incapable of appraising the nature of the sexual contact." Record at 525.

The military judge failed to define the applicable terms found in the second element: substantially incapacitated and incapable of declining or communicating unwillingness to engage in sexual contact. This omission takes on increased significance when combined with the affirmative defense instructional error, leaving the members without the critical tools necessary to produce a reliable verdict.

In light of the record as a whole, and in light of the magnitude of the error involved, we cannot conclude that the error did not contribute to the verdict beyond a reasonable doubt. *McDonald*, 57 M.J. at 20 (*citing Chapman v. California*, 386 U.S. 18, 24 (1967)).

Conclusion

The findings of guilty and the sentence are set aside. A rehearing is authorized.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge GEISER participated in this decision before his retirement.