

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

**Before
L.T. BOOKER, E.C. PRICE, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TIMOTHY S. SWEMLEY, JR.
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900359
GENERAL COURT-MARTIAL**

Sentence Adjudged: 06 April 2009.

Military Judge: Col Daniel Daugherty, USMC.

Convening Authority: Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

Staff Judge Advocate's Recommendation: LtCol M.P. Gilbert, USMC.

For Appellant: LT Sarah Harris, JAGC, USN.

For Appellee: Capt Michael Aniton, USMC.

29 April 2010

OPINION OF THE COURT

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

PERLAK, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of an indecent act, two counts of burglary, and adultery in violation of Articles 120, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 929, and 934. The members acquitted the appellant of aggravated sexual assault, in violation of Article 120(c), but found him guilty of assault consummated by a battery, as a lesser included offense under Article 128. The military judge entered a finding of Not Guilty to an additional specification of wrongful sexual contact in violation of Article

120. The appellant was sentenced to six months confinement, reduction to pay grade E-1, forfeiture of \$932.00 pay per month for six months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed.

The appellant's assignment of error challenges the legal sufficiency of the finding of guilty to Article 128, assault consummated by a battery, as a lesser included offense of Article 120(c), in Specification 2 of Charge I. The appellant makes essentially a three-pronged argument. First, he alleges that the military judge erred in his analysis of the Article 128 offense as a lesser included offense and erred by instructing the members on it. Second, the appellant avers that the corpus of conduct in the lesser included offense was not apparent and there was a failure of notice which renders the conviction infirm. Third, he alleges that the military judge erred by instructing the members on the lesser included offense, over defense objection, based on the intention of the defense to employ an "all or nothing" strategy in defending against the greater offense under Article 120(c).

We have examined the record of trial, the assignment of error, the Government's response, and the appellant's reply. The assignment of error, in all particulars, is without merit. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The assigned error addresses the second specification under Charge I, alleging aggravated sexual assault; the appellant was convicted of the offense of assault consummated by a battery upon the same victim, Lance Corporal (LCpl) R, under Article 128. The essential facts as adduced at trial and as adopted by the parties are not in dispute. The court-martial did not find that the appellant had unlawfully committed an act of sexual intercourse upon an incapacitated victim, as alleged in the specification under Article 120, but rather, did commit battery upon LCpl R by touching her and beginning to remove her clothing while she was asleep, fully clothed in her bed in the female barracks. Additional facts as necessary to this decision are contained herein.

Instructions on Lesser Included Offenses

Questions of law pertaining to the military judge's instructions are reviewed de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). The military judge's findings as to when an offense is a lesser included offense is likewise reviewed de novo. *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009). The military judge has a *sua sponte* duty to instruct the members on any and all lesser included offenses reasonably raised by the evidence admitted at trial. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F. 2008). See generally, RULE FOR COURTS-MARTIAL 920(e)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The court in *Miergrimado* affirmed that a military judge can only instruct on a lesser included offense where the greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser violation. *Miergrimado*, 66 M.J. at 36. The appellant's argument as to the disputed factual element requirement in this case is unpersuasive. Consistent with the holdings in *United States v. Griffin*, 50 M.J. 480, 482 (C.A.A.F. 1999), and *Miergrimado*, we have no difficulty concluding that the act of nonconsensual sexual intercourse with LCpl R was a disputed element at trial which was not required for conviction of assault consummated by a battery. *Miergrimado*, 66 M.J. at 37.

As raised during trial, the victim, LCpl R, testified, "I was fully dressed when I went to bed," and "I remember waking up with some guy on top of me having sex with me," and "[h]is penis was going in and out of my vagina." Record at 218. Trial counsel also introduced the appellant's sworn confession in which he stated, prior to recounting consensual sex, "I think I started taking her clothes off first, but then she started to wake up and helped me get her pants off." Prosecution Exhibit 6. The appellant was charged under Article 120, aggravated sexual assault, which specifically lists assault consummated by a battery as a lesser included offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45d(3)(b). The other evidence introduced, upon cross-examination, failed to convince the court-martial that the sexual intercourse was non-consensual or perhaps predicated upon a reasonable mistake of fact. However, the evidence did clearly raise the lesser included offense of assault consummated by a battery under Article 128, for the contact upon the sleeping LCpl R, preceding the unproven Article 120(c) offense. The military judge appropriately exercised his *sua sponte* duty to instruct the members on the lesser included

offense, given the state of the evidence. See *United States v. Bean*, 62 M.J. 264, 266 (C.A.A.F. 2005).

Notice

The appellant complains that the military judge erred in his instructions, by providing factual examples of battery, "by touching her and beginning to remove her clothing." Record at 396; AE XXX at 3. Giving factual examples, gleaned from the evidence received at trial, does not thereby elevate those facts to an essential element of the charge for which notice is required. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007). Further, we do not require the panel to return with an agreement on a single form or specific basis of liability; rather, a general verdict of guilt may be entered even when the charge could have been committed by various means, as long as the evidence supports at least one of the means beyond a reasonable doubt. *Id.* at 359 (citing *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987)).

Based on the evidence presented in this case, the panel could find the appellant committed assault consummated by a battery in several ways and the members were not required to disclose the manner in which they found the offense to have been committed. Their verdict is sufficient for our purposes, based on the facts developed at trial and the instructions of the military judge, without greater specificity. *Id.*

Even if the examples are essential to the lesser offense, the appellant argues there is lack of notice; more specifically that aggravated sexual assault, "to wit: sexual intercourse" was insufficient notice to the defense that they should be prepared to also defend against the lesser included offense of assault consummated by a battery by touching the victim and beginning to remove her clothing, preparatory to engaging in the charged sexual intercourse.

"A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged." MCM, Part IV, ¶ 3b(1). "The due process principle of fair notice mandates that an accused has the right to know what offense and under what legal theory [he may be convicted]." *United States v. Jones*, ___ M.J. ___, No. 09-0271 (C.A.A.F. Apr. 19, 2010), slip op at 6. Mindful of and guided by these principles, we conclude the appellant had notice.

First, assault consummated by a battery, the Article 128 offense of which the appellant was convicted is indeed a "subset" of the Article 120(c) offense charged. Slip op. at 6. Specifically, we find the statutory elements of assault consummated by a battery, did bodily harm with unlawful force or violence, are a subset of, or lesser form of the statutory elements of aggravated sexual assault, engaging in a sexual act with a substantially incapacitated victim. Arts. 120(c) and 128, UCMJ. Stated another way, proof of the elements of aggravated sexual assault also proves the elements of assault consummated by a battery.

Second, Articles 120(c) and 128 are legislatively defined and there are no additional elements to distinguish these two offenses from the Article 134 analysis in *Jones*. Slip op. at 15-19.

Third, the Manual for Courts-Martial specifically enumerates assault consummated by a battery as a lesser included offense of aggravated sexual assault. MCM, Part IV, ¶ 45d(3)(b). We acknowledge that the Manual's specific enumeration does not, standing alone, "automatically make[]" assault consummated by a battery a lesser included offense of aggravated sexual assault. Slip op. at 14. However, this specific enumeration, in conjunction with the aforementioned analysis clearly establishes that when the appellant was charged under Article 120(c), aggravated sexual assault, he was on general notice of the lesser offense.

In this case, a fair, if not requisite, implication drawn from the specification of sexual assault by "sexual intercourse," when the victim was by all accounts asleep and fully clothed, is that the victim's clothing would have to be removed or adjusted; that such removal or adjustment necessarily required touching; and that, with a sleeping victim, the action was initiated without her consent. Indeed, "[t]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *United States v. Weymouth*, 43 M.J. 329, 332 (citing *Schmuck v. United States*, 489 U.S. 705 (1989)). It would not have been possible for the appellant to have had sex with the victim without first removing or adjusting her clothing and that necessitated touching her. Conducting our de novo review, we find the military judge did not err and there was no failure of notice on the lesser included offense of assault consummated by a battery. See *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009); Record at 429.

All-or-Nothing Defense

The appellant asserts that even if the instruction on the lesser included offense was correct, the military judge erred by *de facto* overruling a putative defense request for an all-or-nothing submission of this specification to the members. We disagree.

On the record before us, and as the appellant's brief acknowledges,¹ trial defense counsel did not directly pursue, litigate, achieve consensus with the Government on, or obtain a ruling from the military judge to have the matter presented to the members on an all-or-nothing theory of defense, focused on the Article 120 offense. Such a litigation tactic remains viable in military jurisprudence, but is far from being an absolute right or the unilateral prerogative of the defense. *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008). We do not conclude that the existence of the ability to seek waiver of an instruction, or attempt to obtain Government acquiescence on same, thereby creates error when those tactics are not litigated or do not otherwise succeed. See *Id.*

We review the military judge's decision to overrule the defense objection to the lesser included offense instruction under an abuse of discretion standard. Hence, the judge's decision "cannot be set aside . . . unless [we have] a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)(citation omitted). The military judge specifically found that assault consummated by a battery was a lesser included offense of Article 120. Record at 359. He also determined that under the facts presented, the lesser offense was "fairly embraced by the evidence . . . in front of [the court]." *Id.* The judge also determined that "in order to complete the [charged] act, the pants had to come off." *Id.* at 358. The military judge did not abuse his discretion in making these determinations or his ruling.

Conclusion

Senior Judge Booker, in his dissent, raises a compelling matter for contemplation in the context of the new Article 120's

¹ "The trial defense counsel was insinuating that he would elect an all or nothing defense if the lesser included offense of assault consummated by a battery was proper, but since it is improper, he should not have to go so far as to make that election." Appellant's Brief of 30 Oct 2009 at 11.

interface with lesser included offenses. However, on the facts of this case and in the specific context of an Article 120(c) offense found to have been an assault consummated by a battery, we disagree.²

Even assuming Senior Judge Booker is correct and the Article 128 guilty finding is set aside, we would reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

In view of the other charges and specifications of which the appellant was convicted, and the admissibility of the evidence of the appellant's actions in LCpl R's room in aggravation, we are satisfied beyond a reasonable doubt that the sentence adjudged would have been no less than that awarded for the remaining charges.

We find the appellant's assignment of error to be without merit in all particulars and have determined 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 was committed. Arts. 59(a) and 66(c), UCMJ. Accordingly, we affirm the findings and the sentence as approved by the convening authority.

Judge PRICE concurs.

BOOKER, Senior Judge (concurring in part and dissenting in part):

I respectfully dissent from the court's action in affirming the guilty finding of a battery upon Lance Corporal (LCpl) R. I join, however, the court's opinion insofar as the remaining findings of guilt and the sentence are concerned.

Elements, Notice, Due Process, and Included Offenses

Specification 2 of Charge I alleged that the appellant violated subsection (c)(2) of Article 120 by engaging in sexual intercourse with LCpl R when she was "substantially incapacitated and/or substantially incapable of appraising the nature of the sexual act and/or substantially incapable of declining participation in the sexual act and/or substantially incapable of

² We leave for another day consideration of Senior Judge Booker's lesser included offense analysis to Article 120(a) and other Article 120 offenses not before currently before us.

communicating unwillingness to engage in the sexual act.”¹ After the parties rested, the military judge instructed, over defense objection, on the lesser included offense of assault consummated by a battery, reasoning that the appellant must have removed clothing from a fully clothed LCpl R before he could have engaged in intercourse with her, thereby committing an “offensive touching”. Record at 357, 428-29. I believe that this was legal error.

Nowhere in the specification is there any language about touching to remove clothing; the only touching implicit in the specification is the contact between genital areas. The appellant might have been aware that investigations showed that the victim was incapacitated and clothed, but he was not told he would have to defend against the application of any sort of force. See *United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995) (noting that in military practice, specification provides notice of essential elements of the offense). The Court of Appeals’ fresh decision in *Jones*, cited by the majority in support of its opinion, ante at 4-5, does nothing to sway me; if anything, it strengthens my argument that the appellant here lacked notice about the clothing removal. “While people are presumed to know the law, e.g., *Atkins v. Parker*, 472 U.S. 115, 130 (1985), they can hardly be presumed to know that which is a moving target and dependent on the facts of a particular case.” *United States v. Jones*, __ M.J. __, No. 09-0271, slip op. at 6 (C.A.A.F. Apr. 19, 2010). See also *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953) (stating the test is whether specification contains the elements and sufficiently appraises the accused of what he must defend against; additionally, does it constitute a former jeopardy bar against successive prosecutions?).

I would resist any attempt to bootstrap the specifications under the burglary charge, Charge III, to demonstrate the requisite notice. Such an action would likely involve the “inherent relationship” test, specifically rejected in *Schmuck v. United States*, 489 U.S. 705, 717 (1989), to reason that if the appellant entered the barracks room of LCpl R with an intent to commit wrongful sexual contact, he necessarily intended to engage in non-consensual touching that would include removing clothing from LCpl R. See also *Weymouth*, 43 M.J. at 334 (“fairly embraced” concept previously rejected). I note in this regard that the only included offense listed for wrongful sexual contact is attempted wrongful sexual contact (*but see* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 3b(4) -- listing is not all-inclusive), and I also note that the statutory language can lead one to conclude that the element of lack of permission

¹ I take this opportunity to remind practitioners of the perils of “kitchen sink” charging. See *United States v. Garner*, 67 M.J. 734, 741 (N.M.Ct.Crim.App. 2009) (Booker, J., concurring in the result), rev. granted, __ M.J. __, No. 09-0729, 2010 CAAF LEXIS 39 (C.A.A.F. Jan. 15, 2010).

contained within wrongful sexual contact might be different from an element of lack of consent. See Art. 120(r) (noting "lack of permission" as an element of wrongful sexual contact, and then discussing consent and mistake of fact as to consent in the context of other sub-articles).

I have a more fundamental concern about the relationship between the offense alleged here and the supposed included offense of assault consummated by a battery. The appellant was prosecuted under the heavily revised Article 120 of the Code, 10 U.S.C. § 920. In a reflection of society's evolution, Congress rewrote Article 120 and shifted the focus from the actions of the putative victim to the actions of the accused, making lack of consent no longer an element that must be proved beyond a reasonable doubt. See *United States Neal*, 68 M.J. 289, 301 (C.A.A.F. 2010) (citing *Russell v. United States*, 698 A.2d 1007, 1009 (D.C. 1997)). The particular theory of prosecution in this case, under Article 120(c)(2)(C) of the Code, 10 U.S.C. § 920(c)(2)(C), did not require proof of any threat or use of force to accomplish the sexual activity, in contrast to subsection (c)(1), for example, which prohibits "causing bodily harm" to cause another person to engage in a sexual act. The theory of prosecution is critical to any consideration of due process, as it constitutes fair notice of what elements the Government must prove beyond a reasonable doubt to secure a conviction. See *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008).

In *Medina*, the Court was faced with a prosecution based on federal law (specifically the prohibition on possessing child pornography) and alleged as a "crime and offense not capital" under Clause 3 of the General Article. The appellant had pleaded guilty to the Clause 3 violation, but during the plea colloquy the military judge also addressed service discrediting and prejudicial conduct elements associated with Clauses 1 and 2 of the General Article. *Id.* at 24. On direct appeal, the Army Court of Criminal Appeals set aside the Clause 3 violation, as there was a significant question about the extraterritorial effect of the substantive statute, but it affirmed a conviction of a lesser included offense constituting a Clause 1 or Clause 2 violation. *Id.*

The Court of Appeals for the Armed Forces set aside the Clause 1 and Clause 2 convictions affirmed by the Army Court. As noted in the opinion of the Court of Appeals, "[t]o determine whether a lesser offense is necessarily included in the offense charged this Court applies the 'elements test' derived from *United States v. Schmuck* [sic], 489 U.S. 705, 716 (1989)." *Id.* The Court of Appeals amplified this point of analysis in *Neal*:

The Supreme Court has "observed that '[t]he definition of the elements of criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.'" *Dixon v. United States*, 548 U.S. 1, 7 [] (2006) (alteration in

original) (quoting *Liparota v. United States*, 471 U.S. 419, 424 [] (1985)). Congress has broad authority to define the elements of offenses under the constitutional power to make rules for the government and regulation of the armed forces. U.S. Const. art. 1, § 8, cl.14; see *Parker v. Levy*, 417 U.S. 733, 750 [] (1974); see also *Weiss v. United States*, 510 U.S. 163, 177 [] (1994).

Neal, 68 M.J. at 301-02.

Neal came before the Navy-Marine Corps Court of Criminal Appeals as a Government appeal under Article 62, alleging that the trial judge had erred when he declared that the revised Article 120 impermissibly shifted the burden of disproving lack of consent to the defense. Neal actually construed subsection (e) of the rewritten article, not (c),² but the rationale of the Court of Appeals in reaching its decision that the statute was constitutional is instructive for the case before us: "In short, under the structure of the amended statute, the absence of consent is not a fact necessary to prove the crime of aggravated sexual contact under Article 120(e)." *Id.* at 301.

In contrast, assault consummated by a battery still requires proof, among other things, that the touching occurred absent the lawful consent of the victim. See, e.g., *United States v. Johnson*, 54 M.J. 67, 69 n.3 (C.A.A.F. 2000). As Article 120 has removed lack of consent as an element that must be proved, it follows that an accused is not normally on notice that he must defend against any lesser offense that includes such an element, in this case, battery.

It may be debatable that lack of consent is not a statutory element of battery -- the statute provides simply that any person "who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault" -- and this may not be the proper case for exploring this issue; however, courts have interpreted the element of "unlawful force or violence" to mean "without the lawful consent of the victim". See *Johnson*, 54 M.J. at 69 n.3. But see *United States v. Gutierrez*, 63 M.J. 568, 572 (Army Ct.Crim.App. 2006) (casting consent as a defense, and not its absence as an element), *rev'd and remanded*, 63 M.J. 374 (C.A.A.F. 2007).

² The Navy-Marine Corps Court applied similar reasoning in determining that it was not unconstitutional to require the defense to prove an asserted consent defense in the context of an Article 120(c)(2)(C) prosecution. *United States v. Crotchett*, 67 M.J. 713 (N.M.Ct.Crim.App. 2009), *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009). The Court of Appeals for the Armed Forces has recently granted a petition to consider whether Article 120(c) is facially constitutional. *United States v. Medina*, 68 M.J. 587 (N.M.Ct.Crim.App. 2009), *rev. granted*, No. 10-0262 (C.A.A.F. Mar. 30, 2010).

The approach of *Gutierrez* might actually be in line with the revisions to Article 120, as the statute purports to remove consent as an issue but to preserve it as an affirmative defense for certain subsections. Art. 120(r), UCMJ, 10 U.S.C. § 920(r). The question then becomes whether, if battery is always an included offense of Article 120 offenses, the statutory scheme can be frustrated because an accused member will always fight all included offenses and will always raise the issue of consent, the limitations of Article 120(r) notwithstanding, as conviction of the greatest offense will always stand as a bar to conviction of any lesser offenses. See also RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), relative to ignorance or mistake of fact generally.

Conclusion

As noted above, Congress has tried to emphasize the accused member's actions and intentions, rather than those of the putative victim, through its revisions to Article 120. In doing so, however, I fear that the drafters have eliminated a large number of potential lesser included offenses, and because, in my mind, the battery of which the appellant was convicted was not an included offense of the aggravated sexual assault with which he was charged, I would set aside the battery conviction. I would still, however, affirm the sentence adjudged and approved, as the appellant's burglaries and sexual activities in Yuma in April 2008, balanced against his otherwise commendable service as a noncommissioned officer, support the sentence.

For the Court

R.H. TROIDL
Clerk of Court