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

Before
J.A. MAKSYM, J.R. PERLAK, R.Q. WARD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MICHAEL IGNACIO
COMMUNICATIONS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY

NMCCA 201100062
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 October 2010.
Military Judge: CDR Donald King, JAGC, USN.
Convening Authority: Commander, Navy Region Southeast, Jacksonville, FL.
Staff Judge Advocate's Recommendation: CDR M.C. Holifield, JAGC, USN.
For Appellant: Capt Michael Berry, USMC.
For Appellee: Maj Elizabeth Harvey, USMC.

8 November 2011

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.

PER CURIAM:

A panel of members, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of abusive sexual contact in violation of Article 120(h), Uniform Code of Military Justice, 10 U.S.C. § 920(h).[1] The members sentenced the appellant to confinement for 3 years, reduction in pay grade to E-1, forfeiture of all pay and allowances, and a bad-conduct

[1] The military judge dismissed a specification of wrongful sexual contact prior to sentencing. Record at 379.

discharge. The convening authority approved the adjudged sentence and, except for the punitive discharge, ordered the sentence executed.

In four assignments of error, the appellant asserts; that Article 120(h) of the UCMJ is facially unconstitutional; that the Military Judge exceeded his authority and violated the separation of powers by instructing inconsistently with the statute; that the military judge erred when he failed to give a dual-use instruction to the members on the issue of consent; and that the military judge abused his discretion and prejudiced the appellant when he admitted statements under the excited utterance exception to the hearsay rule. Having carefully reviewed the record of trial and the pleadings of the parties, we conclude that the approved 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

The appellant provided 10 years of service to the Navy as an interpretive cryptological technician. At the time of this offense, he was detailed to the Coast Guard Cutter HAMILTON, which made a port call in Puerto Vallarta, Mexico. During the port call, the appellant and the victim departed the cutter as liberty buddies and shared a hotel room with a third shipmate. Following an afternoon and evening involving the consumption of alcohol, the appellant and victim ultimately shared a bed while the third shipmate, who had returned earlier, lay asleep in the other bed. In the early morning hours, the victim awoke to discover the appellant engaged in sexual contact with him while he slept. The victim, upon realizing his situation, reacted angrily, pushing the appellant away and immediately collecting himself and his belongings, exiting the hotel room, and securing a taxi back to the cutter. In a distraught state, the victim then boarded HAMILTON and awoke his division officer, emoting as he recounted what had happened to him. Within the hour, in the same distraught state, the situation was recounted to the cutter’s executive officer.

Facial Challenge

The appellant asserts that the statutory interplay of Article 120(h), 120(t)(14), and 120(t)(16), UCMJ, is facially unconstitutional. We disagree.

The constitutionality of a statute is a question of law we review *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The essence of the appellant's argument here is to mount a facial challenge by extrapolating similar elements or affirmative defense jurisprudence from other Article 120 offenses, and leveraging the combined infirmities of certain nuances of Article 120, when combined with certain facts, to broadly invalidate the entire statutory scheme, taking the appellant's Article 120(h) conviction in tow. To the extent that the appellant mounts a facial challenge to the constitutionality of the scheme of Article 120, his argument fails. *See, e.g., United States v. Crotchett*, 67 M.J. 713, 716 (N.M.Ct.Crim.App. 2009), *rev. denied*, 68 M.J. 222 (C.A.A.F. 2009); *see also United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 121 (2010). To the extent that a prosecution for violation of subsection (h) of Article 120 depends upon incorporation of concepts from subsection (c), we agree that the appellant's argument on an "as-applied" basis can be meritorious under certain circumstances, but such facts and circumstances have not been demonstrated in this case. *See United States v. Prather,* 69 M.J. 338 (C.A.A.F. 2011).

In light of the heavy burden and standard of review stated above, and on the facts of this case, we are not persuaded by appellant's argument and decline to declare the statute facially unconstitutional.

Separation of Powers

The appellant next claims that the military judge exceeded his constitutional authority when he failed to strictly adhere to the language of the statute in his instructions to the members. The appellant asserts that he suffered prejudice that was not harmless beyond a reasonable doubt. Finding no possible prejudice to the appellant in instructional error that entirely favors his cause, we disagree.

The constitutionality of a military judge's instructions is a question of a law we review *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). Erroneous instruction on an affirmative defense has constitutional implications and "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). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id*. (citations and internal quotation marks omitted).

In this case the military judge instructed the members using recommended instructions from the Military Judges' Bench Book. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 3-45-6 (1 Jan 2010)(Abusive Sexual Contact). These instructions place the burden of proof on the Government to prove beyond a reasonable doubt that consent did not exist. In *United States v. Medina*, the court found that a judge similarly instructing according to the Military Judges Bench Book and contrary to the plain language of the statute committed error. 69 M.J. 462 (C.A.A.F. 2011). The court in *Medina* then applied the test for constitutional error, finding that the bench book instructions were harmless beyond a reasonable doubt. *Id*. As distinguished from *Medina*, the military judge in this case notably put his reasons for declining to follow the language of the statute on the record. He stated, "(t)he intent of this approach is to balance the intent of Congress, the dictate of superior court rulings and the plain wording of the statute in a manner that ensures any ambiguity is resolved in favor of the accused." Record at 305. These words indicate the military judge was endeavoring to comport the statute with constitutional requirements and attempting to give effect to the intent of Congress. However, in the absence of discernable prejudice to the appellant, we need not reach the putative separation of powers argument.

The appellant asks us to find prejudice in instructions that varied from the statute by increasing the burden on the Government and decreasing the burden on the appellant. The instructions that the military judge gave to the members in this case resolved any questions about the issue of consent in favor of the appellant, and placed the burden squarely on the Government to prove a lack of consent beyond a reasonable doubt. In other words, as in *Medina*, the military judge placed the burden on the Government to prove a lack of consent beyond a reasonable doubt. This variance was entirely in favor of the appellant. To the extent that this variance from the statutory framework constituted judicial error, we hold that any such error was harmless beyond a reasonable doubt.

Additional Instruction

The appellant asserts that the military judge failed to properly give a requested dual-use instruction on consent evidence and thus reasonable doubt exists as to whether the Government was required to prove every element of the crime beyond a reasonable doubt. *See* In *re Winship*, 397 U.S. 358, 364 (1970). We disagree.

Again, a military judge's omission of an instruction is a matter of law we review *de novo*. *McDonald*, 57 M.J. 1 at 20.

The appellant asserts that a dual use instruction must be given in this case and cites to *Neal*, 68 M.J. at 289 and *Prather,* 69 M.J. at 338, in support of this proposition. In *Martin v. Ohio,* the court held that while the instructions given by the judge in that case could have been more clear, "when read as a whole, we think [the instructions] are adequate to 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." 480 U.S. 228, 234 (1987). Applying this analysis here, we evaluate the instructions given to determine if they, when read as a whole, were adequate to convey to the members that all of the evidence had to be considered in deciding if reasonable doubt existed about the elements of the crime.

First, we note that there are substantial differences in the instructional landscape in *Prather* and *Martin,* and that facing the appellant. No burden of persuasion was assigned to the appellant in this case, and the military judge's instructions to the members clearly placed the burden on the Government to prove every element of the crime beyond a reasonable doubt. Record at 330-34. Second, even disregarding those differences, we find that the instructions in this case "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." *Neal*, 68 M.J. at 299 (quoting *Martin*, 480 U.S. at 232-36) (brackets in original). The military judge specifically instructed the members "[e]vidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt". Record at 329. Reviewing the matter *de novo*, we find that the instructions given obviated

any burden on the appellant and there was no instructional advantage or benefit which the appellant was denied by the omission of the dual-use language. Further, because we presume that members understand and follow the instructions of the military judge, *see United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975), we are satisfied that no error materially prejudicial to the substantial rights of the appellant occurred in this regard. Art. 59(a), UMCJ. Even if we were to assume error, we would hold it was harmless beyond a reasonable doubt.

Excited Utterance Ruling

The general prohibition on the admission of hearsay testimony is qualified by a limited exception under MILITARY RULE OF EVIDENCE 803(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), to allow for excited utterances, or out of court statements, "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We review the military judge's ruling on excited utterances for an abuse of discretion. *United States v. Moolick,* 53 M.J. 174, 176 (C.A.A.F. 2000). We evaluate a statement's merits as an excited utterance guided by the analysis in *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987) and *United States v. Feltham*, 58 M.J. 470 (C.A.A.F. 2003).

In this case, the military judge's ruling to admit the statements made to the division officer and to the executive officer of the HAMILTON was fully supported by record and did not constitute an abuse of discretion. The record establishes that the victim's statements were prompted by a startling event, awaking to an inexplicable sexual state at the hands of a shipmate. The victim responded immediately to the stress of the event, pushing the appellant aside, and in very short order, recounting the sexual contact to his military superiors in an agitated, distraught state. We are not convinced by the appellant's assertion that the military judge abused his discretion in admitting the excited utterances in this case as an exception to the hearsay rule.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court