

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ALAN D. SOBENES  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000381  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 26 March 2010.

**Military Judge:** CDR Mario DeOliveira, JAGC, USN.

**Convening Authority:** Commanding General, Training and Education Command, Quantico, VA.

**Staff Judge Advocate's Recommendation:** LtCol C.M. Greer, USMC.

**For Appellant:** Maj Kirk Sripinyo, USMC.

**For Appellee:** Capt Samuel Moore, USMC.

**28 April 2011**

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

REISMEIER, Chief Judge:

The appellant, after entering mixed pleas, was convicted by a general court-martial composed of officer and enlisted members, of one specification of disrespect toward a superior commissioned officer, striking a superior commissioned officer, willful disobedience of a superior commissioned officer, fleeing apprehension, resisting apprehension, aggravated sexual assault, battery, impersonating a noncommissioned officer, and carrying a concealed weapon, in violation of Articles 89, 90 95, 120, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 889, 890, 895, 920, 928, and 934. The appellant was sentenced to

confinement for 15 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

The appellant raises four assignments of error: (1) the military judge abused his discretion by refusing to call a panel member as a witness in a post-trial session after allegations that the member may have heard about one of the offenses pretrial and failed to disclose it during *voir dire*; (2) Article 120(c)(2) is unconstitutional because it places a burden upon the appellant to disprove an element of the offense; (3) the evidence of aggravated sexual assault was legally and factually insufficient as to the element of penetration; and (4) the military judge erred in failing to instruct on the affirmative defense of consent.<sup>1</sup> 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 was committed.<sup>2</sup> Arts. 59(a) and 66(c), UCMJ.

### **Factual Background**

The appellant, in the company of the victim, then-Private First Class (PFC) BP, drank to the point of intoxication on the evening of 24-25 October 2009. Prior to the evening of 24-25 October 2009, the appellant and PFC BP were friends. Their interaction included exchanges of emails and photos, including topless photos the victim took of herself specifically so that she could send them to the appellant. The two also watched a movie together.

Sometime shortly before midnight on 24-25 October 2009, the appellant, the victim, and two other Marines went to a bar. The victim and the appellant engaged in sexually-charged physical contact as they danced at the bar, including rubbing or "grinding" their groins together, kissing, and touching each other with their hands. Testimony suggested that similar physical contact may have preceded their arrival at the bar as well.

By the early morning hours of 25 October 2009, after consuming at least 4-5 shots of tequila, some portion of two mixed drinks, alcohol-based energy drinks, and five "swallows" of Goldschlager (a sweet liquor), PFC BP was drunk. Lay witnesses noted that she had difficulty walking without bumping into people and tables, slurred speech, and, ultimately, that she became

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<sup>1</sup> The fourth assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>2</sup> The record indicates that the military judge instructed the members prior to deliberations on sentencing that parole was not a possibility for the appellant. We find any error therein to be harmless as it inured to the favor of the appellant by leading the members to believe that the appellant had no chance at an early release from confinement.

unresponsive. Blood-alcohol levels taken later in the evening registered .219 at about 0200, and .188 at 0355.

Upon leaving the bar, PFC BP vomited in the parking lot. The other female Marine in the group, PFC AT, assisted PFC BP back into the appellant's truck, where BP again vomited on the back seat. The group determined to return to PFC AT's house. While in the back seat of the appellant's truck, PFC BP exhibited the common behavior of belligerent intoxication - punching, kicking, yelling and repeating herself.

Once at PFC AT's off-base house, which she shared with her mother JT, PFC AT dragged PFC BP onto an air mattress in one of the bedrooms. According to PFC AT, PFC BP was passed out, and was "dead weight" as she moved BP to the mattress. She then changed PFC BP (because PFC BP had vomited on herself) into PT shorts and a tank top. As these efforts were ongoing, PFC BP apparently regained some level of consciousness, as she was kicking, punching, screaming, and squirming.

Once PFC BP was changed and placed on the mattress, the appellant got onto the mattress as well, pulling the blanket over himself and PFC BP. When PFC BP began heaving again, PFC AT pulled her into the bathroom. When that occurred, the appellant was seen putting on his shorts.

The appellant and PFC AT began discussing what to do with PFC BP, saying that he wanted to take her home. PFC AT informed the appellant that she, not the appellant, would take PFC BP back to the barracks. The appellant then claimed that he had signed PFC BP out on liberty, and that he needed to return her. PFC AT responded that she was going to accompany the appellant.

PFC AT drove the appellant's truck back to the base, with PFC BP in the back seat once again. JT drove behind them in her own car so that she could give her daughter a ride back home after the group returned PFC BP to the barracks. During the drive back, the appellant asked PFC AT if she wanted to have sex with him. PFC AT declined, prompting the appellant to claim that the victim said she (PFC BP) wanted to have sex with him (the appellant).

After arriving on base, no one knew the location of PFC BP's barracks. After yelling at her a few times, PFC BP responded that she lived in "H barracks." Armed with at least a name, PFC AT set out to determine the location of "H barracks." At that point, what was otherwise an all too common drunken escapade became a violent drunken encounter.

PFC AT pulled into a barracks area, parked the truck, took the keys, and entered the barracks. JT pulled alongside of the truck. PFC AT encountered Aviation Machinist's Mate First Class (AD1) L, on duty in the barracks, informed him that she had a female Marine on board, and that she needed to find H barracks.

As AD1 L made phone calls, JT called PFC AT's cell phone and told her that the appellant was in the back seat of the truck "f\*\*\*ing" the victim. PFC AT ran out, asking AD1 L to help.

PFC AT saw the appellant with his hands on his belt loops, pulling his shorts up. Because he was sitting on his shorts, he was only able to cover his front. AD1 L, who approached the truck at a walking pace because he had not been alerted that there was an unfolding emergency before him, noted that from about 15 feet away he could see a body moving in the back seat of the truck, wearing a light-colored tee-shirt, head facing the passenger side. He could see the person rise, turn forward, and get behind the driver's seat. JT could see the appellant get onto his knees, move PFC BP about, and saw him over PFC BP, thrusting. JT could also see the appellant "messaging" with his shorts. After seeing the thrusting, JT approached the truck and told the appellant to stop, to which the appellant replied, "she told me earlier that she wanted to f\*\*\*." JT responded by telling the appellant to get off of PFC BP because she was passed out. The appellant complied.

When PFC AT approached the truck, she asked the appellant what he was doing. He replied by saying "nothing," and began to get out of the truck. AD1 L then approached the truck, telling the appellant that he was merely there to assist a drunk female Marine. The appellant said that PFC BP was not a Marine, claimed to be a Sergeant, and claimed to be handling it all, before grabbing AD1 L by the neck and throat. When the appellant's hold broke, AD1 L called the police. PFC AT tried to intercede and was struck by the appellant.

PFC AT ran back into the barracks, still carrying the appellant's keys. The appellant followed, demanding them back, but PFC AT instructed the appellant that he was not getting the keys until she got PFC BP out of the truck. They returned to the truck and, when PFC AT opened the door, she found PFC BP sitting, chest to her knees, with her shorts pulled down behind her but the front pulled up. PFC AT adjusted PFC BP's shorts, pulled her out of the truck and carried her to a bench. PFC BP was still passed out at that point, but regained consciousness when the ambulance arrived.

One of the ambulance responders noted that PFC BP was found passed out on her friend's lap, unresponsive and unable to answer questions. Her responses initially were limited to groans and stares. By the time they arrived at the hospital, he noted that PFC BP was awake but still not answering. A nurse at the hospital testified that PFC BP arrived awake and alert, but with slow, slurred speech, and a blood alcohol content of .219. PFC BP herself had very limited recall of events after drinking at the bar. She recalled a drink, then hearing a woman saying "don't mess with her," and then being in an ambulance, on a stretcher, and in the hospital. She had no recall of a sexual assault of any kind.

As events with PFC BP were unfolding, the appellant encountered more difficulty on base. His interaction with AD1 L provided the basis for the offense of impersonating a noncommissioned officer, and led to his apprehension and delivery, in handcuffs, to the Group Duty Officer (GDO), Second Lieutenant (2ndLt) G. Upon his delivery to the GDO, his cuffs were removed, and he was ordered to remain while the GDO tried to determine what happened. The appellant, intent on leaving, became agitated when he realized that the GDO was not going to release him. A verbal attack by the appellant on the GDO was quickly followed by a physical attack, providing the basis for the charges of disrespect, striking, and disobeying a superior commissioned officer, and fleeing apprehension. After his flight from the GDO, the appellant was stopped by an armed forces police officer. He again entered into a confrontation with security personnel. He was pepper-sprayed, resisted apprehension, and was found with a weapon, a .45 caliber pistol, in the center console of his truck.

### **Potential Member Misconduct**

In his first assignment of error, the appellant maintains that the military judge erred by failing to call a panel member to testify in a post-trial session regarding possible undisclosed pretrial information one of the members had about the assault on 2ndLt G. Having reviewed the record and pleadings thoroughly, we disagree.

At trial, the appellant pleaded guilty to all offenses except for the aggravated sexual assault. Following the providence inquiry and acceptance of his pleas, the appellant was tried on the remaining aggravated sexual assault offense by members. Although there were general references to the fact that the appellant pleaded guilty to some offenses prior to presentencing, the defense made a strategic determination not to inform the members of the specifics of the offenses to which the appellant pleaded guilty, and tailored their *voir dire* to the contested offense. The members were asked if they knew anything about the incident on the sanitized charge sheet, and, following a negative response from all members, were instructed that if they did recall anything during the case, they should totally disregard whatever they might recall. At no time were the members asked anything about knowledge of the other offenses. Similarly, at no time did any member indicate any awareness of any events associated with this trial.

After trial, the appellant returned to the brig with a sentence that included 15 years of confinement. He shared the facility with Private (Pvt) B, who, coincidentally, knew Staff Sergeant (SSgt) H, one of the members. The appellant showed the list of members to Pvt B, asking if Pvt B knew any of them. Pvt B indicated that he knew SSgt H, and that he overheard a conversation between staff members at the command about a Marine who assaulted an officer. The conversation allegedly took place

prior to trial. Although Pvt B's testimony at trial differed from his statements in an affidavit he provided on this issue, at the hearing, Pvt B admitted that he did not see SSgt H in the area until 15 minutes after the conversation, that he did not hear SSgt H's voice during the conversation, and that he only saw SSgt H in the general area of the conversation (down the hall, around the corner from the office where the conversation took place). Another staff member could corroborate that an officer's assault was a topic of discussion around the command, but he had no specific recollection of a conversation, and could not recall ever discussing the topic with SSgt H, the member at issue.

The Government correctly notes that when a colorable claim of misconduct occurs, the military judge must conduct an inquiry to address the putative problem. *United States v. Sonogo*, 61 M.J. 1, 4 (C.A.A.F. 2005). A *prima facie* showing is not required. The claim need only be colorable, so as to eliminate frivolous claims yet leave open the potential for proving valid claims upon further inquiry. *Id.*

We need not determine whether the allegations of Pvt B themselves amounted to a colorable claim, as the military judge conducted an inquiry based upon Pvt B's allegations. Pvt B admitted he could not place SSgt H at the meeting he overheard. He admitted he only saw SSgt H in the area 15 minutes after the conversation. The staff member in whose office the conversation occurred was called as a witness, and he too could not place SSgt H in the room. More importantly, there is no basis in this record to suggest that SSgt H misrepresented, or failed to disclose, anything. SSgt H was never asked during *voir dire* if he heard word one about the assaultive behavior that supported the offenses to which the appellant pleaded guilty, and was affirmatively instructed to disregard anything he later recalled should he discover that he knew something about the overall case. We decline to conclude that SSgt H misrepresented his exposure to information he was never asked about, and decline the invitation to demand further inquiry of the SSgt based on pure speculation. Even if SSgt H did know of the allegations, the parties determined at trial to forgo inquiry. To the extent that there ever was a suggestion of member dishonesty, that suggestion evaporated upon further scrutiny by the trial court.

#### **Constitutional Challenge to Article 120(c)**

The appellant's constitutional challenge against Article 120(c)(2) was resolved against the appellant in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011). As in *Medina*, the military judge failed to articulate his reasons for departing from the confusing and potentially unconstitutional statutory construct when matters related to mistake of fact were raised. Instead, he gave the standard instruction found within the Military Judge's Benchbook. We find that instruction harmless beyond a reasonable doubt, as it placed the burden upon the Government to prove beyond a reasonable doubt that the appellant was not acting under

a mistaken belief that his incapacitated victim consented to his actions.

### **Sufficiency of the Evidence**

With regard to whether the evidence was legally and factually sufficient, we find that it was. The appellant's right to have the Government prove that he committed the charged offense beyond a reasonable doubt does not entitle him to be convicted solely by evidence that is free from conflict. See *United States v. Reed*, 51 M.J. 559, 662 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). The standard of "proof beyond a reasonable doubt" applies to the evidence as a whole and whether it warrants a conviction; it does not apply to "each particular fact advanced by the prosecution." *United States v. Teeter*, 12 M.J. 716, 721-22 (A.C.M.R.), *rev'd in part on other grounds*, 16 M.J. 68 (C.M.A. 1983). Therefore, while the evidence in this case was not without some controversy, it is still legally and factually sufficient to sustain the conviction.

The forensic evidence established immunological indications of semen present, but did not establish the actual presence of semen. The fact that a similar immunological indication might have been caused by P30 antigen<sup>3</sup> secretions from the victim herself is a fact to be considered, but it does not raise a reasonable doubt on this record as a whole. It indicates only that another explanation for the positive result is possible - an explanation that is tenuous in light of the full weight of the evidence. Likewise, DNA consistent with the profile from the victim was found on the swab taken from the appellant's penis, although his DNA was not - again, a fact that also must be considered in light of the rest of the evidence.

The fact is that the victim sent the appellant sexually explicit photos of herself prior to the night in question and was seen throughout the evening of the assault in sexually provocative contact with the appellant. The victim was found with her shorts partially removed. The appellant was seen moving her in the back seat of his truck immediately preceding the assault. The appellant was seen with his shorts at least partially removed, atop the victim, thrusting. His actions were followed by various misleading, conflicting, and inculpatory statements, to include that the victim had earlier stated that she wanted to have sex, that she consented, that he did not have sex with her and that he tried to pull her out of the truck by her shorts. Although direct testimony of actual penetration might have been wanting, the fact that no one, to include the victim, could provide direct testimony as to actual penetration is not dispositive. Whether the immunological indications were

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<sup>3</sup> The P30 antigen is the prostate antigen, which is found in semen, but can also be found in vaginal secretions, breast milk, and urine. To be considered a positive test for semen, an examiner would need to also find sperm cells or acid phosphatase, neither of which was found on the swabs.

caused by secretions from the appellant's penis or the victim's vagina, the secretions (and DNA) were found after the appellant and the victim were seen partially unclad and after the appellant was seen thrusting over the victim's body. Similarly, while her capacity was attacked by the defense, the overwhelming evidence establishes that the victim was in fact grossly intoxicated to the point of incapacitation even if not utterly unconscious. Applying the well-known standards for legal and factual sufficiency, we conclude that the evidence satisfies both standards. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *Reed*, 51 M.J. at 562; see also Art. 66(c), UCMJ.

### **Affirmative Defense of Consent**

Finally, we address the military judge's putative error in failing to instruct the members as to the affirmative defense of consent. We note first that the defense neither requested a consent instruction nor objected the lack of its inclusion at trial. The judge did, however, instruct regarding the affirmative defense of mistake of fact as to consent. Consent is "an affirmative defense for the sexual conduct in issue in a prosecution under subsection . . . (c) (aggravated sexual assault)" of Article 120, UCMJ, the section under which the appellant was found guilty. Art. 120(a), UCMJ. While there was evidence of record suggesting consent - the most obvious of which was the appellant's alleged statement during his sexual assault examination, offered by the prosecution, in which he stated that the victim consented - the evidence in this case overwhelmingly established that the victim was completely incapacitated at the time of the assault. Assuming but not deciding that the military judge did err, we are convinced beyond a reasonable doubt that this error did not contribute to the verdict in any way. The members were clearly made aware that matters relating to consent were at issue in the case, and rejected those matters by concluding that the victim was substantially incapacitated. See *United States v. McDonald*, 57 M.J. 18 (C.A.A.F. 2002). As such, the appellant is not entitled to any relief due to the military judge's omission of the consent instruction.

### **Conclusion**

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

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL  
Clerk of Court