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

Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

NICHOLAS S. STEWART
CAPTAIN (O-3), U.S. MARINE CORPS

NMCCA 201000021
GENERAL COURT-MARTIAL

Sentence Adjudged: 18 September 2009.
Military Judge: CAPT Bruce W. MacKenzie, JAGC, USN.
Convening Authority: Commanding General, Training and Education Command, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.
For Appellant: Charles W. Gittins, Esq; Maj Jeffrey Liebenguth, USMC.
For Appellee: Capt Robert Eckert, Jr., USMC.

31 January 2011

OPINION OF THE COURT

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

CARBERRY, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of aggravated sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The convening authority (CA) approved the adjudged sentence of confinement for two years and dismissal from the Marine Corps.

The appellant raises seven errors on appeal: (1) the military judge abused his discretion by failing to require the Government to elect its theory of criminal liability; (2) the

convening authority systematically excluded potential members; (3) the military judge abused his discretion by denying a defense challenge for cause; (4) Article 120(c)(2), UCMJ, is facially unconstitutional because it shifts the burden to the appellant to disprove an element of the offense; (5) the statute as applied to the appellant was unconstitutional because it required the appellant to prove an affirmative defense before the Government's case-in-chief; (6) the military judge's finding that the appellant established an affirmative defense by a preponderance of the evidence precluded a finding that the Government disproved the defense beyond a reasonable doubt; and, (7) the evidence supporting his conviction for aggravated sexual assault is factually insufficient.

We have carefully examined the record of trial and the pleadings of the parties. 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a Marine Corps captain (pay grade O-3), and Ms. N, a civilian, met in 2001. The appellant and Ms. N became good friends and dated for approximately 2 to 3 months in 2004. Their relationship included sexual activity, but no sexual intercourse. When their romantic relationship ended, they resumed their friendship and were friends on the date of the incident.

On 16 May 2008, the appellant attended a party hosted by Ms. N at her home to celebrate her graduation from a Masters in Business Administration program. During the course of the evening, Ms. N became extremely inebriated. Four witnesses testified that Ms. N was so intoxicated that she could not speak coherently or stand by herself. At approximately midnight, Ms. N's friends carried her to her bed. Record at 430-32. Shortly after being laid out on the bed, at that point fully clothed, Ms. N appeared unconscious. *Id*. at 383, 417.

Approximately seven hours later, Ms. N woke up naked next to the appellant, got dressed and lay back in the bed. *Id*. at 586-87. Ms. N then began to reconstruct what had caused her to wake up naked next to the appellant. Ms. N recalled the appellant on top of her trying to put his penis in her vagina while she had been sleeping and she recalled moving her body to prevent the appellant from having sex with her. *Id* at 587-88. Ms. N then recalled that the appellant masturbated and ejaculated on her stomach. *Id*. at 588. Additional background necessary to resolve the assigned errors is included below.

Duplicitous Specification and Abuse of Discretion

The specification under Article 120 read as follows:

> In that Captain Nicholas S. Stewart, U.S. Marine Corps, on active duty, did, at or near Fairfax, Virginia, on or about 17 May 2008, engage in a sexual act, to wit: using his penis to penetrate the vagina of [Ms. N], who was substantially incapacitated or substantially incapable of declining participation in the sexual act.

At trial, the appellant argued that the specification was duplicitous and moved to require the Government to elect its theory of prosecution. The appellant maintained that if convicted of the specification as alleged, it would be impossible to determine whether a 2/3 majority found that Ms. N was substantially incapacitated, substantially incapable of declining participation, or both. The military judge offered the appellant two remedies: (1) to instruct the members to vote on each theory of liability, i.e., incapacitation or incapable of declining participation, and that they could only find the appellant guilty of one theory; or (2) sever the sole specification into two specifications. Record at 128. The appellant requested severance and the military judge instructed accordingly. *Id*. at 181, 795-802.

The appellant's argument is unpersuasive for two reasons. First, a military members panel, "'like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit.'" *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007)(qoting *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997)). Military criminal practice does not require panel "agreement on one theory of liability, as long as two-thirds of the panel members agree that the Government has proven all the elements of the offense." *Id*. (citation omitted).

Second, even assuming that the specification as initially pled was duplicitous, the appellant received the appropriate remedy: severance of the specification. "The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification." RULE FOR COURTS-MARTIAL 906(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion. Moreover, the appellant fails to demonstrate that the military judge abused his discretion in offering the appellant the choice of electing one of two remedies or that he was in any way prejudiced by the application of the remedy he requested from the military judge. Accordingly, we find this assigned error to be without merit.

Members Exclusion Based on Inappropriate Criteria

The appellant asserts that the CA used impermissible criteria to systematically exclude potential members.

Article 25(d)(2), UCMJ, requires a CA to select court-martial members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." A military accused is not entitled to have a representative cross-section of the community detailed to his or her court-martial. *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997). On the other hand, a court-martial may not be "packed" to achieve a desired result. *United States v. White*, 48 M.J. 251, 254 (C.A.A.F. 1998).

"'The defense shoulders the burden of establishing the improper exclusion of qualified personnel from the selection process'." *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000)(quoting *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999)). "Once the defense establishes such exclusion, the Government must show by competent evidence that no impropriety occurred when selecting appellant's court-martial members." *Id.* (citation omitted).

We review the issue of impermissible screening of the panel pool *de novo*. *Id.* We are, however, bound by the military judge's findings of fact unless they are "clearly erroneous." *United States v. Benedict*, 55 M.J. 451, 454 (C.A.A.F. 2001).

A. Pay Grade O-3 Senior to the Appellant

The appellant claims that the CA systematically excluded officers in the pay grade of O-3 who were senior to him. In this instance, the CA solicited nominees in the pay grades of O-4 thru O-6 under the mistaken belief that members had to be senior in grade to the accused. The CA acknowledges that he mistakenly excluded O-3's senior in rank to the appellant. In instances where certain members are mistakenly excluded due to an administrative error, the burden is on the appellant to demonstrate prejudice. *See United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998).

Notwithstanding the inadvertent omission of O-3's, the CA was a person authorized to convene a general court-martial and he referred the appellant's case to court-martial; there is no evidence in the record that the CA excluded O-3's from his solicitation of potential members with an improper motive; the military judge found that there was no nefarious or improper motive in excluding O-3's from consideration; there is no evidence that the CA's motivation in detailing the members he assigned to the appellant's court-martial was anything but benign -- the desire to comply with Article 25(d)(2); the appellant was found guilty and sentenced by court members personally chosen by the convening authority from a pool of eligible officers; and the

court members all met the criteria in Article 25, UCMJ. Moreover, the appellant has not asserted any specific prejudice and the record reflects none. Under these circumstances, we are convinced the error was harmless.[1]

B. Naval Officers

The appellant asserts that the CA systematically excluded naval officers from the members pool. The appellant, however, fails to offer any evidence to establish an improper exclusion of qualified personnel. In this instance, the CA's requests for nominees to serve as members make no mention of service affiliation. The CA simply requested "...officers in the grades of O4 thru O6 who are best qualified for duty by reason of age, education, length of service, and judicial temperament." *See* AE XXXIII at 7-8. Moreover, the CA testified that there were only 2-3 Naval officers under his direct control. Record at 204. Although the CA testified that he had a "preference" for Marine officers because he believed that their career patterns and leadership opportunities made them better suited for duties as a member, there is no evidence that he refused to solicit or consider, or that he systematically excluded Naval officers. *Id.* at 205. Given these facts, we find that the appellant fails to meet his burden of establishing the improper exclusion of qualified personnel.

C. Members' Questionnaires

The appellant asserts that the CA violated Article 25, UCMJ, by failing to consider the members' questionnaires. The appellant cites no case law or Rule for Courts-Martial, and we are unaware of any, that requires a CA to consider a member's questionnaire prior to selecting the member. Notwithstanding the absence of members' questionnaires, it is clear that the CA personally selected the members after being provided a list of nominees by the staff judge advocate (SJA) and advised that he had to select members senior to the accused who were qualified by reason of age, education, training, experience, length of service, and judicial temperament. The electronic-mail from the SJA to the CA listed eight nominees with a brief synopsis including their units, billets, ranks, and years of service. The CA considered the nominees and then personally selected a panel in accordance with the criteria set forth in Article 25(d), UCMJ. *See* AE XLI, CA's Affidavit, AE XXIII. This assignment of error is without merit.

[1] The CA's attempt to correct his inadvertent exclusion of O-3's senior to the appellant is of no moment to our disposition, as the CA's initial solicitation, selection and detailing of members was in compliance with Article 25, UCMJ.

Challenge for Cause

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). This encompasses challenges for actual bias as well as implied bias. *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Accordingly, "military judges are required to test the impartiality of potential panel members on the basis of both actual and implied bias." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." *Id*. (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)).

The appellant's contends that the military judge erred by denying his challenge for cause based on implied bias of a court-martial member. Specifically, the appellant's challenge related to the fact that: (1) the member, Lieutenant Colonel (LtCol) W, previously attended DoD sponsored sexual assault training; (2) LtCol W was a law school graduate who never practiced law; and (3) the member consumed a large quantity of alcohol at a party approximately 20 years ago. The appellant's argument has no merit.

The military judge acknowledged applicability of the liberal grant mandate to the defense challenge, thoroughly vetted the challenge with counsel, placed his recollection of the member's answers and observations regarding the member's ability to follow the court's instructions and ruled on the challenge only after applying separate legal tests for actual and implied bias. The military judge found: (1) that LtCol W was emphatic that he could follow the court's instructions; (2) the member's DoD sponsored sexual assault training was minimal; and (3) the fact that the member was drunk at a party in 1986 or 1987 was of little consequence. Under these circumstances, we see no plausible risk that an informed public would perceive that the accused did not get a full and fair trial. *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007). We conclude, therefore, that the military judge did not commit a clear abuse of discretion in denying the defense challenge for cause.

Constitutionality of Article 120, UCMJ

The appellant argues that Article 120(c)(2), UCMJ, is facially unconstitutional because it shifts the burden to the defense to disprove an element before appellant could raise a defense to the charge.

Article 120(c)(2), UCMJ, requires no assignment of burdens that would deprive an accused of his right to due process under the Fifth Amendment, and thus we conclude that the statute is not

facially invalid. *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).

Article 120, UCMJ, Unconstitutional as Applied

The appellant argues that, Article 120(t)(16), UCMJ, as applied to him, was unconstitutional because the military judge required him to put on evidence of the affirmative defenses of consent and mistake of fact as to consent prior to the Government's presentation of evidence on the merits. He contends that the military judge's "novel procedure" violated the presumption of innocence and right to require the Government to prove his guilt beyond a reasonable doubt, and improperly burdened him with establishing the affirmative defense before trial in order to have the benefit of the defense at trial.

We agree that the military judge erred when he required the appellant to present evidence on these affirmative defenses prior to the presentation of evidence on the merits by the Government. However, assuming without deciding that this error has constitutional implications, we are convinced beyond a reasonable doubt that the error had no impact on the findings or the sentence and was therefore harmless. *See United States v. Medina*, 68 M.J. 587, 590 (N.M.Ct.Crim.App. 2009), *rev. granted*, M.J. (C.A.A.F. Mar. 30, 2010).

After commenting on the novelty of the initial allocation of burdens in Article 120(t)(16), UCMJ, the military judge directed the defense to provide evidence of consent and mistake of fact as to consent, prior to assembly of the court-martial, if the appellant wished to assert those affirmative defenses. Record at 184-85. He reasoned that the statute placed the burden on the appellant to prove, by a preponderance of the evidence, those affirmative defenses were raised in this case. *Id.* at 184. After objecting to the military judge's direction, civilian defense counsel requested that the military judge consider the appellant's written declaration and the verbatim transcript of Ms. N's Article 32, UCMJ, hearing testimony. *Id.* at 186-88. Of note, the appellant's declaration was then part of the record having been attached to a related motion by the appellant, and the transcript of Ms. N's testimony had previously been produced by the Government upon the appellant's motion and by order of the court. *Id.*; AE X at 6-10; AE XLIII.

The military judge commented that he would decide whether instruction on the affirmative defenses of consent and mistake of fact was warranted and that the members would make the factual determinations. *Id.* at 188-91. He concluded that the defense met its burden and indicated he would instruct the members accordingly, but noted the Government may be given leave to object to that instruction at trial. *Id.* at 192-93.

The military judge's decision to conduct a preliminary hearing did not require the appellant to disclose, nor did he disclose information or evidence not already part of the record or possessed by the Government. The appellant's intent to raise the affirmative defenses of consent and mistake of fact as to consent was raised in at least two earlier defense motions and multiple discussions on the record prior to the judge's direction and conduct of the "novel" hearing. AE IV; AE X; Record at 16-17, 47-48, 65, 129, 184. Those affirmative defenses were also central to the defense theory at trial, and the appellant's right to present those defenses was unimpeded.

In addition, the military judge's ruling occurred prior to assembly of the court-martial, and there is no indication in the record that the members were made aware of the hearing or the military judge's conclusions. At trial, the military judge properly instructed the members on the presumption of innocence, the elements of the offenses, the Government's burden of proof on the elements, and other matters fundamental to due process. *Id.* at 794-813, 818-19.

Furthermore, the military judge's instructions on the affirmative defenses of consent and mistake of fact as to consent did not improperly shift the burden of proof or persuasion to the appellant. Instead, the military judge omitted any reference to the appellant's burden of proof or persuasion, and placed the burden on the prosecution to prove, beyond a reasonable doubt, that Ms. N did not consent to the sexual act and that the accused did not reasonably and honestly believe that she had. *Id.* at 803-04; *see Medina*, 68 M.J. at 591-92. This determination was properly left to the members.

Therefore, we conclude the military judge's error had no impact on the findings or the sentence.

Preponderance of Evidence Precluded Guilty Beyond a Reasonable Doubt

The appellant asserts that the Government could not disprove the affirmative defenses of consent and mistake of fact as to consent beyond a reasonable doubt because the military judge found these defenses were proven by a preponderance of the evidence. We disagree.

As discussed *supra*, the military judge conducted the preliminary hearing to determine whether the members would be instructed on the affirmative defenses. Record at 191. His conclusion that the appellant met that standard in a preliminary hearing was neither presented to the members, nor relevant to their findings. In fact, prior to ruling that the affirmative defense instructions were warranted, the military judge noted that the factual determinations on the affirmative defenses were not his to make, as those determinations were within the members'

purview. Stated another way, the military judge was not the fact-finder, the members were the fact-finders.

Accordingly, we find that the military judge's determination that the affirmative defenses were raised, regardless of the burden of proof he applied in rendering that determination, had no impact upon the members fact-finding authority or responsibility. Here, the members determined, beyond a reasonable doubt, that Ms. N did not consent to the sexual act, and that the appellant was not operating under a mistaken belief as to her consent at the time of that sexual act. *See Medina*, 68 M.J. at 592.

Accordingly, we find this assignment of error is without merit.

Factual Sufficiency

Applying the test for factual sufficiency, as set forth in *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), this court must determine whether we are convinced of the appellant's guilt beyond a reasonable doubt "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses."

At trial, the Government was required to prove that (1) the appellant penetrated Ms. N's vagina with his penis and (2) Ms. N was substantially incapable of declining participation in the sexual act. Charge Sheet; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 45b(3)(c). The appellant maintains that there is insufficient evidence to prove these two elements beyond a reasonable doubt. We disagree.

Having carefully reviewed the evidence and making allowances for the fact that we did not personally observe the witnesses, we are convinced that the appellant committed aggravated sexual assault upon Ms. N.

A. Penetration

The testimony established that Ms. N was placed in bed fully clothed. Record at 417. Ms. N testified that she woke up naked and remembered that the appellant had been on top of her trying to put his penis in her vagina. *Id.* at 588. Ms. N testified that she turned and twitched when the appellant tried to insert his penis into her. *Id.*

Evidence of actual penetration was provided by the appellant, through his admissions to Ms. N and her brother. The appellant first indicated sexual intercourse occurred several hours after the sexual activity, when he asked Ms. N if she was "on the pill" and in response to her question of "why?" he responded "Cause we didn't use a condom last night." *Id.* at 590.

Ensuing electronic communications between the appellant and Ms. N corroborate his admission. In those communications, the appellant acknowledged being sickened by the word "violated," remembering "it happening, just not details about what happened," not remembering "being forceful," and praying that he wasn't forceful. Prosecution Exhibit 6 at 4. He then posed the question: "But do you think I did something that I can't even bring myself to say, or do you think it was something that happened between two extremely drunk people?" *Id.* at 4-5.

Approximately one month later, Ms. N's brother, also a long-time friend of the appellant's, phoned the appellant and informed him that he knew what happened with his sister, that the appellant was no longer invited to his bachelor party, and that the appellant should not contact his and Ms. N's parents. Record at 435. During that conversation, Ms. N's brother asked the appellant if he raped his sister, to which the appellant replied "I raped your sister" followed immediately by "Oh, my God. Oh, my God. Oh, my God." *Id.* at 436. Ms. N's brother then told the appellant he needed to "get right with God" and encouraged him "to get help" at which time the appellant said he would "get help." *Id.* at 436-37. Though unsolicited, the appellant then provided a series of text messages and emails reporting on his progress. *Id.* at 437.

After weighing all the evidence in the record of trial, including the appellant's age, education and experience, and recognizing that we did not see or hear the witnesses, we are convinced beyond any reasonable doubt that there was penetration.

B. Substantially Incapable of Declining Participation

The evidence clearly established that Ms. N was substantially incapable of declining participation in the sexual act. The testimony established that during the party Ms. N consumed multiple shots of liquor. *Id.* at 381, 585. Four witnesses described Ms. N as extremely inebriated, incoherent, and intoxicated to the point that she had to be carried her to bed. Moreover, after being placed in bed, Ms. N appeared unconscious. *Id.* at 383.

At approximately 0400, the appellant left the living room where he had been sleeping and walked downstairs to Ms. N's bedroom. *Id.* at 433. Ms. N testified that she was unable to resist the appellant because she was exhausted, drunk, and already asleep when the appellant came into her room. *Id.* at 665. After carefully reviewing the record, we find that Ms. N's testimony at trial remained substantially consistent, detailed, withstood a vigorous cross-examination, and are convinced that she was substantially incapable of declining participation when the appellant had sex with her.

Accordingly, we find his assignment of error to be without merit.

CA's Action

Although not assigned as error, we note that the CA's action approved the sentence, which included a dismissal, and then stated, "In accordance with the UCMJ, Rules of [sic] Courts-Martial, and this action, the sentence is ordered executed." Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the CA's action purported to execute the dismissal, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

We also note that the specification in the court-martial order states that the appellant penetrated the vagina of Ms. N "who was substantially incapacitated or substantially incapable of declining participation in the sexual act". The appellant was found guilty of penetrating Ms N. while she was substantially incapable of declining participation in the sexual act, not while she was substantially incapacitated. We will order corrective action in our decretal paragraph.

Conclusion

We direct that the supplemental court-martial order accurately reflect that the appellant was found guilty of the specification except for the words "substantially incapacitated or." The findings and approved sentence are affirmed.

Judge PRICE concurs in the opinion.

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

I join the majority's conclusions with respect to all assigned errors except the factual sufficiency of the evidence to sustain the conviction. Because I am not convinced beyond a reasonable doubt that the appellant penetrated AN, I respectfully dissent from the majority's conclusion that the finding is correct in fact.

If the issue before us were of the legal sufficiency of the evidence, *see United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987), I would readily conclude that the finding is correct in law. Considering the evidence in the light most favorable to the Government, a reasonable (and I interpret that term to mean one who is properly instructed, including the instruction to use his knowledge of the ways of the world) member had sufficient evidence to conclude beyond a reasonable doubt that the appellant had engaged in a sexual act with an incapacitated victim or a victim who was incapable of expressing her unwillingness to engage in sexual activity.

When I place myself in the position of the finder of fact, however, taking into account that I did not watch the witnesses or hear their testimony, *see id. at 325*, I am not convinced that penetration occurred. The victim's testimony does not establish penetration. There was no medical testimony (not surprising, given the lapse of time between the incident and the date it was reported) and the appellant's statements to the victim's brother do not establish that the two actually engaged in sexual intercourse. His statement that he "hurt" the victim is accurate from an emotional standpoint and, of course, is not an element of the particular offense with which he was charged. I interpret his statements about "rape" to be in response to the tenor of the brother's accusations – in other words, the appellant believed that he could mollify the brother by simply saying the word. The appellant's concern about birth control, voiced to the victim the morning after the event, could suggest that intercourse occurred, but it is not beyond comprehension that a penis could not be sufficiently rigid to penetrate yet could be sufficiently stimulated to ejaculate sperm. The appellant's and the victim's mutual sexual history supports other possible explanations. The doubt I harbor is a serious misgiving caused by the evidence, or lack of it, in this case; it is not a speculative or fanciful conjecture.

I am, however, convinced beyond a reasonable doubt that the appellant attempted to engage in a sexual act with AN, an offense offered for the consideration of the members, and I would affirm a conviction of that offense. Considering all the evidence before the sentencing authority, moreover, I am convinced that even an attempted aggravated sexual assault would result in a sentence at least as severe as that adjudged by the members.

For the Court

R.H. TROIDL
Clerk of Court