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.

AKEEM A. WILKINS
MASTER-AT-ARMS THIRD CLASS (E-4), U.S. NAVY

NMCCA 201000289
GENERAL COURT-MARTIAL

Sentence Adjudged: 19 November 2009.
Military Judge: CAPT Ross Leuning, JAGC, USN.
Convening Authority: Commander, Navy Region Europe, Africa, Southwest Asia, Sicily, Italy.
Staff Judge Advocate's Recommendation: LCDR T.D. Stone, JAGC, USN.
For Appellant: Maj Kirk Sripinyo, USMC.
For Appellee: Maj Elizabeth Harvey, USMC.

24 March 2011

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:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of aggravated sexual contact and forcible sodomy, violations, respectively, of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The convening authority approved the adjudged sentence of confinement for 18 months and a dishonorable discharge from the United States Navy.

The appellant now raises two assignments of error before us: that the military judge erroneously concluded that subsection (h) of Article 120, abusive sexual contact, is a lesser included

offense of subsection (c), aggravated sexual assault, thereby violating the appellant's due process right to notice of the offense which he must defend against; and that the statutory scheme of Article 120 places a burden on the defense to disprove an element of the Government's case, specifically, that the victim of the offense was not substantially incapacitated.

We have considered the parties' briefs, the record of trial, and the case law relevant to Article 120. We address first the appellant's assignment of error that the scheme of Article 120 impermissibly placed a burden on him to disprove an element of the offense in order to establish an affirmative defense of consent or mistake of fact as to consent. To the extent that the appellant mounts a facial challenge to the constitutionality of the scheme of Article 120, his argument fails. *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 appears meritorious under certain circumstances. *See United States v. Prather*, __ M.J. __, No. 10-0345, 2011 CAAF LEXIS 95 (C.A.A.F. Feb. 8, 2011).

Here, however, the military judge's instructions, Record at 680-90 *passim*, to the members imposed no burden of either production or persuasion upon the appellant. The military judge instructed the members that consent and mistake of fact as to consent were defenses and that the Government bore the burden of proving beyond a reasonable doubt that there was no consent and that there was no mistake of fact as to consent. Because we presume, in the absence of evidence to the contrary, 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. *See United States v. Medina*, __ M.J. __, No. 10-0262, (C.A.A.F. Mar. 10, 2011).

Sexual Act Versus Sexual Contact

The specification of Charge I alleged that the appellant "did . . . engage in a sexual act . . . [by] placing his fingers or another object in the anus of [MA3 L] when [MA3 L] was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act because he was asleep." Charge Sheet. This specification

incorporated a term of art from Article 120(c) – "sexual act" – yet described activity that met the definition of "sexual contact," a term of art found in Article 120(h). The military judge brought this drafting error to the parties' attention after the close of evidence. Record at 637.[1]

Doubtless the specification could have been drafted better, and a better pretrial screening effort (including, for example, following the model specification at the preferral stage, taking special note of the statutory definitions; refinement of the charge by the pretrial investigating officer; correction of any error while preparing the Article 34 advice) could have detected and corrected the error before arraignment, but we cannot conclude that this specification was so defective as to mislead the appellant. It has, however, long been recognized that:

> [t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953).

Granted, the pleading error was noted only when the military judge was preparing his instructions to the members after presentation of evidence had concluded. The military judge correctly observed that the act described in the specification of Charge I – digital penetration of the victim's anus – does not meet the statutory definition of "sexual act." The military judge also correctly observed that the act described does meet the definition of "sexual contact." Record at 637-38. There was apparently no objection to the military judge's action in sending a charge of violating Article 120(h) to the members instead of a charge of violation Article 120(c).

We are satisfied that the appellant had the requisite due-process notice of the elements he was required to defend against at his trial. The specification alleged a specific act – insertion of something, fingers or an object, into the incapacitated or "incapable" victim's anus – that the appellant would have to defend against, and a review of the entire record of trial makes it clear that the defense team knew all along that

[1] We agree with the appellant that digital penetration of the anus is not a lesser included offense of penetration of a genital opening, and the military judge's characterization of the offense, Record at 637-38, is therefore erroneous. For the purposes of this appeal, however, that error need not detain us.

it was defending against digital or object penetration of the victim's anus, not against penetration of a genital opening. *E.g.*, Charge Sheet; Record at 286 (opening statement of defense counsel), 323, 371 (examination and cross-examination of victim); Prosecution Exhibit 4 (results of physical examination of victim); Record at 427 (cross-examination of on-call physician). A verdict with respect to that specification would foreclose another prosecution for the same set of operative facts. Additionally, the statutory language demonstrates a clear relationship between the two subsections of Article 120. *Compare* Art. 120(h)("any person . . . who engages in or causes sexual contact . . . if to do so would violate subsection (c) . . . had the contact been a sexual act") *with* Art. 120(c)(delineating the various theories of liability which are incorporated by reference into Art. 120[h]).

Conclusion

There being no error materially prejudicial to the substantial rights of the appellant, the findings and the approved sentence are affirmed. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court