UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHAD E. CARTWRIGHT
United States Air Force

ACM 37641

15 August 2013

Sentence adjudged 12 September 2009 by GCM convened at Aviano Air Base, Italy. Military Judge: William E. Orr, Jr.

Approved Sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Michael S. Kerr; Major Phillip T. Korman; Major Daniel E. Schoeni; and Lieutenant Colonel Frank R. Levi.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; Major John M. Sims; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of abusive sexual contact with an Airman while she was substantially incapacitated, in violation of Article 120, UCMJ, 10 U.S.C. § 920. He was acquitted of aggravated sexual assault of a different Airman. The adjudged sentence consisted of a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved 15 months of confinement and the remainder of the sentence as adjudged.

On appeal, the appellant asserts: (1) Article 120, UCMJ, is facially unconstitutional and the military judge's corrective instructions violated the separation of powers doctrine; (2) by incorporating uncharged theories of liability, the military judge's definition of "substantially incapacitated" violated the appellant's due process rights; (3) the statutory definition of "substantially incapacitated," as interpreted by the military judge, is void for vagueness; (4) the record is devoid of factually sufficient evidence to support the appellant's conviction. Finding no error prejudicial to the substantial rights of the appellate occurred, we affirm.

Background

On 11 October 2008, Airman First Class (A1C) AL and a male friend from her duty section (A1C DL) spent the night at the appellant's off-base house following a going-away party for a co-worker. They watched football, drank, and socialized. A1C AL ended up sleeping on a futon couch next to A1C DL, without incident.

The following evening, all three went out to dinner and then visited two bars where they had several alcoholic drinks. They returned to the appellant's off-base house, where they again watched football and the appellant had a few more drinks. While watching television, A1C AL and the appellant sat on a futon and A1C DL sat on a couch near the futon. A1C AL changed into shorts offered to her by the appellant and laid down on the futon to go to sleep while the appellant was sitting on the edge of the futon watching television.

The last thing A1C AL recalled before falling asleep was the appellant spilling his drink. She then awoke and realized something was happening. She became aware the appellant had his hands inside her shorts and underwear, touching her genitals though not penetrating her. She grabbed his arm and pulled his hand out. She asked him what he was doing, to which he responded "it was okay, it was okay" and then rolled away from her to the other side of the futon. He appeared drunk to A1C AL. Although she was frightened, A1C AL believed the incident was over and subsequently went back to sleep after moving away from the appellant on the futon.

A1C AL was awakened again. This time, she was lying on her back and the appellant was somewhat on top of her. Her shorts and underwear were pulled halfway down between her hips and knees and his head was near her crotch. She sat up, pushed him off and asked what he was doing. Again, the appellant stopped, answered "it's okay, it's okay," rolled over and appeared to go back to sleep.

About 15 minutes later, A1C AL got up, went into the bathroom, and texted a male Airman she was dating at the time. He did not respond, so A1C AL evaluated a number of different options, ranging from calling various friends or coworkers, to waking up A1C DL. She ultimately decided leaving was not logistically possible, so she returned

to the futon, turned on the television, and tried to stay awake. She positioned herself as far as possible from the appellant and stayed on top of the blankets.

The appellant rolled over and tried to put the blanket on top of her and slide his hands down her shorts. She quickly grabbed his arm, placed it around her stomach, and told him he could cuddle with her but she did not "want to do anything" with him. The appellant said something A1C AL could not understand and then appeared to go back to sleep. A1C AL sat up and continued to watch television until the appellant got up for the day.

After the appellant awoke and went to shower, A1C AL fell back asleep. Later, she and A1C DL got up and the appellant cooked them breakfast. The appellant was their ride so the two watched television while waiting for the appellant to drive them back to the base. A1C DL testified that the appellant did not appear impaired or hung over that morning.

After the appellant dropped them off at the base, A1C AL told A1C DL what had happened the previous night. A1C DL testified that A1C AL did not appear upset and she described the incident rather jokingly, laughingly referring to the appellant as "Mr. Clean" because he had a bald head. About a week later, A1C DL told the appellant what A1C AL was saying, and the appellant said he did not remember anything about the incident and was upset that no one had told him earlier. According to A1C DL, when he told A1C AL that the appellant had no memory of the incident, she said if he did these things while drunk and did not recall it, she was "cool with it" and didn't want to make things awkward between them. A1C DL relayed this to the appellant.

Approximately one week later, A1C AL's supervisor, who had learned about the incident from another source, asked A1C AL if what she heard—that the appellant had acted in the manner described above—was true. A1C AL confirmed that it was and eventually provided oral and written statements to agents of the Air Force Office of Special Investigations (OSI).

When questioned by OSI agents about the events of that evening under rights advisement, the appellant said he had been drinking heavily and did not remember anything from the time he fell asleep on the futon next to A1C AL until the next morning when he awoke. He also told the agents A1C DL had informed him that A1C AL had previously made similar allegations about inappropriate sexual advances by two other male airmen in her unit, though A1C DL denied making such a statement.

For his conduct, the appellant was charged with abusive sexual contact under Article 120(c)(2), UCMJ, by "engag[ing] in sexual contact, to wit: touching the genitalia of [A1C AL] with his fingers while she was substantially incapacitated." The Government's theory was that this contact occurred when A1C AL was asleep, while the

defense argued the evidence was insufficient to prove the appellant touched her genitals and that he was too intoxicated to form the intent needed to commit the offense. The panel convicted the appellant.

Constitutionality of Article 120, UCMJ

At trial, the defense moved to dismiss the Article 120, UCMJ, offense, arguing the statute created an unconstitutional burden shifting regime. Stating he was convinced Congress had not affirmatively shifted the burden of proof to the defendant, the military judge denied the motion, ruling:

> [I]f the affirmative defense of consent or mistake of fact as to consent is raised by some evidence, this Court intends to treat the defense of consent or mistake of fact as to consent like many other existing affirmative defenses. In essence, if the defense of mistake of fact as to consent is raised by some evidence, I intend to instruct the members that the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense does not exist.
>
> This Court is convinced that this approach will adequately protect the accused's rights under the Fifth and Sixth Amendments of the U.S. Constitution, without invoking the drastic remedy of dismissal.

Following the close of evidence, the military judge instructed the members in accordance with his written ruling, never shifting any burden to the defense, and making clear in numerous sections of his instructions on findings that the burden of proving beyond a reasonable doubt that the defense of consent or reasonable mistake of fact as to consent was on the prosecution.

As part of his first assignment of error, the appellant argues Article 120(c)(2), 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). To date, no appellate court has found Article 120, UCMJ, to be facially unconstitutional and, in light of the appellant's heavy burden, we decline to do so here. *See United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011); *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), *cert. denied*, 131 S. Ct. 121 (2010); *United States v. Prather*, ACM 37329, unpub. op. at 3-5 (A.F. Ct. Crim. App. 25 January 2010), *aff'd*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Garcia*, 69 M.J. 658 (C.G. Ct. Crim. App. 2010), *aff'd*, 70 M.J. 87 (C.A.A.F. 2011); *United States v. Crotchett*, 67 M.J. 713 (N.M. Ct. Crim. App. 2009), *pet. denied*, 68 M.J. 222 (C.A.A.F.

2009); *United States v. Everhart*, NMCCA 201000065, (N.M. Ct. Crim. App. 24 March 2011) (unpub. op.); *United States v. Tiller*, Army 20080438 (Army Ct. Crim. App. 12 April 2011) (unpub. op.).

The appellant next argues the military judge exceeded his constitutional authority when he failed to follow the language of Article 120, UCMJ, in his instructions to the members, thus violating the separation of powers doctrine and usurping Congress' legislative function.

Determining whether a military judge properly instructed the jury 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) (citing *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "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*.

Here, the military judge did not instruct the panel in a manner consistent with Article 120, UCMJ. Instead, he advised the members that consent and mistake of fact were defenses to the charge of abusive sexual contact, and the Government had the burden of proving beyond a reasonable doubt that those defenses did not exist. In *Medina*, our superior court held "in the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute." *Medina*, 69 M.J. at 465.

As in *Medina*, the military judge's instructions placed the burden on the Government to prove a lack of consent and mistake of fact beyond a reasonable doubt. This instruction clearly and correctly conveyed to the members the burden/instructional regime ultimately upheld by our superior court in that case and afforded the appellant the protections required by the Constitution and governing case law. Unlike in *Medina*, the trial judge in the case at bar articulated his rationale for deviating from the statutory scheme, specifically referencing the protection of the appellant's rights under the Fifth and Sixth Amendments[1] of the U.S. Constitution. The variance from the language of Article 120, UCMJ, was entirely in favor of the appellant, and the military judge clearly explained his rationale for deviating from Article 120's statutory scheme based on constitutional grounds. We therefore find no error. In the absence of any discernible prejudice to the appellant, we decline to reach the separation of powers argument.

[1] U.S. CONST. amend. V and VI.

Substantial Incapacitation

The appellant was charged with engaging in abusive sexual contact with A1C AL when she was "substantially incapacitated," in violation of Article 120(h), UCMJ. The offense of abusive sexual contact piggybacks the definition of aggravated sexual assault found in Article 120(c)(2), UCMJ. *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012). As such, the elements of both offenses are identical except that abusive sexual contact requires "sexual contact" instead of a "sexual act." *Id.* When those two statutes are considered in conjunction with each other, abusive sexual contact is committed when a person "engages in [sexual contact[2]] with another person of any age if that other person is substantially incapacitated or substantially incapable of—

> (A) appraising the nature of the sexual [contact];
> (B) declining participation in the sexual [contact]; or
> (C) communicating unwillingness to engage in the sexual [contact]."

At trial, the defense requested a specifically crafted instruction defining "substantially incapacitated" as:

> A degree of mental impairment due to alcohol, drugs, or other circumstances, which has left a person unable to have awareness of themselves, their mental processes and their surroundings and unable to respond in any way, to include verbally or physically, to external stimuli.

The military judge denied that request and instead used the following instruction:

> That level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.[3]

[2] In pertinent part, "sexual contact" is defined as: "the intentional touching, either directly or through the clothing, of the genitalia … of another person, … with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(2), UCMJ, 10 U.S.C. § 920(t)(2).

[3] This same language is included in the current version of the Benchbook. It appears to be largely derived from the level of mental impairment recognized in the area of consent. In defining consent, Article 120(t)(4), UCMJ, states a person cannot consent to sexual activity if the person is substantially incapable of (1) appraising the nature of the sexual conduct due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance or otherwise; (2) physically declining participation in the sexual conduct; or (3) physically communicating unwillingness to engage in the sexual conduct.

1. Uncharged theories of liability

The appellant contends Article 120, UCMJ, creates four separate and distinct theories of liability, namely where the victim is (1) substantially incapacitated; or (2) substantially incapable of appraising the nature of the sexual act; or (3) substantially incapable of declining participation in the sexual act; or (4) substantially incapable of communicating unwillingness to engage in the sexual act.

As he did at trial, the appellant argues this instruction is erroneous because it is overly broad, encompassing more than the charged offense of "substantially incapacitated" by adding uncharged theories of liability for "substantial incapability." The appellant specifically asserts that Congress intended for prosecutors to select and prove one of four distinct theories of liability. Therefore, his argument continues, the definition of substantial incapacitation given to the members impermissibly homogenized those four separate theories into essentially a single definition, violating his due process rights by contravening Congressional intent and by denying him adequate notice of the crimes for which he stood trial.

An allegation that the members were improperly instructed is an issue we review de novo. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). While the military judge has a duty to provide an accurate, complete, and intelligible statement of the law, the judge has wide discretion in choosing the instructions to give. *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012). The propriety of an instruction is reviewed by the appellate courts reading each instruction in the context of the entire charge to determine whether the instruction completed its purpose. *Id.*; *see also Prather*, 69 M.J. at 344. When instructional error as to the elements of a crime is discovered, the error must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States*, 527 U.S. 1, 13-15 (1999)). 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 accused's conviction. *Id.*

We note that our superior court has found there may only be an "abstract distinction" between a victim who is "substantially incapacitated" and one who is "substantially incapable." *Prather*, 69 M.J. at 343. Here, we similarly find no meaningful legal distinction between those terms. However, even if it was error for the military judge to give the Benchbook instruction in this regard, we find that error was harmless beyond a reasonable doubt. Nothing about trial defense counsel's thorough cross examination of A1C AL—or closing argument—suggests a strategy that ever had anything to do with A1C AL's mental state at the time of the charged offense. Rather, trial defense counsel focused on: the fact that A1C AL's actions after the unlawful touching appeared inconsistent with those of someone who had been victimized; that A1C AL—a grown woman with a degree in criminal justice who knew the importance of

using specific language in criminal matters—never used anatomically accurate words in her statement to the OSI to describe where the appellant touched her; that the most plausible explanation of why she didn't use such words was that the appellant never actually touched her on her genitals at all; and that even if he did, he was so intoxicated that he couldn't have had the requisite intent to be guilty of the charged offense. This defense approach would not have changed if the military judge had given the defense-requested instruction. Under these circumstances, we find beyond a reasonable doubt that any instructional error did not contribute to the appellant's conviction.

Furthermore, prior to trial, the appellant was on fair notice that his Article 120, UCMJ, charge required him to defend against the definition ultimately given by the military judge. That definition was contained in the Benchbook prior to his trial and the military judge advised the defense he intended to give that instruction in a pre-trial session. Upon learning that, the defense did not state they were surprised or unprepared to defend against this possibility, nor did the defense request additional time to prepare. The appellant clearly knew and understood the legal theory on which he was prosecuted: that he touched A1C AL on her genitals and that he did so while she was substantially incapacitated—while she was asleep. His trial defense counsel mounted a spirited and thorough attack on whether any touching of A1C AL's genitals actually occurred, and whether—if so—the appellant could have formulated the requisite criminal mens rea in his intoxicated state. Under these circumstances, the appellant's due process rights were not violated because he was on notice of what he needed to defend against throughout his court-martial. *Wilkins*, 71 M.J. at 414.

2. Ambiguous language

In his instructions, the military judge included the phrase "or otherwise unable to make or communicate competent decisions" as part of the definition of "substantially incapacitated." The appellant argues this phrase is ambiguous and thus makes the definition "void for vagueness," as applied to his case.

We note this phrase is not found in Article 120, UCMJ, which only uses the phrase "competent" in explaining the affirmative defense of consent relative to a "competent person." The military judge properly instructed the panel on the issue of consent, namely that "consent means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person." He also informed the panel members that they must find beyond a reasonable doubt that A1C AL did not consent. Absent evidence to the contrary, we presume that members understand and follow the military judge's instructions. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001). In doing so and then finding the appellant guilty, the members were convinced beyond a reasonable doubt that A1C AL did not consent, because she was not a "competent person who freely agreed" to the sexual activity since she was asleep when it occurred. Since the military judge defined consent in terms of a "competent person" instead of a "competent

decision," and the panel rejected the notion that A1C AL consented, we are convinced the panel did not rely on any improper connotation from the words "competent decisions" in the definition of "substantially incapacitated." Thus, assuming without deciding that the use of the phrase "competent decisions" by the military judge was error, we find it harmless beyond a reasonable doubt.

The appellant's "void for vagueness" argument similarly fails. He is correct that a basic principle of due process requires "fair notice" that an act is subject to criminal sanction and about the standard that is applicable to the forbidden conduct. *United States v. Vaughn*, 58 M.J. 29, 31 (C.A.A.F. 2003). A law is "void for vagueness" if "one could not *reasonably* understand that his contemplated conduct is proscribed." *Id*. (emphasis added). The sufficiency of statutory notice is determined in the light of the conduct with which a defendant is charged. *Parker v. Levy*, 417 U.S. 733, 757 (1974). "Criminal statutes are presumed to be constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise." *United States v. Mansfield*, 33 M.J. 972, 989 (A.F.C.M.R. 1991), *aff'd*, 33 M.J. 972 (C.M.A. 1993).

Given the relationship between the two concepts, we find no meaningful distinction between a "competent" person and a person "able to make or communicate competent decisions" and thus find the appellant was on fair notice that engaging in a sexual act with someone who is "unable to make or communicate a competent decision" subjected him to criminal sanction.

Factual Sufficiency

The appellant argues the evidence was factually insufficient to support his conviction. The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The appellant suggests the evidence was factually insufficient to support his conviction as it was based primarily on inconsistencies between A1C AL's and A1C DL's testimony about the time the appellant drove them back to the base, A1C AL's actions at the appellant's home following the sexual contact, her failure to use the words "genitals" or "vagina" when describing the incident to the OSI agents who took her statement, and her written statement which said simply that the appellant put his hand down her pants. Pointing out all the things she could have done – such as calling someone, locking herself in the bathroom, shouting or waking up A1C DL, walking to a bar down the street, calling a cab, immediately contacting law enforcement, confronting the appellant, and not staying on or returning to the futon after the first unlawful touching – the appellant argues her failure to do so "defies logic" and is proof of his innocence. We disagree.

A1C AL testified she was 100 percent certain that when she woke up and discovered the appellant's hand down her shorts he was touching her genitals; that in the context of her interview with OSI agents, it was "implied" that the appellant touched her genitals; that she was as uncomfortable when discussing these matters with the OSI agents as she was when discussing them in open court; that these matters were hard to talk about because they were embarrassing and because "[y]ou don't think it's going to happen to you. Not from someone you work with." We also find the nature of the appellant's repeated physical overtures directed at A1C AL sufficient to prove his actions were undertaken in furtherance of his intent to arouse or gratify his own and or A1C AL's sexual desire. On balance and with due regard for the fact that we did not observe the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).s Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).