UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman STEPHEN A. PRATHER
United States Air Force

ACM 37329

25 January 2010

Sentence adjudged 16 July 2008 by GCM convened at Travis Air Force Base, California. Military Judge: Thomas Dukes.

Approved sentence: Dishonorable discharge, confinement for 2 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major David P. Bennett (argued), Major Shannon A. Bennett, Major Michael A. Burnat, Major Tiffany M. Wagner, and Major Lance J. Wood.

Appellate Counsel for the United States: Captain Naomi N. Porterfield (argued), Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, THOMPSON, and GREGORY
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, a panel of officer members sitting as a general court-martial convicted the appellant of one specification of aggravated sexual assault and one specification of adultery, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. He was sentenced to a dishonorable discharge, two years and six months of confinement, forfeiture of all pay and allowances, and reduction to E-1.[1]

[1] This Court heard arguments in this case as part of the Project Outreach Program at the University of Connecticut School of Law.

The appellant asserts two errors: (1) the requirement that an accused prove consent on the part of an alleged victim in order to raise an affirmative defense to a charge under Article 120, UCMJ, creates a burden shift that violated the appellant's right to due process under the Fifth Amendment;[2] and (2) the evidence is legally and factually insufficient to prove beyond a reasonable doubt that the appellant had sexual intercourse with Ms. SH who was substantially incapacitated.[3] We disagree.

Background

The appellant was a 23-year-old airman assigned to Travis Air Force Base, California. On 30 October 2007, he and his wife had a party at their house. The appellant invited Ms. SH to the party. Prior to arriving at the party, Ms. SH decided she would spend the night on the appellant's couch because she planned to drink.

During the party, the appellant, Ms. SH, and others played drinking games. At some point that night, before all of the guests departed, Ms. SH made her way to the couch. There was conflicting testimony about exactly how much Ms. SH had to drink and how intoxicated she was before and once she was on the couch. During the early morning hours, the other guests departed and the appellant and his wife went upstairs to their bedroom.

The appellant came back downstairs at some point during the night. He testified that Ms. SH was awake, talked to him, kissed him, and engaged in consensual sex with him. Ms. SH testified that she passed out on the couch, woke up to find the appellant on top of her, passed out again, woke up the next morning to go to work, found semen while getting ready, and later called her sister to tell her that something had happened.

Prior to the incident in question, Article 120, UCMJ, was substantially revised. At trial, after all the findings evidence was presented and before deliberations, the military judge gave the panel members instructions on the law. The instructions included those for the affirmative defense of consent and the affirmative defense of mistake of fact as to consent. The military judge used the new language from the statute to craft his instructions for the members. The defense counsel objected to the military judge's two instructions and requested alternate instructions based on Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 3-45-5 (Interim Changes since Ch-2, 15 Jan 2008).

The *Military Judges' Benchbook* is the standard guide used by trial judges in all branches of the military, but trial judges are not required to follow it. *United States v.*

[2] U.S. CONST. amend. V.
[3] The second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Greszler, 56 M.J. 745, 746 (A.F. Ct. Crim. App. 2002). The *Military Judges' Benchbook* handled this change to Article 120, UCMJ, by advising trial judges,

> Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent [and mistake of fact as to consent are] treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent [or mistake of fact as to consent] did not exist.

D.A. Pam. 27-9, ¶ 3-45-5, Note 9.

The military judge overruled the defense counsel's objection and gave the instructions using the wording of the statute rather than the guidance in the *Military Judges' Benchbook.*

Challenges to Article 120, UCMJ

We review de novo whether an article of the Uniform Code of Military Justice is constitutional as a question of law. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). Whether a jury was properly instructed is also a question of law we review de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

The appellant has made both "facial" and "as applied" challenges to the constitutionality of Article 120, UCMJ. We will first address the facial challenge. As both the Supreme Court and our superior court have noted, facial challenges should be raised infrequently. *Sabri v. United States*, 541 U.S. 600, 608 (2004); *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004). To prevail on a facial challenge, the appellant must establish that no set of circumstances exists under which this provision in Article 120, UCMJ, would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("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.").

The elements of the revised Article 120(c), UCMJ, Aggravated Sexual Assault, are: "[1] That the accused engaged in a sexual act with another person, who is of any age; and [2] That the other person was substantially incapacitated." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45.b.(3)(c)(i), (ii) (2008 ed.).

One major change evident in the revised Article 120, UCMJ, is that lack of consent is no longer an element of the offense. Instead, the statute now provides the accused with the opportunity to raise the affirmative defenses of consent and mistake of

fact as to consent. *MCM*, Part IV, ¶ 45.a.(r). If the accused raises either or both of these defenses, he first has the burden of proving the affirmative defense by a preponderance of the evidence. Once he has done this, the government then has the burden of proving lack of consent beyond a reasonable doubt. However, "notwithstanding the advancement of any particular affirmative defense, the [g]overment always bears the burden in a prosecution under this subsection of proving beyond a reasonable doubt that the sexual act occurred, and that the victim was [incapacitated] . . . ." *United States v. Crotchett*, 67 M.J. 713, 716 (N.M. Ct. Crim. App. 2009), *review denied*, 68 M.J. 222 (C.A.A.F. 2009).

The crux of the appellant's argument is that "substantially incapacitated" and "consent" are the same so by requiring the appellant to prove consent, the burden has been shifted to him to disprove an element of the offense. We do not agree.

The appellant argues that "[e]ven though the word 'consent' is nowhere to be found in the elements of Article 120(c), [UCMJ,] lack of consent is still a core element of the offense under this charge, and the burden to prove this element belongs with the government."

In a similar case, our sister court held that "force" and "consent" are related but are not "inextricably intertwined." *United States v. Neal*, 67 M.J. 675, 679 (N.M. Ct. Crim. App. 2009). We likewise find that although "substantially incapacitated" and "consent" are related, they are not "inextricably intertwined." Some evidence may be relevant to both, but they need not cause or flow from each other.

The government has the burden of proving the victim was "substantially incapacitated." In doing so, the government may or may not present evidence relating to consent. If the accused does raise the affirmative defense of consent or mistake of fact as to consent, the evidence he presents need not deal with the allegation that the victim was "substantially incapacitated." Despite the appellant's argument to the contrary, the evidence necessary to prove "substantially incapacitated" and "consent" are not necessarily the same evidence. In determining the constitutionality of this Article, we must look to whether there are any set of facts and circumstances that would allow for a constitutional interpretation. *Salerno*, 481 U.S. at 745.

In order to violate the Due Process Clause, the article must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Wright*, 53 M.J. at 481 (citation omitted). Due process is not violated simply because proof of an affirmative defense may tend to negate an element of a crime. *Martin v. Ohio*, 480 U.S. 228, 234-36 (1987). The burden of proving the elements beyond a reasonable doubt always remains on the government.

In two cases, *Martin v. Ohio*, 480 U.S. 228 (1987), and *Patterson v. New York*, 432 U.S. 197 (1977), the Supreme Court held that affirmative defenses are separate issues

that do not require an accused to disprove any element of the offense charged. The Court was "not moved by assertions that the elements of [the offense] and [the affirmative defense] overlap in the sense that evidence to prove the latter will often tend to negate the former." *Martin*, 480 U.S. at 234.

The two elements of Article 120(c)(2)(B), UCMJ, are distinct from the affirmative defenses of consent and mistake of fact as to consent. On its face, Article 120, UCMJ, does not deprive an accused of his right to due process under the Fifth Amendment by unconstitutionally assigning burdens.

Having found that Article 120(c), UCMJ, is not facially unconstitutional, we shift our focus to its application to the facts in this case. When drafting his instructions to the members, the military judge looked directly to the wording in the revised Article. The appellant points to the sample instructions in the *Military Judges' Benchbook* to show that the military judge's instructions violated his due process rights. However, as the *Military Judges' Benchbook* itself states, it is not to be used as legal authority. D.A. Pam. 27-9, Foreword. ("Statutes, Executive Orders, and appellate decisions are the principal sources for this Benchbook, and such publications, rather than this Benchbook, should be cited as legal authority.").

The appellant argues that the military judge's instructions are similar to those used in *Russell v. United States*, 698 A.2d 1007 (D.C. App. 1997), which were later found to violate the appellant's due process rights. However, we read *Russell* to indicate that the problem with the military judge's instructions was that they failed to instruct the jury that evidence relating to consent is relevant to the question of force – an element of the offense charged. *Russell*, 698 A.2d at 1015.

Unlike in *Russell*, here the military judge properly instructed the members: "You may, however, still consider any evidence presented on the issue of consent if you find such evidence is relevant to your consideration of whether the prosecution has proven the elements of the offense beyond a reasonable doubt."

The appellant's argument that the military judge's instructions in this case violated his due process rights fails. The instructions are not like those in *Russell*; rather, they allow for consideration of evidence relating to consent, if the members find it relevant. Further, although the military judge deviated from the standard instruction in the *Military Judges' Benchbook*, the deviation was to ensure the instructions mirrored the statute. Having found the statute constitutional, we also find the military judge's instructions to be constitutional.

The government's primary evidence on the required element of incapacitation was Ms. SH's own testimony. In addition, the government presented evidence from two airmen who were at the party with the appellant and Ms. SH. Each described the amount

of alcohol Ms. SH drank at the party and her apparent intoxication level. Following the presentation of this evidence, the appellant testified, thereby raising the affirmative defense of consent or mistake of fact as to consent. The government did not introduce any rebuttal evidence.

The appellant argues that due to the general verdict in this case, "there is no way of knowing whether the affirmative defense was raised successfully or whether the government overcame the burden to disprove it beyond a reasonable doubt." Therefore, it follows that this Court is unable to conduct a proper Article 66(c), UCMJ, 10 U.S.C. § 866(c), review. With minor exceptions, a "court-martial 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. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997). Despite the nature of general verdicts, this Court remains capable of fulfilling our responsibility under Article 66(c), UCMJ.

For all of the reasons explained above, we find that Article 120, UCMJ, does not violate the appellant's right to due process.

Sufficiency of the Evidence

In accordance with Article 66(c), UCMJ, we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The appellant challenges the legal and factual sufficiency of the evidence to support his conviction of aggravated sexual assault. He specifically attacks the lack of evidence used to prove Ms. SH was substantially incapacitated. He asserts that while she may have been under the influence of alcohol, her behavior at the party and her actions once she woke up for work the next morning prove that she was not substantially

incapacitated. However, there was evidence that Ms. SH drank a significant quantity of alcohol over short time period that night, her speech was slurred, and the appellant even acknowledged that she was too intoxicated to drive home. We have carefully considered the evidence with particular attention to the matters raised by the appellant and are convinced beyond a reasonable doubt that the appellant is guilty of aggravated sexual assault.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court