UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER M. SEARS
United States Air Force

ACM 35922

16 February 2006

Sentence adjudged 12 February 2004 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major John N. Page III.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant of one specification of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted two assignments of error: (1) whether the military judge erred in her instructions on mistake of fact, and (2) whether the military judge erred in denying a defense challenge for cause. Finding no prejudicial error, we affirm.

Instructions

We review the judge's decision to give or not give a specific instruction, as well as the substance of any instructions given, "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence. The question of whether [the members were] properly instructed [is] a question of law, and thus, our review is *de novo*." *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (quoting *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)).

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." Rule for Courts-Martial 920(f). Plain error is an error that is plain or obvious and materially prejudices the substantial rights of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

In the present case, the evidence raised the issue of mistake of fact as to consent. A mistake of fact as to a victim's consent to an indecent assault must be both honest and reasonable. *United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997). The evidence showed that during the events that formed the basis for the charge and specification, the appellant was under the influence of alcohol. The military judge sought to instruct the members on the significance of the appellant's intoxication to the reasonableness of his alleged mistake of fact as to the victim's consent. She advised the panel, that in determining whether a mistake of fact occurred, they "should consider [the appellant's] education, experience, prior dealings with [the victim], along with the level of his intoxication." She went on to instruct:

> You need to realize in that regard that when we're talking about intoxication, when we talk about voluntary intoxication and how that might affect one, you have to look at the extent of the intoxication as well. So you should consider the evidence as to that. It's voluntary intoxication. In that regard, the law does recognize that a person's ordinary thought process may be materially affected when he or she is under the influence of intoxicants. So you can consider that evidence but when you talk about a reasonable person in this position, it should be what a reasonably sober person would. In other words, you can't be intoxicated and, in essence—you can consider it, but it has to be based on what a reasonable person with that age, education, and experience who would be sober would decide in the situation. That's basically what I needed to add to that. So you can consider that and you should consider all those facts and intoxication and

> how that may have played into that because a person can still be drunk and yet still be aware of what their actions are and the probable results. There was some issue as to drinking. It may have been as to both [the victim] and you can consider it regarding her as well, her state of mind, as well as the [appellant]. So you can consider all those factors.

The trial defense counsel did not object to the military judge's instructions, although the pertinent instruction from the *Military Judge's Benchbook* reads as follows:

> There has been some evidence concerning the accused's state of intoxication at the time of the alleged offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

Department of the Army Pamphlet 27-9, *Military Judge's Benchbook*, ¶ 5-11-2 (15 Sep 2002).

It is clear that the military judge did not give the *Benchbook* instruction verbatim. The appellant contends that the instruction actually supplied by the military judge was confusing, focusing his attention on the phrase "in other words, you can't be intoxicated." The appellant contends that this phrase might have led a member to conclude that if the appellant was intoxicated, then the defense of mistake of fact as to consent was unavailable to him.

It is always preferable to give instructions verbatim from the *Benchbook* whenever possible. Failure to do so invites confusion and error. In this case, the judge's instruction appeared inconsistent in that it advised the panel that they could consider the appellant's intoxication on the issue of mistake of fact while at the same time stating that they could not consider it as to the reasonableness of any such mistake. On the other hand, to the extent that the panel may have been misled by the instruction, the result would have been that they considered, rather than ignored, the appellant's intoxication. Reading the instruction as a whole, we conclude that any error therein would have worked to the benefit of the appellant; therefore, such error did not materially prejudice the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). We hold that there is no plain error in the military judge's instruction. *See Powell*, 49 M.J. at 463.

Challenge for Cause

We resolve the remaining assignment of error adversely to the appellant. The military judge did not abuse her discretion by denying the challenge for cause against the wing commander's executive officer. *See United States v. Richardson*, 61 M.J. 113, 118-19 (C.A.A.F. 2005); *United States v. Napoleon*, 46 M.J. 279, 282-83 (C.A.A.F. 1997).

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court