UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRADLEY J. OWENS
United States Air Force

ACM 38096

28 August 2013

Sentence adjudged 12 November 2011 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Vance H. Spath.

Approved Sentence: Dishonorable discharge, confinement for 1 year, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

HARNEY, SOYBEL, and MITCHELL
Appellate Military Judges

PER CURIAM:

The appellant was charged with one specification of rape under Article 120, UCMJ, 10 U.S.C. § 920.[1] Contrary to his plea, the appellant was convicted by a panel of officer members of the lesser included offense of aggravated sexual assault under Article 120, UCMJ. The members sentenced the appellant to a dishonorable discharge, confinement for 1 year, and reduction to E-1. The convening authority approved the sentence as adjudged.

[1] *See Manual for Courts-Martial, United States*, Part IV, ¶ 45.a.(a) (2008 ed.).

Background

The appellant was friends with Army Specialist (SPC) KG and her boyfriend at Osan Air Base, Republic of Korea. In 2011, soon after SPC KG's boyfriend returned to his permanent assignment in Alaska, SPC KG and the appellant began to socialize. One evening, they began to engage in various types of sexual activity of escalating intimacy. At different times, SPC KG stopped the activity saying she should not continue because she had a boyfriend. But each time, the sexual activity would resume. SPC KG told the appellant that during this escalating sexual activity she almost climaxed. Eventually, the appellant engaged in sexual intercourse with SPC KG.

In his written statement given to the Air Force Office of Special Investigations (OSI) agent investigating the allegations, the appellant confirmed the intercourse. He even noted that SPC KG gave him an awkward look and began to resist the intercourse. He stated he continued to have sex with her in an attempt to persuade her, but after a few more thrusts, SPC KG pushed against him and he stopped.

Although minimizing the extent of the sexual encounter, the appellant told SPC KG's boyfriend about their encounter before SPC KG was able to. SPC KG then reported the allegation of rape. Her story was factually similar to the appellant's, but painted a picture of her being a less willing participant. She described the appellant as being more aggressive than he described his behavior in his written statement. She testified she said no multiple times during the encounter and pushed the appellant away. She also said she was upset with the appellant for telling her boyfriend about their encounter because she wanted to be the one to tell him.

During a discussion of the findings instructions, the trial judge notified trial and defense counsel that he would instruct on consent, explaining, "It's not a defense, but it's something the members should consider." During the actual instructions, the trial judge concluded that evidence raised the issue of whether SPC KG consented to the sexual act. He went on to note that the Government had the burden of proof and evidence of consent was "relevant and must be considered" by the members. When the members asked for clarification on some of the instructions, the trial judge referred back to his "mistake of fact and consent instructions."

The appellant raises two issues on appeal: First, that the OSI agent's testimony at trial that the appellant was honest during his interview was inadmissible human lie detector testimony. Second, that the judge erred when he failed to instruct the jury that consent is a defense to rape and aggravated sexual assault. Because we agree and set aside the findings and sentence based on the second issue, there is no need to address the first issue.

Instructions Regarding Consent as a Defense

The propriety of a trial judge's instructions is a question of law, which we review de novo. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011); *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001). The error in not giving the consent instruction in this case is constitutional in nature. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). The standard for testing an instructional error of this type is whether it was "harmless beyond a reasonable doubt." *Id*.; *Medina*, 69 M.J. at 465.

Required instructions, such as those regarding affirmative defenses or elements to lesser included offenses, must be given. *United States v. Stanley*, 71 M.J. 60, 63 (C.A.A.F. 2012) (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)). *See also* Rule for Courts-Martial 920(e). These instructions must be given to the military panel acting as the fact finder whenever "some evidence, without regard to its source or credibility has been admitted upon which members might rely." *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). Any affirmative waiver of a required instruction must be in the record; failure to object to erroneous instructions does not waive the issue or prevent appellate review. *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999).

The version of Article 120, UCMJ, applicable during the charged time frame lists consent and mistake of fact as to consent as an affirmative defense available to the appellant. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 45.a.(r) (2008 ed.). Article 120, UCMJ, further provides that if an accused raises this affirmative defense, he must prove it by a preponderance of the evidence, which then places the burden on the Government to prove the defense did not exist. *See MCM*, Part IV, ¶ 45.a.(t)(16). This burden shifting was found unconstitutional under *United States v. Prather*, 69 M.J. 338 (2011). The Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* [hereinafter "Benchbook"], ¶ 3-45-5 (1 January 2010), incorporates the holding in *Prather* and was used by the military judge when instructing the members in this case.

The *Benchbook* instruction concerning consent as it relates to the offense for which the appellant was convicted (aggravated sexual assault under Article 120, UCMJ), is divided into two sections. *Benchbook*, ¶ 3-45-5, Note 9. The military judge provided the members a slightly modified version of the first section when he instructed: "The evidence has raised the issue of whether [SPC KG] consented to the sexual act concerning the lesser included offense of aggravated sexual assault. Evidence of consent is relevant and must be considered by you in determining whether the prosecution has proven the elements of the lesser included offense beyond a reasonable doubt."[2]

[2] The original language in the *Benchbook* reads: "The evidence has raised the issue of whether (state the name of the alleged victim) consented to the sexual act(s) concerning the offense(s) of aggravated sexual assault, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____)." Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-45-5, Note 9 (1 January 2010).

The *Benchbook* provides further instructions as to "consent" and explains how it applies to aggravated sexual assault:

> When consent has been raised, include the following instruction:
>
> . . . .
>
> Consent is a defense to (that) (those) charged offense(s). "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. (A person cannot consent to sexual activity if that person is
>
> . . . .
>
> (substantially incapable of physically declining participation in the sexual conduct at issue)
>
> (substantially incapable of physically communicating unwillingness to engage in the sexual conduct at issue).)
>
> The prosecution has the burden to prove beyond a reasonable doubt that consent did not exist. Therefore, to find the accused guilty of the offense(s) of aggravated sexual assault, as alleged in (The) Specification(s) (_____) of (The) (Additional) Charge (_____), you must be convinced beyond a reasonable doubt that, at the time of the sexual act(s) alleged, (state the name of the alleged victim) did not consent.

Benchbook, ¶ 3-45-5, Note 9.

The military judge did not provide this or any similar instruction for either the rape specification or the lesser included offense of aggravated sexual assault. The only instruction he gave for both was the first section, which basically instructed the members that consent was relevant and must be considered when deciding whether the Government's burden of proof was met. This was apparently purposely done because the military judge paradoxically stated he believed consent was "not a defense but it's something the members should consider."

Informative and correct instructions are essential to correctly educate the members on the law and how the law should be applied to the evidence in the case they are deciding. This is especially true regarding findings instructions that discuss affirmative defenses. *See United States v. Neal*, 68 M.J. 289, 299 (C.A.A.F. 2010). Instructions on an affirmative defense must "'convey to the jury that all of the evidence, including the evidence going to [the affirmative defense], must be considered in deciding whether there was reasonable doubt . . . .'" *Id*. (citing *Martin v. Ohio*, 480 U.S. 228, 232-36 (1987) (alterations in original)). The *Neal* decision stressed that instructions to the members must reflect "sensitivity to th[e] dependent relationship between the two [] factual issues." *Id.* (alterations in the original).

It has long been held that "in the absence of instruction as to the law by the judge, court members cannot be presumed to know a technical legal rule." *United States v. Hendon*, 6 M.J. 171, 174 (C.M.A. 1979). Instructions may not be cursory, but must be sufficiently explanatory to provide guideposts for "informed deliberation" by the members. *United States v. Anderson*, 32 C.M.R. 258, 259 (C.M.A. 1962); *United States v. Dearing*, 63 M.J. 478, 479 (C.A.A.F. 2006). "Doubtful instructions must be resolved in favor of the accused." *United States v. Tackett*, 41 C.M.R. 85, 87 (C.M.A. 1969).

In the instant case, the instructions did not provide the correct instructions or enough guidance to enable the members to conduct an "informed deliberation." Clearly, consent was an issue in the case; the judge and the attorneys recognized that. The defense made consent, along with mistake of fact as to consent, their two alternative defenses. The defense primarily argued that there was consent, but SPC KG lied because she was worried about her boyfriend finding out about her infidelity. The defense also argued that the appellant reasonably, but mistakenly, believed SPC KG consented based on the escalating sexual activity. The defense further argued that the appellant's seemingly inculpatory statements to SPC KG as well as his written admissions were based, respectively, on his guilt over cheating with his friend's girlfriend, and the OSI agent incorrectly defining rape during the interview.

Although the members were instructed that consent was relevant and must be considered when determining whether the Government had proven all of the elements of the lesser included offense, they were not instructed about the specific relevance. While the trial judge also instructed the members that the appellant would not be guilty of the lesser included offense if he made a reasonable mistake that SPC KG consented to the sexual act alleged, he did not instruct them on the legal definition of the word consent or that the prosecution had the burden to prove beyond a reasonable doubt that consent did not exist. The members were not even told that consent was a defense.

At one point during deliberations, the members asked the judge a question concerning the issue of consent. They asked, "Can there be a Rape in mid-penetration? –

i.e. After some period of time of penetration (30 [seconds]?) she said no/resists [and] he did not stop . . . is that equal to saying no/resisting prior to the [first] penetration?"

The trial judge answered by rephrasing the question back to the members: "'Can there be a rape mid-penetration?' The legal answer to that is yes, depending on the facts." He then reiterated that the Government had the burden to prove the elements beyond a reasonable doubt: the accused committed the sexual act by force (for the rape) or by bodily harm (for the lesser included offense). He also told them that if they believed the act started consensually or with an honest and reasonable mistake of fact they would have to continue with that analysis through the entire event. He explained, "It would be a significant factor for the consent issue that I instructed you on, and for the mistake of fact defense that I instructed you on." The members indicated they understood the explanation and returned to deliberations.

Obviously the issue of consent was significant enough for the members to ask for further guidance. We cannot say beyond a reasonable doubt that the missing instruction on consent did not contribute to the verdict reached by the jury. Clearly, the instruction regarding consent was a necessary guidepost for an informed deliberation by the members. Without it we cannot be confident the panel applied the proper standard which would have placed the burden on the Government to prove that consent did not exist. All that the members knew about "consent" was that it was somehow "relevant" and a "significant factor" but they were not informed of what the legal definition was or how, why, or in what manner it would be relevant. We are left to guess what legal standard the members used when deciding how the issue of consent influenced their decision to find the appellant guilty. Since we must resolve any doubt as to how the members may have interpreted the instructions in favor of the appellant, we are compelled to find this constitutional error was not harmless beyond a reasonable doubt.

Conclusion

Accordingly, the findings and sentence are set aside. A rehearing is authorized.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court