UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
J.R. PERLAK, M.D. MODZELEWSKI, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SHELDON J. HOWARD
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 201200074
GENERAL COURT-MARTIAL

Sentence Adjudged: 27 October 2011.
Military Judge: LtCol Charles Hale, USMC.
Convening Authority: Commanding General, Training Command, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol J. Gruter, USMC; **Addendum:** Maj C.M. Burnett, USMC.
For Appellant: LT Ryan Mattina, JAGC, USN.
For Appellee: Capt Samuel Moore, USMC.

31 January 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault, abusive sexual contact, wrongful sexual contact, and adultery in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The convening authority (CA) approved the adjudged sentence of three years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The CA then suspended the adjudged

forfeitures and waived for six months the automatic forfeitures as an act of clemency.[1]

The appellant raises eight assignments of error; 1) that the convictions are an unreasonable multiplication of charges, 2) that the military judge abused his discretion in denying a continuance request on the eve of trial, 3) that the military judge erred in instructing the members with regard to substantial incapacitation, 4) that Charge II is defective because it is charged in the disjunctive; 5) that the military judge erred in admitting a statement made by SSgt Howard because it was uncorroborated, 6) that the military judge erred in suppressing evidence of Sgt Howard's acquittal in state court, 7) that the convening authority erred in failing to comply with section 0124 of the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E (20 Jun 2007), and 8)that the evidence was factually insufficient to sustain a conviction.[2]

We have considered the record of trial and the parties' pleadings. We conclude that the findings of guilty to Specifications 2 (abusive sexual contact) and 3 (wrongful sexual contact) of Charge I constitute an unreasonable multiplication of charges. The remaining findings and sentence are correct in law and fact and there are no other errors materially prejudicial to the substantial rights of the appellant. We approve the findings as modified herein and sentence as approved by the CA. Arts. 59(a) and 66(c), UCMJ.

Background

Sgt Howard, a married Marine, attended a birthday party for a fellow Marine sergeant and his sister, DU. Various party guests remained overnight due to the consumption of alcohol. DU was displaced from her own bedroom to accommodate guests and spent the night on a common area couch. She awoke to the sensation of the appellant lying on top of her naked and discovered that she was also naked from the waist down. When DU left the room to get help, the appellant left the house. DU underwent a sexual assault exam and samples collected from that exam indicated the presence of Sgt Howard's seminal fluid in her underwear. Additional facts are developed below as necessary.

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[1] To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

[2] Assignments of error 5-8 were submitted pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

Unreasonable Multiplication of Charges

The specifications under Charge I allege that Sgt Howard 1) penetrated DU's vagina with his penis while she was incapacitated; 2) laid on top of her while he was naked and she was incapacitated; and 3) laid on top of her while he was naked without her permission. All of the specifications flow from the state of events that caused DU to awaken.

Before trial, the military judge and the parties discussed lesser included offenses and multiplicity. Record at 93. The military judge acknowledged that the specifications under Charge I, of aggravated sexual assault, abusive sexual contact, and wrongful sexual contact "may be" merged for sentencing if there were multiple convictions, but reserved ruling on the issue until after findings by the members. *Id.* at 113. The military judge also considered whether the charges were unreasonably multiplicious for findings but, referencing the unsettled state of the law, stated "[i]f there is a conviction, the appellate court can decide whether or not the multiple convictions creates some type of relief . . . ." *Id.* After the findings of guilty were announced, the military judge merged Specifications 2 and 3 (abusive sexual contact and wrongful sexual contact) with Specification 1 of Charge I (aggravated sexual assault) for sentencing. *Id.* at 653-54.

The military judge denied the defense request to merge Charge II (adultery) with Charge I for sentencing. *Id.* Trial defense counsel did not request that Specifications 2 and 3 of Charge I be dismissed as unreasonable multiplication of charges for findings. *Id.* at 654. Nevertheless, we find that the three specifications of Charge I are an unreasonable multiplication of charges for findings. The specification of Charge II, however, is a distinctly separate criminal act and therefore not an unreasonable multiplication of charges for findings.

We review a military judge's decision to deny relief for unreasonable multiplication of charges for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.). To determine whether there has been an unreasonable multiplication of charges, we analyze the case under the well-known framework of *United States v. Quiroz*, 55 M.J. 334, 338

(C.A.A.F. 2001). We grant appropriate relief if we find that the aggregate of charges is so extreme or unreasonable that it warrants invocation of our Article 66, UCMJ, authority. *United States v. Tovar*, 63 M.J. 637, 643 (N.M.Ct.Crim.App. 2006). Where there is an unreasonable multiplication of charges for findings, the appropriate remedy is to dismiss those charges which are unreasonable. *United States v. Campbell*, 71 M.J. 19, 22-23 (C.A.A.F. 2012).

With regard to the specifications of Charge I, we find the first three *Quiroz* factors instructive. First, while the defense did not specifically object at trial, the military judge recognized a potential issue with unreasonable multiplication of charges for findings when he deferred to the judgment of the appellate courts on the record. Second, Specifications 2 and 3 of Charge I do not address distinctly separate acts from Specification 1 of Charge I. *Campbell*, 71 M.J. at 24. Instead, they address different degrees of culpability for the same chain of events accounting for contingencies of proof. Third, convictions for all three specifications of Charge I misrepresent or exaggerate the criminality of the appellant, because there were not three distinct acts in this case.

We find that specifications 2 and 3 of Charge I are an unreasonable multiplication of charges with Specification 1 of Charge I and take appropriate action in our decretal paragraph.

We make the opposite finding as to Charge II. The crime of adultery is a distinct criminal act from various charges under Article 120, UCMJ, because the Article 120 focuses on the appellant's violation of a victim and the other focuses on his violation of good order and discipline. *See, eg.*, *United States v. Hill*, 48 M.J. 352, 352-53 (C.A.A.F. 1997) (summary disposition) (holding rape and adultery are not mutually exclusive); *United States v. Scholz*, No. 200800512, 2009 CCA LEXIS 43, unpublished op. (N.M.Ct.Crim.App. 10 Feb. 2009) (holding adultery and carnal knowledge not an unreasonable multiplication of charges for findings). Consistent with these holdings, we find that Charge I and Charge II, aggravated sexual assault and adultery, are not an unreasonable multiplication of charges for findings or sentencing.

Request for Continuance

The appellant next avers that the military judge abused his discretion by denying his request for a continuance, which was submitted one business day before the trial. Appellate Exhibit V. The trial defense counsel claimed that he required time to

consult with a psychiatrist regarding the impact of the victim's history of post-traumatic stress disorder (PTSD) on her ability to perceive and remember. The trial defense counsel acknowledged various facts about how long he had this case and admitted that this specific request was due to a change in strategy for the defense. Record at 49.

We review a military judge's denial of a continuance for abuse of discretion. *United States v. Miller,* 47 M.J. 352, 358 (C.A.A.F. 1997). "The military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Art. 40, UCMJ. Military judges are given broad discretion on matters of continuances. *United States v. Wellington,* 58 M.J. 420, 425 (C.A.A.F. 2003) (citing *Morris v. Slappy,* 461 U.S. 1, 11 (1983)). Factors used to determine whether the military judge abused his discretion in denying a request for a continuance include surprise, nature of the evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, whether the moving party received prior continuances, good faith of the moving party, use of reasonable diligence by the moving party, possible impact on the verdict, and prior notice. *Miller,* 47 M.J. at 358.

The military judge ruled on the defense request for a continuance verbally and later reduced his ruling to writing. Record at 97-98; AE XLIV. The military judge properly addressed *Miller*, Record at 48-49; AE XLIV, and concluded that relying on cross-examination of the victim instead of inviting a battle of the experts would accomplish the stated goals of the defense. We conclude that the military judge correctly applied the law. His reasoning was not untenable and his ruling did not deprive the appellant of a substantial right. *Miller,* 47 M.J. at 358. The extremely untimely nature of the request and the lack of diligence by the moving party were sufficient grounds for the military judge to deny the motion. We find no abuse of discretion. This assignment of error is without merit.

Instructions

The appellant next claims that the military judge erred by instructing the members, consistent with the Military Judges' Benchbook model instructions, that, with respect to Specification 1 of Charge I:

> "Substantially incapable" means that level of mental impairment due to consumption of alcohol,

> drugs, or similar substances while asleep or unconscious or other reasons which render 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*.

Record at 593 (emphasis added), 597; AE XXXI at 2 and 5; *see* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-45-5d (1 Jan 2010).[3] The appellant was only charged with assaulting the victim when she was "substantially incapable of declining participation in the sexual contact." He claims this instruction was erroneous first because the definition was overly broad, encompassing more than the charged offense. He further avers that the phrase "otherwise unable to make or communicate competent decisions" is not included in the text of the statute, and it impermissibly lowered the burden of the Government. Benchbook at ¶ 3-45-5d; and Art. 120(c)(2) and (h), UCMJ.

The military judge and the counsel held a lengthy discussion about instructions on the record, and referenced several additional R.C.M. 802 sessions in which instructions were discussed. Record at 577-91. At no time did the trial defense counsel object to this portion of the military judge's instructions. As discussed below, we find any potential error in these definitions to be harmless beyond a reasonable doubt.

Whether a panel is properly instructed is a question of law we review *de novo*. Turning first to military judge's use of the phrase "unable to appraise the nature of the sexual conduct" in the definition of substantially incapable, we hold, that the military judge did not err. In *United States v. Prather,* 69 M.J. 338, 343 (C.A.A.F. 2011), and *United States v. Stewart,* 71 M.J. 38 (C.A.A.F. 2012), the Court of Appeals for the Armed Forces found no meaningful distinction between "substantially incapacitated" and "substantially incapable." Consistent with *Prather* and *Stewart*, we find no error in the military judge's definition of substantially incapable, because there is no distinction between substantially incapacitated and "substantially incapable of appraising the nature of the sexual act." Even if error was committed, all three theories under the

[3] Sgt Howard also alleges the same error with regard to Specification 2 of Charge I. Since that specification is being merged as an unreasonable multiplication for findings we need not address that portion of the assignment of error.

"substantially incapacitated" instructional umbrella did not introduce prejudice in a case where the only theory presented by the Government was that DU was asleep at the time of the assault. The victim was proven to be asleep and as such, she was equally unable to appraise the nature of the sexual act, unable to decline participation, and unable to communicate an unwillingness to participate in the sexual act. We find any error in providing the full instruction harmless beyond a reasonable doubt.

Next we address Sgt Howard's objection to the phrase "or otherwise unable to make or communicate competent decisions" as part of the definition of substantially incapable. In *United States v. Perry*, No. 201100273, 2012 CCA LEXIS 288, unpublished op. (N.M.Ct.Crim.App. 31 Jul 2012), we held the use of this phrase to be harmless beyond a reasonable doubt where the rest of the instructions given by the military judge were consistent with the statute. *See Prather*, 69 M.J. 344. As in *Perry*, we find the rest of the instructions of the military judge in this case were consistent with the statute.

Conclusion

The remaining assignments of error are without merit. The findings of guilty of Specifications 2 and 3 of Charge I are set aside. Since Specifications 2 and 3 of Charge I were merged with Specification 1 of Charge I at trial for sentencing purposes, there is no change to the sentencing landscape triggering a reassessment of the sentence. The findings as modified herein and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court