UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Air Force Cadet STEPHAN H. CLAXTON
United States Air Force

ACM 38188

17 December 2013

Sentence adjudged 22 June 2012 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: J. Wesley Moore.

Approved Sentence: Dismissal, confinement for 6 months, and forfeiture of all pay and allowances.

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

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jamie L. Mendelson; and Gerald R. Bruce, Esquire.

Before

ORR, HECKER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge

The appellant was tried by a general court-martial composed of officer members and, contrary to his pleas, was convicted of engaging in wrongful sexual contact with a female cadet, assaulting a female former cadet, attempting to engage in abusive sexual contact with the former cadet, and assaulting two male cadets, in violation of Articles 80, 120, and 128, UCMJ, 10 U.S.C. §§ 880, 920, 928.[1] The adjudged and approved sentence

[1] The appellant was acquitted of engaging in wrongful sexual contact with another female former cadet.

consisted of a dismissal, confinement for 6 months, and forfeiture of all pay and allowances.[2]

On appeal, the appellant alleges the military judge erred by not giving a voluntary intoxication instruction for the wrongful and abusive sexual contact offenses or, in the alternative, that the trial defense counsel was ineffective for waiving the instruction. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

On 4 November 2011, the appellant and some friends met at a downtown restaurant. The group included Ms. SW, a former cadet who had been an acquaintance of the appellant while the two were students at the Air Force Academy Preparatory School and the Air Force Academy (the Academy). Ms. SW drank multiple alcoholic drinks and then went to the Academy dormitory area with several cadets. A group of cadets decided to return downtown and Ms. SW went with them. After she drank vodka in the car, she felt too intoxicated to join the others in the bar and has little memory about what occurred after that time. The appellant admitted to investigators that he kissed Ms. SW after they arrived downtown. According to the testimony of other cadets, Ms. SW passed out inside the bar's bathroom and had to be carried to the car. Because no one knew where she lived, the cadets took her to the Academy and carried her to a dormitory room.

The other cadets left the room, and the appellant locked himself in the room with Ms. SW. After those cadets returned a few minutes later and pounded on the door, the appellant eventually opened it slightly and declined to go to his own room. Seeing the lights were out, the cadets forced their way in and pulled the appellant into the hallway. A physical altercation between the appellant and these two cadets then occurred, which served as the basis for the appellant's convictions for assault consummated by a battery.

The cadets found Ms. SW with her jeans unbuttoned and her shirt pulled up to chest level. She was unresponsive and was removed from the campus by ambulance. For his actions with Ms. SW that night, the appellant was convicted of attempting to engage in abusive sexual contact with Ms. SW by unbuttoning and unzipping her pants while she was substantially incapacitated and assault consummated by a battery for kissing her.

[2] Both the Action and promulgating Court-Martial Order (CMO) incorrectly state the appellate review process as reviewed pursuant to Article 69(a), UCMJ. To correct this clerical error, we direct the convening authority to withdraw the initial Action and to accomplish a new Action. In doing so, a new CMO rescinding the initial order is also required. Rules for Courts-Martial 1107(f)(2) and 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.25 and 10.10.2 (6 June 2013).

The appellant was also convicted of engaging in wrongful sexual contact with Cadet MI, a female cadet, by placing her hand on his penis, stemming from an incident that occurred in his dormitory room in March 2011. Cadet MI, the appellant and two other male cadets drank mixed drinks and played cards for several hours. Cadet MI had never met the appellant before this evening. She ended up vomiting due to her over-consumption of alcohol and then fell asleep in the bed of the appellant's roommate while the three male cadets watched a movie. She was awakened when a hand or arm brushed against her head, and then someone got into the bed behind her. Cadet MI testified that she was terrified and "froze" as the person grabbed her hand, pulled it behind her back, and placed it on his penis. She then pulled her hand away, got out of the bed, and vomited into a nearby trashcan. At this time, she realized the appellant had been the person in the bed with her and they were alone in the room.[3]

In both opening statement and closing argument, the trial defense counsel told the panel that the defense was not using alcohol as an excuse or a defense in the case, but that the members should consider the effect alcohol had on individuals' perceptions and behavior during the incidents and their memories of the events. The trial defense counsel also emphasized that all the individuals were college students who were engaging in misconduct by drinking underage and/or on the Academy grounds, and that several had biases and motives to be untruthful.

The appellant now contends the military judge erred by not giving a voluntary intoxication instruction for the wrongful sexual contact and attempted abusive sexual contact specifications regarding Cadet MI and Ms. SW.[4] The Government argues that these two offenses are "general intent" crimes so voluntary intoxication is not a defense and that the evidence was insufficient to raise such a defense even if it was applicable.

Voluntary Intoxication Instruction

Whether the military judge instructed the panel properly is a question of law we review de novo. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010). The military judge bears the primary responsibility for ensuring the panel is properly instructed on the elements of the offenses, as well as potential defenses. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). "[T]he military judge is under an affirmative duty to instruct on . . . any defense that reasonably is raised by the evidence at trial." *United States v. Watford*, 32 M.J. 176, 178 (C.M.A. 1991). Failure to object to an omitted instruction waives the objection absent plain error. Rule for Courts-Martial

[3] That evening, Cadet MI told another cadet what had happened and then filed a restricted report with the Academy's Sexual Assault Response Coordinator. After she later learned that the appellant had been accused of assaulting other women, she agreed to change her report to unrestricted.

[4] The military judge did reference voluntary intoxication when instructing the panel on the wrongful sexual contact specifications related to the appellant's interaction with a third woman, telling the members that his state of voluntary intoxication is not relevant to whether he mistakenly thought she consented to the sexual activity. The appellant was acquitted of these specifications.

(R.C.M.) 920(f). "The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citation and quotation marks omitted).

Voluntary intoxication may, but does not necessarily, negate the specific intent required for some offenses. *United States v. Anderson*, 25 M.J. 342, 343 (C.M.A. 1987); R.C.M. 916(l)(2) ("evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of . . . specific intent . . . if [it] is an element of the offense."); *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996). According to the *Military Judges' Benchbook*, "[t]he military judge must instruct, sua sponte, on this issue when it is raised by *some evidence* in the case." Department of the Army (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 5-12, Note 2 (1 January 2010) (emphasis added). However, to ultimately constitute a defense to a specific-intent offense, "there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent, not just evidence of mere intoxication." *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997) (quotation marks and citation omitted).

The appellant was convicted of attempting to engage in abusive sexual contact with Ms. SW by unbuttoning and unzipping her pants with the specific intent to commit the offense of abusive sexual contact with her. Therefore, evidence of the appellant's voluntary intoxication could theoretically raise a reasonable doubt as to whether the appellant had this specific intent when he manipulated Ms. SW's clothing. The appellant complains on appeal that the panel was not instructed about this matter.[5]

The appellant also complains that the voluntary intoxication instruction was not given to the panel relative to the allegation he had engaged in wrongful sexual contact with Cadet MI. According to the version of Article 120, UCMJ, in place at the time of this alleged offense, the offense occurs when "[a]ny person . . . who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact." *Manual for*

[5] This instruction would have stated, "The law recognizes that a person's ordinary thought process may be materially affected when [he] is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused [had the specific intent to commit abusive sexual contact.] On the other hand, the fact that a person may have been intoxicated at the time of the offense does not necessarily indicate that [he] was unable to [have the specific intent to commit the abusive sexual contact] because a person may be drunk yet still be aware at that time of [his] actions and their probable results. In deciding whether the accused [had the specific intent to commit the abusive sexual contact at the time of the offense] you should consider the effect of intoxication, if any, as well as the other evidence in the case." Department of the Army (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 5-12, Note 2 (1 January 2010). "The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused in fact [had the specific intent to commit the abusive sexual contact with Ms. SW], the accused will not avoid criminal responsibility because of voluntary intoxication." D.A. Pam. 27-9, ¶ 5-12, Note 4.

Courts-Martial, United States (*MCM*), Part IV, ¶ 45.a.(m) (2008 ed.). "Sexual contact" was defined, in relevant part, as "intentionally causing another person to touch . . . the genitalia . . . of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." *MCM*, Part IV, ¶ 45.a.(t)(2). The elements of that offense are that (1) the appellant engaged in certain sexual contact by placing Cadet MI's hand on his penis; (2) this was done without Cadet MI's permission; and (3) the sexual contact was wrongful. *MCM*, Part IV, ¶ 45.b.(13); *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011). Given the definition of "sexual contact," the Government was required to prove the appellant caused Cadet MI to make contact with his penis with the intent of arousing or gratifying himself. Thus, we agree with the appellant that wrongful sexual contact is a specific-intent crime and evidence of the appellant's voluntary intoxication could theoretically raise a reasonable doubt as to whether the appellant had this specific intent when he placed her hand on his penis. However, we disagree with the appellant that plain error occurred when the panel was not given the voluntary intoxication instruction relative to these offenses.

When he was interviewed by investigators, the appellant described himself as "very drunk" and a "7" on a 10-point intoxication scale on the nights he interacted with Ms. SW and Cadet MI, respectively. Another cadet also testified that he believed the appellant to be "drunk" and "fairly intoxicated" on the night involving Ms. SW. However, although the appellant claimed to not remember everything that happened on these nights, the appellant provided extensive details about his activities during multiple interviews. He described how Ms. SW ended up in the dormitory room and admitted kissing her while she was unconscious. He also told investigators how he got into bed behind a sleeping Cadet MI after the other cadets left the room, pulled down his pants and boxer shorts, put her hand on his leg, and positioned himself so his penis came into contact with her hand.

Other witnesses also testified regarding the appellant's behavior on those occasions. The other cadets described him carrying Ms. SW from the car to the bed, locking the door after pretending to leave the dormitory room with them, and engaging in a subsequent conversation with them. Cadet MI testified about how the appellant got into bed with her, pulled her hand onto his penis, engaged in a conversation with her, and called another cadet at her request.

The appellant's own description of his interactions with both women makes clear that his actions were sufficiently focused and directed to demonstrate that he could have, and did form, the required specific intent for these offenses despite his alcohol consumption. *Peterson*, 47 M.J. at 234 (explaining that often "the conduct of an accused is sufficiently focused and directed so as to amply demonstrate a particular *mens rea* or other state of mind."). His intoxication level did not render him incapable of forming that intent. The observations of others corroborate that conclusion.

Thus, after carefully considering the record, we find the appellant's level of intoxication did not ultimately constitute a defense, and we do not find plain error in the military judge's failure to instruct the panel on voluntary intoxication.

Ineffective Assistance of Counsel

Similarly, we do not find the appellant's trial defense counsel were ineffective for failing to request the instruction. "[T]o prevail on a claim of ineffective assistance of counsel, [the] appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We can rule against the appellant if he fails to meet either prong. *Strickland*, 466 U.S. at 697; *Loving v. United States*, 68 M.J. 1, 6 (C.A.A.F. 2009). We review such claims de novo. *Green*, 68 M.J. at 362.

To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 698; *Green*, 68 M.J. at 362. Here, we find there is no reasonable probability that the panel would have come to a different conclusion about the appellant's guilt even if the instruction was given. *See Green*, 68 M.J. at 362; *Strickland*, 466 U.S. at 694-695. Even if the military judge gave such an instruction, the panel would have found the appellant guilty of engaging in wrongful sexual contact with Cadet MI and attempting to engage in abusive sexual contact with Ms. SW.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court