UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic LEE W. PAYTON, JR.
United States Air Force

ACM 37699

19 February 2013

Sentence adjudged 13 January 2010 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Don M. Christensen (sitting alone).

Approved sentence: Dishonorable discharge and confinement for 66 months.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Darrin K. Johns; Major Nathan A. White; and Guy L. Womack, Esquire (civilian counsel).

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Christopher C. Vannatta; Major Naomi N. Porterfield; Major Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

PER CURIAM:

On 26-28 May 2009 and 11-13 January 2010, the appellant was tried by a military judge sitting alone as a general court-martial. Contrary to his pleas, the appellant was found guilty of one specification of aggravated sexual assault and one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge sentenced the appellant to a dishonorable discharge and 66 months of confinement. The convening authority approved the sentence as adjudged. On appeal, the appellant argues that the military judge misapplied Article 120, UCMJ, when finding the appellant

guilty, and that the evidence is factually and legally insufficient to support his conviction. Finding no prejudice to a substantial right of the appellant, we affirm.

Factual Background

On 2 July 2008, the victim, Senior Airman SV, went drinking with friends at some bars in Great Falls, Montana. While at the first bar, called the Eight Ball, SV texted other friends, including the appellant, to join them, which he did. During the course of the evening, SV drank several mixed drinks and beers, and he became drunk. She was unaware if the appellant was drunk or had been drinking. In fact, the appellant had consumed one-third of a bottle of rum and three "double Jack and Cokes." Believing the appellant was sober, SV accepted a ride from him back to Malmstrom Air Force Base. Upon arriving at SV's room, the appellant asked her if he could stay to "sober up" and "sleep it off." SV agreed, but she told the appellant he would have to sleep in the bed of her suitemate, LB. After fixing some food and checking her e-mail, SV changed into her pajamas and went to bed. After talking to the appellant for a few minutes, she told him she was about to "pass out."

The appellant went to LB's room and laid down on her bed. After a few minutes, however, he became "horny" and went back to SV's room. She was asleep. The appellant tried to wake her to no avail. He kissed her on the lips. He removed her shorts and performed oral sex on her by putting his mouth on her vagina for less than a minute. He then inserted his penis into her vagina. Except for a "short moan," SV was asleep and did not otherwise wake up or react to the appellant's actions. The appellant woke SV up, gave her a bottle of water, apologized to her, and went back to LB's bed.

When SV awoke the next morning, she thought things felt "off." Her shorts were on crooked, and she felt a sensation in her vaginal area as though she had sex. Recalling the appellant's conversation, and fearing he might have "tried something" while she was asleep, SV contacted the Sexual Assault Response Coordinator. Forensic testing of the evidence collected as part of a rape examination revealed that the semen in SV's vagina and on her shorts belonged to the appellant.

The Air Force Office of Special Investigations (AFOSI) interviewed SV and arranged for her to participate in pretext telephone calls to the appellant on 2 August and 4 August 2008. During those phone calls, the appellant admitted that he performed oral sex on SV by putting his mouth on her vagina. He also admitted that he placed his penis in her vagina. The AFOSI interviewed the appellant on 6 August 2008. After proper rights advisement, the appellant confessed to his actions and acknowledged that SV was asleep during these events. He reduced his confession to writing.

Procedural Background

The appellant's court-martial began on 26 May 2009, recessed for eight months beginning on 28 May 2009, and reconvened on 11 January 2010. During the initial colloquy with the military judge on 26 May 2009, the appellant requested to be tried by a panel of officer and enlisted members. The appellant also filed a motion to dismiss the charge and specifications under Article 120, UCMJ, as unconstitutionally vague, because they violated the appellant's due process rights. The defense specifically claimed that Article 120(t)(16), UCMJ, failed to set forth a procedural process for implementing the affirmative defense of consent and mistake of fact as to consent.[1] After considering the briefs and arguments of counsel, as well as the language of Article 120, UCMJ, the military judge denied the motion to dismiss. The military judge then crafted a proposed instruction to the members to implement the affirmative defense portion of Article 120(t)(16), UCMJ.[2] The trial defense counsel requested a stay in proceedings in order to pursue an extraordinary writ with this Court regarding the military judge's proposed Article 120, UCMJ, instruction. Both this Court and the Court of Appeals for the Armed Forces declined to hear the appeal. *See Payton v. Christenson*, Misc. Dkt. No. 2009-03 (A.F. Ct. Crim. App. 30 June 2009), *pet. denied sub nom. Payton v. Burg*, 68 M.J. 222 (C.A.A.F. 2009).

When the court-martial resumed on 11 January 2010, the appellant changed his choice of forum, electing to be tried by military judge alone. The military judge granted the request. In addition, the military judge also advised counsel that he had reconsidered his approach to Article 120, UCMJ. The judge found that, because Article 120(t)(16), UCMJ, required the defense to prove consent by a preponderance of the evidence, it was unconstitutional. The judge further opined that he could find a portion of a statute unconstitutional without invalidating the entire statute. The judge concluded that Article 120(t)(16), UCMJ, could be severed and that the rest of Article 120, UCMJ, would remain valid. In his ruling, the military judge noted that the defense of mistake of fact as to consent had been raised by the evidence and that, based on the guidance in Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, the prosecution had the burden to prove beyond a reasonable doubt that the defense did not exist.

[1] This case predated decisions by our superior court in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011), and *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

[2] The military judge proposed to bifurcate the findings portion of the trial in order to give the members a chance to determine, by a majority vote, if the defense had proved the affirmative defense of consent by a preponderance of the evidence. If the defense met its burden, then the prosecution would have been required, as part of its case, to prove beyond a reasonable doubt that the affirmative defense did not exist. The military judge reasoned that the only way to know if the defense met its burden by a preponderance of the evidence was by an unambiguous vote of the members. The judge opined that this was the only way to know whether the prosecution had to disprove the affirmative defense.

Article 120, UCMJ

The appellant argues that the military judge did not properly consider and apply Article 120, UCMJ, when finding the appellant guilty of the Charge and its specifications. Interpretation of a statute and its legislative history are questions of law we review de novo. *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005). We find that the military judge did not err.

Our superior court has addressed, in varying degrees, the unconstitutional burden shifting raised by Article 120, UCMJ. *See United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011); *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011); *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). This Court has also addressed the burden shifting provision in the context of an appeal under Article 62, UCMJ, 10 U.S.C. § 862. *See United States v. Boore*, Misc. Dkt. No. 2011-01 (A.F. Ct. Crim. App. 3 August 2011) (order reversing military judge's dismissal of an Article 120, UCMJ, charge as unconstitutional and finding that constitutional concerns "can be remedied" by severing from the remainder of the statute the requirement of Article 120, UCMJ, that the accused prove the affirmative defense by a preponderance of the evidence), *pet. denied*, 70 M.J. 348 (C.A.A.F. 2011). When a statute contains both constitutionally valid and invalid provisions, a court may sever the impermissible section so long as the remaining language is consistent with Congress' basic objectives in enacting the statute. *Ayotte v. Planned Parenthood of Northern New England* 546 U.S. 320, 329 (2006); *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1880). The principle test to determine whether unconstitutional portions of a statute may be severed is whether what remains after the severance is "fully operative as a law." *I.N.S. v. Chadha*, 462 U.S. 919, 934 (1983) (citation omitted); *see e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam).

We find that the military judge acted appropriately when he severed Article 120(t)(16), UCMJ, from the remainder of the statute. The military judge explained the need to deviate from the statute, severed the offensive portion of the statute, and found the remainder of the statue viable and capable of enforcement. He recognized that the affirmative defense of consent had been raised by the evidence and that the prosecution had the burden to disprove consent beyond a reasonable doubt. Moreover, instructions were not required in this case. When a military judge sits as the trier of fact, he is presumed to know the law and apply it correctly. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). In this case, the military judge, sitting as the trier of fact, properly applied the law to avoid violating the appellant's constitutional rights.

Legal and Factual Sufficiency

The appellant next argues that the evidence was legally and factually insufficient to support his convictions for aggravated sexual assault and abusive sexual contact under Article 120, UCMJ. As part of his argument, the appellant avers that the military judge

was bound to return a finding of not guilty after acknowledging that the evidence raised the affirmative defense of mistake of fact as to consent. We disagree.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), 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 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). "In resolving legal-sufficiency questions, [we are] bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)) (internal quotations omitted); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). 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).

We find the evidence in this case legally and factually sufficient. The appellant admitted to SV, and later to the AFOSI, that he had oral sex with her by putting his mouth on her vagina. He also admitted that he put his penis in her vagina. He acknowledged that she was asleep and did not react or respond to his actions during the assault. Additionally, the appellant attempted to dispute SV's level of intoxication through testimony of a forensic toxicologist. Other evidence at trial, however, showed that SV appeared intoxicated. Not only did SV state she was drunk, but others who saw her, including the appellant, remarked about how intoxicated she seemed. In fact, the appellant offered to give SV a ride home because she was, in his words, "pretty inebriated." Thus, having reviewed the evidence in the record in a light most favorable to the prosecution, we find the evidence legally sufficient. Likewise, having made allowances for not personally observing the witnesses, we find the evidence factually sufficient and are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

We have reviewed the record in accordance with Article 66, UCMJ. The findings and the sentence are determined to be correct in law and fact and, on the basis of the

entire record, should be approved.[3] *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings of guilty and the sentence, as approved below, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[3] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).