UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DAVID C. VAZQUEZ
United States Air Force

ACM 37647

1 March 2013

Sentence adjudged 7 January 2010 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, contrary to his pleas, of one specification of rape by placing someone in fear of grievous bodily harm and three specifications of assault, in violation of Articles 120 and 128, UCMJ, 10 U.S.C. §§ 920, 928. The military judge acquitted the appellant of two specifications of rape. Pursuant to his pleas, the appellant was convicted of one specification of making a false official statement, one specification of simple arson and five specifications of assault, in violation of Articles 107, 126 and 128, UCMJ, 10 U.S.C. §§ 907, 926, 928. The adjudged sentence consisted of a bad-conduct discharge,

confinement for 30 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts the evidence is factually insufficient to prove his guilt of rape because the evidence creates a reasonable doubt as to whether he reasonably and honestly believed the victim consented to sexual intercourse. He also contends Article 120, UCMJ, is facially unconstitutional. Finding no error that materially prejudices the appellant, we affirm.

Background

All but one of the charged offenses in the case involved the appellant's conduct with his 21-year-old girlfriend, Ms. CH, over an eight week period.[1] Ms. CH and the appellant had been involved in an off-and-on relationship since 2005. She moved to Guam in early April 2009 to live with the appellant with the intention of marrying him. They shared an off-base apartment until she left Guam in early June 2009, after multiple incidents of abuse by the appellant.

Within a week of her arrival, the appellant assaulted Ms. CH. After she confronted him with her suspicion that he was being unfaithful to her, he pushed her against the wall with his hands. Several weeks later, after Ms. CH sent an email to a woman she believed was in a relationship with the appellant, he grabbed her by the neck with his hands and choked her while simultaneously pushing her over a couch and onto the floor. This act was done with such force that he broke the couch and caused finger-shaped bruising on Ms. CH's back, arms, legs and jaw. During this incident, Ms. CH was gasping for air and was unable to breathe. The next day, the appellant remained upset with Ms. CH and burned two articles of her clothing in a grill at their residence while narrating the event for her over the telephone.

Several weeks later, on 26 May 2009, the appellant confronted Ms. CH about a text message he found on her cellular phone. The text message was from a male, but Ms. CH denied that she was involved with the individual. After the appellant called the number and heard a male voice answer, he became extremely angry and smashed the back of Ms. CH's head against a concrete stair in their residence. This caused a cut with significant bleeding that warranted stitches, yet he refused to take her to the hospital or let her go on her own.

By June 2009, Ms. CH had decided to leave Guam and the appellant, although she did not tell him about her plans. On the day of her planned clandestine departure, the appellant unexpectedly arrived home while she was showering. After seeing a male's

[1] One assault specification, to which the appellant pled guilty, was based on the appellant's striking a male Airman seven times with his closed fist.

name on her cell phone, he angrily confronted her, ripping down the shower curtain and hitting her on the face with his hand three times.

The appellant pled guilty to all the above conduct, including simple arson, aggravated assault, and assault consummated by a battery, as well as falsely telling Security Forces investigators that he had never struck Ms. CH. The appellant pled not guilty to raping Ms. CH on three occasions, two aggravated assaults, and an additional assault consummated by a battery. The military judge found the appellant guilty of raping Ms. CH on one occasion and of assaulting her on three occasions.[2] He was acquitted of two of the rape specifications.[3]

On appeal, the appellant continues to assert that he should be found not guilty of raping Ms. CH on 27 May 2009 due to her lack of credibility; the late reporting of the rape allegations; and the circumstances of their sexual relationship, which led him to reasonably believe she was consenting to intercourse on this occasion. He also continues to argue that dismissal is the proper remedy for what he contends is a constitutionally invalid Article 120, UCMJ. We disagree.

Constitutionality of Article 120, UCMJ

The appellant raises a constitutional challenge to the statutory scheme involving the affirmative defenses of consent and mistake of fact as to consent in the context of Article 120 (a), UCMJ. Because the constitutionality of a statute is a question of law, the standard of review is de novo. *United States v. Prather*, 69 M.J. 338, 341 (C.A.A.F. 2011).

The appellant was charged with causing Ms. CH to engage in a sexual act, specifically sexual intercourse, "by placing her in fear that she would be subjected to grievous bodily harm by assaulting her over the course of several months culminating in an assault the previous evening," which constitutes rape as defined by Article 120(a)(3), UCMJ. At trial, the appellant contended Ms. CH consented to the sexual intercourse and that he also had an honest and reasonable mistake of fact as to her consent.

When this incident occurred, Article 120(r), UCMJ, provided in pertinent part that "[c]onsent and mistake of fact as to consent . . . are an affirmative defense for the sexual conduct in issue in a prosecution [for rape]." The statute required the accused to prove the affirmative defense by a preponderance of the evidence, at which time the Government would have the burden of proving beyond a reasonable doubt that the defense did not exist. Article 120(t)(16), UCMJ.

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[2] The military judge found the appellant guilty of two choking incidents, which were charged as aggravated assaults, and assault consummated by a battery for pushing her against the wall on another occasion.

[3] The appellant was acquitted of raping Ms. CH on two occasions where she testified that she initially said "no" to his sexual advances but ultimately "gave up" and stopped resisting.

The appellant contends this aspect of Article 120, UCMJ, is "constitutionally invalid" due to its burden shifting regime. We need not determine whether the burden shifting regime is unconstitutional in this context, as the military judge did not apply that regime when considering the evidence in the appellant's case. Instead, having agreed with the defense that these burden-shifting provisions "may be flawed," the military judge advised the parties that he would be evaluating the evidence of consent and mistake of fact as to consent using the 2007 interim changes to instructions in Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* [hereinafter Benchbook], ¶ 3-45-3, n. 10, 11 (Interim Change 15 January 2008). These interim changes laid out a burden regime that was ultimately upheld by our superior court in *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011) (finding that the trial judge's failure to instruct in accordance with the statutory scheme of Article 120(t)(16), UCMJ, was error in the absence of a legally sufficient explanation, but rendered harmless beyond a reasonable doubt when the judge instructed the members that the evidence raised the defense of consent and that the Government had the burden of disproving the defense beyond a reasonable doubt).

As in *Medina*, the military judge here properly required the Government to prove this Article 120, UCMJ, offense beyond a reasonable doubt and to disprove the affirmative defenses of consent and mistake of fact by the same standard. While the military judge did not provide a detailed justification on the record as to why he deviated from the statutory scheme outlined in Article 120, UCMJ, we find that error harmless beyond a reasonable doubt.

Sufficiency of the Evidence

The appellant contends the evidence in his case is factually insufficient to sustain his conviction for raping Ms. CH on 27 May 2009 "because the evidence creates a reasonable doubt as to whether [he] reasonably and honestly believed Ms. CH consented to sexual intercourse." We disagree.

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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). 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 military judge served as the fact finder in this case and elected to make special findings of fact describing the elements and proof he considered in reaching his

conclusion that the appellant was guilty of rape.[4] *See* Article 51(d), UCMJ, 10 U.S.C. § 851(d); Rule for Courts-Martial (R.C.M.) 918(b) (military judge can make special findings of fact as to matters reasonably in issue in an offense of which the accused was found guilty).[5]

As has our sister court, we adopt the standards applied to the appellate review of special findings under Fed. R. Crim. P. 23(c) when we evaluate, on appeal, a military judge's special findings made pursuant to R.C.M. 918(b). *United States v. Truss*, 70 M.J. 545, 547 (Army Ct. Crim. App. 2011). Under that federal rule, special findings on the ultimate issue of guilt or innocence are subject to the same appellate review as a general finding of guilt, while other special findings are reviewed for clear error. *Id.*; *United States v. McMurrin*, 69 M.J. 591, 597 (N.M. Ct. Crim. App. 2010), *aff'd*, 70 M.J. 15 (C.A.A.F. 2011); 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 10.04 (3d Ed. 1999). The military judge's special findings here cover pure questions of fact as well as mixed questions of law and fact which pertain to the ultimate issue of guilt. We will thus review the military judge's special findings using the same standard we use when reviewing a general finding of guilt. *Truss*, 70 M.J. at 547-48.

This allegation arose from an act of sexual intercourse that occurred the morning after the appellant smashed Ms. CH's head against the concrete stairs and prevented her from going to the hospital. After the assault, the appellant berated her for, among other things, bleeding in his apartment. According to Ms. CH, after she went to bed, the appellant joined her there and told her "you're not going anywhere." Later that morning, he awoke her by climbing on top of her. Because of the pain in the back of her head, she kept her face turned to the side and held a towel against the wound. The appellant spread her legs and penetrated her. According to Ms. CH, she did not consent to the act but did not say anything to him or physically resist him because she was scared, due in part to what he had done to her the night before.

Based on this incident, the appellant was charged with rape under Article 120(a)(3), UCMJ, with the specification contending the appellant caused Ms. CH to engage in sexual intercourse on this occasion, by placing her in fear that she would be subjected to grievous bodily harm due to his prior history of assaulting her. The elements of this offense are that (1) on 27 May 2009, the appellant caused Ms. CH to engage in

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[4] Noting his perception that appellate courts are increasingly encouraging finders of fact to articulate the rationale behind their rulings, the military judge sua sponte made special findings of fact to support what he described as his "unusual" decision to find the accused guilty of rape when the victim had an ongoing sexual relationship with the accused and offered little or no resistance to the charged instance of sexual contact.

[5] Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, recommends that special findings be made in the case of a conviction "whenever the judge concludes that the record does not adequately reflect all significant matters considered when 'the trial court saw and heard the witnesses.'" *See* D.A. Pam. 27-9, App. G, ¶ G-1, n.3. "The need to have trial judges set forth their conclusions of law and determinations of fact has always been viewed as a method of insuring compliance with the law, and for effecting justice." Lee D. Schinasi, *Special Findings: Their Use at Trial and on Appeal*, 87 Mil.L.Rev. 73, 75 (Winter 1980) (citing *Norris v. Jackson*, 76 U.S. 125 (1870)).

sexual intercourse, and (2) that he did so by placing Ms. CH in fear that she would be subjected to grievous bodily harm by assaulting her over the course of several months, culminating in an assault on the evening of 26 May 2009. "Placing Ms. CH in fear," in this context, means a communication or action by the appellant that is of sufficient consequence to cause a reasonable fear in Ms CH that non-compliance will result in her being subjected to grievous bodily harm (defined as serious bodily injury). Article 120(t)(3) and (6), UCMJ.

The military judge found both of these elements beyond a reasonable doubt. He did so by concluding that the sexual intercourse occurred; that, at the time, Ms. CH did hold the reasonable belief/fear that grievous bodily injury would be inflicted on her by the appellant if she did not engage in that activity; and that the appellant had caused her to fear this result through his assaults on her over the course of several months, including an assault the evening before the rape.[6]

During her testimony, Ms. CH testified about the tumultuous relationship she had with the appellant, which involved accusations and counter-accusations about infidelity; lengthy, frequent and heated verbal arguments; and unusual consensual sexual activity (including role playing, bondage, erotic asphyxiation and engaging in sex acts in public places). At trial, the appellant's arguments centered on Ms. CH's purported lack of credibility, due to her inconsistent statements and late reporting of the events; her continued contact with the appellant after she left Guam; her admitted false statements to investigators and defense counsel; the active and occasionally aggressive sexual history between the appellant and Ms. CH; her failure to resist him during the incident in question; and his claim that he reasonably believed she was consenting to sex, based on their pattern of engaging in "make up sex" after they argued or fought. The defense cross-examined Ms. CH extensively on each of these matters.

Because some evidence had been raised that Ms. CH consented to the sexual intercourse and, in the alternative, that the appellant had a mistake of fact defense regarding Ms. CH's consent to the activity, the military judge also made specific findings relating to those issues. The military judge found the Government had successfully proven beyond a reasonable doubt that Ms. CH had not consented to this act of sexual intercourse, that the appellant knew or reasonably should have known that she was not consenting and that the appellant was not under a mistaken belief that she did consent. These findings make clear that the military judge applied the correct burden of proof and legal standards to these two affirmative defenses. *See Medina*, 69 M.J. at 465.

In reaching the various conclusions, the military judge noted that he found Ms. CH to be "highly sincere and highly credible" in her demeanor. In finding the appellant guilty of rape, the military judge stated he found persuasive and credible the evidence

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[6] The military judge went further, finding beyond a reasonable doubt that Ms. CH reasonably believed resisting the appellant would be futile and that, under the totality of the circumstances, her resistance would have been futile.

that the appellant: intimidated, coerced, dominated and abused Ms. CH through actual physical violence and other means, including one act of choking so severe it was likely to cause death or grievous bodily harm; committed an aggravated assault on Ms. CH on the evening before the alleged rape and refused to let her seek necessary medical treatment; had intercourse with Ms. CH several hours after causing this injury, despite her failure to indicate any willingness or consent to the activity as she lay stiff and motionless on the bed with her injured head turned away from him; and violently attacked her when she tried to leave him.

Our own review of the record convinces us that the evidence admitted at trial is factually sufficient to sustain the appellant's conviction for raping Ms. CH, as well as to support the military judge's special findings. After weighing the evidence in the record and taking into account that we did not personally observe Ms. CH's testimony, we are convinced beyond a reasonable doubt that: (1) the appellant caused Ms. CH to engage in sexual intercourse on 27 May 2009; (2) he did so by placing Ms. CH in fear that she would be subjected to grievous bodily harm, based on his prior treatment of her; (3) Ms. CH did not consent to this act of sexual intercourse; (4) the appellant knew—or reasonably should have known—that she was not consenting; and (5) the appellant had no reasonable mistake of fact as to her consent.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[7] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

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[7] Though not raised as an issue on appeal, 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)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).