IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE (CORRECTED)**
v.	Docket No. ARMY 20210638
Private (E-1) **LUKE A. WATKINS,** United States Army, Appellant	Tried at Fort Hood, Texas, on 24 January, 14 February, and 9–12 March 2022, before a general court-martial appointed by the Commander, III Corps, Colonel Matthew Fitzgerald and Lieutenant Colonel Tiffany Pond, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error[1]

I.

WHETHER THE MILITARY JUDGE ERRED IN NOT INSTRUCTING ON PARTIAL MENTAL RESPONSIBILITY NEGATING MENS REA.

[1] The Government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits they lack merit. Should this court consider any of those matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

Panel 3

Statement of the Case

On 30 November and 1–3 December 2021, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of four specifications of insubordinate conduct toward a noncommissioned officer (NCO) and one specification of communicating a threat, in violation of Articles 91 and 115, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 891, 915 (2018).[2] (R. at 692; Charge Sheet). The military judge sentenced appellant to confinement for 140 days and a bad-conduct discharge. (R. at 714–15). On 15 December 2021, the convening authority took no action on the adjudged sentence. (Action). On 3 January 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant stops reporting for duty.

In the summer of 2020 and at all times relevant in this case, appellant was a 91B (Wheeled Vehicle Mechanic) assigned to the 11th Theater Tactical Signal Brigade. (Pros. Ex. 69; Charge Sheet). In August 2020, appellant began to ask his platoon sergeant, Staff Sergeant (SSG) [redacted], for excusal from duties, either for personal or family reasons or because he was not "feeling well." (R. at 429). Over time, appellant simply stopped showing up for morning physical training (PT) formations or for the regular duty day. (R. at 429–30). "He would come to work,

[2] The panel acquitted appellant of one specification of sexual assault. (R. at 692).

and then sometimes he would, sometimes he wouldn't." (R. at 469). Staff Sergeant [redacted] counseled appellant for these failures to report, which became a near daily occurrence. (R. at 430). Staff Sergeant [redacted] or his proxy would give the counseling statements to appellant in his barracks room during the routine daily checks. (R. at 430). Over time, appellant's effective place of duty was his barracks room. (R. at 499).

B. Appellant begins to display unusual behavior.

Beginning in May 2021, appellant began to display unusual behavior. (R. at 434). On one occasion, appellant "was saying that people weren't themselves, that they were demons and that he was going to pull them out and pretty much kill them." (R. at 434). Following that incident, appellant was taken to the hospital. (R. at 435). When SSG [redacted] picked up appellant from the hospital, appellant told him "he could act that way if he wants to again." (R. at 435).

C. Appellant is insubordinate towards SSG [redacted] and SGT [redacted] on 23 June 2021.

Sergeant (SGT) [redacted] arrived at appellant's unit in March 2021. (R. at 446). He worked in the orderly room and encountered appellant "six or seven times" in the office or at the smoke pit. (R. at 446). Both SGT [redacted] and appellant would be wearing the operational camouflage pattern army combat uniform (ACU) during these encounters. (R. at 446).

On 22 June 2021, SGT [redacted] accompanied SSG [redacted] to give appellant a

counseling statement, "just in case anything crazy might have happened." (R. at 447). Appellant seemed "a little irritated [and] aggravated" at the time, but the encounter was otherwise unremarkable. (R. at 447). Both noncommissioned officers were wearing the ACU at the time. (R. at 447–48).

On 23 June 2021, when appellant failed to report for a fitness test, SSG [redacted] sent SGT [redacted] and Specialist (SPC) Flores to check on appellant in his barracks room and give him another counseling form for failing to report. (R. at 431, 448). Both soldiers were wearing the Army Physical Fitness Uniform at the time. (R. at 467). When they arrived, appellant asked SGT [redacted] "what the fuck he was doing there." (R. at 449). Sergeant [redacted] told appellant that SSG [redacted] needed him to sign the counseling form. (R. at 449). Appellant said, "Yeah, I know what the fuck he needs." (R. at 449). Appellant grabbed the form and continued talking, going back and forth between SGT CM and SPC Flores:

> Where at one point he's referring to [SGT [redacted]] as [SSG [redacted]], referring to [SGT [redacted]] as first sergeant. Referring to Specialist Flores, he's brought up Kim Kardashian. And then at another point he's sitting there having a conversation like he's playing middle man for a conversation between somebody in his room that was not there and somebody down at the end of the hallway that was not there.

(R. at 449).

This continued for "roughly 20, 25 minutes."[3] (R. at 450). Once appellant finally signed the form, he "kind of shoved it into [SGT [redacted]'s] chest." (R. at 450, 467).[4] Sergeant [redacted] took the form and asked appellant if he was okay, and appellant "kept going back and forth, kind of being okay with us and like recognizing us, to going back to being kind of aggravated and irritated in his demeanor." (R. at 450). When SGT [redacted] and SPC Flores started walking away to return to PT, appellant said, "Well, I'm coming with you," and walked with them down the hallway and down a flight of stairs. (R. at 450–51). Then he stopped and whispered to SPC Flores, calling him "President Obama." (R. at 451, 467). The soldiers eventually took appellant back to his room and left him there. (R. at 451).

After SGT [redacted] and SPC Flores returned appellant to his room, they reported the incident to SSG [redacted]. (R. at 431). They explained that appellant was "acting strange." (R. at 431). Staff Sergeant [redacted], along with another NCO (SGT Coates), returned to appellant's room to check on him.[5] (R. at 431). Both NCO's were

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[3] Specialist Flores testified that he and SGT [redacted] were at appellant's room "[p]robably like an hour, hour and a half tops." (R. at 467).

[4] This conduct formed the basis for Specification 3 of Additional Charge I (Violation of Article 91 (Insubordinate conduct toward noncommissioned officer), UCMJ). (Charge Sheet).

[5] Sergeant Coates was appellant's first-line supervisor at the time. (R. at 474, 483–84). Although he knew appellant, he "[a]ctually didn't really see him at work, so we were just checking on him at the room." (R. at 475). Sergeant Coates

wearing the ACU at the time. (R. at 431, 475). Appellant was playing music very loudly and the NCOs had to knock several times before he answered the door. (R. at 432, 476). When appellant opened the door, he was swearing at SSG [redacted], calling him a "bitch," and telling him to "shut the fuck up a couple of times."[6] (R. at 432, 477). Appellant referred to SGT Coates as President Obama. (R. at 432). Staff Sergeant [redacted] testified:

> [He] was just trying to see where [appellant's] state of mind was … because he was referring to [SGT Coates] as other names, I was trying to see if he was able to have a conversation with us. […] After a couple of minutes of [SSG [redacted]] trying to establish a conversation with him, he leaned forward, he mumbled or whispered something to [SSG [redacted]] but [SSG [redacted]] wasn't able to make out what he said. And he proceeded to punch [SSG [redacted]] in the chest.[7]

(R. at 432).

The NCO's decided it was time for them to leave at that point. (R. at 434,

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testified:

> My understanding "was that [appellant] wasn't coming to work because the unit had … a prior engagement with him. And I knew he was in treatment and things like that. So they had like – they were just checking up on him.

(R. at 475).

[6] This conduct formed the basis for Specification 2 of Additional Charge I (Violation of Article 91 (Insubordinate conduct toward noncommissioned officer), UCMJ). (Charge Sheet).

[7] This conduct formed the basis for Specification 1 of Additional Charge I (Violation of Article 91 (Insubordinate conduct toward noncommissioned officer), UCMJ). (Charge Sheet).

479).

D. Appellant is insubordinate towards SGT [redacted] and threatens to stab him in the neck.

Two days later, around 1700 on 25 June 2021, Captain (CPT) Stribrny and Sergeant First Class (SFC) Lemus were conducting "welfare checks" in appellant's building when they heard extremely loud music coming from appellant's room. (R. at 493–94, 517). Because appellant was from a different unit, he was unknown to either CPT Stribrny or SFC Lemus. (R. at 495, 499). After SFC Lemus knocked loudly appellant finally answered the door. (R. at 495). Appellant was completely naked. (R. at 495).

Roughly thirty seconds passed with CPT Stribrny and SFC Lemus standing in disbelief, and then appellant slammed the door. (R. at 495–96). Appellant refused SFC Lemus's directions to put on clothes. (R. at 496–97). Once SFC Lemus notified appellant's company commander of the situation, he returned to appellant's room with two other NCO's, including SGT [redacted] (who was on staff duty at the time), as well as SSG Howard, the staff duty NCO.[8] (R. at 498, 500, 506, 518). When appellant refused to answer after roughly five minutes of knocking, SSG Howard used a master key to open the door. (R. at 501, 508).

Inside appellant's room, the floor was wet with condensation and the shower

[8] Staff Sergeant Howard was formerly appellant's platoon sergeant for roughly a year prior to this encounter. (R. at 506).

was running at "full blast heat," generating fog and steam in the room. (R. at 501–02, 508). Appellant was nowhere to be seen. (R. at 502). The music stopped for a few seconds, and then turned back on. (R. at 502). Appellant emerged from behind a sheet hung as a privacy curtain, still nude. (R. at 502). Appellant picked up a child's sweater and walked to the door where SFC Lemus and SSG Howard were standing. (R. at 503). Sergeant First Class Lemus was trying to close the door, but appellant was apparently trying to invite them into his room, saying, "Do you want to see what I have, come inside" while holding the door open. (R. at 503). Appellant eventually released the door, allowing SFC Lemus to close it. (R. at 503). The soldiers returned to the CQ to record their inspection. (R. at 504). The NCO's told appellant to put on clothes multiple times, but he never complied. (R. at 504). All soldiers were wearing the ACU at the time. (R. at 504, 507).

Roughly an hour or two later, appellant's company commander called SSG Howard and directed him to return to appellant's room to check on him. (R. at 509). Staff Sergeant Howard, along with SGT [redacted] and SGT Bitler (the CQ NCO), returned to appellant's room. (R. at 510). After appellant answered the door, appellant "seemed okay" talking to SSG Howard but started yelling at SGT [redacted] to "get out of here." (R. at 510). At one point, he threatened to stab SGT [redacted] in the

neck.[9] (R. at 510, 512, 518). Appellant also told SGT [redacted] that SGT [redacted] "liked what he saw earlier, seeing the tip," and called SGT [redacted] a "pussy."[10] (R. at 455). Appellant's demeanor would alternate between threatening anger and happy smiling, or "between calm and aggressive." (R. at 455, 512). Sergeant Bitler said at trial that appellant "wasn't fully there." (R. at 519).

E. The command prefers the Additional Charges and directs a sanity board.

The government preferred Additional Charges I and II against appellant on 6 July 2021.[11] (Charge Sheet). On 7 July 2021, appellant's brigade commander ordered a

> Rule for Courts-Martial (R.C.M.) 706 inquiry [sanity board] into the mental capacity and/or mental responsibility of [appellant] to determine if [appellant] had the requisite mental responsibility at the time of his alleged criminal acts and presently possess[ed] the requisite mental capacity to properly participate in the preparation of his defense.

(App. Ex. XXXI). The order directed the board to issue findings on the following questions:

> a. At the time of the alleged criminal conduct did

[9] This conduct formed the basis for The Specification of Additional Charge II (Violation of Article 115 (Communicating threats), UCMJ). (Charge Sheet).
[10] This conduct formed the basis for Specification 4 of Additional Charge I (Violation of Article 91 (Insubordinate conduct toward noncommissioned officer), UCMJ). (Charge Sheet).
[11] On 8 June 2021, the government preferred The Specification of The Charge (Violation of Article 120 (Sexual assault), UCMJ), for which appellant was ultimately acquitted at trial. (Charge Sheet; R. at 692).

> [appellant] have a severe mental disease or defect? As used in this memorandum, the term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as non-psychotic behavior disorders and personality defects.
>
> b. What is the clinical psychiatric diagnosis?
>
> c. Was [appellant], at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?
>
> d. Is [appellant] presently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense?

(App. Ex. XXXI).

On 10 August 2021, the sanity board issued its answers (in relevant part):

> [a.] For all charges: No, [appellant] did not have a severe mental disease or defect at the time of the alleged criminal conduct. […]
>
> [b.] At the time of the events resulting in Article 91 and Article 115 charges: Severe Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder.
> At the time of 706 evaluation: Cannabis Use Disorder, Severe, In a Controlled Environment. […]
>
> [c.] [Appellant] *was able* to appreciate the nature and quality or wrongfulness of his conduct at the time of the alleged criminal conduct. […]
>
> [d.] [Appellant] is *not* presently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or to conduct or

> cooperate intelligently in his defense.

(App. Ex. XXXVI) (emphasis in original).

F. Appellant asks the military judge to compel production of a Defense Expert in forensic and clinical psychology.

On 10 August 2021, appellant filed a motion in limine to compel production of a defense expert in forensic and clinical psychology.[12] (App. Ex. XXII). As support for the motion, appellant argued in part that

> [a] mental condition not amounting to a lack of mental responsibility is not an affirmative defense, but may be admissible to determine whether [appellant] entertained the state of mind necessary to prove an element of the offense. R.C.M. 916(k)(2), Discussion.

(App. Ex. XXII, p. 7).

On 27 September 2021, the parties litigated appellant's motion in an Article 39(a) hearing. (R. at 15–21). Appellant argued that the defense expert "could assist the defense … in developing potential mitigation material that … may be relevant should we get to presentencing proceedings." (R. at 16). Following defense counsel's argument, the military judge asked appellant to clarify whether "there aren't any specific defenses that the Defense has identified in reviewing the long form that [appellant] would need [the expert] to help flesh out, it's just

[12] Because appellant filed his motion before the sanity board released its findings, he did not include or make any references to the sanity board's findings as evidence in support of the motion. (App. Ex. XXII; R. at 15).

requesting assistance in general?" (R. at 17). Defense counsel responded that the expert could assist in "exploring those implications." (R. at 18).

On 1 October 2021, the military judge issued her findings and conclusions and denied appellant's motion. (App. Ex. XXXIX). The military judge found that appellant failed to show a reasonable probability an expert in forensic psychology would be of assistance, finding in part that denial of expert assistance would not result in a fundamentally unfair trial:

> The Court notes that evidence of "Severe Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder" may raise the issue of voluntary intoxication which in turn, may be shown to negate the element of knowledge in Article 91 and the specific intent element in Article 115. If raised, the Court will provide the voluntary intoxication instruction to the panel members. However, voluntary intoxication is not necessarily an issue that requires expert assistance and the Defense has not argued so.

(App. Ex. XXXIX, p. 7).

G. The panel recalls Article 120 witnesses to inquire about appellant's behavior as it related to the Additional Charges.

Following the government's case on the merits, a panel member recalled SPC [redacted], the alleged victim from appellant's sexual assault charge, as well as her roommate SPC [redacted], who was appellant's girlfriend at the time of the sexual assault allegation. (R. at 521, 533). The panel asked the question of both witnesses: "[D]id you ever witness [appellant] exhibit behaviors where he was talking to himself or others who weren't present at the time?" (R. at 533, 538; App. Ex.

LXV). While both witnesses answered that they had observed appellant talking to himself before, SPC [redacted] said that it was:

> Only when he was under the influence of alcohol. Like one minute he'd be laughing, and then borderline crying, and then he'd get mad at himself.

(R. at 538–39).

H. The military judge denies appellant's request for an instruction regarding evidence negating *mens rea*.

At the close of evidence, appellant objected to the military judge's proposed findings instructions and requested a specific instruction regarding evidence negating *mens rea*. (R. at 583). Appellant argued that:

> this instruction is appropriate when there is evidence—when the offenses contain the elements of knowledge and when there is evidence tending to establish a mental or emotional condition of any kind. Although not amounting to a lack of mental responsibility that may negate that knowledge element.

(R. at 583).

The military judge denied appellant's request for the instruction. (R. at 585). While "acknowledg[ing] that there was significant testimony from a number of witnesses regarding their observations of the accused's behavior, his speech, his actions, demeanor during the charged offenses," the military judge observed that appellant could argue that he lacked the knowledge element for the Additional Charges. (R. at 584). Further, the military judge reviewed the relevant

Benchbook[13] instruction and the case law it cited, and found:

> there was insufficient evidence raised showing that [appellant] had a mental disease, a mental defect, a mental impairment, a mental condition, a mental deficiency, a mental character, or … some sort of behavior disorder. That the observations of witnesses at the time of the alleged offense is that he was acting erratically, that he was calling people by different names, by itself was insufficient to meet the threshold to … give this instruction.

(R. at 584). The military judge also noted that:

> [I]t's not the court's position that an expert is required … in order to get this instruction, but that there does need to be some evidence of a mental condition, a mental deficiency, a mental character or behavior disorder. And just based on the evidence that's been presented, the court finds it's insufficient to instruct the panel.

(R. at 586).

However, the military judge instructed the panel on voluntary intoxication and ignorance or mistake of fact. (R. at 600–02; App. Ex. LXVII, p. 7–9).

[13] Dept't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 5-17 (29 Feb. 2020) [Benchbook].

Assignment of Error

WHETHER THE MILITARY JUDGE ERRED IN NOT INSTRUCTING ON PARTIAL MENTAL RESPONSIBILITY NEGATING MENS REA.

Standard of Review

"Whether a required instruction on findings contained within R.C.M. 920(e) is reasonably raised by the evidence is a question of law that we review de novo." *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017) (cleaned up). A preserved instructional error is tested for harmlessness. *Id*.

Law and Argument

The military judge properly provided the panel with a voluntary intoxication instruction and was not required to provide an instruction on evidence negating *mens rea* under the facts of this case. Even if this court finds the military judge committed instructional error, such error was harmless.

A. The government established appellant's requisite *mens rea* beyond a reasonable doubt.

Article 91, UCMJ, requires the government to prove that the accused had "actual knowledge that the victim was a … noncommissioned … officer." Manual for Courts-Martial, United States (2019 ed.) [*MCM*], pt. IV, ¶ 17.c(2). "Actual knowledge may be proved by circumstantial evidence." *Id*. The government presented ample evidence to meet this burden, establishing that appellant was familiar with both SSG [redacted] and SGT [redacted] and knew that they were NCOs. Most

obviously, SSG [redacted] was appellant's platoon sergeant who had known appellant since November 2019—roughly eighteen months prior to appellant's offenses—and had interacted with him on a daily basis. (R. at 427). Sergeant [redacted] was also known to appellant, having interacted with him at least six or seven times prior to the 23 and 25 June 2021 incidents. (R. at 446). In fact, SGT [redacted] was present with SSG [redacted] at appellant's counseling on 22 June 2021. (R. at 447–48). Finally, both of appellant's victims were in uniform at the time of the offenses, leaving no possible doubt that appellant knew his victims were NCOs then in the execution of their duties.[14] (R. at 431, 467, 475, 504, 507).

B. Appellant's behavior did not warrant an instruction on evidence negating *mens rea*.

Under R.C.M. 920(e)(3), instructions on findings shall include a description of any special defense under R.C.M. 916 in issue. Rule for Courts-Martial 916(k)(2) describes "partial mental responsibility" as "a mental condition not amounting to a lack of mental responsibility under paragraph (k)(1) [lack of mental responsibility]" and further establishes partial mental responsibility as not an

[14] Sergeant [redacted] was wearing the APFU during his encounter with appellant on the morning of 23 June 2021, occasioning the conduct for which appellant was charged in Specification 3 of Additional Charge I. (R. at 467). While the APFU did not reflect SGT [redacted]'s rank, Sergeant [redacted] was wearing his ACU uniform the day prior when he accompanied SSG [redacted] to counsel appellant. (R. at 447–48).

affirmative defense (i.e., as a "special defense).[15]

"[W]hen the evidence establishes a mental condition which may negate an accused's ability to entertain a required mens rea element of an offense, the military judge must, sua sponte instruct." *United States v. Tarver*, 29 M.J. 605, 609 (A.C.M.R. 1989) (citing *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987)). *See also* Benchbook, para. 5-17, note 2. This duty to instruct arises "when 'some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose.'" *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (citing R. C.M. 920(e) Discussion).

The military judge acknowledged there was testimony in the trial about appellant's behavior, but this testimony did not trigger a requirement for the military judge to instruct the panel concerning evidence negating *mens rea*. All of the witnesses to appellant's offenses under Additional Charges I and II testified to his behavior, and at least one panel member was clearly interested in this angle to the case in light of his question to SPC [redacted] and SPC [redacted] on recall. (R. at 533, 538; App. Ex. LXV).

Additionally, appellant originally raised the possibility that expert assistance

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[15] *See United States v. Feliciano*, 76 M.J. 237, n. 1 (C.A.A.F. 2017) ("[T]he three defenses under R.C.M. 916 for which the defense bears the initial burden of proof should be appropriately referred to as affirmative defenses, and every other defense under the rule is a special defense that, if raised at trial, the defense need not initially prove in order for the burden of proof to be placed on the prosecution.")

might assist the defense in exploring the special defense of a "mental condition not amounting to a lack of mental responsibility" without the benefit of the sanity board's findings that appellant's behavior at the time of the criminal behavior was attributable to Severe Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder. (App. Ex. XXII, p. 7; App. Ex. XXXVI). Notably, appellant did not raise "partial mental responsibility" as justification for his motion to compel production of a defense expert during the motions hearing, which occurred *after* the sanity board issued its answers.[16] (R. at 15–21). Further, appellant offered no evidence at trial that he suffered from a mental disease, defect, impairment, condition or deficiency which may have rendered him incapable of having the knowledge that his victims were NCOs in the execution of their duties at the time of his offenses. Benchbook, para 5-17. Accordingly, the military judge was correct when she found that:

> there was insufficient evidence raised showing that [appellant] had a mental disease, a mental defect, a mental impairment, a mental condition, a mental deficiency, a mental character, or … some sort of behavior disorder. That the observations of witnesses at the time of the alleged offense is that he was acting erratically, that he was calling people by different names, by itself was insufficient to meet the threshold to … give this instruction.

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[16] Even when the military judge inquired whether "there aren't any specific defenses that the Defense … would need [the expert] to help flesh out," appellant merely responded that the expert could assist in "exploring those implications" of psychological expertise in general. (R. at 17–18).

(R. at 584).

"Military judges are presumed to know the law and to follow it absent clear evidence to the contrary," and this presumption is not overcome in this case. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). Therefore, it was not error for the military judge to deny appellant's request for an instruction on evidence negating *mens rea*.

C. The voluntary intoxication instruction was appropriate given the evidence before the military judge and the panel.

Specialist [redacted] testified that she had seen appellant behave similarly to the way he behaved during the Article 91 and 115 offenses while he was intoxicated. While SPC [redacted]'s testimony referenced appellant's alcohol intoxication as opposed to cannabis intoxication, the panel was nevertheless confronted with some evidence that appellant's behavior may have been intoxicant induced.

In light of these circumstances, the military judge appropriately instructed the panel on voluntary intoxication, and not on evidence negating *mens rea*.[17]

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[17] Appellant did not object to the voluntary intoxication instruction at trial and has not mentioned the instruction in his brief on appeal. (R. at 582). If the court finds that it was error for the military judge to instruct the panel on voluntary intoxication, the error inured to the benefit of appellant. *See generally, United States v. Sears*, AFC 35922, 2006 CCA LEXIS 50, *6 (A.F. Ct. Crim. App. 2006) (unpub.) ("On the other hand, to the extent that the panel may have been misled by the instruction, the result would have been that they considered, rather than ignored, the appellant's intoxication. Reading the instruction as a whole, we

D. Even if the military judge committed instructional error, the error was clearly harmless.

1. This court should apply the nonconstitutional test for harmlessness.

This court "reviews de novo the issue of whether a constitutional error was harmless beyond a reasonable doubt." *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In *United States v. Gibson*, which dealt with an erroneous failure to give a requested accomplice instruction, the Court of Appeals for the Armed Forces determined the error in that case was not of a constitutional magnitude. 58 M.J. 1, 7 (C.A.A.F. 2003). In a non-constitutional context, "the test for harmlessness is whether the instructional error had 'substantial influence on the findings.'" *Id*. (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

Here, because appellant has not identified a constitutional provision implicated by the partial mental responsibility special defense, appellant's requested instruction should be tested for non-constitutional error.[18] (Appellant's Br. 13).

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conclude that any error therein would have worked to the benefit of the appellant; therefore, such error did not materially prejudice the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).")

[18] *Ellis v. Jacob*, advanced by appellant in support of applying the constitutional standard, is inapposite here because the error in *Ellis* concerned the erroneous exclusion of expert testimony related to the appellant's state of mind at the time of the offense. 26 M.J. 90 (C.M.A. 1988). In contrast, appellant's assignment of error here concerns an alleged instructional error.

2. An "evidence negating *mens rea*" instruction would not have had a substantial influence on the findings.

"Any doubt whether an instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981)). Rather than suggesting that the military judge should have instructed on evidence negating *mens rea*, *Davis* suggests instead that the military judge was correct in instructing the panel on appellant's voluntary intoxication.

Additionally, the theme of the government's opening, closing, and rebuttal arguments centered largely around the likelihood that appellant was only pretending to be confused when he committed the offenses in the Additional Charges. (R. at 168, 634, 644–47, 674, 677). *See also* App. Ex. LXIX (where the government's closing argument slide presentation includes three slides devoted to appellant's statement "I could act like that again if I wanted to."). Conversely, the defense barely referenced this possibility in its closing argument. (R. at 650). Moreover, while appellant's behavior was odd to the NCOs who were present at the time, there is no suggestion that appellant didn't know that his victim's were sergeants, given his extensive history with them, their uniforms, and even the fact that he referred to SGT [redacted] as "sergeant." (R. at 451).

An "evidence negating *mens rea*" instruction could not have had a "substantial influence" on the panel's findings under these circumstances. *United*

States v. Gibson, 58 M.J. 1, 7 (C.A.A.F. 2003) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

3. The military judge's instructions were proper, the panel considered them, and found the government proved its case beyond a reasonable doubt.

Because the military judge instructed the panel on the lesser included offense of assault for Specifications 1 and 3 of Additional Charge I, and because the military judge instructed the panel on ignorance or mistake of fact, the panel necessarily found that appellant had the requisite *mens rea* for all four specifications of Additional Charge I.

The military judge instructed the panel with respect to the lesser included assault offense:

> [T]he offense of Assault Consummated by a Battery, is a lesser included offense of the offense set forth in Specifications 1 and 3 of Additional Charge I. When you vote, if you find the accused not guilty of the offense charged, that is Striking or Assaulting a Noncommissioned Officer, then you should consider the lesser included offense of Assault Consummated by a Battery, in violation of Article 128, UCMJ.

(R. at 593–94; App. Ex. LXVII, p. 3). He further explained the difference between the charged and the lesser included offense:

> The offense charged, Striking or Assaulting a Noncommissioned Officer and the lesser included offense of Assault Consummated by a Battery differ in that the offense charged requires as elements that you be convinced beyond a reasonable doubt:

> 1. That, at the time, [SSG [redacted]][*] and [SGT [redacted]][*] were in the execution of their office;
> 2. That the accused *then knew* that [SSG [redacted]][*] and [SGT [redacted]][*] were noncommissioned officers;
> 3. That [SSG [redacted]][*] and [SGT [redacted]][*] were the superior noncommissioned officers of the accused; and
> 4. That the accused then knew that [SSG [redacted]][*] and [SGT [redacted]][*] were his superior noncommissioned officers.
>
> Whereas the lesser offense of Assault Consummated by a Battery does not include such elements.

(R. at 594; App. Ex. LXVII, p. 4) (emphasis added).

With respect to ignorance or mistake of fact, the military judge instructed the panel in part that:

> The evidence has raised the issue of ignorance or mistake on the part of the accused concerning his knowledge that [SSG [redacted]] and [SGT [redacted]] were noncommissioned officers in relation to the offenses of striking or assaulting a [NCO] and disrespect towards a [NCO].
>
> …
>
> If the accused at the time of the offense was ignorant of the fact or under the mistaken belief that [SSG [redacted]] and [SGT [redacted]] were not [NCOs], then he cannot be found guilty of the offenses of striking or assaulting a noncommissioned officer and disrespect towards a [NCO].
>
> The ignorance or mistake, no matter how unreasonable it might have been, is a defense.

[*] CORRECTED

(R. at 600–01; App. Ex. LXVII, p. 7).

Absent evidence to the contrary, panel members are presumed to comply with the judge's instructions. *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014). Therefore, because the panel convicted appellant of the charged "striking or assaulting a NCO" and not the lesser included offense of "assault consummated by a battery," the panel necessarily found that appellant had the requisite knowledge that SSG [redacted] and SGT [redacted] were NCOs with respect to the "striking or assaulting an NCO" offenses in Specifications 1 and 3 of the Additional Charge. Given that Specifications 2 and 4 concerned the same NCOs in the same encounters, the panel's finding of knowledge would also necessarily extend to the "disrespect towards an NCO" charges reflected in those specifications.

These facts, in conjunction with the military judge's voluntary intoxication instruction, clearly establish that under the facts of this case an instruction concerning evidence negating *mens rea* could not have had a substantial influence on the panel's findings.[19, 20]

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[19] The government also prevails on account of these reasons even under the constitutional "harmless beyond a reasonable doubt" standard. *Kreutzer*, 61 M.J. at 299.

[20] If this court finds that appellant did not have the requisite *mens rea* for Specifications 1 and 3 of Additional Charge I, it may nevertheless affirm the lesser included "assault consummated by a battery" offenses. *See* UCMJ art. 59(b)

CONCLUSION

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence.

[redacted]
MAJ, JA
Appellate Government Counsel

[redacted]
CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate Division

("Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

APPENDIX

United States v. Sears

United States Air Force Court of Criminal Appeals

February 16, 2006, Decided

ACM 35922

Reporter
2006 CCA LEXIS 50 *; 2006 WL 521587

UNITED STATES v. Airman CHRISTOPHER M. SEARS, United States Air Force

Notice: [*1] THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.
NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Sears, 2006 CAAF LEXIS 1502 (C.A.A.F., Sept. 28, 2006)*

Prior History: Sentence adjudged 12 February 2004 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Mary M. Boone. Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major John N. Page III.

For the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Judges: Before BROWN, MOODY, and FINCHER, Appellate Military Judges.

Opinion by: MOODY

Opinion

OPINION OF THE COURT

MOODY, Senior Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant of one specification of indecent assault, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. The members sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted two assignments of error: **[*2]** (1) whether the military judge erred in her instructions on mistake of fact, and (2) whether the military judge erred in denying a defense challenge for cause. Finding no prejudicial error, we affirm.

Instructions

We review the judge's decision to give or not give a specific instruction, as well as the substance of any instructions given, "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence. The question of whether [the members were] properly instructed [is] a question of law, and thus, our review is *de novo*." *United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996)* (quoting *United States v. Snow, 82 F.3d 935, 938-39 (10th Cir. 1996)*).

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error." Rule for Courts-Martial 920(f). Plain error is an error that is plain or obvious and materially prejudices the substantial

rights of the appellant. *United States v. Powell, 49 M.J. 460, 463 (C.A.A.F. 1998)*.

In the present case, the evidence raised the **[*3]** issue of mistake of fact as to consent. A mistake of fact as to a victim's consent to an indecent assault must be both honest and reasonable. *United States v. Peterson, 47 M.J. 231, 234-35 (C.A.A.F. 1997)*. The evidence showed that during the events that formed the basis for the charge and specification, the appellant was under the influence of alcohol. The military judge sought to instruct the members on the significance of the appellant's intoxication to the reasonableness of his alleged mistake of fact as to the victim's consent. She advised the panel, that in determining whether a mistake of fact occurred, they "should consider [the appellant's] education, experience, prior dealings with [the victim], along with the level of his intoxication." She went on to instruct:

> You need to realize in that regard that when we're talking about intoxication, when we talk about voluntary intoxication and how that might affect one, you have to look at the extent of the intoxication as well. So you should consider the evidence as to that. It's voluntary intoxication. In that regard, the law does recognize that a person's ordinary thought process may be materially affected **[*4]** when he or she is under the influence of intoxicants. So you can consider that evidence but when you talk about a reasonable person in this position, it should be what a reasonably sober person would. In other words, you can't be intoxicated and, in essence--you can consider it, but it has to be based on what a reasonable person with that age, education, and experience who would be sober would decide in the situation. That's basically what I needed to add to that. So you can consider that and you should consider all those facts and intoxication and how that may have played into that because a person can still be drunk and yet still be aware of what their actions are and the probable results. There was some issue as to drinking. It may have been as to both [the victim] and you can consider it regarding her as well, her state of mind, as well as the [appellant]. So you can consider all those factors.

The trial defense counsel did not object to the military judge's instructions, although the pertinent instruction from the *Military Judge's Benchbook* reads as follows:

> There has been some evidence concerning the accused's state of intoxication at the time of the alleged **[*5]** offense. On the question of whether the accused's (ignorance) (belief) was reasonable, you may not consider the accused's intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary prudent sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

Department of the Army Pamphlet 27-9, *Military Judge's Benchbook*, P5-11-2 (15 Sep 2002).

It is clear that the military judge did not give the *Benchbook* instruction verbatim. The appellant contends that the instruction actually supplied by the military judge was confusing, focusing his attention on the phrase "in other words, you can't be intoxicated." The appellant contends that this phrase might have led a member to conclude that if the appellant was intoxicated, then the defense of mistake of fact as to consent was unavailable to him.

It is always preferable to give instructions verbatim from the *Benchbook* whenever possible. Failure to do so invites confusion and error. In this case, the judge's instruction **[*6]** appeared inconsistent in that it advised the panel that they could consider the appellant's intoxication on the issue of mistake of fact while at the same time stating that they could not consider it as to the reasonableness of any such

mistake. On the other hand, to the extent that the panel may have been misled by the instruction, the result would have been that they considered, rather than ignored, the appellant's intoxication. Reading the instruction as a whole, we conclude that any error therein would have worked to the benefit of the appellant; therefore, such error did not materially prejudice the substantial rights of the appellant. *See* Article 59(a), UCMJ, *10 U.S.C. § 859(a)*. We hold that there is no plain error in the military judge's instruction. *See Powell, 49 M.J. at 463*.

Challenge for Cause

We resolve the remaining assignment of error adversely to the appellant. The military judge did not abuse her discretion by denying the challenge for cause against the wing commander's executive officer. *See United States v. Richardson, 61 M.J. 113, 118-19 (C.A.A.F. 2005)*; *United States v. Napoleon, 46 M.J. 279, 282-83 (C.A.A.F. 1997).* **[*7]**

Conclusion

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

AFFIRMED.

End of Document

CERTIFICATE OF SERVICE, U.S. v. WATKINS (20210638)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 26th day of June, 2023.

[redacted]
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