UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, MORRIS, and ARGUELLES[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 LUKE A. WATKINS
United States Army, Appellant

ARMY 20210638

Headquarters, III Corps and Fort Cavazos
Tiffany D. Pond, Military Judge
Colonel Runo C. Richardson, Staff Judge Advocate

For Appellant: Captain Rachel M. Rose, JA (argued); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief); Major Mitchell D. Herniak, JA; Captain Tumentugs D. Armstrong, JA (on reply brief).

For Appellee: Captain Vy T. Nguyen, JA (argued); Colonel Christopher B. Burgess, JA; Major Andrew M. Hopkins, JA (on brief).

27 September 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent

PENLAND, Senior Judge:

Where the military judge erred in denying appellant's requests for expert assistance and a centrally-important findings instruction,[2] we will set aside the result and authorize a rehearing.[3]

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[1] Judge ARGUELLES decided this case while on active duty.

[2] These errors jointly and severally prejudiced appellant.

[3] We have fully and fairly considered matters submitted personally by appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Our disposition of the case renders them moot.

A panel consisting of officer and enlisted members, sitting as a general court martial, convicted appellant, contrary to his pleas, of four specifications of insubordinate conduct toward a noncommissioned officer and one specification of communicating a threat, in violation of Articles 91 and 115, Uniform Code of Military Justice, 10 U.S.C. §§ 891 and 915 [UCMJ]. The military judge sentenced him to confinement for 140 days and bad conduct discharge. We review the case under Article 66, UCMJ.

BACKGROUND

Additional details about appellant will follow; it is sufficient to begin by stating he was known as a good duty performer until the COVID-19 pandemic, during which he rarely reported for duty. For months, unit leaders essentially allowed him to remain alone in his barracks room and would regularly check on him there. Over time, appellant became aggressive and erratic; the findings of guilty revolve around two particularly troubling days detailed in the second subsection below.

A. Pretrial

Based on reports of appellant's unusual behavior and alleged misconduct, the convening authority ordered an evaluation under Rule for Courts-Martial [R.C.M.] 706. Among other things, it found:

> [Appellant] did not have a severe mental disease or defect at the time of the alleged criminal conduct . . . .
>
> At the time of the events resulting in Article 91 and Article 115 charges [appellant] had Severe Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder.

The defense filed a motion to compel the assistance of an expert consultant in the field of forensic psychology, writing:

> 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.

The military judge denied the motion:

> Here, the accused's diagnosis of "Severe Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder" by the R.C.M. 706 Board, without more, does not demonstrate a necessity for expert assistance.

....

> The Defense argues the expert will evaluate the reliability of the R.C.M. 706 Board. But there are no irregularities with the board's proceedings presented to the Court.
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> ...
>
> 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.

B. Trial

Staff Sergeant (SSG) LAT, appellant's platoon sergeant, testified at trial. On 23 June 2021, the unit was conducting the Army Combat Fitness Test, but appellant was absent – as had become normal by this time.[4] SSG LAT told Sergeant (SGT) [redacted] and Specialist (SPC) [redacted] o check on appellant in his barracks room. They did so and returned to report he was acting strange. SSG [redacted] and SGT [redacted] appellant's first line supervisor, then went to check on him. He was playing his music loudly, referred to SGT [redacted] as President Obama, called SSG [redacted] a b--ch, and told him to shut the f--- up multiple times. At one point, appellant leaned toward SSG [redacted], mumbling and whispering, and punched him twice in the chest.

CM also testified about going to appellant's barracks room with SPC [redacted] the next day. Appellant answered the door after they knocked for about five minutes. CM testified, "he kind of rushed out really quickly in my face[.]"

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[4] SSG [redacted] described a previous incident in May 2021, where appellant was acting erratically, saying "people weren't themselves, that they were demons and that he was going to pull them out and pretty much kill them." SSG [redacted] prevented appellant from getting close to the company commander, who was also present. He then went to the hospital, and when SSG [redacted] picked him up later, appellant said he could "act that way if he wanted to again." According to SSG [redacted], the command took "other actions" regarding appellant's behavior approximately six times; he did not describe what they were – nor was he asked. [redacted], a former noncommissioned officer by the time of trial, testified describing another peculiar uncharged interaction with appellant. On 22 June 2021, he accompanied SSG [redacted] to give appellant a counseling statement for failure to report (this appears to have become normal procedure). Appellant seemed "irritated, aggravated[.]"

> And he takes the paper from me, and then keeps talking, goes back and forth between me and [SPC [redacted]]. Where at one point he's referring to me as [SSG [redacted]], referring to me as first sergeant. Referring to [SPC [redacted]] 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."

Appellant ultimately signed the counseling statement, shoved it into [redacted] chest, and started to go to physical training with him and SPC [redacted]. They did not get far:

> Got about one flight of stairs down, and he stopped and was saying something to [SPC [redacted]], kind of whispering where I heard him call him Obama at one point, but I didn't really hear anything else.... We eventually got him back to his room and then we left.... A couple times he referred to me as...first sergeant at one point. He did at one point recognize me as sergeant, as my rank at that time.

SPC [redacted] also offered his perspective:

> [Appellant] came out, stared at [redacted], and then started talking to people that weren't there. Then he called me Obama. And then that kind of rinsed and repeated a couple of times....and he just pushed [redacted]. And then after that he signed the counseling and we went downstairs.

SGT [redacted] testified about appellant's unusual status:

> Actually I didn't really see him at work, so we were just checking him at the room.... My understanding was that he 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.

Like SSG [redacted] vague testimony about "other actions", SGT [redacted] did not describe the nature of appellant's "treatment." Neither party asked him to elaborate. SGT [redacted] testified that, on the date charged, appellant opened his door and behaved oddly, punching SSG [redacted] twice:

> I thought it was like a friendly punch, like back in the day when you got promoted that center punch to the chest, but the second one was much harder.... I would consider the second one the actual punch.

Various leaders went again to appellant's room on 25 June 2021. Captain (CPT) [redacted] and Sergeant First Class (SFC) [redacted] responded to loud music from his room as they

performed a routine barracks check, and [redacted] joined them. Eventually appellant answered the door, naked. [redacted] testified:

> He just ignored it [the request to clothe himself] for the most part. He really wasn't acknowledging the fact that we – you know, that he had been told, you know, put some pants on. At one point he was trying to close the door on us while they were talking to him. And then he gave us like a really weird, like, big eyed look and asked us if we wanted to see something. So his behavior then was erratic and kind of aggressive....

Captain [redacted] told appellant to get dressed, and appellant closed the door without answering. CPT [redacted] and SFC [redacted] left and returned with other noncommissioned officers, but appellant would not answer the door. SSG [redacted], the staff duty noncommissioned officer and appellant's former platoon sergeant, used a master key to open the door. Appellant was still naked and would not get dressed. Captain [redacted] testified, "We verified that he was still alive, which was the purpose of the health and welfare check, and we terminated the contact."

Sergeant First Class [redacted] gave additional detail:

> Staff Sergeant [redacted] told me just some of the issues they've had in the past. He just simply explained that somebody is sent to check on [appellant] daily just to make sure he's okay, make sure he's alive, make sure he's safe, but that he doesn't report to work, he doesn't, his place of duty essentially was his room.

According to SFC [redacted], appellant's commander was notified, but "didn't feel comfortable coming in because she felt like it would make the situation worse." SFC [redacted] described the conditions in appellant's room:

> [T]he first thing I noticed was it was extremely hot and kind of muggy, extremely muggy. Kind of a sour smell.... [T]he floor was wet from like condensation, and the shower was running. The shower had been on full blast heat, because there was a lot of fog and steam coming from the bathroom.

When SFC [redacted] told appellant to get dressed, he responded by picking up a small clothing item that "looked like a child's sweater" and invited the senior noncommissioned officer into his room to "see what I have[.]" Sergeant First Class SL left instead, after directing those on duty to continue checking on appellant.

Staff Sergeant [redacted] testified:

> [Appellant tried] to walk out the door naked. And we just kind of pushed him back inside and said no don't come out there – you know, come outside of the

> room naked. And then we just closed the door. And I was like, hey, he's fine. He's alive. Let me go, just let the chain of command know that he's alive. He's good. And let's just leave him alone.
>
> I was called by my commander at the time and she told me we need to go back up there. It was like an hour later, an hour or two hours later. She said we need to go back up there and check on him and make sure that he's all right and he's still alive.

As directed, SSG [redacted] and [redacted] returned to appellant's room, where loud music continued. Appellant answered the door, wearing clothes this time. [redacted] said, "his behavior [was] kind of off and on again, where one minute it's like he recognizes us and another he doesn't." Appellant called [redacted] a "pu--y" and said he was going to stab him in the neck. On cross-examination, [redacted] said he did not know whether appellant recognized those who responded to the loud music. Staff Sergeant [redacted] did not see appellant with a weapon, and he described his demeanor as shifting from yelling to smiling to angry again. When appellant threatened to stab [redacted], he was not holding a weapon.

A panel member asked SSG [redacted], "when did [appellant] stop showing up to work?" Staff Sergeant [redacted] answered:

> The exact time, I can't predict the exact time when he started doing it. But it was weird and awkward when he started.... It was weird and awkward when he started because that wasn't the type of person he was.... I guess he started going through some stuff, and just slowly – I can't say a time limit. But I just noticed slowly his personality start to change a little bit, yeah.

Staff Sergeant [redacted], another responding leader on 25 June 2021, described appellant as "pretty harsh. But again, he wasn't fully there, from what I noticed."

The court-martial called for additional testimony from SPC [redacted] and SPC [redacted].[5] When asked, "did you ever witness [appellant] exhibit behaviors where he was talking to himself or others not present?", SPC [redacted] answered, "Yes, I did.... It was the first time we were alone in the house together.[6] He was kind of just talking to himself in the living room out loud." SPC [redacted] did not observe another similar event.

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[5] They had previously testified about separate charged misconduct that ultimately led to an acquittal.

[6] Specialist [redacted] indicated no one else was present.

Without specifying a date range – she was not asked – SPC [redacted] responded "Yes" to the same question, explaining appellant had done so after consuming nearly an entire large bottle of alcohol "by himself." Asked "Is that the only time that you observed that?," she said, "Only when he was under the influence of alcohol."

When the presentation of evidence ended, notably absent was any testimony about appellant drinking alcohol or ingesting illegal drugs either in the barracks, or at or near the time of the Article 91 and Article 115 charges. However, the military judge told the parties she intended to give the voluntary intoxication instruction. The defense objected, requesting a partial mens rea instruction instead:

> Defense Counsel (DC): It's defense's position that this instruction is appropriate when there is evidence—when the offenses contain the element 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.
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> And the government paraded about seven witnesses in front of the panel, who all gave pretty clear and consistent testimony that the accused did in fact possess a mental or emotional condition specifically relating to the knowledge element, and that they testified he did not seem aware of what was going on. He did not seem to recognize individuals, he was talking to people who wasn't there. He has a wildly fluctuating demeanor, his wildly fluctuating emotions, and all of those facts go directly to his mental state."
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> Military Judge (MJ): And the court acknowledges 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 defense can certainly argue that based on those observations that the accused lacked the knowledge element for—for the charged offenses, both for the article and the specific intent and the knowledge piece for the wrongful element, for communicating a threat under Article 115 and for the—the knowledge elements for all four specifications for the Article 91 offenses.
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> The court's decision not to instruct the members on—to give this instruction, which 5-17 evidence negating mens rea was a—after reviewing the instruction—instruction and reviewing the case law that cited, that there—the court found there was insufficient evidence raised showing that the accused had a mental disease, a mental defect, a mental impairment, a mental condition, a mental deficiency, a mental character, or—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—to give this instruction. That is why the court decided not to give that instruction.

The assistant trial counsel added:

> We would just direct the court's attention or appellate court[]s if it is reviewed by appellate courts at some point to [the 706 "short form" analysis], [which found] the accused did not have a severe mental disease or defect at the time of the alleged criminal misconduct, and that the accused was able to appreciate the nature, and quality, or wrongfulness of his conduct at the time of the alleged criminal conduct.
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> The importance of this is that and defense is certainly in possession of more information than the government because the defense would have the long form of this examination. Neither the government nor the defense likely knows exactly why [appellant] was acting the way he was during those alleged misconduct—or alleged charges. However, there is also evidence that there was malingering based on his statements to [SSG [redacted]. There's evidence that it might have been even from the—the appellate exhibit that I just cited, evidence that this might have been the basis of his voluntary intoxication. Voluntary intoxication instruction is going before the panel. And furthermore just the elements themselves of the offense and the instructions on that will make it clear to the panel they still have to find he had appropriate mens rea. There's not been enough before this court to justify the mens rea instruction in this case.

Ending the discussion, the military judge reasoned:

> [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.

The military judge instructed the panel, in pertinent part:

> The evidence has raised the issue of voluntary intoxication in relation to the offenses of striking or assaulting a noncommissioned officer, disrespect toward the noncommissioned officer... and communicating a threat. I advised you earlier that the elements of striking a noncommissioned officer and disrespect towards a noncommissioned officer require the accused then knew that [SSG [redacted] and former SGT [redacted] were noncommissioned officers and then knew that [they] were superior noncommissioned officers at the time of the offense. In deciding whether the accused had such knowledge at the time, you should consider the evidence of voluntary intoxication. Similarly, I advised you one of the elements of communicating a threat is the requirement that the accused's communication is wrongful; meaning that the accused transmitted

> the communication with the subjective intent to issue a threat or with the knowledge that it would be viewed as a threat. In deciding whether the accused's communication was wrongful, you should also consider the evidence of voluntary intoxication. The law recognizes that a person's ordinary thought process may be materially affected when he's 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 knew that [they] were superior noncommissioned officers at the time of the offense with respect to Specifications 1, 2, 3, and 4 in Additional Charge I, or cause you [to] have a reasonable doubt that the accused made the communication with the intent to issue a threat or the knowledge that it be viewed as a threat in the--in The Specification of Additional Charge II. 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 such knowledge or such intent, because *a person may be drunk, yet still be aware at the time of his actions and their probable results*. (Emphasis added)

LAW

A. Expert Assistance

A military judge's ruling regarding appointment of an expert consultant is reviewed for an abuse of discretion and will only be overturned if the findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law. *United States v. Anderson*, 68 M.J. 378, 383 (citing United States v. Lee, 64 M.J. 213, 217 (C.A.A.F. 2006)). The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). (*citing United States v Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

In *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986), the CMA held that a showing of necessity entitles the accused to an expert consultant. In *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), the same court set forth a three-factor test to determine whether the assistance of an expert consultant is "necessary": (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and, (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop. In addition to addressing these three factors, an accused seeking the appointment of an expert consultant must demonstrate that the denial of such assistance would result in a fundamentally unfair trial. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (holding an accused has the burden of establishing that a reasonable probability exists that an expert would be of assistance and that denial of the expert would result in a fundamentally unfair trial).

In *United States v. McAllister*, the Court of Appeals for the Armed Forces (CAAF) held that a military judge's erroneous ruling denying appellant expert assistance deprived him of the right to present a defense, "a fundamental element of due process of law." 64 M.J. 248, 252 (C.A.A.F. 2007)(citations omitted). We review such errors under the constitutional harmless error standard, which requires the government to demonstrate that the error is harmless beyond a reasonable doubt in that there is no reasonable probability it contributed to the contested findings of guilty. *Id.* at 252-53.

B. Instructions

Appellant alleges the military judge committed two instructional errors: (1) failing to instruct the panel it could consider evidence of his partial mental impairment regarding the knowledge and specific intent elements for the crimes at issue; and (2) providing the panel with a voluntary intoxication instruction over his objection.

In *United States v. Wolford*, the CAAF held that the military judge's obligation to assure the accused receives a fair trial includes the duty to "provide appropriate legal guidelines to assist the jury in its deliberations." 62 M.J. 418, 419 (C.A.A.F. 2006) (citations omitted). We review questions of law regarding whether a military judge properly instructed a panel *de novo*. *United States v. Simpson*, 60 M.J. 674, 680 (Army Ct. Crim. App. 2004) (citing *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003)).

1. Partial Mental Responsibility

As noted above, in this case the military judge denied appellant's request for Military Judge's Benchbook Instruction 5-17, which provides that even where there is no lack of mental responsibility defense, the panel may still consider whether an underlying mental impairment renders an accused mentally incapable of having the required knowledge or specific intent. Dept. Army Pam. 27-9, Legal Services: Military Judges Benchbook, ¶ 5-17, 29 Feb. 2020 (MJBB). The Court of Military Appeals established this principle in *United States v. Ellis*, holding it was error to prevent an accused from presenting evidence of his diminished mental capacity in support of his claim that he lacked specific intent. 26 M.J. 90, 93 (C.M.A. 1988). *See also United States v. Tarver*, 29 M.J. 605, 608-09 (A.C.M.R. 1989) ("We find that evidence of this [mental] disorder was relevant, even if a complete defense of lack of mental responsibility did not exist, to the element of intent to be proved in both charged offenses."); R.C.M. 916(k)(2) Discussion ("Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.").

When evaluating a military judge's decision not to give an instruction, we consider whether the record shows "some evidence" from which a reasonable inference can be drawn that the affirmative defense was in issue. *United States v. Dearing*, 63 M.J. 478, 482 (C.A.A.F. 2007). *See also*, R.C.M. 920(e) discussion. Similarly, in *United States v. Davis*, the CAAF held that "[a]ny doubt about whether an [affirmative defense] instruction should be given should be resolved in favor of the accused." 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981). And as it specifically applies to diminished mental capacity, we held in *Tarver* that "when 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." 29 M.J. at 609 (citing *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987).

On the question of whether a missing partial mens rea instruction rises to the level of constitutional error, although the Court of Military Appeals in *Ellis* noted in dicta that it "raises obvious constitutional concerns," our superior court has never affirmatively answered. However, in *Axelson*, we pointed out that since the U.S. Supreme Court has held that a state does not violate due process by barring partial mental responsibility defenses, "partial mental responsibility remains in military practice a creature of executive enactment, and not a Constitutional requirement." 65 M.J. at 513 n.10 (citing *Clark v. Arizona*, 548 U.S. 375 (2006)). For non-constitutional error we assess whether there is a "reasonable probability that, but for the error, the outcome of the proceedings would have been different." *United States v. Tovarchavez*, 78 M.J. 458, 462 n.5 (C.A.A.F. 2019) (citations omitted).

2. Voluntary Intoxication

In *United States v. Hearn*, we held that "evidence that an accused consumed intoxicants, standing alone, is insufficient to require a voluntary intoxication instruction." 66 M.J. 770, 777 (Army Ct. Crim. App. 2008). Instead, "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." *Id.* (citing *United States v. Peterson*, 47 M.J. 231, 234 (C.A.A.F. 1997). We further held in *Hearn* that absence of a required voluntary intoxication instruction is tested under the constitutional harmless error standard. *Id.* at 777 (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2020).

ANALYSIS

A. Expert Assistance

At trial and before us, the government asserts the defense did not meet its burden to demonstrate assistance was necessary. This is not an unfair argument, especially considering the defense's proffered justification at trial that it was

"exploring [the] implications[]" of appellant's behavior. This is exactly the kind of phrasing that might cause a military judge to conclude a fishing expedition is underway. However, the defense did write in its motion:

> 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.

While lacking case-specific detail, this passage does proffer the theory of partial mental responsibility under RCM 916(k)(2), and the motion separately recounted behavioral details that raised questions about appellant's mental state. The motion also referred to the R.C.M. 706 report, which diagnosed appellant with "Cannabis Use Disorder with Cannabis-Induced Psychotic Disorder" at the time of the alleged Article 91 and 115 offenses.[7] At oral argument, appellee conceded government counsel's limited understanding of the interplay between a substance use disorder and resultant psychoses. We do not point this out to criticize appellee's advocacy, rather we do so to acknowledge these are medically complex phenomena, particularly when diagnosed together[8] – even more reason to grant the defense request for expert assistance.[9]

Appellant met his burden below to show both: (1) that an expert was necessary to explain the relationship between the multiple reported instances wherein he appeared to be suffering from mental health issues and his psychotic disorder diagnosis; and (2) the inability of defense counsel to undertake this analysis themselves. Given that appellant's apparent diminished mental capacity went to the core of his defense, the government cannot meet its burden to demonstrate the military judge's error in declining to appoint an expert consultant is harmless beyond a reasonable doubt.

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[7] To a lay reader, at least, the report also included a potential internal inconsistency, stating appellant "did not have a severe mental disease or defect at the time of the alleged criminal conduct." The military judge adopted both as findings of fact in denying the defense motion, without addressing that they appeared to conflict with one another. With this observation, we question the military judge's conclusion, "no irregularities with the board's proceedings [were] presented to the Court."

[8] For example, the temporal connection, if any, between these conditions calls for specialized analysis.

[9] We do not speculate whether defense expert assistance would have evolved into expert trial testimony. However, without the former the defense case was virtually guaranteed not to include the latter.

B. Instructions

Without restating the witnesses' record testimony, there was clearly "some evidence" that appellant lacked the necessary mens rea to be found guilty of the Article 91 and Article 115 charges. In "[finding] there was insufficient evidence raised showing that the accused had a mental condition, a mental deficiency, a mental character, or—or some sort of behavior disorder," the military judge erred in denying the defense request to give the partial mens rea instruction. Given our concern that this omission directly contributed to the guilty findings, the error is not harmless under either a constitutional or non-constitutional standard.[10]

With respect to the voluntary intoxication instruction that the military judge gave over the defense objection, beyond appellant's aberrant behavior, there was no record evidence to indicate he was voluntarily intoxicated[11] at the time of his charged misconduct toward his noncommissioned officer leaders.[12] The only evidence of intoxication came from SPC [redacted], but we interpret her testimony as referring to episodes of alcohol consumption at a time and place apart from the basis of the Article 91 and Article 115 charges. Because the evidence at trial did not "reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged," the military judge erred in giving this instruction. *Hearn*, 66 M.J. at 777 (citation omitted).

Moreover, based on the evidence,[13] one might *assume* intoxication – voluntary or not - caused appellant's strange conduct. However, we expect fact finders to use their common sense and experience to make reasoned inferences from admissible evidence – not unreliable assumptions. One could reasonably think

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[10] The assistant trial counsel's opposition to the partial mens rea instruction causes us to separately caution practitioners. At trial the government argued appellant's comments to SSG [redacted] on his hospital discharge indicated that he was malingering by feigning a behavioral health condition. This *was an argument for the panel* to consider in deciding a contested factual issue, *not for the military judge* to consider in deciding whether to give the instruction. The distinction is important – getting it wrong sows seeds of reversible error.

[11] Merriam-Webster's dictionary defines "intoxicated" as: "affected by alcohol or drugs especially to the point where physical and mental control is markedly diminished." Merriam-Webster 2023. Web. 13 September 2023.

[12] We also observe, as a matter of law, that depending on the circumstances a military judge may give both the voluntary intoxication and partial mens rea instructions; they are not necessarily mutually exclusive.

[13] Neither the R.C.M. 706 report nor its findings became evidence.

something else – perhaps an underlying behavioral health condition – might have caused appellant's indiscipline.

Compounding the overall problem with the voluntary intoxication instruction on these facts, it specifically called for the panel to evaluate whether appellant's "drunk[enness]" deprived him of scienter. Considering the previously mentioned lack of relevant evidence of alcohol use, this was essentially an empty instruction that, at the very least, risked confusing the panel. Moreover, it could have affirmatively – but incorrectly - caused the panel to reach an unreasonable corollary: absent evidence of drunkenness, there were no impediments to finding appellant's mens rea was culpable. Accordingly, we find the military judge's error in giving this instruction was not harmless under either a constitutional or non-constitutional standard.

CONCLUSION

The findings of guilty and the sentence are SET ASIDE. A rehearing is authorized.

Judge MORRIS and Judge ARGUELLES concur.

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court