United States Navy–Marine Corps Court of Criminal Appeals

Before
MYERS, HOUTZ, and KISOR
Appellate Military Judges

UNITED STATES
Appellee

v.

Rodney D. HARVEY
Hospital Corpsman First Class (E-6), U.S. Navy
Appellant

No. 202200040

Decided: 23 May 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Ann K. Minami (arraignment)
Matthew R. Brower (trial)

Sentence adjudged 5 November 2021 by a general court-martial convened at Naval Base Kitsap, Bremerton, Washington, consisting of officer and enlisted members. Sentence in the Entry of Judgment: reduction to paygrade E-1, confinement for one year, and a dishonorable discharge.[1]

For Appellant:
Lieutenant Christopher R. Dempsey, JAGC, USN

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[1] Appellant was credited with having served seven days of pretrial confinement.

For Appellee:
Captain Tyler W. Blair, USMC
Lieutenant R. Blake Royall, JAGC, USN
Lieutenant James P. Wu Zhu, JAGC, USN

Judge KISOR delivered the opinion of the Court, in which Senior Judge MYERS and Senior Judge HOUTZ joined.

PUBLISHED OPINION OF THE COURT

KISOR, Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of indecent exposure in violation of Article 120(c),[2] Uniform Code of Military Justice [UCMJ], but acquitted him of one charge of sexual assault and one charge of battery, charged as violations of Articles 120 and 128, UCMJ.[3]

Appellant asserts three assignments of error [AOEs]:

> **I. Is Appellant's conviction for indecent exposure factually and legally sufficient where the exposure (if it happened at all) occurred late at night in a parking lot, obscured by surrounding vehicles, with no one around, and the alleged victim consented to the exposure?**
>
> **II. Did the military judge err by denying the Defense request to instruct the members on the defense of reasonable mistake of fact as to consent for indecent exposure?**
>
> **III. Did the military judge err in admitting a stipulation of fact from a prior court-martial as a**

[2] 10 U.S.C. § 920(c).

[3] 10 U.S.C. §§ 920; 928.

personnel record under Rule for Courts-Martial 1001(b)(2)?

We find no prejudicial error and affirm.

I. BACKGROUND

The Factory Fitness Center is a privately run gym with weightlifting and exercise equipment in Bremerton, Washington, where Appellant was a member. Appellant trained, and competed, in bodybuilding competitions. Ms. Echo, a civilian, also worked out at the Factory Fitness Center and was training to compete in her first bodybuilding competition. Within the Factory Fitness Center is a posing room, which is a room with mirrors where aspiring bodybuilders can photograph themselves to document their progress in bodybuilding. Although the posing room does not have a door, there is a curtain that can be pulled to prevent observation from outside. The facility, including the posing room and parking lot, is equipped with surveillance cameras.

Prior to the evening in question Appellant and Ms. Echo did not know one another. Ms. Echo was working out at the Factory Fitness Center during the evening of 28 April 2021 when Appellant struck up a conversation with her about bodybuilding. The two exchanged social media contact information and Ms. Echo testified that Appellant made sexual comments to her, including that Appellant and his wife were interested in having a threesome. After she finished her workout, Ms. Echo went into the posing room. Appellant followed her into the posing room where the two continued a conversation and Appellant helped her with her posing. As part of the posing for the mirror, Appellant partially pulled down his pants, and Ms. Echo also removed her t-shirt which she was wearing over a sports bra.

The video from the surveillance camera in the posing room, which does not contain audio, shows the two engaging in various posing activities, including partially removing their clothing, and apparently engaging in friendly conversation. Appellant picked up Ms. Echo's phone, which was unlocked, and looked at some of the pictures on it. Ms. Echo testified that she was uncomfortable, and she left the posing room to go to the restroom.

After Ms. Echo came out of the restroom, Appellant then walked with her outside to the parking lot. Her car was parked next to his. Ms. Echo testified she gave Appellant a "side hug" and she got into her car.

Ms. Echo testified that Appellant then knocked on her car window, and when she rolled it down, he leaned into her car and began choking her. She testified that she told him to stop, and he then touched her vagina through her

shorts. She testified that he continued attacking her for "a few minutes."[4] She further testified that she was fighting back and was scared that Appellant would kill her.

Ms. Echo testified about that moment, describing how Appellant then "stood outside my car and whipped his penis out, fully erect, and he put it on my door so that I could see it."[5]

The surveillance camera footage from the Factory Fitness Center parking lot is of limited clarity as to the actual moment of indecent exposure. It shows Appellant and Ms. Echo leave the Factory Fitness Center and that their cars were parked adjacent to one another. The video shows that Appellant and Ms. Echo hugged. Then, after he put his gym bag in his car, Appellant approached the driver's side window of Ms. Echo's car. The window remained rolled down and he leaned his torso into her car for approximately two minutes. He then stood outside her driver's side window, facing the window with his back to the surveillance camera.[6]

Shortly after the incident, Ms. Echo had a video call with her friend, Ms. Golf. Ms. Golf testified that Ms. Echo was "hysterical" and she felt that "something really bad had happened."[7] She testified that Ms. Echo told her that Appellant "attacked her in the car" and "she mentioned something about him putting his penis on her windshield or windowsill."[8] Ms. Echo reported the incident to the Bremerton Police Department the next morning. Officer Alpha testified that he interviewed Ms. Echo at the police department. He looked for, but did not see, any injuries to her face or neck. Ms. Echo's account of what transpired omitted many details that were later observed on the surveillance footage at the Factory Fitness Center. Officer Alpha testified that when comparing the footage with what Ms. Echo had reported to him "it was not consistent."[9] Further, Ms. Bravo, an acquaintance of Ms. Echo, testified that, in her opinion, Ms. Echo was an untruthful person.[10]

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[4] R. at 372.

[5] R. at 373.

[6] Pros. Ex. 2.

[7] R. at 476-77.

[8] R. at 477.

[9] R. at 737.

[10] R. at 790.

The members acquitted Appellant of sexual assault and battery, but convicted him of indecent exposure. During sentencing proceedings, a stipulation of fact (Pros. Ex.13), signed by Appellant, from Appellant's prior special court-martial was admitted as evidence in aggravation, over Defense objection, as a personnel record, under Rule for Courts-Martial 1001(b)(2).[11] Members awarded Appellant the maximum sentence available.[12]

Additional facts will be set forth as necessary to resolve Appellant's assignments of error.

II. DISCUSSION

A. Appellant's Indecent Exposure Conviction is Factually and Legally Sufficient.

In Appellant's first AOE he challenges the factual and legal sufficiency of his conviction for indecent exposure under Article 120c, UCMJ.

Charge II alleged:

> In that Hospital Corpsman First Class Rodney D. Harvey, USN, Submarine Readiness Squadron Three-One, on active duty, did, at or near Bremerton, Washington, on or about 28 April 2021, intentionally expose his genitalia in an indecent manner, to wit: exposing his penis to [Ms. Echo] in a public parking lot.[13]

Thus, in order to prove indecent exposure, the Government had to prove that on or about 28 April 2021:

1) Appellant exposed his penis to Ms. Echo in a public parking lot; and

2) That the exposure was done in an indecent manner; and

3) That the exposure was intentional.

The term "indecent manner" means conduct that "amounts to a form of immorality relating to sexual impurity, which is grossly vulgar, obscene and repugnant to common propriety, and tends to excite the sexual desire or depraved morals with respect to sexual relations."[14] The term "intentional"

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[11] R. at 1084. The parties agree that Pros. Ex. 13 is not contained in Appellant's Official Military Personnel File .

[12] R. at 1259.

[13] Charge Sheet.

[14] Article 120c(d)(6), UCMJ.

means willful or on purpose. (An act done as the result of a mistake or accident is not done intentionally).

Relevant here, in determining whether any intentional exposure was indecent, the members were instructed to consider all the facts and circumstances surrounding the exposure. Specifically, factors they were instructed to consider included, but were not limited to: whether the person witnessing the exposure consented to the exposure; whether the exposure was made in a public or private setting; and the prior relationship between the accused and the alleged victim.[15]

1. Factual Sufficiency:

a. The revised statute:

Regarding factual sufficiency, this is the Court's first case to address the application of the recently amended Article 66, UCMJ, standard of review.[16] Article 66(d) now states,

(d) Duties.-

(1) Cases appealed by accused.-

(A) In general. In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title (article 60c). The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.

(B) Factual sufficiency review.-

(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.

(ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-

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[15] R. at 928-29.

[16] Section 542(e) of the FY 2021 National Defense Authorization Act made the new standard applicable to offenses that occur after 1 Jan 2021.

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

(iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

b. The new standard of review:

Congress undoubtedly altered the factual sufficiency standard in amending the statute, making it more difficult for a court of criminal appeals to overturn a conviction for factual insufficiency. In the past, we evaluated factual sufficiency of a conviction to determine "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of [an appellant's] guilt beyond a reasonable doubt."[17] In conducting this unique appellate function, we took "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt."[18] Proof beyond a "[r]easonable doubt, however, [did] not mean the evidence must be free from conflict."[19] And we were required to apply this standard of review for each charge and specification regardless of whether an appellant challenged the factual sufficiency of any of his convictions.

Now, to trigger factual sufficiency review under the present Article 66(d)(1)(B), Congress requires two circumstances be present: (1) a request of the accused; and (2) a specific showing of a deficiency in proof. In amending Article 66, Congress has therefore eliminated this Court's duty, and power, to review a conviction for factual sufficiency *absent* an appellant (1) asserting an assignment of error, and (2) showing a specific deficiency in proof.

(1) Specific Showing of a Deficiency in Proof.

Appellant contends that a "deficiency in proof" means a weakness in the evidence presented to support an element, not a complete absence of evidence

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[17] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

[18] *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

[19] *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006).

on an element.[20] The Government contends that "deficiency in proof. . . must allege a defect in evidence that, if valid, would undermine at least one element of an offense."[21] Complete absence of evidence on an element of a charged offense would, of course, render a conviction legally insufficient because a reasonable fact-finder could not find all the essential elements beyond a reasonable doubt."[22] The parties in this case substantially agree on this point.

Regarding identification of the element (or elements) of the crime for which there is a deficiency in proof, we hold that this means that an appellant must identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.

(2) Appropriate Deference to the Fact Finder.

In explaining *how* to conduct this analysis, Congress has enacted explicit statutory language that we are to give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." This is a different, and higher, standard than the prior statute's language of "recognizing that the trial court saw and heard the witnesses."[23]

Here, the parties disagree as to the meaning of the new statutory language that this Court must give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."[24] Appellant posits that the

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[20] Appellant's (initial) Reply Brief at 16. Appellant points to *United States v. Dolan*, 42 C.M.R. 893 (A.C.M.R. 1970). Specialist Dolan, a member of the California National Guard, was convicted of unauthorized absence for failing to report for active duty when he was ordered to do so by mail, which was sent to an address in Copenhagen, Denmark (rather than his address in California). The court in *Dolan* explained that in that case the "deficiency of proof" meant "the failure of the Government, either directly or circumstantially, to establish" an element of the offense (that he actually received the order.) However, the court in *Dolan* then set aside the conviction on *legal insufficiency* grounds.

[21] Gov't (corrected) Answer at 42.

[22] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014); *see also* Rule For Courts-Martial 917.

[23] As this case was not a bench trial, we have no need to reach the language in Article 66(d)(1)(B)(ii)(II) "appropriate deference to findings of fact entered into the record by the military judge."

[24] Gov't (corrected) Answer at 43-46; Defense Reply Br. at 14. See Article 66(d)(1)(B)(ii), UCMJ.

"appropriate deference" language is "slightly more deferential than simply 'recognizing' that the factfinder was present in the courtroom," and concludes that "it does not substantially change the application of the standard of review."[25] In stark contrast, the Government asserts that "this Court no longer has the power to 'judge the credibility of witnesses.'"[26]

Neither party is correct on this point. We hold that "appropriate deference" does *not* mean that this Court can no longer make any credibility determinations of witnesses, as the Government argues.[27] This is because the statute explicitly allows this Court to "weigh the evidence and determine controverted questions of fact."[28] Obviously, testimony is part of the evidence to be weighed, and the qualifier in the subsection requires "appropriate deference" rather than entirely eliminating credibility determinations regarding testimony from the evidence to be weighed. And because members do not make special findings or explain how they weighed the evidence admitted at trial in reaching a general verdict (apart from sometimes indicating a minor variance in charged language or making a finding of guilt to a lesser included offense), we find that "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" is a higher standard than the prior "recognizing that the trial court saw and heard the witnesses."

(3) A court of criminal appeals may not set aside a guilty finding unless clearly convinced the finding was against the weight of the evidence.

In revising Article 66, Congress mandated that this Court may only set aside (or modify) a guilty finding "[i]f, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence." The parties also disagree about the meaning of the phrases "clearly convinced" and "against the weight of the evidence" as used in Article 66(d)(1)(B)(iii).

Appellant initially posited that "this Court reviews factual sufficiency for clear and convincing evidence 'that the finding of guilty is against the weight of the evidence.'"[29] Appellant refined his argument substantially in subsequent

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[25] Appellant's Supplemental Reply at 12.

[26] Gov't (corrected) Answer at 44; *see generally* Gov't Motion to Cite Supplemental Authorities.

[27] Gov't (corrected) Answer at 39.

[28] Art. 66(d)(1)(B)(ii).

[29] Appellant's Br. at 21.

briefing, and now argues that "Article 66's amended language 'clearly convinced' cannot mean 'clear and convincing evidence' . . . '[c]learly convinced' is a state of confidence as it relates to the burden (convinced of the burden in a clear way)."[30] Appellant contends that this new factual sufficiency standard equates to a "beyond a reasonable doubt" standard, requiring "little departure from the way this Court has performed factual sufficiency [review] in the past."[31] The Government argues that "clearly convinced" means that a court of criminal appeals must have a "'definite and firm conviction' that the weight of the evidence did not support a finding of guilt."[32] The Government equates this to a standard where "evidence of guilt is substantially outweighed by the evidence not supporting guilt."[33]

We find that the revised statute requires a departure from the prior practice, and the standard for factual sufficiency has become harder for an appellant to meet. It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty.

We are guided by the well-settled principle that unless ambiguous, the plain language of a statute will control unless it leads to an absurd result.[34] We do not find any ambiguity here, and recasting the statutory language in synonyms would only create confusion. Put plainly, this Court will weigh the evidence in a deferential manner to the result at trial. If we are clearly convinced that, when weighed, the evidence (including the testimony) does not support a conviction, we may set it aside. This is not to say that we must be convinced beyond a reasonable doubt that the Accused is *not* guilty in order to reverse a conviction – as Congress did not go that far. Nor do we accept the Government's invitation to equate "substantially outweighed by the evidence

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[30] Appellant's Second Supplemental Reply Br. in Response to Oral Argument at 2 citing Merriam Webster's Collegiate Dictionary (10th Ed. 2001).

[31] Appellant's (initial) Reply Br. at 20; see also Appellant's Second Supplemental Reply Br. in Response to Oral Argument at 5.

[32] Gov't (corrected) Answer at 48.

[33] *Id*.

[34] *See, e.g., United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012.)

not supporting guilt" with "against the weight of the evidence" as that is a higher standard beyond what Congress intended. Rather, Congress simply requires us to be clearly convinced that the guilty verdict is contradicted by the weight of the evidence in order to set aside a guilty finding.

c. The finding of guilt as to indecent exposure is factually sufficient.

Under this revised statute, Appellant contends that the finding of guilty to the charge of indecent exposure is factually insufficient. Appellant advances two alternative theories as to the threshold requirement of showing a deficiency in proof. Appellant argues that the evidence admitted at trial does not prove: (1) that he ever exposed his penis; or (2) if he did, that the manner in which he did was indecent.[35]

In this case, Appellant has met the threshold requirement and made a specific showing of a deficiency in proof under Article 66(d)(1)(B)(i). First, Appellant's allegation that Ms. Echo was not credible has merit because her testimony about how she was uncomfortable in the posing room was contradicted by the surveillance video of the Factory Fitness Center's internal cameras. Second, there was evidence that Ms. Echo had a character trait for untruthfulness. Third, the surveillance video of the parking lot was inconclusive as to whether Appellant exposed his penis.

We assess that the circumstances in this case may fairly aggregate to a showing of a deficiency of proof, requiring this Court take the next step to weigh the evidence and determine controverted questions of fact, giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence."[36] Only if we are clearly convinced that the finding of guilty was against the weight of the evidence may we set aside the conviction.[37]

In this case, Appellant contends that the controverted questions of fact are: (1) whether Appellant exposed his penis at all in the parking lot; and (2) if he did, whether it was indecent. Appellant further contends that any intentional exposure, if it took place, was not indecent because (1) if he exposed himself at all, Ms. Echo consented, and (2) because any intentional exposure was not in a public place.[38]

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[35] Appellant's Br. at 21.

[36] Article 66(d)(1)(B)(ii)(I), UCMJ.

[37] Article 66(d)(1)(B)(iii), UCMJ.

[38] Appellant's Br. at 32-34.

We give appropriate deference to the fact that the members heard the testimony of Ms. Echo and the other witnesses. Given the video evidence of the interactions between Appellant and Ms. Echo in the posing room and the video of the interaction in the parking lot, her account of the interaction leaves us dubious as to the veracity of some portions of her testimony. However, the video evidence corroborated an important portion of Ms. Echo's testimony -- that after she got into her car, Appellant came around to the driver's side window and leaned his torso into her car for several minutes. He then stood next to her car window with his back to the camera. The members found her testimony that he was intentionally exposing his genitalia to her at that moment to be credible. That being the case, we agree with the members' conclusion that the exposure was indecent, as the video reveals that the parking lot was public, that there were several other cars parked nearby, and that there was at least one other car facing toward Ms. Echo's car with its headlights on. Further, her car was parked within a few feet of the Factory Fitness Center's main entrance.[39]

Accordingly, applying the current statute, giving appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, we are not clearly convinced that the finding of guilty is against the weight of the evidence in this case. Accordingly, we decline to set it aside.

2. The finding of guilty as to indecent exposure is legally sufficient.

To determine legal sufficiency, a question we review *de novo*, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."[40] In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution."[41]

The testimony from Ms. Echo was that Appellant intentionally exposed his penis to her in the Factory Fitness Center parking lot. The interactions between Appellant and Ms. Echo were video-recorded by the various surveillance

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[39] *See, e.g, United States v. Johnston,* 75 M.J. 563 (N.M. Ct. Crim. App. 2016) (stating that "intentional exposure in a public place will satisfy the element of indecency in most cases"). *Accord United States v. Izquierdo*, 51 M.J. 421, 423 (C.A.A.F. 1999); *United States v. Shaffer*, 46 M.J. 94 (C.A.A.F. 1997).

[40] *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see Gutierrez*, 73 M.J. at 175 .

[41] *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (citation and internal quotation marks omitted).

cameras at the fitness center, and the parking lot camera shows Appellant outside of Ms. Echo's car window and leaning into her car. Reasonable inferences from this evidence include that regardless of whether the members believed that Ms. Echo consented to the intentional exposure of Appellant's penis, it was nonetheless done in an indecent manner because Appellant was in a public parking lot where other people could have seen it. The video from the exterior surveillance camera reveals that Ms. Echo's car was only a short distance from the door of the Factory Fitness Center gym, and that although it was at night there were numerous cars in the parking lot and other people were in the gym at that time. One other car had its headlights on as well and the headlights were directed towards Ms. Echo's car.

Thus, viewing this evidence in the light most favorable to the prosecution, the conviction is legally sufficient.

B. The military judge properly declined to give a mistake of fact as to consent instruction as to indecent exposure.

1. Standards of review as to members' instructions

A military judge is required to instruct on the elements of a charged offense.[42] These instructions should fairly and adequately cover the issues presented, and should include "[s]uch other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given."[43] When deciding whether the military judge properly instructed a panel, this Court uses a de novo standard of review.[44] That said, a military judge has "substantial discretionary power" regarding whether to give tailored instructions.[45]

Military judges are required to provide instructions for special defenses that are "in issue."[46] A defense is "in issue" when "some evidence, without

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[42] Rule for Courts-Martial (R.C.M.) 920(e)(1); Article 51(c), UCMJ, 10 U.S.C. § 851(c) (2016); *see United States v. Bailey*, 77 M.J. 11, 13-14 (C.A.A.F. 2017.)

[43] R.C.M. 920(e)(7); *see* R.C.M. 920(a) Discussion

[44] *See United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007); *Bailey*, 77 M.J. at 14.

[45] *United States v. Damatta-Olivera*,37 M.J. 474, 478 (C.M.A.1993); *see also United States v. Carruthers*, 64 M.J. 340, 345–46 (C.A.A.F. 2007) (reviewing military judge's ruling on a defense-requested instruction for abuse of discretion).

[46] R.C.M. 920(e)(3).

regard to its source or credibility, has been admitted upon which members might rely if they choose."[47] We review de novo whether an affirmative defense is reasonably raised by the evidence.[48]

In reviewing whether a military judge erred by not providing a requested instruction in a specific case, military appellate courts use a three-pronged test.[49] Specifically, we determine whether: (1) the requested instruction is correct; (2) the main instruction given does not substantially cover the requested material; and (3) the instruction "is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation."[50] All three prongs must be satisfied for there to be error.[51]

2. The instructions in this case.

The military judge instructed the members on the crime of indecent exposure:

> Next is indecent exposure under Article 120(c) of the UCMJ. Elements:
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> One, that at or near Bremerton, Washington, on or about 28 April 2021, the Accused exposed his genitalia;
>
> Two, that such exposure was done in an indecent manner; and
>
> Three, that such exposure was intentional.
>
> Definitions and other instructions:
>
> The term indecent manner means conduct that amounts to a form of immorality relating to sexual impurity, which is grossly vulgar, obscene and repugnant to common propriety, and tends to excite sexual desire or depraved morals with respect to sexual relations.
>
> The term intentional means willful or on purpose. An act done as the result of a mistake or accident is not done intentionally.

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[47] *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007).

[48] *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

[49] *Carruthers*, 64 M.J. at 346.

[50] *Id*. (alteration in original) (internal quotation marks omitted) (quoting *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003)); see *Bailey*, 77 M.J. at 14.

[51] *United States v. Barnett*, 71 M.J. 248, 253 (C.A.A.F. 2012); *Bailey*, 77 M.J. at 14.

> In determining whether an intentional exposure was indecent, you should consider all the facts and circumstances surrounding the exposure. Specifically, factors you should consider include, but are not limited to:
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> Whether the person witnessing the exposure consented to the exposure;
>
> Whether the exposure was made in a public or private setting; and
>
> Prior relationship between the accused and the alleged victim.[52]

3. The charge alleged indecent exposure in a public place – consent is not a defense to this Specification as charged.

The Government charged Appellant with "intentionally expos[ing] his genitalia in an indecent manner, to wit: exposing his penis to [Ms. Echo] in a public parking lot."[53]

The Defense argues that the military judge erred by failing to instruct the members as to the availability of a mistake of fact defense as to whether Ms. Echo consented to the exposure.[54] The Government contends that the military judge did not err because under the charge in this case a mistake of fact as to consent would not "negate any element."[55]

Rule for Courts-Martial 916(j) governs the defense of "ignorance or mistake of fact." It provides, in relevant part, "it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense."[56]

Appellant's position is that the evidence at trial, specifically the video surveillance footage in the gym and in the posing room, was sufficient to raise the issue of whether or not Appellant could have had a mistaken belief that Ms.

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[52] R. at 928-29. The instructions were in accordance with the *Military Judges' Benchbook*, Dep't of the Army Pam. 27-9, and as to this charge were untailored to the evidence admitted at trial.

[53] The charge sheet.

[54] Appellant's Br. at 37-42.

[55] Gov't (corrected) Answer at 63.

[56] R.C.M. 916(j)(1).

Echo consented to the intentional exposure.[57] However, the Government charged Appellant with intentional exposure that was indecent because it was in a public parking lot. The trial counsel's closing argument made this clear to the members. He argued, "the accused pulled out his erect penis in a public gym parking lot, during business hours. Patrons are just inside, on the other side of the cement walls, This wasn't secluded in a wooded area, This wasn't in a hotel room. This was in public."[58]

Applying the proper test under *Carruthers* and *Bailey*, we find that the military judge did not err in declining to give the requested mistake of fact defense because Ms. Echo's consent was not a defense to the crime as charged.[59] Thus, Appellant cannot show error under the first prong of the *Carruthers* test.

Neither of the second and third prongs of the *Carruthers* test are met here either: the instruction given substantially covered the requested material (that the members should take into account whether Ms. Echo consented in determining whether the exposure was indecent); and the requested instruction is not on such a vital point in the case (it is unrelated to the public nature of the exposure) that the failure to give it deprived the accused of a defense, because Ms. Echo's consent was not a complete defense to this charge.[60] Appellant does not assert that the military judge erred in failing to instruct the members regarding a mistake of fact defense as to whether the parking lot was a public place.[61] However, even if the military judge erred in failing to provide an instruction on mistake of fact as to consent, we would find this error was harmless beyond a reasonable doubt because intentional exposure of his genitalia in a public parking lot is the gravamen of the offense charged.

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[57] Appellant's Br. at 40.

[58] R. at 958.

[59] R. at 888-889. *See Carruthers*, 64 M.J. at 346; *see also Bailey*, 77 M.J. at 14.

[60] *See Bailey*, 77 M.J. at 14; *see also United States v. Lee,* 2020 WL 1063016 (A. F. Ct. Crim. App. Feb. 26, 2020)(holding that a military judge did not abuse his discretion in not giving a mistake of fact as to consent instruction to an indecent exposure charge, as it was consistent with the second and third prongs of the *Carruthers* test.)

[61] *See* generally Appellant's Br. at 37-43. Appellant did not ask the military judge to instruct the members as to mistake of fact as to whether the Factory Fitness Center parking lot was "a public parking lot." R. at 878-889. Nor did Appellant request the military judge instruct the members on variance.

Because the military judge did not err in not providing the Defense requested instruction as to mistake of fact as to consent, we decline to set aside the conviction in this case on that basis.

C. The stipulation of fact from the prior court-martial was improperly admitted as a service record document.

1. Standard of review

Appellant contends that the military judge erred in admitting a stipulation of fact from Appellant's prior special court-martial as a personnel record under Rule for Courts-Martial 1001(b)(2).[62] The military judge initially sustained the Defense objection, reading the Rule's term "personnel records" literally.[63] After hearing some further argument, the military judge reconsidered and overruled the objection.[64] We review a decision to admit sentencing evidence under an "abuse of discretion" standard.[65] A military judge's decision which is controlled by an error of law is an abuse of discretion.[66]

2. Rule for Courts-Martial 1001(b)(2) allows admission of "personnel records of the accused." Pros. Ex. 13 was erroneously admitted.

Rule 1001(b)(2) states, in relevant part, that "'[p]ersonnel records of the accused' includes any records made or maintained in accordance with military or departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused." However, the rules of evidence apply, including Mil. R. Evid. 403. The Court of Appeals for the Armed Forces has stated that R.C.M. 1001(b)(2) does not provide blanket authority to introduce all information that happens to be maintained in the personnel records of an

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[62] Appellant's Br. at 44. Appellant also asserted error in admitting a "non-punitive letter of caution" (Pros. Ex. 14) but clarified that Prosecution Exhibit 14 is a punitive letter of reprimand and withdrew his challenge to that document. *See* Appellant's Response to Court Order of 21 March 2023.

[63] R. at 1078.

[64] R. at 1084. The military judge did not conduct a balancing test under Military Rule of Evidence 403.

[65] *See United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999) citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

[66] *See United States v. Rodriguez*, 57 M.J. 765, 770 (N.M. Ct. Crim. App. 2002).

accused. Personnel records sometimes contain entries of questionable accuracy, relevance, or completeness, which can create a danger of unfair prejudice that would substantially outweigh any probative value.[67]

In the Navy, the Naval Military Personnel Manual (*MILPERSMAN*) governs the proper contents of enlisted service records.[68] We take judicial notice of Article 1070-080, which describes the categories of documents, including "Adverse Information" which may be maintained in an enlisted service record.[69] Although court memoranda and punitive letters are specifically permitted, the *MILPERSMAN* precludes submission of documents like Prosecution Exhibit 13 because they do not meet the requirements for insertion into a personnel record.[70]

The Defense asserts that definition of "personnel records of the accused" is meant to include only those records contained in Appellant's official service record (Official Military Personnel File), and that the military judge therefore erred by admitting Prosecution Exhibit 13 into evidence.[71] The Government, for its part, contends that the definition of "personnel records of the accused" is to be read broadly, to encompass the stipulation of fact from the prior special court-martial, because the record is maintained in accordance with Judge Advocate General Instruction (JAGINST) 5814.1D, which mandates the preparation of a certified record of trial for post-trial review.[72] The Government and the Defense agree that, as a factual matter, Prosecution Exhibit 13 is not contained in Appellant's Official Military Personnel File.

In *United States v. Brogan*, the Navy-Marine Corps Court of Military Review broadly held that "evidence to explain the detailed facts underlying a

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[67] *See generally Clemente*, 50 M.J. at 37; *United States v. Zakaria*, 38 M.J. 280, 283 (C.M.A. 1993).

[68] Dep't of the Navy, *Naval Military Personnel Manual*, art. 1070-080, Enlisted Official Military Personnel File (OMPF) (Feb. 29, 2016) [*MILPERSMAN*], para. 2.

[69] *See United States v. Harris*, 56 M.J. 480, 482 (C.A.A.F. 2002) (stating that an appellate court may take judicial notice of regulations governing the administration of personnel records).

[70] *See MILPERSMAN*, art. 1070-080, para. 3(e) (stating that documents not meeting the retention guidelines of Bureau of Personnel Instruction 1070.27C should not be submitted to the official personnel file and will be destroyed).

[71] Appellant's Br. at 45-46.

[72] Gov't Answer at 70-71.

prior conviction is inadmissible during the prosecution's case in sentencing."[73] In *Brogan*, the Court held that a military judge erred in allowing a police officer to testify about the underlying circumstances of that appellant's prior crimes. However, that decision was interpreting a different subsection of R.C.M. 1001 (R.C.M. 1001(b)(3) allows the prosecution to introduce evidence of prior convictions of the accused). *Brogan* also preceded *United States v. Douglas,* which we find distinguishable as to this point.[74]

As an initial matter, the parties disagree as to the breadth of *Douglas*. The Defense asserts that C.A.A.F. held that admission of the stipulation from a prior court-martial was admissible under R.C.M. 1001(b)(2) because Air Force regulations required records of trial from prior courts-martial to be maintained in the service member's personnel file.[75] The Government counters that Appellant "misreads *Douglas* to require trial records exist within a personnel file as opposed to R.C.M. 1001(b)(2)'s broad term of 'personnel records.'"[76]

Douglas is a fractured opinion with a majority opinion, two concurring opinions, and a dissent. Thus the narrow holding as to the admissibility of the stipulation at issue was whether it "was properly maintained in appellant's personnel file in accordance with Air Force departmental regulations, reflected appellant's conduct, and was the type of personnel record envisioned by R.C.M. 1001(b)(2)."[77] Judge Baker, in his concurrence, agreed with Senior Judge Sullivan that the stipulation was inadmissible under R.C.M. 1001(b)(2), but found the error to be harmless in that case.[78] Judge Sullivan, in his concurrence, explained his view that the stipulation was inadmissible under R.C.M. 1001(b)(2) based on its "plain language."[79] He explained "the obvious intent [of R.C.M. 1001(b)(2)] was to limit it to disciplinary documents traditionally maintained in a service member's personnel file."[80] He also found no prejudice in that case. Judge Effron stated in his dissenting opinion, that "I agree with Judge Baker

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[73] 33 M.J. 588, 593 (N.M.C.M.R. 1991), *aff'd* on other grounds, *United States v. Brogan*, 40 M.J. 270 (C.A.A.F. 1994) (summary disposition).

[74] *United States v. Douglas,* 57 M.J. 270 (C.A.A.F. 2002).

[75] Appellant's Br. at 45.

[76] Gov't (corrected) Answer at 71.

[77] *Douglas*, 57 M.J. at 273.

[78] *Id*. at 274 (Baker, J., concurring).

[79] *Id*. at 276 (Sullivan, S.J., concurring).

[80] *Id*.

and Senior Judge Sullivan to the extent that they conclude that the document at issue was not admissible in this case . . . as a personnel record under R.C.M. 1001(b)(2)."[81] He, though, would have found that the error was prejudicial, and he thus dissented.

This Court agrees with the reasoning of the three judges from the C.A.A.F. who found in separate opinions in *Douglas* that a stipulation of fact from a prior court-martial is not admissible under R.C.M. 1001(b)(2) as a personnel record. We distinguish this case from the majority opinion, authored by Chief Judge Crawford insofar as the Navy Regulations at issue do not require that this type of document be maintained in a personnel record, and because the parties agree that, as a factual matter, Prosecution Exhibit 13 is not actually contained in Appellant's official military personnel file. Thus, we hold that, under the facts of this case, it was error for the military judge to admit Prosecution Exhibit 13 over the Defense objection.

3. The error was harmless.

However, the error was harmless. The parties agree that the stipulation of fact contains some information which is not found in the prior court-martial's Entry of Judgment (Pros. Ex. 12) or his punitive letter of reprimand (Pros. Ex. 14), or other testimony. The stipulation, however, adds only minor details to the charges. The fact that the members awarded the maximum available confinement time and a dishonorable discharge is some evidence that they gave the Government's case in aggravation considerable weight. But the existence of the prior conviction for sexual harassment, and the related fact that Appellant had been a Chief Petty Officer at the time of that court-martial, but by the time of this trial was in paygrade to E-6 were contained in Prosecution Exhibits 12 and 14. Any additional non-cumulative detail contained in the stipulation was harmless.[82]

III. CONCLUSION

After careful consideration of the entire record, the numerous briefs of appellate counsel, and the *excellent* oral arguments of both appellate counsel, presented at the George Washington University School of Law on 12 April 2023, we have determined that the findings and sentence are correct in law and fact

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[81] *Id.*, at 277 (Effron, J., dissenting).

[82] *See Douglas*, 57 M.J. at 274 (Baker, J., concurring) and at 276 (Sullivan, S.J., concurring).

and that no error materially prejudicial to Appellant's substantial rights occurred. The findings and sentence are therefore **AFFIRMED**.[83]

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[83] Articles 59 & 66, UCMJ.