

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20210071

Specialist (E-4)

JORGE G. MARTINEZCOLON,
United States Army,

Appellant

Tried at Fort Hood, Texas, on
9 to 12 February 2021, before a
general court-martial appointed by the
Commander, Headquarters, Fort
Hood, Lieutenant Colonel Scott Z.
Hughes, military judge, presiding.

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

Pursuant to Rule 18(d) of this Court's Rules of Appellate Procedure,

Appellant hereby replies to the government's Answer, filed on 18 November 2022.

I.

**SPECIFICATION 1 OF CHARGE I MUST BE SET ASIDE
BECAUSE APPELLANT WAS CHARGED WITH SEXUAL
ASSAULT "ON ONE OR MORE OCCASION;" THE
GOVERNMENT PRESENTED EVIDENCE THAT THE
MISCONDUCT OCCURRED ON MORE THAN ONE
OCCASION; THE MILITARY JUDGE FOUND APPELLANT
NOT GUILTY OF THE WORDS "OR MORE" WITHOUT
SPECIFYING WHICH INCIDENT FORMED THE BASIS OF
THE CONVICTION; RENDERING AN AMBIGUOUS
VERDICT WHICH THIS COURT CANNOT REVIEW FOR
FACTUAL SUFFICIENCY UNDER ARTICLE 66(d), UCMJ.**

Other than to cite this Court's dicta in the footnotes in *United States v. Pasay*, 2017 CCA LEXIS 268, *3, n.4 (Army. Ct. Crim. App. 19 Apr 2017) and *United States v. Wood*, 2018 CCA LEXIS 112, *6, n.4 (Army. Ct. Crim. App. 27 Feb. 2018), the government does not address the substance of Appellant's claims.

For example, the government has failed to explain how this Court can, consistent with *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003), conduct its factual sufficiency review in the face of a partial acquittal by the court-martial. The government has not pointed to any specific conduct in the record that forms the basis of the finding with respect to guilt or acquittal. And it has not because it cannot. The government does not know -- any more than Appellant knows, or this Court could know -- what the conduct is that Appellant was acquitted of. This, of course, was the precise issue the CAAF identified in *Walters*, 58 M.J. at 395: "the legal effect of uncertainty over what specific conduct may have served as the basis for a jury's verdict of not guilty."

And while the government cites *United States v. Rodriguez*, 66 M.J. 201, 205 (C.A.A.F. 2008) for the proposition that a general verdict stands if the evidence is sufficient with respect to any one of the acts charged, the government fails to recognize that the acquittal in *Rodriguez* came, not at the trial level, but on appeal. The government cites *Rodriguez* to the extent that it supports its position with respect to general verdicts but ignores the part of *Rodriguez* that does not. As

the Court of Appeals for the Armed Forces [CAAF] held in *Rodriguez*, at 204, “if the members found Appellant not guilty of the act alleged in the specification as amended by the [Court of Criminal Appeals], the lower court could not conduct a factual sufficiency review.” That is what happened in this case -- the court-martial found Appellant not guilty by excepting the language “or more” without specifying the conduct that formed the basis of the acquittal. And, consistent with the CAAF’s holdings in *Rodriguez*, at 204, and *Walters*, at 395, this Court cannot conduct a factual sufficiency review because it “cannot find as a fact any allegation in a specification for which the fact-finder below has found the accused not guilty.”

By excepting the words “or more,” the military judge acquitted Appellant of all but one of the incidents of misconduct the government sought to prove at trial. Since this Court cannot know which conduct formed the basis of the acquittal, it cannot conduct its factual sufficiency review under Art. 66(d), UCMJ. Specification 1 of Charge I must therefore be set aside, and the sentence reassessed. Since the military judge announced a segmented sentence pursuant to R.C.M. 1002(d)(2)(A) and sentenced Appellant to one year confinement for this offense (R. at 432), Appellant respectfully submits that this Court should reduce appellant’s sentence by one year of confinement.

WHEREFORE Appellant so prays.

II

THE MILITARY JUDGE ABUSED HIS DISCRETION IN PERMITTING THE GOVERNMENT, OVER DEFENSE OBJECTION, TO PRESENT EVIDENCE PURSUANT TO MIL.R. EVID. 413 BECAUSE THE GOVERNMENT FAILED TO PROVIDE ADEQUATE NOTICE OF THE “SEXUAL OFFENSE” THAT WAS SUPPOSED TO HAVE BEEN COMMITTED AND FAILED PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT ANY “SEXUAL OFFENSE” WAS, IN FACT, COMMITTED.

A. The evidence was insufficient to show that Appellant committed another offense of sexual assault.

The government argues that Appellant’s claim that no evidence was presented that Appellant knew or should have know that ■ was asleep or intoxicated “fails because the support Appellant cites for this contention paints an incomplete picture of the evidence. (Gov’t Br. at 28). The government goes on to argue that Appellant “is entirely silent regarding ■ testimony that before the ‘moaning’-- which she described as her ‘body’s reaction to the act’ -- she had been asleep and awoke to appellant performing this sexual act on her.” (Gov’t Br. at 28)(cleaned up). As Appellant discussed in his opening brief, and as discussed in more detail below, it is not enough that ■ claimed to have been asleep. Sexual assault is not a strict liability offense.

The government then argues that ■ testimony “was more than sufficient to meet this low evidentiary threshold and show both that ■: (1) was asleep when appellant began sexually assaulting her and thus could not consent and (2)

that after she awoke, she did not consent.” The government ignores entirely that the accused must have known or reasonably should have known that the victim was asleep. Not to put too fine a point on it, but it is not unlawful for an accused to have sex with a sleeping person unless the accused knew or reasonably should have known that the person was asleep. That knowledge, whether actual or reasonably imputed by the circumstances, is *an element* of the offense. See Art. 120(b), Uniform Code of Military Justice [UCMJ]; see also Manual for Courts-Martial (2016 ed.), Part IV, para. 45.b.(d)(e). At the risk of stating the obvious, in order for evidence to be admissible as a “any other sexual offense” under Mil. R. Evid. 413, it must actually *be* a sexual offense.

No evidence was presented that Appellant knew or should have known that ■ was asleep. The government claims that a reasonable factfinder could have concluded that Appellant knew or reasonably should have known that ■ was asleep because “Appellant had placed ■ on his bed (App. Ex. XIII, p. 5), and ■ testified that her eyes were closed when she woke up to the sexual act being performed.” What ■ actually told CID was “she remembered [Appellant] putting her on his bed.” ■ testified that she did not recall how she got to Appellant’s room and did not recall whether she walked there or was carried. (R. at 37). ■ testified that she recalled telling trial counsel that she was “led” to Appellant’s room, by which she meant that she “[didn’t] remember getting out of

the truck, so pretty much I put my trust in my friends to take me back to my room.” (R. at 47-48). Although [REDACTED] and [REDACTED] were apparently also present, neither of them testified at the hearing.

Perhaps it is merely a matter of semantics to say that she was “placed” on the bed versus “put” on the bed, but if *this* is to be the proverbial smoking gun, the government should at least get it right. But it’s not the smoking gun. It is patently ridiculous to suggest that Appellant knew or should have known [REDACTED] was asleep because he placed her on his bed, or that she had her eyes closed. There was no evidence presented that Appellant carried [REDACTED] or that she did not walk under her own steam. People the world over routinely engage in sexual conduct on beds with their eyes closed. And, of course, there is no evidence that Appellant ever saw [REDACTED] eyes.

Yet there *was* evidence presented tending to suggest that Appellant would have reasonably thought [REDACTED] was actually *awake*. For example, Appellate Exhibit XIII includes a report by CID in which [REDACTED] stated that she was “being loud.” [REDACTED] testified that she was “moaning,” which she described as “her body’s reaction to the act.” (R. at 49). No reasonable jury could find that Appellant knew or reasonably should have known she was asleep in the face of these facts. Even under a preponderance of the evidence standard, and even if everything [REDACTED] said

was true, there is an element of the offense that is lacking in this case, rendering the evidence inadmissible under Mil. R. Evid. 413.

The government argues that Appellant's claim that by not charging the offense the government was permitted to bridge the spillover gap in a manner it could not have done had it charged the offense is "misplaced," and notes the government's "broad discretion" in charging decisions. (Gov't Br. at 30-31). As a general matter, Appellant takes no issue with the government's assertion that it has broad discretion in its charging decisions. But when it chooses to charge offenses and present evidence in a manner that permits it to reduce its burden with respect to one or more of those offenses, this Court should require *at a minimum* that the evidence in support of uncharged offense meets *all* of the elements of the uncharged offense, and not just some.

B. The evidence is inadmissible under the *Wright* factors.

1. Strength of proof the of prior act

The government argues that the military judge "acknowledged the concerns raised by the defense," and that the military judge "clearly did consider these items before arriving at the reasonable conclusion that a fact finder could fairly consider any impeachment evidence that the defense brought out at trial along with [REDACTED] allegation." (Gov't Br. at 32-33). Respectfully, the most the military judge said about [REDACTED] relationship with other witnesses; her inability to remember details

of the incident; whether she consented; or whether she did anything to cause Appellant to believe she consented; were things the defense could impeach her on at trial. (App. Ex. XXXIX, p. 12). The military judge also said that the defense could impeach [REDACTED] on her delayed reporting, the sequence of events leading up to the reporting, and any motive to fabricate. (App. Ex. XXXIX, p. 12). The military judge did *not* say he considered these things himself in determining whether [REDACTED] allegation was admissible under Mil. R. Evid. 413.

As previously discussed, since there is no evidence on the knowledge element the evidence is inadmissible irrespective of the remaining *Wright* factors. But in any event, while the military judge “neither weighs credibility nor makes a finding that the Government has proved the condition fact by a preponderance of the evidence” (*Huddleston v. United States*, 485 U.S. 681, 685 (1988)), the circumstances surrounding the allegation, to include [REDACTED] relationships, her inability to remember details, whether she consented, whether her actions may have caused Appellant to believe she consented, her delayed reporting, the sequence of events leading to her reporting, were all things the military judge was required to consider in evaluating the strength of proof. Without making any credibility determination at all, the military judge could have concluded, and should have concluded, that no reasonable juror could find by a preponderance of the evidence that the prior act occurred.

And at the risk of repeating himself, the prior act the government was required to prove in this case is not that Appellant had sex with ■■■, or even that he had sex with ■■■ while she was asleep, but that he had sex with ■■■ while she was asleep *and* that he knew or reasonably should have known that she was asleep.

2. The probative weight of the evidence.

The government argues, “As discussed above, supra p. 30, ■■■ testimony establishes both that she was asleep when the sexual act commenced, that appellant knew or reasonably should have known she was asleep, and that once she was awake, she did not consent to sex.” As noted, the only thing the government argued on page 30 of its submission with respect to whether Appellant knew or reasonably should have known ■■■ was asleep was the specious claim he “placed her on the bed” (a location generally well-known as conducive to sexual activity), and that ■■■ eyes were closed (a common occurrence in consensual sexual activity, and in any event, a fact Appellant’s knowledge of which was not proved at trial).

The government argues, “regardless of her latter actions, the fact remains that a reasonable fact finder could find by a preponderance of the evidence that ■■■ ■■■ was asleep when she awoke to appellant performing a sexual act on her and appellant knew or reasonably should have known she was asleep at the time he began having sex with her.” (Gov’t Br. at 34-35). As discussed previously, it

wasn't enough that ■ was asleep, no matter how many times the government repeats it. He must also have known or reasonably should have known that she was asleep.

The government also argues that a reasonable fact finder “could find that once ■ was awake, she did not consent to sex with appellant.” The notice in this case provided that the government intended to offer the evidence “to illustrate the Accused’s propensity to sexually assault intoxicated women after they fall asleep.” The military judge concluded that the proffered evidence “establishes that the Accused is inclined to engage in sexual assaults against women who are asleep and/or intoxicated.” (App. Ex. XXXIX, p. 13). Neither the notice nor the ruling say anything about sexual assault of a conscious victim, and this Court should decline the government’s implicit invitation to rescue this case by recasting the underlying offense to one not alleged in the notice or found by the military judge.

The government does not address Appellant’s claim that the conduct alleged is not “extremely similar” (App. Ex. XXXIX, p. 13) to the charged offenses where ■ testified that she engaged in conduct that would lead a reasonable person to conclude that she was awake and not too intoxicated to consent. As noted, even if everything ■ said is true the uncharged conduct is not an offense as is not probative of anything.

3. The potential for less prejudicial evidence

The government argues that Appellant “implicitly agrees that there is no less prejudicial evidence because [REDACTED] is the only one who could testify to this evidence.” (Gov’t Br. at 35). Appellant has made no claim with respect to whether less prejudicial evidence existed or the reason why less prejudicial evidence might or might not exist. The military judge concluded that there was no less prejudicial evidence, and the only evidence is [REDACTED] testimony. (App. Ex. XXXIX, p. 13). What Appellant takes issue with is the military judge’s finding that since there was no less prejudicial evidence and [REDACTED] was the only source, that it weighs in favor of admission. In Appellant’s view, this evidence was *so* prejudicial that did not weigh in favor of admission.

The government again takes issue with Appellant’s claim that there was no other evidence presented about what Appellant knew or should have known with respect to [REDACTED] state of wakefulness or her ability to consent. (Gov’t Br. at 35). The government states, “This argument fails,” and again the government reroutes this Court to its argument on page 30 where the only facts it offers in support of Appellant’s knowledge is that he placed [REDACTED] on the bed, and she had her eyes closed. As discussed, even under a preponderance standard, no reasonable jury could find that Appellant knew or reasonably should have known [REDACTED] was asleep from those two facts.

The government argues that Appellant’s claim regarding prejudice flowing from bridging the spill-over gap with evidence of an alleged offense the government knows it cannot prove at trial is “seriously undercut by the fact that even incidents for which an appellant has been acquitted may be admissible under Mil. R. Evid. 413.” (Gov’t Br. at 35-36). Respectfully, there is a difference between an acquittal based on an otherwise legally sufficient allegation and what happened in this case, where the government was unable to prove *an element of the offense*.

4. Distraction of the fact-finder

The government appears to argue that since Appellant “takes no specific issue” with the military judge’s finding regarding distraction of the factfinder and the time needed to prove the prior conduct, then the military judge “correctly found that these two factors weigh in favor of admission.” (Gov’t Br. at 36-37). It is true that in Appellant’s view there was not a great deal of time required to present this evidence and it likely did not devolve into a mini-trial. However, he does not concede that these factors weigh in favor of admission, because *any* time spent on the presentation of evidence that is irrelevant and inadmissible is too much time.

5. Temporal proximity

As the government acknowledges, Appellant does not challenge the portion of the military judge’s conclusion regarding temporal proximity but does challenge

the conclusion that the conduct was done “in a similar manner” and “while the alleged victim was asleep and/or intoxicated.” The government again argues that Appellant’s argument is “misplaced” (Gov’t Br. at 37), and Appellant again disagrees for the reasons previously discussed.

6. Frequency of the acts

The government argues that the military judge “did not abuse his discretion when he found that since the uncharged misconduct only occurred once, ‘this factor weighs against admission.’” (Gov’t Br. at 38). On this point, at least, the government and Appellant appear to be in agreement.

7. Presence or lack of intervening circumstances

The government urges this Court to “adopt the same interpretation” of the meaning of “intervening circumstances” that the Air Force Court of Criminal Appeals found in *United States v. Crump*, 2020 CCA LEXIS 405, at *72 (A. F. Ct. Crim. App. 10 Nov. 2020) where the Air Force Court apparently interpreted the *Wright* factors to include, among other things, “the presence or absence of intervening circumstances between the prior acts and the charged offenses.” Respectfully, if the CAAF intended to limit the interpretation of “intervening circumstances” to include the time between the prior acts and the charged offenses it would have said so in *Wright*. That it did not tends to suggest that it could

conceive of circumstances like the ones that exist in this case, where the relevant intervening circumstances might have occurred after the charged offense.

By way of example, if a purported victim of a prior offense were to recant her allegation on the eve of trial, Appellant respectfully submits that that would be a significant intervening circumstance affecting the admissibility of the allegation under Mil. R. Evid. 413 because the allegation would be irrelevant to the accused's propensity to commit a similar offense if the prior event never happened.

Obviously, that is not what happened in this case, but it is illustrative to show that this Court should not limit the factor as urged by the government because there are an untold number of potential intervening circumstances depending on the facts of the case.

The intervening circumstances between the date of the alleged incident between Appellant and [REDACTED] and the charged offense involving [REDACTED] are that [REDACTED] never told anyone about the allegation until she was contacted by CID; that [REDACTED] purchased a hotel room in San Antonio for a group that included Appellant and never objected to him going on the trip or staying in the hotel room; [REDACTED] and [REDACTED] were friends and roommates who would have had an opportunity to discuss [REDACTED] allegation. In the government's view, "these items go to [REDACTED] credibility, and the military judge already addressed these issues when he weighed the probative weight of the evidence and found these issues could be handled appropriately as

impeachment evidence.” (Gov’t Br. at 38). First of all, the military judge made his ruling with respect to impeachment evidence when discussing the strength of proof factor, not the probative weight factor. (App. Ex. XXXIX, p. 12). But in any event, this Court should decline the government’s invitation to conflate the strength of proof factor with the intervening circumstances factor; they are separate and distinct factors each deserving a separate and distinct analysis. As discussed previously, the military judge should have considered these issues when evaluating the strength of proof. But whether he did or didn’t, they are nevertheless also relevant as intervening circumstances that undermine the credibility of the evidence, and as a consequence, undermine its relevance as propensity evidence.

The government argues that Appellant waived this issue by failing to make these arguments at trial, but contends that waiver is not necessary because the government “does not believe there is any legal error to correct.” (Gov’t Br. at 39). Appellant has not waived this issue. The defense made a motion *in limine* to exclude evidence under Mil. R. Evid. 413. The parties briefed the issue, and the military judge made a ruling. The government has cited to no case, and Appellant’s research reveals no case, standing for the proposition that an argument on appeal must be identical in all respects to the argument made at trial. Indeed, the CAAF has held that a *partis* is “required to provide sufficient argument to make known to the military judge the basis of his objection and, where necessary to

support an informed ruling, the theory behind the objection.” *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2004). These facts were all before the military judge at the time he made his ruling, he was required to consider them, and this Court should consider them in evaluating whether this factor weighs in favor or against admission of this evidence.

8. *Relationship between the parties*

The government compares the victims in this case to the victims in another unreported case, *United States v. Essary*, 2019 CCA LEXIS 325, *12 (Army. Ct. Crim. App. 9 Aug. 2019). This Court in *Essary*, at *12, held that the victims were “similar” inasmuch as one of the victims in that case was the accused’s adult girlfriend and the other was the accused’s wife. According to the government, the “similarities” in this case “are even more stark.” (Gov’t Br. at 40). Other than to simply say it, the government has failed to explain how it arrived at the conclusion that the similarities between the victims in this case are “even more stark” than those in *Essary*. Unlike the victims in this case, it does not appear that the victims in *Essary* even knew each other, let alone were close friends. *Essary*, at *2-3 (noting that the marriage to the earlier victim ended in 2007, and the appellant met the second victim in 2016).

But even if there is some similarity between the victims, it is the relationship between the parties that is at issue in this factor. Appellant respectfully submits

that it is not merely the relationship between the accused and each individual victim that is at issue, but also the relationship between the victims themselves where there is one.

The government's discussion of this issue focuses on the "similarities," between both the victims and the offenses. (Gov't Br. at 40-41). As noted, Appellant does not believe there is a similarity because the government failed to show that Appellant knew or reasonably should have known that ■ was asleep. But in any event, "similarity" is not shorthand for "relationship." There was a relationship between these victims. ■ sister contacted ■ seeking "help" with the allegation. ■ then made a report to CID, and CID contacted ■, who was ■ friend and roommate, and ■ made her allegation. Other than to say that the defense could impeach the witnesses with evidence of these relationships, the military judge did not evaluate them in the context of admissibility under this *Wright* factor. Because of the relationship between these victims and the potential for collusion, this factor weighs against admission.

9. Conclusion with respect to the Wright factors

The government argues that Appellant's claim amounts to no more than a mere difference of opinion. It is true that Appellant disagrees with the conclusions of the military judge. He respectfully submits, however, that the military judge abused his discretion in this case because he admitted as propensity evidence

conduct that is *not an offense* because no reasonable juror could have found all of the elements of the uncharged offense. As discussed throughout this submission, that issue permeated all of the *Wright* factors. And, as noted here and in his prior submission to the Court, many of the military judge's conclusion with respect to the *Wright* factors were erroneous, and his decision to admit this evidence was an abuse of discretion as a consequence.

C. Appellant was prejudiced by the admission of this evidence.

The government argues that Appellant suffered no prejudice because the government's case was strong and the defense case was weak. Respectfully, the government's case was not strong. With respect to ■■■, the government points to the text messages as the "smoking gun," but as discussed in his Assignment of Error, these text messages are not the admission the government claimed them to be. The very testimony that the government claims "provided strong circumstantial evidence that appellant had committed a sexual act" with ■■■ (Gov't Br. at 80) is itself inconsistent with the other evidence in the case. And as Appellant noted in his Assignment of Errors with respect to factual sufficiency, and as discussed more fully below, both ■■■ and ■■■ had significant credibility problems, not the least of which is that it appears that they may have colluded with respect to their allegations. Both ■■■ and ■■■ had strong motives to fabricate.

There is a great deal of inconsistency in the evidence. The defense case was strong for the same reasons the government's case was weak.

Yet the government was able to bolster its weak case with propensity evidence. The government argues, "While this evidence was helpful to the government's case, it was not essential." (Gov't Br. at 82). Perhaps not. But whether it was "essential" to the government's case is not the issue. The issue is whether it was prejudicial; that is, whether, after evaluating the *Wright* factors in order to determine whether the probative value is substantially outweighed by the danger of unfair prejudice.

The government acknowledges a key difference between the allegations involving ■■■, ■■■, and ■■■, and that is that Appellant was in a romantic relationship with ■■■, but not with ■■■ or ■■■. (Gov't Br. at 81). In the government's view, the "primary use" of the evidence "was to support the offenses relating to ■■■." (Gov't Br. at 81). But the government never argued to the military judge that the evidence should be admissible only as to the charges involving ■■■, and the military judge never said he would limit his consideration of the evidence to those charges. Moreover, during closing argument the government argued, "the accused assault of ■■■ demonstrates that he has the propensity to begin sexually assaulting women who were asleep . . ." (R. at 367); that "he has this propensity the inclination to sexually assault women who are asleep and or

intoxicated . . . (R. at 368); that “He has this propensity, sexually assaulting women who are asleep and or intoxicated . . .” (R. at 369); and that “the accused has a propensity to assault women who are intoxicated or asleep.” (R. at 389). There is nothing in this record from which this Court can conclude that the evidence was admitted or considered by the military judge only in support of the charges involving [REDACTED].

Finally, the government argues that there is no prejudice because this was a judge alone trial. Respectfully, the military judge admitted the evidence in this case, the government repeatedly argued its relevance to the charged offenses, and there is no reason to believe the military judge didn’t consider it despite the military judge’s claim that he “did not consider any inadmissible evidence or impermissible arguments.” (R. at 393). Indeed, the military judge could have issued special findings if he determined there had been inadmissible evidence or improper argument. *See* R.C.M. 918. The fact that he did not speaks volumes, and this Court should be reluctant in the extreme to presume the military judge did not consider this evidence after having presided over the motion hearing, having listened to the testimony as it was being presented, and having listened to the arguments of counsel.

Before leaving this topic, Appellant once again urges this Court to bear in mind that the government had jurisdiction over this “offense,” and could have

charged it if it wanted to. Rather than risk an acquittal on its weakest offense, the government opted instead to use that offense to bolster the remaining offenses under the guise of “propensity” evidence. Appellant acknowledges that Rules as currently drafted do not appear to prohibit this, but as he argued in his Assignment of Error, he doubts Congress in enacting the Federal Rules of Evidence, or the President, in promulgating the Military Rules of Evidence, contemplated such a thing. But if that is the approach the government is going to take, this Court should hold its feet to the fire in recognition of “the potential for undue prejudice that is inevitably present when dealing with propensity evidence.” *United States v. James*, 63 M.J. 217, 222 (C.A.A.F. 2006). In this regard, this Court should critically examine the evidence as it relates both to the second threshold finding as well as all of the *Wright* factors in which that threshold finding is implicated. The government bore the burden to prove by a preponderance of the evidence -- that is, more likely than not -- that Appellant knew or should have known that ■ was asleep. That he placed (or put) her on his bed (assuming that even happened because ■ claimed not to remember how she got there), and that ■ eyes were closed, barely reaches the “some evidence” standard; it is certainly not proof by a preponderance.

Based on the foregoing, the findings and sentence should be set aside.

WHEREFORE Appellant so prays.

III

APPELLANT WAS DENIED THE RIGHT TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT.

Appellant stands on his Assignment of Error with respect to this issue.

Because Appellant was denied his Fifth and Sixth Amendment rights to a unanimous verdict, the findings and sentence must be set aside. WHEREFORE Appellant so prays.

IV

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT ANY OF THE CHARGES AND SPECIFICATIONS.

Appellant stands on his Assignment of Error with respect to this issue. He reiterates, however, that with respect to the charges involving ■■■, that ■■■ had a variety of motives to testify falsely against Appellant, including that ■■■ had previously assaulted Appellant, and ■■■ apparently agreed to “help” ■■■ with her allegations; that the testimony is inconsistent with respect to the identity and number of people who were on the trip to San Antonio; that many of the people who were present on that trip, including one who was purportedly in the room when the incident was supposed to have occurred, were never called to testify; that other than ■■■ and ■■■, none of the government’s witnesses testified to any assault; that ■■■ testimony is inconsistent with ■■■ testimony regarding what happened

when [REDACTED] returned to the room; that the testimony was inconsistent regarding the sleeping arrangements and who was likely present in the room when the assault was alleged to have occurred; that the testimony was inconsistent with respect to the darkness of the room; that [REDACTED] testimony, [REDACTED] testimony, and [REDACTED] testimony is all inconsistent regarding who escorted [REDACTED] back to the hotel room; that the government failed to prove that [REDACTED] was so intoxicated that she was incapable of consent; and that because [REDACTED] allegations are incredible in their entirety, both Specifications 1 and 2 of Charge II should be set aside.

With respect to the charges involving [REDACTED], Appellant reiterates that he is unsure which event led to his conviction of Specification 1 of Charge I; that [REDACTED] had a motive to fabricate the allegations against Appellant; and that [REDACTED] conduct is inconsistent with sexual assault.



Appellant also again urges this Court to discount in its entirety the so-called propensity evidence, both for the reasons discussed in Assignment of Error I, and because at trial [REDACTED] [REDACTED] testified that [REDACTED] told him that he and [REDACTED] had placed [REDACTED] in her own bedroom.

Because there is reasonable doubt with respect to all of the allegations in this case, the findings and sentence should be set aside. WHEREFORE Appellant so prays.

Conclusion

WHEREFORE, the appellant requests that this honorable court set aside the findings and sentence.


WILLIAM E. CASSARA
Civilian Appellate Counsel



Tumentugs D. Armstrong
Captain, Judge Advocate
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on November 28, 2022.



MICHELLE L.W. SURRATT
Paralegal Specialist
Defense Appellate Division

