

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Staff Sergeant (E-6)
ISAC D. MENDOZA,
United States Army,

Appellant

Docket No. ARMY 20210647

Tried at Fort Riley, Kansas, on 20
September and 6-8 December 2021,
before a general court-martial
convened by Commander, 1st Infantry
Division and Fort Riley, Colonel
Steven C. Henricks and Lieutenant
Colonel Ryan W. Rosauer, military
judges, presiding.

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

Assignments of Error

**I. WHETHER APPELLANT’S CONVICTION FOR
SPECIFICATION 1 OF THE CHARGE IS
FACTUALLY SUFFICIENT.**

**II. WHETHER THE MILITARY JUDGE ERRED
BY FAILING TO INSTRUCT THAT A FINDING OF
GUILTY REQUIRED A UNANIMOUS VOTE BY
THE MEMBERS, SO THAT APPELLANT WAS
DENIED A MEANINGFUL OPPORTUNITY TO
MAKE A FORUM SELECTION.**

Statement of the Case

On 8 December 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].¹ (R. at 279). On the same day, the military judge sentenced appellant to a reduction to the grade of E-1, confinement for thirty months, and a dishonorable discharge. (R. at 376). On 6 January 2022, the convening authority took no action on the findings and approved the sentence. (Action). The military judge entered judgment on 12 January 2022. (Judgment).

Statement of Facts

A. The prelude to the sexual assault.

On the night of 11 July into the early morning of 12 July 2020, Ms. [REDACTED] then a Specialist (SPC) in the U.S. Army deployed to Camp Casey, Korea, consumed various alcoholic drinks off-post and then returned to her barracks building. (R. at 31–33, 139–42). Upon returning to the barracks, she continued to drink and exhibited symptoms of alcohol intoxication, such as slurred speech, poor balance, and an inability to walk straight. (R. at 96, 160). She also displayed flirtatious behavior with multiple male soldiers, including appellant—with whom Ms. [REDACTED]

¹ The military judge found appellant not guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ. (R. at 279; Statement of Trial Results).

had never spoken before. (R. at 34, 104, 113, 120–21; Pros. Ex. 2 at 49:45–50:04). After observing Ms. ■■■ act flirtatiously toward another male soldier, appellant told that soldier that Ms. ■■■ was “too intoxicated” and that he was going to have her sent to her room. (R. at 105, 108–10; Pros. Ex. 1 at 11:27–12:47). Less than ten minutes later, appellant met Ms. ■■■ in a hallway, and, pursuant to his invitation, they walked into his room in the same barracks building. (Pros Ex. 1 at 13:40–14:18; Pros. Ex. 2 at 1:26:22–44). During the walk towards his room, appellant touched Ms. ■■■ groin. (Pros. Ex. 1 at 14:06–14:10).

B. Appellant sexually assaulted Ms. ■■■

Approximately one hour after they entered his room, closed circuit television (CCTV) footage showed appellant exiting his room with Ms. ■■■ and walking—with Ms. ■■■ arms around his shoulders and her body and head slumped against him for support—to Ms. ■■■ room, where he dropped her off before returning to his room. (Pros. Ex. 1 at 14:19–16:30). Approximately one minute later, he left his room to retrieve a master key from the soldier working charge of quarters (CQ) duty and used it to open Ms. ■■■ room door and return her hat, which had been left in his room. (R. at 78–79; Pros. Ex. 1 at 16:39–19:24; Pros. Ex. 2 at 1:33:30–55, 2:43:29–2:45:00). Appellant returned Ms. ■■■ shoes to her in her room later that morning. (R. at 33–34, 79–80; Pros. Ex. 1 at 21:13–22:13).

Ms. ■■■ testified that she had blacked out at some point on the night of 11

July 2020. (R. at 33, 49). The next thing she remembered after drinking at her barracks was waking up to appellant knocking on her door the next morning to return her shoes. (R. at 33–34). After appellant came to her room again that morning to ask if she was okay, Ms. ■■■ noticed that she was not wearing the bra or underwear she had been wearing the day before and that the tampon she had inserted the day before was pushed all the way inside her to the extent that she could not reach the string. (R. at 34–35, 44, 55–56). At trial, Ms. ■■■ testified that she never inserted a tampon to the point where the string was all the way inside her body, and that she would never have sex with her tampon in or when she was on her period. (R. at 56–57, 60). Ms. ■■■ crying and visibly upset and confused, sought assistance from members of her unit, and the soldier on CQ duty arranged for her to receive a sexual assault forensic examination (SAFE). (R. at 133, 149–51, 161–63, 204).

After speaking to Ms. ■■■ that morning, SPC ■■■ Ms. ■■■ friend, went to appellant's room and asked appellant if Ms. ■■■ had been there the previous night, and appellant, whose voice was shaking and was visibly nervous, said Ms. ■■■ fell asleep in his bed but did not disclose anything else at the time. (R. at 137, 151–52). Appellant followed SPC ■■■ to the troop medical clinic (TMC) where Ms. ■■■ received her SAFE. (R. at 152–53, 204). Specialist ■■■ called Ms. ■■■ phone while he was in appellant's presence, handed his phone to appellant during the call,

and appellant said to Ms. [REDACTED] who was trying to figure out what had happened the previous night—words to the effect that nothing had happened, but that she had locked herself in the bathroom at one point. (R. at 37–40). At the TMC parking lot, appellant, who was not suspected of any crime at the time, told Criminal Investigation Division (CID) Special Agent ([REDACTED] [REDACTED] while [REDACTED] [REDACTED] was conducting canvassing interviews that Ms. [REDACTED] was in his room at some point but that he did not know why she was there. (R. at 169-70).

After being informed of and waiving his Article 31, UCMJ rights at the CID office later on 12 July 2020, (Pros. Ex. 2 at 34:24–40:00; Pros. Ex. 5), appellant initially told [REDACTED] [REDACTED] that he did not remember events of the previous night after a certain point because he “blacked out quite a bit,” but that the last thing he remembered was that Ms. [REDACTED] was in his bathroom where she “started to fall all over the place,” after which he “propped her upright,” and picked her up and took her to her room. (Pros. Ex. 2 at 43:30–46:06). Appellant repeated to [REDACTED] [REDACTED] that he did not know how Ms. [REDACTED] entered his room, (Pros. Ex. 2 at 1:18:13–26), but later stated that he invited Ms. [REDACTED] to his room after she was hitting on him. (Pros. Ex. 2 at 1:24:10–1:26:44). Appellant then described Ms. [REDACTED] intoxication by stating that she was stumbling, told him she was going to throw up, and that he had to walk Ms. [REDACTED] to her room because she was “super drunk.” (Pros. Ex. 2 at 1:28:40–1:31:00). However, in describing how Ms. [REDACTED] walked to her room,

appellant stated that he “wasn’t holding her up,” that she had her arm around him for “comfort,” and that she was “walking perfectly fine.” (Pros. Ex. 2 at 1:39:19–1:40:15). Appellant also stated that they “didn’t have any sexual contact of any kind.” (Pros. Ex. 2 at 1:28:20–37). Despite his claims of lack of memory, except for any sexual contact with Ms. [REDACTED] or the sexual assault, appellant recounted the previous night during the first approximately two hours of the interview—including sequences of events and identities of people and their locations—in detail. (Pros. Ex. 2 at 50:19–2:43:22).

Later in the interview, [REDACTED] [REDACTED] showed appellant CCTV footage of him touching Ms. [REDACTED] groin while walking with her to his room. (Pros. Ex. 2 at 3:16:20–55). After being confronted with the CCTV footage, appellant admitted that Ms. [REDACTED] was falling asleep on his bed with a drink in her hand, that he woke her up and had sexual intercourse with her during which he “was in control the whole time,” that he knew Ms. [REDACTED] could not consent because of her intoxication, and that he knew it was wrong to commit sexual acts upon Ms. [REDACTED] when she could not consent. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellant also stated that he removed Ms. [REDACTED] out of his room because he “didn’t want to incriminalize himself,” (Pros. Ex. 2 at 2:17:24–30), and that, in response to [REDACTED] [REDACTED] question of what made him decide to have sex with Ms. [REDACTED] despite knowing how intoxicated she was and her inability to consent, he “made the conscious

decision to just do it,” and “didn’t think about how [Ms. ■■■ was, didn’t think about the consequences it.” (Pros. Ex. 2 at 3:39:48–3:41:00). Appellant also acknowledged that he “didn’t just make a mistake, [he] committed . . . a severe felony.” (Pros. Ex. 2 at 3:43:17–24). Appellant wrote and swore to a statement containing these admissions, among other assertions, at the conclusion of the interview. (Pros. Ex. 2 at 4:07:40–5:08:52; Pros. Ex. 6). Although appellant also stated that, among other indicia of consent, Ms. ■■■ kissed him and said “yes” in response to him asking “is this okay” during the sexual encounter, (Pros. Ex. 2 at 3:20:00–31), when ■■■ ■■■ asserted “she didn’t say yes, and you know that,” appellant said “yeah” and nodded in assent. (Pros. Ex. 2 at 3:27:29–36).

Ms. ■■■ a U.S. Army Criminal Investigation Laboratory (USACIL) DNA examiner and expert in forensic biology, (R. at 216–17, 220–21), examined the DNA evidence, including a cervical swab and blood sample taken from Ms. ■■■ during her SAFE and a buccal swab taken from appellant. (R. at 87, 209–10, 221). Her examination concluded that semen was identified on the cervical swabs, that a mixture of DNA profiles of two individuals—Ms. ■■■ and appellant—was discovered on those swabs, and that it was at least one quintillion times more likely that those DNA profiles originated from Ms. ■■■ and appellant than from Ms. ■■■ and an unknown individual. (R. at 221–23; Pros. Ex. 7, p. 1). Dr. ■■■ an expert in forensic psychology with an emphasis on effects of alcohol on behavior, (R. at

229), testified that she estimated through backwards extrapolation based on Ms. ■■■ SAFE toxicology report that Ms. ■■■ blood alcohol concentration (BAC) was between .175 to .19 when appellant sexually assaulted her. (R. at 232–33). Dr. ■■■ further testified that such a BAC, when combined with Ms. ■■■ other symptoms of intoxication, comported with experiencing a blackout, impaired decision making, difficulty processing information, and diminished mental capacity. (R. at 235).

Assignment of Error I

WHETHER APPELLANT’S CONVICTION FOR SPECIFICATION 1 OF THE CHARGE IS FACTUALLY SUFFICIENT.

Standard of Review

This court reviews convictions for factual sufficiency de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

Law

In reviewing a conviction for factual sufficiency, this court takes “a fresh, impartial look at the evidence,” applying “neither a presumption of innocence nor a presumption of guilt.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This court may not affirm a conviction unless, “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,” it is “convinced of the accused’s guilt beyond a reasonable doubt.”

United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt “does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented.” *King*, 78 M.J. at 221. In analyzing both legal and factual sufficiency, the Court of Appeals for the Armed Forces [CAAF] “has long recognized that the government is free to meet its burden of proof with circumstantial evidence,” and “recognize[s] that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private.” *Id.*

To convict appellant of sexual assault of Ms. [REDACTED] without her consent as alleged in Specification 1 of The Charge (“Specification 1”), the government was required to prove that: (1) appellant committed a sexual act upon Ms. [REDACTED] and (2) he did so without the consent of Ms. [REDACTED]. Article 120(b)(2)(A), UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [MCM], pt. IV, ¶ 60.b.(2)(d); Dep’t of Army, Pam. 27-9, Legal Services: Military Judges’ Benchbook, para. 3A-44-2 (29 Feb. 2020) [Benchbook]. “Sexual act” means, in relevant part, “the penetration, however slight, of the penis into the vulva.” Article 120(g)(1)(A), UCMJ. “Consent” is a “freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent.” Article 120(g)(7)(A), UCMJ. Further, “[a] sleeping, unconscious, or incompetent

person cannot consent,” and “[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent.” Article 120(g)(7)(B), (C), UCMJ.

Argument

A. The evidence is factually sufficient to support appellant’s conviction.

The evidence is factually sufficient to support appellant’s conviction for sexual assault without consent. Appellant does not dispute that he engaged in a sexual act upon Ms. [REDACTED] a fact supported by his statements to CID and corroborated by the USACIL examination, which discovered appellant’s DNA and sperm on Ms. [REDACTED] cervical swabs. (R. at 221–23; Pros. Exs. 6, 7). This evidence shows, beyond a reasonable doubt, that appellant committed a “sexual act” upon Ms. [REDACTED] i.e., penetrated her vulva with his penis.

The evidence also establishes beyond a reasonable doubt that this sexual act occurred without Ms. [REDACTED] consent. This court recently found in *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, *11 (Army Ct. Crim. App. 27 Apr. 2022) (unpub.), that the government may carry its burden of proving sexual assault without consent by presenting, mainly but with other evidence, the fact of the victim’s extreme intoxication at the time of the sexual act. The government has carried its burden with such evidence here.

Multiple witnesses and CCTV footage established that Ms. [REDACTED] exhibited

signs of alcohol intoxication on the night of 11 July and early morning of 12 July 2020, such as slurred speech, poor balance, and difficulty walking straight. (R. at 34, 96, 104, 113, 120–21, 160; Pros. Ex. 2 at 49:45–50:04). Less than ten minutes before appellant took her to his room, Ms. [REDACTED] evident intoxication caused appellant—who closely observed Ms. [REDACTED] behavior—to tell another soldier that he was going to send her to her room because she was “too intoxicated.” (R. at 105, 108–10; Pros. Ex. 1 at 11:27–14:18). Dr. [REDACTED] testified that Ms. [REDACTED] symptoms of intoxication and estimated BAC of .175 to .19 at the time of the sexual assault were consistent with experiencing a blackout, impaired decision making, difficulty processing information, and diminished mental capacity. (R. at 232–33, 235). Finally, compelling CCTV evidence admitted at trial showed appellant essentially propping up Ms. [REDACTED] whose mobility and ability to stand were visibly severely diminished—with his body as he guided her to her room soon after the sexual assault. (R. at 21; Pros. Ex. 1 at 14:19–15:39).

Appellant’s statements and actions after the sexual assault further establish that Ms. [REDACTED] did not consent. Appellant admitted to CID that he removed Ms. [REDACTED] from his room because he “didn’t want to incriminalize himself,” (Pros. Ex. 2 at 2:17:24–30), which also explains why he returned her hat and shoes later in the morning. (R. at 33–34, 78–80; Pros. Ex. 1 at 16:39–19:24, 21:13–22:13; Pros. Ex. 2 at 1:33:30–55, 2:43:29–2:45:00). Later in the day, appellant was not candid with

SPC ■■■ Ms. ■■■ or during ■■■ ■■■ canvassing interview in failing to be forthcoming in his responses to their questions about the previous night. (R. at 37–40, 137, 151–52, 169–70). Further, during his subject interview with ■■■ ■■■ at the CID station, appellant initially feigned a lack of memory and made demonstrably false exculpatory statements, most critically that he and Ms. ■■■ “didn’t have any sexual contact of any kind.” (Pros. Ex. 2 at 43:30–56, 1:28:30–36). Like his attempts to remove evidence from his room, appellant’s false exculpatory statements evidenced his consciousness of guilt to a criminal offense. *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021) (“[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt.”).

Appellant eventually admitted to CID that he committed vaginal sexual intercourse with Ms. ■■■ during which he “was in control the whole time,” that he knew Ms. ■■■ could not consent because of her intoxication, and that he knew it was wrong to commit sexual acts upon Ms. ■■■ when she could not consent. (Pros. Ex. 2 at 3:38:00–46; Pros. Ex. 6). Appellant also recognized that he “didn’t just make a mistake, [he] committed . . . a severe felony.”² (Pros. Ex. 2 at 3:43:17–23).

² Given this and other admissions appellant made to CID, including those regarding Ms. ■■■ inability to consent to a sexual act, his attempt on appeal to portray his lies as motivated by his “shame” about “the adultery and the fraternization” with Ms. ■■■ and not his consciousness of guilt regarding a more serious sexual offense, (Appellant’s Br. 19–20), is unsupported. Further,

These were credible admissions which explained his motive for his numerous, earlier attempts to avoid accountability, and are strong factual evidence of his guilt.

Though appellant also attempted in the course of these admissions to portray Ms. ■■■ as a consenting participant in the sexual act—by stating that Ms. ■■■ kissed him, performed oral sex on him, got on top of him while they had intercourse, and responded “yes” when he asked “is this ok” throughout their sexual intercourse, (Pros. Ex. 2 at 3:20:00–31; Pros. Ex. 6)—like stating that he “wasn’t holding [Ms. ■■■ up” and that Ms. ■■■ was “walking perfectly fine” when he took her back to her room, (Pros. Ex. 2 at 1:40:03–15)—these were self-serving statements that the objective evidence and appellant’s admissions disprove. For example, when ■■■ ■■■ asserted “[Ms. ■■■ didn’t say yes, and you know that,” appellant said “yeah” and nodded in assent. (Pros. Ex. 2 at 3:27:29–36). Further, appellant admitted Ms. ■■■ was falling asleep on his bed while holding a drink in her hand before the sexual act. (Pros. Ex. 2 at 3:28:00–50). After committing the sexual act, appellant admitted Ms. ■■■ was in his bathroom where she “started to fall all over the place” and that he had to “prop her upright,” before he walked her

appellant’s reference to presentencing character evidence, (Appellant’s Br. 19), is an inappropriate basis on which to challenge the factual sufficiency of the evidence on the merits of his conviction. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007) (remanding an appeal because CAAF could not determine whether the court of criminal appeals improperly considered the victim’s pretrial or presentencing testimony in its sufficiency reviews).

to her room because she was “super drunk.” (Pros Ex. 2 at 43:30–46:06; 1:28:40–1:31:00). These admissions were self-inculpatory and, under the principle “that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true,” were credible. *Williamson v. United States*, 512 U.S. 594, 599 (1994) (explaining the rationale for the statements against interest hearsay exception).

On the other hand, the notion that Ms. [REDACTED] managed to consent to sexual intercourse between the point at which she lost control of her faculties and fell asleep on appellant’s bed while holding a drink and the point where she was “falling all over the place” in his bathroom—which is what appellant’s statements establish to be his theory—strains credulity. Thus, appellant’s claims of Ms. [REDACTED] consent to the sexual act interspersed with his inculpatory admissions are not credible and do not warrant disturbing his conviction. *Williamson*, 512 U.S. at 600 (“Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.”).

Finally, that Ms. [REDACTED] consented to the appellant’s sexual act is disproved by the fact that she was wearing a tampon at the time, and that appellant’s sexual act caused it to be pushed into her body to a degree that she could not reach the string

and her vagina to be sore later in the morning.³ (R. at 35, 56–57, 60–61, 207).

Appellant posits various theories regarding the tampon on appeal, including that Ms. ■ may have been inclined to have sex with a tampon in while drunk or that she lied about the presence of the tampon. (R. at 17–19). These theories are conjectural, unsupported, and do not amount to reasonable doubt. In contrast, Ms. ■ testimony about waking up with the tampon pushed painfully inside her, which was consistent with her statement during her SAFE exam, (R. at 207–08), is also consistent with the details portrayed by appellant’s inculpatory statements to CID: that Ms. ■ was minimally conscious, if at all, at the time of the sexual act, and that the sexual act that pushed her tampon all the way inside her occurred without her consent. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Although appellant suggests on appeal that Ms. ■ testimony—ostensibly that she would never having sex with her tampon in or while on her period—was either deliberately false or based on an imprecise attempt to fill her memory gaps, (Appellant’s Br. 20–21), that Ms. ■ would have consented to a sexual act in which her tampon was thrust painfully into her vagina is so improbable that it fails to constitute reasonable doubt.

³ Contrary to appellant’s claim on appeal that Ms. ■ cannot remember when she put the tampon in, (Appellant’s Br. 17), Ms. ■ testified at trial that she could not remember “exactly” when she put the tampon in, but that she put it in the day prior to the sexual assault. (R. at 60–61).

In sum, on the issue of lack of consent, in addition to the testimony, CCTV footage, and appellant's own admissions establishing Ms. [REDACTED] extreme intoxication, appellant's consciousness of guilt as demonstrated by his various attempts to evade responsibility, combined with his ultimate inculpatory statements to CID and the improbability of Ms. [REDACTED] consenting to a sexual act resulting in her tampon pushed painfully and entirely into her vagina—which is supported by her testimony that she would never have done so—established that Ms. [REDACTED] did not consent to a sexual act. This court should therefore be convinced of appellant's guilt beyond a reasonable doubt.

B. Appellant did not have an honest or reasonable mistake of fact that Ms. [REDACTED] consented to a sexual act.

As part of his challenge to the factual sufficiency of the evidence to support his conviction, appellant also argues that he had an honest and reasonable belief that Ms. [REDACTED] consented to a sexual act based on Ms. [REDACTED] earlier flirtatious behavior. (Appellant's Br. 15–16).

An honest and reasonable (nonnegligent) mistake of fact as to consent serves as an affirmative defense to the offense of sexual assault without consent. *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (stating that mistake of fact is an affirmative defense to the offense of sexual assault without consent under a predecessor statute). For the defense of mistake of fact to exist, “the ignorance or

mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.” Rule for Courts-Martial 916(j)(1).

As discussed, the evidence shows that Ms. [REDACTED] was minimally conscious, if at all, when appellant committed a sexual act upon her, and appellant therefore cannot validly claim that he reasonably believed Ms. [REDACTED] consented to a sexual act. Even assuming, arguendo, that Ms. [REDACTED] did offer some indication in her intoxicated state that could have been construed as consent, such a construal by appellant would not have been honest nor reasonable under the circumstances. Appellant demonstrated knowledge of Ms. [REDACTED] incompetence to consent due to her severe intoxication when, shortly before the sexual act, he told a soldier with whom Ms. [REDACTED] had been flirting—according to that soldier’s testimony—that she was “too intoxicated” and that he was going to have her sent to her room. (R. at 105, 108–09; Pros. Ex. 1 at 11:27–12:47). During his CID interview, appellant repeated to [REDACTED] [REDACTED] even before admitting to the sexual act—that Ms. [REDACTED] was “really drunk” and “super drunk” while she was in his room. (Pros. Ex. 1 at 1:17:15–30, 1:30:50–1:31:00).

Any suggestion that appellant had an honest or reasonable mistake of fact of Ms. [REDACTED] consent due to their flirtation earlier in the night is directly refuted by his admissions to CID about her extreme intoxication, and ultimate admissions that he knew she could not consent because of her intoxication and that it was wrong to

commit sexual acts upon her when she could not consent. (Pros. Ex. 2 at 3:28:00–28; Pros. Ex. 6 at 2). In response to ■■■■■ question of what made him decide to have sex with Ms. ■■■■ despite knowing how intoxicated she was and inability to consent, he said he “made the conscious decision to just do it,” “wanted to have sex,” “didn’t think about how [Ms. ■■■■ was,” and all he thought about was “what [he] wanted,” (Pros. Ex. 2 at 3:39:48–3:41:00), meaning that appellant, far from having an honest or reasonable mistake of fact as to consent, decided to commit a sexual act upon Ms. ■■■■ regardless of whether she gave consent or lacked the competence to consent. Appellant’s knowledge of Ms. ■■■■ lack of consent or lack of competence to consent was further demonstrated by his knowledge that he had committed “a severe felony,” (Pros. Ex. 2 at 3:43:17–23), his admission that he removed Ms. ■■■■ from his room because he “didn’t want to incriminalize himself,” (Pros. Ex. 2 at 2:17:24–30), and his extensive course of conduct in order to evade accountability, starting with his return of Ms. ■■■■ and her belongings to her room and ending with his hours-long false narrative to ■■■■ ■■■■ The totality of these circumstances demonstrates that appellant neither honestly nor reasonably believed that Ms. ■■■■ consented to a sexual act as required to support a defense of mistake of fact. *See United States v. Drafton*, ARMY 20190051, 2020 CCA LEXIS 335, *3-4, 7 (Army Ct. Crim. App. 21 Sep 2020) (finding that an appellant’s statement to law enforcement acknowledging the victim’s lack of consent to sexual

intercourse showed he did not have an honest belief that she consented), pet. denied, 80 M.J. 474 (C.A.A.F. 2020); *United States v. Khoi Pham*, No. 201600313, 2018 CCA LEXIS 117, *12-13 (N.M. Ct. Crim. App. 8 Mar 2018) (finding that an appellant's false statements tended to show his guilt and that there was no reasonable mistake of fact as to consent), pet. denied, 78 M.J. 48 (C.A.A.F. 2018); *United States v. Teague*, 75 M.J. 636, 638 (Army Ct. Crim. App. 15 Mar 2016) ("Nor can an accused simultaneously hold a reasonable belief that a victim cannot consent while also reasonably believing she did consent."), pet. denied, 75 M.J. 373 (C.A.A.F. 2016).

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THAT A FINDING OF GUILTY REQUIRED A UNANIMOUS VOTE BY THE MEMBERS, SO THAT APPELLANT WAS DENIED A MEANINGFUL OPPORTUNITY TO MAKE A FORUM SELECTION.⁴

Supplemental Facts

In discussing appellant's forum selection rights, the military judge informed appellant that, if he were to be tried by a panel, three-fourths of the members must agree before he could be found guilty of any offense. (R. at 7, 15). Appellant

⁴ As explained in his brief, the appellant only raises this issue for preservation due to the pending status of *United States v. Anderson*, 2022 CAAF LEXIS 529 (C.A.A.F. 2022). (Appellant's Br. 21).

requested to be tried by military judge alone. (R. at 16; App. Ex. XI). Appellant did not object to either of these instructions or otherwise raise the issue of unanimous verdicts at trial.

Law & Argument

This issue is moot because appellant ultimately elected to be tried by military judge alone.⁵ *United States v. Napoleon*, 46 M.J. 279, 281 (C.A.A.F. 1997) (stating that an issue is moot if resolving it would not result in a material alteration of the situation for the accused or for the government).

⁵ There is also no evidence in the record that the military judge's instructions regarding the three-fourths requirement for conviction by a panel impacted the appellant's decision to be tried by military judge alone.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.



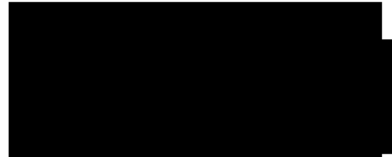
CHRISTOPHER H. KIM
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APPENDIX

United States v. Anderson

United States Court of Appeals for the Armed Forces

July 25, 2022, Decided

No. 22-0193/AF

Reporter

2022 CAAF LEXIS 529 *; 82 M.J. 440; 2022 WL 3219303

U.S. v. Anthony A. Anderson

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: CCA 39969 [*1] .

[United States v. Anderson, 2022 CCA LEXIS 181, 2022 WL 884314 \(A.F.C.C.A., Mar. 25, 2022\)](#)

Opinion

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is ordered that said petition is granted on the following issue:

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE [SIXTH AMENDMENT](#), THE [FIFTH AMENDMENT'S DUE PROCESS CLAUSE](#), AND THE [FIFTH AMENDMENT'S](#) RIGHT TO EQUAL PROTECTION.

Briefs will be filed under [Rule 25](#).

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United States v. Drafton

United States Army Court of Criminal Appeals

September 21, 2020, Decided

ARMY 20190051

Reporter

2020 CCA LEXIS 335 *; 2020 WL 5642012

UNITED STATES, Appellee v. Specialist TASHAWN E. DRAFTON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Drafton, 2020 CAAF LEXIS 704 \(C.A.A.F. Dec. 22, 2020\)](#)

Prior History: [*1] Headquarters, 7th Infantry Division. Timothy P. Hayes, Jr., Military Judge, Colonel Rebecca K. Connally, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Kyle C. Sprague, JA; Captain Alexander N. Hess, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Captain Brian Jones, JA; Captain Christopher K. Wills, JA (on brief).

Judges: Before BURTON, RODRIGUEZ, and FLEMING, Appellate Military Judges. Senior Judge BURTON and Judge FLEMING concur.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications each of aggravated assault and assault consummated by a battery, and one specification of violating a lawful order, in violation of [Articles 128 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 928 \(2016\)](#) [UCMJ]. Contrary to his pleas, the military judge convicted appellant of one specification each of rape and false official statement, in violation of [Articles 120 and 107, UCMJ](#). The convening authority approved the adjudged sentence of a reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for six years, [*2] and a dishonorable

discharge from the service.

This case comes before us for review under *Article 66, UCMJ*. Appellant raises two assignments of error, one of which warrants discussion but no relief.^{1*}

BACKGROUND

Appellant and his friend Specialist (SPC) [REDACTED] met appellant's civilian victim, TJ, in December 2016. TJ began dating SPC [REDACTED] and, though their relationship ended sometime in 2017, the two continued socializing with appellant and his wife throughout 2017.

On 3 December 2017, SPC [REDACTED] picked up TJ from a Tacoma hotel. TJ, who lived approximately two hours from Joint Base Lewis-McChord (JBLM) and did not have her own car, then accompanied SPC [REDACTED] and appellant on several errands. Later that evening TJ, SPC [REDACTED] appellant, and appellant's wife went to dinner together. The foursome returned to appellant's off-post apartment and spent the night of 3 December there, with TJ and SPC [REDACTED] sleeping on the couch.

On the morning of 4 December 2017, the three soldiers (appellant, appellant's wife, and SPC [REDACTED] woke up and reported to post, leaving TJ alone at appellant's apartment. At some point that morning, appellant returned to his apartment. Appellant started kissing TJ while they both sat on the [*3] couch. She said "no" and rolled over to lay on her stomach. Appellant then sat on TJ's legs, pulled down her sweatpants, and penetrated her vagina with his penis while grabbing both of her wrists with one hand and pinning them above her head. TJ pleaded "stop" and "no" to appellant, and one firm and loud "no" finally caused appellant to stop raping her.

Appellant then left TJ in his apartment, where she remained until appellant's wife came home in the

^{1*}We have given full and fair consideration to the matters personally raised by appellant pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#), and find they merit neither discussion nor relief.

afternoon and they went to the gym together. That evening, TJ rode with appellant and his wife to board her bus home, but missed its departure. TJ then requested a ride from appellant and his wife to SPC [REDACTED] on-post barracks, where she spent the night. The following morning, TJ informed SPC [REDACTED] about the rape at appellant's apartment. SPC [REDACTED] notified his unit's chain of command.

As part of the investigation, law enforcement investigators interviewed appellant twice. In his first interview, appellant explained away his interaction with TJ as entirely consensual. Days later, at his second law enforcement interview, appellant acknowledged that TJ had told him "no" during the assault, and he had held both of her hands in order to prevent her [*4] from stopping the penetration.

LAW AND DISCUSSION

"A finding of guilt is legally sufficient if any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." [*United States v. Nicola*, 78 M.J. 223, 226 \(C.A.A.F. 2019\)](#) (citations and internal quotations omitted). In conducting our legal sufficiency review, we are obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." [*United States v. Robinson*, 77 M.J. 294, 298 \(C.A.A.F. 2018\)](#) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." [*United States v. King*, 78 M.J. 218, 221 \(C.A.A.F. 2019\)](#) (citation and internal quotations omitted).

With regard to factual sufficiency, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." [*United States v. Washington*, 57 M.J. 394, 399 \(C.A.A.F. 2002\)](#). We may not affirm a conviction unless, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," we are personally convinced beyond a reasonable doubt of appellant's guilt. [*United States v. Turner*, 25 M.J. 324, 325 \(C.M.A. 1987\)](#).

Appellant contends the evidence is both legally and factually insufficient to sustain his conviction for raping TJ. Specifically, appellant argues there is "some evidence" of his reasonable and honest mistake of fact that TJ consented [*5] because of the manner in which

she allegedly said "no" to him, with "chuckles" and "caveats" about appellant being married, and interjections about the likely reactions of appellant's wife and SPC [REDACTED] if they were to learn of appellant's actions.

Appellant also urges us to give little weight to his second statement to law enforcement. At the end of the second lengthy interrogation, it allegedly dawned on appellant that the sexual intercourse with TJ might not have been consensual, as viewed by a reasonable person at the time, despite his alleged honest belief in that moment that it was consensual. Appellant now claims he made this statement because law enforcement confused him by asking him hypothetical questions designed to elicit a response that sexual intercourse with someone who says "no" is always rape, regardless of the circumstances or beliefs of the parties to the sexual encounter.

After our complete review of the record of trial, we find, as did the military judge, that TJ's testimony combined with appellant's sworn statement to law enforcement warrants his conviction for rape. As discussed in-depth below, TJ's trial testimony regarding the rape was not only credible but was [*6] also corroborated by appellant's statement to law enforcement in many key areas.

For instance, both described sitting on the couch after appellant returned to his apartment, and TJ rolling over onto her stomach after appellant began kissing her. Both agreed appellant pulled down TJ's pants and penetrated her vagina with his penis from behind, while TJ told appellant "no" numerous times throughout the incident.

Furthermore, the evidence showed remarkable consistency on not only how appellant held TJ's hands as he raped her from behind, but on his rationale for doing so. In his sworn statement to law enforcement after his second interview, appellant was asked, "[y]ou stated as you removed her pants and she reached back with her hand you then did something. What did you do?" Appellant responded to this open-ended question that he "[g]rabbed both" of TJ's hands and "had a feeling that [he] was doing something wrong and still did not stop." When he was asked by law enforcement why he grabbed both of TJ's hands, appellant responded that he was preventing TJ from stopping the penetration of her vagina with his penis.

In a case that largely hinged on credibility, appellant's

credibility was clearly [*7] undermined by his sworn statement and admissions to law enforcement during his second interview. Appellant argues "some evidence" of his reasonable and honest mistake of fact concerning consent is based on his belief that TJ was not serious when she said "no" to him at the time of the assault. Significantly, however, appellant specifically retracted this previous assertion in his written sworn statement to law enforcement. Thus, appellant's own statement clearly shows he did not have an honest belief that TJ consented to sexual intercourse.

The evidence was more than legally sufficient to convince the military judge beyond a reasonable doubt as to appellant's guilt and, after our review of the entire record of trial and making appropriate allowances for not personally observing the witnesses, we too are convinced beyond a reasonable doubt that appellant is guilty of raping TJ.

CONCLUSION

Upon consideration of the entire record, the findings and sentence are AFFIRMED.

Senior Judge BURTON and Judge FLEMING concur.

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United States v. Khoi Pham

United States Navy-Marine Corps Court of Criminal Appeals

March 8, 2018, Decided

No. 201600313

Reporter

2018 CCA LEXIS 117 *

UNITED STATES OF AMERICA, Appellee v. KHOI V. PHAM Senior Chief Culinary Specialist (E-8), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by [United States v. Pham, 2018 CAAF LEXIS 233 \(C.A.A.F., May 8, 2018\)](#)

Review denied by [United States v. Pham, 2018 CAAF LEXIS 389 \(C.A.A.F., July 5, 2018\)](#)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Captain David M. Harrison, JAGC, USN. Convening Authority: Commander, U.S. Naval Forces Japan, Yokosuka, Japan. Staff Judge Advocate's Recommendation: Commander T.D. Stone, JAGC, USN.

Counsel: For Appellant: Lieutenant Commander Jeremy J. Wall, JAGC, USN; Lieutenant Jacqueline M. Leonard, JAGC, USN.

For Appellee: Major Cory A. Carver, USMC; Captain Sean M. Monks, USMC.

Judges: Before MARKS, PRICE, and JONES, Appellate Military Judges. Senior Judge MARKS and Judge JONES concur.

Opinion by: PRICE

Opinion

PRICE, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his

pleas, of one specification of false official statement and two specifications of sexual assault, in violation of Articles 107 and 120, Uniform Code of Military Justice (UCMJ), [10 U.S.C. §§ 907](#) and *United States v. Pham*, 920.¹¹ The members sentenced the appellant to 179 days' confinement, reduction to pay grade E-3, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

The appellant asserts two assignments of error (AOEs): (1) the evidence is legally [*2] and factually insufficient to prove the complaining witness's (PI's) incapacitation beyond a reasonable doubt; and (2) the military judge abused his discretion by denying the appellant's motion to compel production of PI's cell phone which contained potentially exculpatory evidence, thus depriving the appellant of equal access to evidence and violating his due process rights.

Having carefully considered the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. [Arts. 59\(a\)](#) and 66(c), UCMJ.

I. BACKGROUND

On 11 February 2015, PI, a Philippine national civilian living as a foreign resident in Yokosuka, Japan, went out for the evening with two female friends to socialize and with the express intent of getting drunk.

At approximately 1800, PI and her friends went to

¹¹ The two specifications of sexual assault were for the same sexual act—penile penetration of PI's vulva. Prior to sentencing, the military judge conditionally dismissed—pending final appellate review—Specification 2 of Charge II (sexual assault by causing bodily harm in violation of [Article 120\(b\)\(1\)\(B\)](#), UCMJ), as multiplicitous with Specification 1 of Charge II (sexual assault upon person incapable of consenting due to impairment by alcohol in violation of [120\(b\)\(3\)\(A\)](#), UCMJ). Record at 983.

Yakitori Place where they drank an unspecified quantity of beer and ate some food. PI testified that, "[o]f course we had more than one. . . . so sometimes you order a mug. Sometimes you order a big glass, and we pour like Japanese style. You don't stop drinking while you're pouring it."²² "[S]ometimes [*3] we order like a big bottle . . . and we pour it together with each other And then when it's finished we gonna pour again."³³

At around 2100, PI and her friends went to a club and paid a fixed price to participate in an all you can drink for an hour special. They drank oolong-hi, a strong mixed drink consisting of tea and alcohol similar to, but not as strong as, whiskey or rum. PI did not recall how many oolong-hi drinks she *United States v. Pham*, consumed but testified that she continued to drink while at the club. Her memories were unclear after she left the club, but she did not recall consuming any more alcoholic beverages that night.

Sometime after midnight, PI stopped at a bar she owned named Liquid. NI—her former roommate, current employee, and friend of over ten years—was bartending. PI was so visibly drunk that NI decided not to serve PI any drinks. NI testified that PI could not walk straight, needed to hold on to things to maintain balance, spilled customers' drinks, and could not speak clearly. NI testified that on a scale of one to ten—one being a completely sober person and ten being passed out drunk—PI was an eight, meaning really drunk. PI remained at Liquid for [*4] approximately 30 minutes and then left the bar alone and headed for her apartment, which was less than a two minute walk away.

While walking home, PI encountered the appellant on the street. PI and the appellant had been casual acquaintances for approximately ten years but had no prior sexual relationship.

A. PI's testimony

PI recalled seeing and talking to the appellant on the street near her apartment but could not recall what was said. Her next memory was waking up and seeing him on or near her bed while she looked for a plastic bag to

vomit into. She recalled him trying to "touch [her] clothes or maybe taking off [her] clothes" and her saying, "What are you doing here[?] Go home."⁴⁴ Her next memory was of the appellant pulling her head towards his exposed penis. She could not recall whether his penis penetrated her mouth or whether she touched his body. PI testified there was no conversation during these events because she was so drunk and did not have the ability to do anything more.

PI's next memory was seeing the appellant kneeling in front of her, with his penis inside her vagina. She testified that she was unable to say anything because she was so drunk, and that she couldn't fight [*5] or do anything, including make any decisions. She recalled seeing what appeared to be ejaculate on her stomach. The next morning she contacted friends and asked what to do when you have been raped. PI was subsequently escorted to the hospital for examination.

B. Appellant's statements to NCIS

On 6 March 2015, the appellant was informed by Naval Criminal Investigative Service (NCIS) special agents that he was suspected of rape. His interview with NCIS was video recorded, and he also provided a sworn written statement.⁵⁵ The appellant explained that on 11 February 2015 he went out with friends, visited three bars and drank about three beers and three shots of Tequila. He said he "wasn't drunk at all remember[ed] everything and [he] knew what [he] was doing."⁶⁶

The appellant ran into PI on the street. They hugged, and he agreed to walk PI to her home. He said when they arrived at her apartment, PI led him into her bedroom and told him to lie on the bed. He stated she laid down next to him, they kissed, he removed her shirt, and then she removed her bra and panties. He removed his shirt and sweat pants, but was still wearing shorts and boxer underwear. He said PI told him they needed [*6] to hurry before her husband came home, but then laughed and said she was joking. The appellant said PI's comments scared him, and he thought he

²² Record at 405.

³³ *Id.* at 484.

⁴⁴ *Id.* 421-23.

⁵⁵ Prosecution Exhibit (PE) 1, 3.

⁶⁶ PE 3.

should leave.

He claimed PI repeatedly asked him to stay the night. According to the appellant, she wanted him to engage in sexual intercourse with her, despite his protestations and even though she knew he was married. He said PI then pulled his shorts and underwear down and performed fellatio on him while he was standing, then directed him to lie down on the bed and continued to fellate him. He explained that prior to ejaculating, he pushed her onto her back and then ejaculated on her abdominal area. He claimed PI kept asking him to spend the night, but he said he could not stay and then went home.

The appellant denied engaging in sexual intercourse with PI that night or at any other time. He also declared that PI didn't smell like alcohol and that he did not know that she had been drinking.

Additional facts necessary to resolution of the AOE are included below.

II. Discussion

A. Legal and factual sufficiency of the sexual assault

The appellant argues that the evidence is both legally and factually insufficient to find that PI was incapable of [*7] consenting to sexual activity due to impairment by alcohol or, alternatively, that the evidence is factually insufficient to overcome his reasonable mistake of fact. We disagree.

We review for both legal and factual sufficiency *de novo*. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)); see also Art. 66(c), UCMJ. When reviewing for legal sufficiency, 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. United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In evaluating factual sufficiency, we 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 the appellant's guilt beyond a reasonable doubt. Id. at 325.

A conviction for sexual assault upon PI, a person incapable of consenting due to impairment by alcohol, required proof beyond a reasonable doubt of two elements: (1) that the appellant committed a sexual act upon PI—by penetrating her vulva with his penis, and (2) that PI was incapable of consenting to the sexual act due to impairment by alcohol and her condition reasonably should have been known by the appellant. MANUAL FOR COURTS-MARTIAL, [*8] UNITED STATES (2012 ed.), Part IV, ¶45a(b)(3)(A).⁷⁷

1. Evidence of the sexual act

The evidence that the appellant penetrated PI's vulva with his penis is overwhelming. PI's testimony that she saw the appellant's penis inside her vagina was credible and corroborated by forensic evidence. His semen DNA profile, including spermatozoa, was found on swabs taken from her vagina and cervix during a sexual assault forensic examination (SAFE). The SAFE examiner also observed micro-abrasions near PI's vaginal opening consistent with blunt force trauma, which can be caused by penile penetration.

We are unpersuaded by the appellant's assertions that the DNA collection procedures and defective equipment used to dry the swabs could have mixed the DNA evidence collected from PI's abdomen and pubic mound with evidence collected from her vagina and cervix. Notably, the only specimens that contained the appellant's semen DNA profile and spermatozoa were those obtained from her vagina and cervix. This forensic evidence effectively rebutted the appellant's cross-contamination theory as swabs taken from PI's pubic mound included the appellant's semen DNA profile, but no spermatozoa, while no semen DNA was detected [*9] on swabs taken from her abdomen. In addition, both the SAFE examiner and observer testified they did not see swabs placed in the drying rack touch other swabs. The observer testified that she watched the swabs the entire time they were in the dryer.

Juxtaposed against this evidence of penetration are the appellant's denials of engaging in vaginal intercourse

⁷⁷ Charge Sheet; Record at 898; AE CLIII at 1.

with PI. After being advised that he was suspected of rape by NCIS investigators, he told a remarkable story of seduction after a chance encounter on the street with PI, a non-romantic acquaintance. He claimed that after she repeatedly asked him to spend the night and engage in sexual intercourse, he demurred. At which time she pulled his underwear down and fellated him until he ejaculated. The appellant denied engaging in vaginal sexual intercourse with PI at least six times during the NCIS interview. We find his denials and story of a consensual sexual encounter with PI both incredible and evidence of his consciousness of guilt. See United States v. Colcol, 16 M.J. 479, 484 (C.M.A. 1983) ("false statements by an accused in explaining an alleged offense may themselves tend to show guilt") (citation omitted).

We are convinced beyond a reasonable doubt the appellant committed the charged [*10] sexual act.

2. Evidence of incapacity

We also find PI was incapable of consenting to the sexual act due to impairment by alcohol, that the appellant reasonably should have known her condition, and that there was no reasonable mistake of fact as to PI's capacity to consent.

First, PI consumed a significant quantity of alcohol over a period of at least four hours with the express goal of getting drunk. Although she did not recall the specific quantity of beer or number of mixed drinks that she consumed, her testimony was consistent, credible, and corroborated in part.

PI testified that she consumed beer over a three-hour period at Yakitori Place, where she and her friends drank beer together, poured beer from bottles into their own mugs, and refilled their mugs and those of their friends whenever empty. She also consumed an unspecified number of mixed drinks. Her testimony conveys that she continuously drank oolong-hi, an alcoholic beverage, for approximately one hour. This interpretation is supported by her history of heavy drinking, her specific intent to get drunk that night, her payment of a fixed fee to participate in a one hour all you can drink special, her loss of memory, and severe [*11] intoxication at Liquid later in the evening.

NI's testimony corroborated that PI was heavily

intoxicated. PI could not walk straight, spilled drinks, slurred her speech, and was so drunk NI declined to serve her alcoholic beverages that evening. PI's limited memory after leaving the second club further corroborates her degree of intoxication.

Second, PI's limited memories and inability to resist, say anything, or do anything while the appellant penetrated her vagina with his penis are evidence she "lack[ed] the cognitive ability to appreciate the sexual conduct in question or [lacked] the physical or mental ability to make [or] to communicate a decision about whether [she] agreed to the conduct." United States v. Pease, 75 M.J. 180, 185-86 (C.A.A.F. 2016) (citation and internal quotation marks omitted).

Her limited recollections, limited ability to process information, and inability to communicate and to physically resist the appellant's penetration of her vulva evidence severe alcohol impairment. Her memory of seeing the appellant in her apartment when she awoke with the urge to vomit and subsequent recollection of the appellant pulling her head toward his exposed penis are consistent with fragmentary blackouts that often accompany severe intoxication. [*12] Her testimony that she could not talk, say anything, fight, or do anything because she was so drunk support a finding that she lacked the physical and mental ability to communicate consent or lack thereof.

Third, we are convinced that the appellant reasonably should have known that PI was incapable of consenting to the sexual act due to impairment by alcohol and conclude the evidence overcomes his asserted mistake of fact as to her incapacity. The appellant encountered PI on the street within moments of her departure from Liquid where NI had observed multiple physical and mental manifestations of her severe state of alcohol impairment. NI's description of PI's severe impairment is credible, direct evidence that the appellant reasonably should have known that PI was heavily intoxicated and incapable of consenting to sexual conduct.

Moreover, the appellant's claims that he did not know PI had been drinking and that they engaged in normal conversation both on the street and during a lengthy and fanciful sexual encounter are incredible. Like his repeated and false claims that he did not engage in vaginal intercourse with PI, the appellant's false statements about her level of impairment [*13] also tend to show his guilt and leave us convinced that there

was no reasonable mistake of fact. See [Colcol. 16 M.J. at 484](#).

In conclusion, we find PI's testimony to be credible, consistent even through the crucible of extensive cross-examination, and corroborated by other evidence. Her recollections of the sexual act, though fractured, convey her clear memory of penetration and incapacity to consent due to severe alcohol impairment. Additionally, evidence of the appellant's consciousness of guilt weighs heavily in our determination. Like the court-martial members, we are convinced that his statements to NCIS were false.⁸⁸

Proof beyond a reasonable doubt is a high standard but "does not mean that the evidence must be free from conflict." [United States v. Rankin, 63 M.J. 552, 557 \(N-M. Ct. Crim. App. 2006\)](#), *aff'd on other grounds*, [64 M.J. 348 \(C.A.A.F. 2007\)](#) (citation omitted). On the basis of the record before us, and considering the evidence in the light most favorable to the government, a reasonable fact finder could have found all the essential elements of the charged offense beyond a reasonable doubt. [Turner, 25 M.J. at 324](#). After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt. [*14]⁹⁹

B. Motion to compel production of cell phone

1. Facts

On 18 February 2015, PI voluntarily provided her cell phone, a Samsung Galaxy S-IV, to NCIS for forensic examination. NCIS investigators performed a *logical*

⁸⁸ The military judge properly instructed the members that "If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence point to a consciousness of guilt." Record at 909. See [Colcol. 16 M.J. at 484 \(C.M.A. 1983\)](#).

⁹⁹ Though not raised as an AOE, we are also convinced beyond a reasonable doubt that the appellant is guilty of sexual assault by causing bodily harm in violation of [Article 120\(b\)\(1\)\(B\)](#), UCMJ. Charge II, Specification 2; Court-Martial Order.

extraction of the phone and returned it to PI the same day. In response to a January 2016 defense discovery request for a copy of the *physical extraction* of PI's cellular phone, the government provided a report and disc produced from the *logical extraction* performed 11 months earlier. A mobile device *logical extraction* utilizing the forensic tools employed by NCIS apparently provided contacts, call logs, media, SMS, and application data, while a *physical extraction* would have provided access to a broader scope of data including additional file data, hidden files, and deleted data.¹⁰¹⁰

In March 2016, a defense expert consultant determined the government had provided data only from a *logical extraction*. The appellant then filed a motion to compel production of PI's "Samsung Galaxy S-IV" cell phone. The defense asserted that the report derived from the *logical extraction* did not include deleted data, hidden data, or mobile applications data. The defense also sought data relevant to PI's [*15] claimed initial reports of rape or other messages she may have sent which were potentially probative of her capacity to consent. The evidence submitted for consideration by the court consisted of documents attached to the parties' pleadings.

After hearing argument, the military judge denied the defense motion to compel production of PI's cell phone. The appellant asserts that the military judge abused his discretion, depriving the appellant of equal access to evidence, as required by Article 46, UCMJ, and in violation of his due process rights. We disagree.

2. Law

The parties to a court-martial are entitled to an "equal opportunity to obtain witnesses and other evidence[.]" [Article 46, UCMJ, 10 U.S.C. § 846 \(2012\)](#). "Each party is entitled to production of evidence that is relevant and necessary." RULE FOR COURTS-MARTIAL, (R.C.M.) 703(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). "[A] party is not entitled to production of evidence which is destroyed, lost, or otherwise not subject of compulsory service. However, if such evidence is . . . essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant [appropriate relief or abate the proceedings]."

¹⁰¹⁰ AE XL at Enclosure (D).

R.C.M. 703(f)(2). The burden of persuasion **[*16]** on a motion for appropriate relief is on the moving party. R.C.M. 905(c)(2)(A), 906(b)(7).

We review a military judge's discovery rulings, including remedies, for an abuse of discretion. United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015). "The abuse of discretion standard calls for more than a mere difference of opinion." *Id.* (citations omitted) (internal quotation marks omitted). "[A]n abuse of discretion occurs when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (citation and internal quotation marks omitted).

3. Analysis

We conclude that the military judge's findings of fact are not clearly erroneous and adopt them as our own. We also conclude that the military judge did not abuse his discretion in denying the defense motion to compel production of PI's cell phone and by not abating the proceedings.

First, the military judge's finding that NCIS was not capable of conducting a physical extraction and securing the deleted data from PI's cell phone was supported by the record. Although the defense submitted an email from a defense expert **[*17]** consultant asserting that physical extraction of a "Galaxy S-IV" could be performed, we find the NCIS expert's response to that email both more credible and un rebutted.¹¹¹¹ The NCIS expert explained that he could not perform a physical extraction because a "Galaxy S-IV" was not a "rooted" phone.¹²¹² The evidence provided in support of the defense expert conclusion that a physical extraction could be performed was a

"screenshot," of an apparently earlier version of the phone, a "Galaxy SIII, Alfa," and the screenshot indicated it was a "rooted" phone.¹³¹³ Based upon this limited and contradictory evidence, we agree with the military judge that the appellant failed to sustain his burden of persuasion. Furthermore, there was no evidence submitted at trial or to date that in February 2015, when NCIS had control of PI's cell phone, the technology existed to conduct a physical extraction of a Galaxy S-IV cell phone.¹⁴¹⁴

Second, PI's cell phone was unavailable as defined in R.C.M. 703(f)(2) when the appellant submitted his discovery request.

In January 2016 when the defense requested PI's cell phone in discovery, the cell phone was "destroyed, lost, or otherwise not subject to compulsory process." R.C.M. 703(f)(2). It is undisputed that **[*18]** PI's cell phone was not then in the possession, custody, or control of the United States, having been returned to her approximately 11 months earlier. It is also not in dispute that PI was a non-U.S. citizen, legal permanent resident of Japan and as such "not subject to subpoena" under the Rules for Courts-Martial. See R.C.M. 703(e)(2)(A), Discussion.

However, the availability of a process to compel production of PI's cell phone under the Status of Forces Agreement (SOFA) between the United States and Japan was and remains in controversy. At trial, the defense asserted the SOFA provided a mechanism for compulsory process of PI's cell phone. The military judge found the evidence submitted by the defense—an email citing SOFA Articles 15-18 but not including attachments which he presumed to be the applicable SOFA provisions—insufficient to sustain their burden of persuasion.¹⁵¹⁵

¹³¹³ AE XL at Enclosure (M).

¹⁴¹⁴ There is evidence that as early as December 2015, the forensic software supported a "file system extraction" of the Galaxy S-IV including data from the "Line" application. AE LVIII at Enclosures (3)-(4). However, there is no evidence a "file system extraction" would include deleted data sought by the defense. AE XL at Enclosures (D), (H); AE LVIII at Enclosure (3).

¹⁵¹⁵ In its motion at trial, the Defense cited Articles 15-18 of the SOFA, as well as an email from the office of the staff judge advocate to the Commander of Fleet Activities in Yokosuka

¹¹¹¹ AE XL at Enclosure (M), AE LVIII at Enclosure (3).

¹²¹² The NCIS expert explained "rooting" provides the ability to alter or replace system applications and settings, run specialized applications that require administrator-level permissions, or perform other operations that are otherwise inaccessible to a normal Android user. Rooting can also facilitate the complete removal and replacement of an Android device's operating system. AE LVIII at Enclosure (3).

After reviewing the SOFA provisions cited by the defense at trial and now attached to the record on appeal by motion before this court, we, like the military judge, are unable to conclude that those provisions provide for "compulsory process" of PI's cell phone.¹⁶¹⁶ Article 17, the provision cited at trial most relevant to production of PI's cell phone does [*19] not appear to be compulsory or even relevant here.¹⁷¹⁷ Article 17 entitled "Presentation of documents or evidence" states Japanese authorities "may" when requested by appropriate U.S. authority "permit" access to evidence "in their custody[.]"¹⁸¹⁸ The plain language of this provision appears discretionary and applicable when the requested "documents or evidence" are in the "custody" of Japanese authorities; there is no evidence that PI's cell phone was in the possession or custody of Japanese authorities at any time.

Additionally, there is evidence that prior to trial counsel's 23 March 2016 request that PI provide the Galaxy S-IV for additional forensic examination, she had obtained a new cell phone and "declined to provide her phone" for further analysis.¹⁹¹⁹ In May 2016, PI testified that she

containing the titles of those Articles. AE XL at FN3 and Enclosure (K).

¹⁶¹⁶ We assume without deciding the undated document attached to the record entitled "Laws for Special Measures Concerning Criminal Cases, Under Authorization of the Ministry of Justice, EHS Law Bulletin Series, EHS Vol. II" was part of the SOFA in accordance with the 28 March 2016 email from the "Legal Advisor, Office of the Staff Judge Advocate, COMFLEACT Yokosuka, Japan, International Law Director, Region Legal Service Office, Japan" also attached to the record. Appellant's Motion to Attach As Appendix to Appellant's Brief [hereinafter Motion to Attach Documents] of 16 February 2017 granted 24 February 2017.

¹⁷¹⁷ Article 15 (Appearance and other duties of witness), Article 16 (Cooperation for production of witnesses), and Article 18 (Cooperation in criminal cases other than those involving offenses against laws or ordinances of Japan) do not appear relevant to production of evidence. Motion to Attach Documents.

¹⁸¹⁸ *Id.*

¹⁹¹⁹ In emails dated 23 March 2016, Trial counsel contacted PI's Victim's Legal Counsel (VLC) to request that PI surrender her cell phone for additional forensic testing. The VLC asked whether they were requesting PI's "old phone or her new phone." When trial counsel clarified it was her "old phone" the VLC responded with a "?" AE LVIII at Enclosure (4); AE XL at

had a "new phone" by the time she was asked to provide her phone for additional examination and that "all [her] messages [we]re gone."²⁰²⁰

Third, we agree with the military judge that the evidence does not satisfy the requirements for production of relevant and material evidence under R.C.M. 703 or exculpatory evidence under [Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 \(1963\)](#).

Even, assuming *arguendo*, the technology existed to conduct a physical extraction of PI's cell [*20] phone when NCIS possessed it, the appellant presented no evidence or persuasive argument that such evidence "possess[ed] an exculpatory value that w[ould] have been] apparent before the evidence was destroyed," or in this case "returned" to PI. See [United States v. Simmermacher, 74 M.J. 196, 199 \(C.A.A.F. 2015\)](#) (quoting [California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 \(1984\)](#)). Further, even assuming the evidence was "potentially useful," there is no evidence the government's actions in not preserving the cell phone were in "bad faith" and thus in violation of due process. [Simmermacher, 74 M.J. at 199](#) (quoting [Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 \(1988\)](#)).

Fourth, the information derived from logical extraction of PI's cell phone and provided to the appellant satisfied the Article 46, UCMJ, requirement for "equal access to evidence." [United States v. Roberts, 59 M.J. 323, 325 \(C.A.A.F. 2004\)](#). Stated another way, the appellant and government enjoyed equal access to the same evidence derived from the logical extraction of PI's cell phone, a lengthy report and an eight gigabyte disk of data.

Accordingly, the military judge's decisions to deny the motion to compel production of PI's cell phone and not to abate the proceedings were not "influenced by an erroneous view of the law," and were well within "the range of choices reasonably arising from the applicable facts and the law." [Stellato, 74 M.J. at 480](#) (citation and internal quotation marks omitted).

III. [*21] CONCLUSION

Enclosure (N).

²⁰²⁰ Record at 571-72.

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge MARKS and Judge JONES concur.

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United States v. Roe

United States Army Court of Criminal Appeals

April 27, 2022, Decided

ARMY 20200144

Reporter

2022 CCA LEXIS 248 *; 2022 WL 1284392

UNITED STATES, Appellee v. Private First Class
AUSTIN M. ROE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by [United States v. Roe, 2022 CAAF LEXIS 585, 2022 WL 4182553 \(C.A.A.F. Aug. 15, 2022\)](#)

Motion granted by [United States v. Roe, 2022 CAAF LEXIS 597, 2022 WL 4182400 \(C.A.A.F. Aug. 16, 2022\)](#)

Review denied by [United States v. Roe, 2022 CAAF LEXIS 770 \(C.A.A.F. Oct. 31, 2022\)](#)

Prior History: [*1] Headquarters, U.S. Combined Arms Center and Fort Leavenworth. S. Charles Neill, Military Judge. Colonel Alexander N. Pickands, Staff Judge Advocate.

Counsel: For Appellant: Captain Julia M. Farinas, JA (argued); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Julia M. Farinas, JA (on brief); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Julia M. Farinas, JA (on reply brief).

For Appellee: Captain Melissa A. Eisenberg, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Samantha E. Katz, JA (on brief).

Judges: Before WALKER, EWING, and PARKER, Appellate Military Judges. Judge PARKER concurs. Senior Judge WALKER, dissenting.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

A panel with enlisted representation sitting as a general court-martial convicted appellant of sexual assault. In this court, appellant contends that: (1) the government violated his due process rights by charging him under one theory of liability for sexual assault but trying and convicting him under another theory; and (2) the government's evidence was legally and factually insufficient. [*2] We find appellant's claims to be without merit, and affirm.¹¹

BACKGROUND

A. The Trial Evidence

On 17 March 2019, the victim in this case was a 19-year-old junior enlisted soldier who had arrived at Fort Leavenworth, Kansas—her first duty station—less than a month prior. After an evening of drinking alcohol, first at a St. Patrick's Day party at another soldier's home and later at a barracks gathering with appellant in attendance, the victim awoke in her barracks room nude, feeling "not normal" and "groggy." When she got out of bed to go to the restroom, she was startled to find appellant in her room, and told him to leave. In the restroom the victim was again surprised to discover semen when she wiped herself. She had no memory of sex, and a few minutes later asked a group of soldiers (including appellant) whether she had had sex with someone. Appellant responded, "not me." Laboratory testing on evidence collected from the victim the following day revealed appellant's semen inside the

¹¹ Appellant elected to be sentenced by the military judge who sentenced appellant to a dishonorable discharge, confinement for twenty-eight months, and reduction to the grade of E-1. We have fully considered appellant's third assignment of error related to the requisite *mens rea* for sexual assault without consent and find it to be without merit. See [United States v. McDonald, 78 M.J. 376, 379 \(C.A.A.F. 2019\)](#) (holding that sexual assault without consent is a general intent crime).

victim's vagina and his DNA inside her rectum.²² Appellant's charges and ultimate court-martial proceeding ensued.

Evidence related to the victim's intoxication played a prominent role at appellant's [*3] court-martial. The victim had arrived at the St. Patrick's Day party between 1700 and 1800 hours; between then and approximately 2000 she reported drinking four "strong" double vodka-Jell-O shots and a Guinness. Around 2000 the victim called a friend for a ride back to the barracks along with two other party-goers; the friend/driver described the three as acting "rowdy" in the car. Back at the barracks the victim changed clothes and joined a party in Private First Class (PFC) CB's room—only a few doors down from her room—with other male soldiers including Private (PV2) AC, PFC KP, and appellant. The room had a shared common area and separate internal rooms for PFC CB and his roommate PV2 AC.

Appellant handed the victim a Mike's Hard Lemonade when she walked into the barracks party; this was the victim's last memory before waking up nude in her room. Private First Class KP, the victim's "good friend," described her as "tipsy" when she arrived, and said that initially she seemed to be enjoying herself and was dancing with a few of the soldiers. Private AC, present but not drinking, described the victim as "kind of off balance" and "giggly" when she entered the party, and later described [*4] her as "dizzy" and "grasping on the walls" while walking. Private AC later saw the victim in the common area "progressively going down towards the ground while holding onto the wall" outside of PFC KP's door, ultimately ending up on the ground. Private AC described the victim's state later in the evening as "fatigued," "mumbling," and, finally, "unconscious."

While the victim lacked memory, barracks surveillance video provided a fair amount of detail about her movements. At 2154 hours, the video showed the victim walking somewhat unsteadily, but fully under her own power, from the party room to her room where she stayed for one minute before returning to the party room at 2155. At 2208, the video showed appellant carrying the victim on his back, accompanied by PFC CB,

outside to smoke cigarettes. Appellant carried the victim back inside and back to the party room five minutes later at 2213, this time "cradling" style with her arms around appellant's neck and his arms under the back of her knees.

Back in the party room, appellant placed her in PFC KP's lap, because, appellant later explained, PFC KP was the victim's friend. Private First Class KP saw that the victim was unable to stand [*5] on her own and was having difficulty speaking, and told the other soldiers that they needed to get the victim back to her room due to her condition. Two minutes later at 2215, video captured appellant carrying the victim down the hall to her room again using the "cradling" carry.³³ Private First Class KP, PV2 AC, and PFC CB also came to the victim's room. Private AC described the victim as "in and out" of consciousness and "mumbling stuff" as the soldiers placed her in bed. The group prepared the victim's military equipment for an early morning ruck march the following day, and discussed pulling a "fire guard" in her room to ensure that she did not "throw up in her sleep" or "choke." Appellant volunteered to take the first shift. At 2238, the video showed the other soldiers exiting the victim's room, leaving appellant and the victim alone for the next thirty-two minutes.

At 2255, video showed PV2 AC in the hallway stopping near the victim's door. At precisely the same time, appellant texted the other soldiers and said that the victim was taking off her clothes and asked for "help." Private AC noticed that while he had previously intentionally left the victim's door slightly open in case [*6] anyone needed to gain entry, the door was now closed and locked.

At 2310 PFC KP and PFC CB returned to the victim's room based on appellant's "help" text message. Appellant was still there, and the victim was in bed covered by a blanket. The victim looked "confused" and "horrified," and asked the group if she had had sex with anyone. Private First Class KP heard appellant reply, "not me." Private First Class KP stayed with the victim for a period of time, after which the victim called her fiancée and stayed on the phone with him for multiple hours before falling asleep. When asked at trial to elaborate on what she meant when she asked the group

²² The government's DNA analyst testified that the semen and DNA were "one quintillion times" more likely to have originated from appellant than an unknown contributor. A quintillion is a one with 18 zeros after it.

³³ Private First Class KP testified that he carried the victim back to her room, but the barracks video appears to show that appellant did so.

whether she had had sex with anyone, the victim said she meant "[d]id I consent or did somebody have sex with me." She further testified that she did not want to have sex with appellant at any point that evening, and that she would not have and did not consent to sex with him.

The victim reported a sexual assault to her chain of command the following morning, and underwent a sexual assault examination that resulted in the DNA evidence implicating appellant.⁴⁴

Appellant made a videotaped statement to the Criminal Investigation Command (CID) the next [*7] day. Appellant provided a high degree of detail about the events both before and after the small window of time when the sexual act occurred. Appellant told CID that he consumed six to seven beers and seven to eight shots of liquor over the course of the evening. He confirmed that he carried the victim to and from the smoke pit outside because she was having difficulty maintaining her balance. He further recalled that the victim was in and out of consciousness and mumbling as he carried her back into the building and as the soldiers took her to her barracks room. Appellant claimed that while all of the soldiers were still in the room the victim started removing her clothing and "wanted sex," but that he and PFC KP told her to wait until the following day when she could "consent."⁵⁵ Once alone with the victim, appellant stated that she grabbed his face and kissed him and he kissed her back. He explained that he felt kissing the victim was wrong, so he moved across the room but then accepted the victim's invitation to join her in her bed. Appellant claimed that he then fell asleep in the victim's bed and awoke with his pants down, genitals exposed, and the victim on top of him wearing [*8] only her bra and underwear. When the victim got up and began removing her undergarments, appellant stated he then went into the common area of the barracks room and texted the other soldiers for help. Appellant claimed to have no memory of sexual intercourse with the victim.

⁴⁴ The nurse who conducted the sexual assault exam found a small tear below the victim's vaginal opening that she testified could have been caused by "lack of participation or cooperation between the two partners," or, in the alternative, from consensual sex.

⁵⁵ Private First Class KP did not testify about this exchange.

B. The Charge and The Parties' Arguments

Appellant was charged with and convicted of a single specification of a violation of [Article 120\(b\)\(2\)\(A\)](#), Uniform Code of Military Justice, [10 U.S.C. § 920](#) (2018) [UCMJ], sexual assault without consent, as follows:

In that [appellant], U.S. Army, did, at or near Fort Leavenworth, on or about 17 March 2019, commit a sexual act upon [victim], by penetrating [victim's] vulva . . . with his penis, without the consent of [victim].

At trial, the government forthrightly argued that the victim's level of intoxication was relevant evidence, along with other evidence, on the question of whether the victim consented to the sexual act with appellant. In closing, the government argued:

And the judge just instructed you about what consent means. He told you that 'consent' means a freely given agreement to the conduct at issue by a competent person. He went on to tell you that a sleeping or unconscious person cannot consent. [*9] [The victim] told you she had zero interest in having sex with the accused. She never told him she was interested. She did not want to have sex with him. She would not have had sex with him. She was emphatic she did not consent to sex with the accused, and more than that, she was in no state to freely consent to sex with anyone.

The government further contended that appellant's statement to CID was not believable and therefore affirmative evidence of his guilt, based on the level of detail he could recall both before and after the sexual act, and that his 2255 text to the other soldiers was likewise an attempt to cover for his actions and "explain why the victim was naked" after she awoke. The government argued that the accused "didn't fall asleep," but rather "knew what he did."

The defense likewise addressed the interplay between the victim's intoxication and consent by stressing in both its opening statement and closing argument that a "lack of memory does not mean lack of consent." The defense further focused on the portions of the video evidence that showed the victim walking unassisted in the hallways, using her keycard to enter her room, and similar evidence to argue that she [*10] was not so incapacitated as to not be able to provide consent.

LAW AND DISCUSSION

I. The Due Process Claim

A. Legal Principles and Standard of Review

Due process "does not permit convicting an accused of an offense with which he has not been charged." [*United States v. Tunstall*, 72 M.J. 191, 192 \(C.A.A.F. 2013\)](#) (cleaned up). A specification therefore must provide an accused both notice of the charge he is to defend against and shield him from double jeopardy. [*United States v. Turner*, 79 M.J. 401, 403 \(C.A.A.F. 2020\)](#). This due process principle of fair notice "mandates that an accused has a right to know what offense and under what legal theory he will be tried and convicted." [*United States v. Riggins*, 75 M.J. 78, 83 \(C.A.A.F. 2016\)](#) (cleaned up).

Appellant asserts that the government violated his due process right to fair notice by charging him with sexual assault without consent, in violation of [*Article 120\(b\)\(2\)\(A\)*, UCMJ](#), but then effectively prosecuting and convicting him under either an [*Article 120\(b\)\(2\)\(B\)*](#) theory that he knew or reasonably should have known that the victim was asleep, unconscious, or otherwise unaware of the sexual act, and/or an [*Article 120\(b\)\(3\)\(A\)*](#) theory that the victim was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance. Appellant further contends that this alleged difference between the charged offense and the government's theory of [*11] the case at trial both prejudiced his ability to present a defense and created ambiguity regarding which theory the panel used to ultimately convict him. Because appellant did not present this claim to the military judge at his court-martial, we will review his claim for plain error. See, e.g., [*United States v. Warner*, 73 M.J. 1, 3 \(C.A.A.F. 2013\)](#) (applying plain-error review to a "fair

notice" claim raised for the first time on appeal).⁶⁶ To satisfy the plain error test, appellant must show: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* (cleaned up).

B. Discussion

Appellant's due process claim turns on a single question: may the Government attempt to carry its burden of proving sexual assault "without consent" in violation of [*Article 120\(b\)\(2\)\(A\)*](#) by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act? Because we answer that question "yes," we hold that the panel in this case convicted appellant the offense as charged, and not some other uncharged offense. Appellant was on notice of the charge on the charge sheet, and so his due process claim fails under any standard of review.

In so [*12] holding, we acknowledge the conceptual difference between affirmatively proving that a victim *did not consent*, and proving facts that show a victim's *legal incapacity to consent*. The Court of Appeals for the Armed Forces (CAAF) discussed this difference in [*Riggins*, 75 M.J. 78 \(C.A.A.F. 2016\)](#). [*Riggins*](#) analyzed the question of whether Article 128, UCMJ, assault consummated by a battery, was a lesser-included offense of the 2012 version of two Article 120, UCMJ, offenses—sexual assault and abusive sexual contact—accomplished through placing the victim in fear. *Id.* at 83. The CAAF held that because the [*Article 120*](#) offenses "did not require the government to prove a lack of consent," but [*Article 128*](#) did, [*Article 128*](#) was not a lesser-included offense of [*Article 120*](#) and that [*Riggins*](#) had therefore not received "fair notice of what offense

⁶⁶ The parties at appellant's court-martial discussed a similar issue in the context of appellant's pretrial motion to suppress evidence of underage drinking under Rule for Courts-Martial (R.C.M.) 404(b). In support of this motion, trial defense counsel argued that appellant's court-martial was a "consent case," and not an "alcohol case." While this raised the same general concept as appellant's current claim, appellant nonetheless did not present his current due process/fair notice claim to the military judge at trial, and is thus entitled only to plain error review. See, e.g., [*United States v. Sweeney*, 70 M.J. 296, 303 & n.16 \(C.A.A.F. 2011\)](#) (applying plain error review to claim not raised with the requisite specificity at trial).

and under what legal theory he was tried and ultimately convicted" when the military judge there found him guilty of [Article 128](#) offenses on an erroneous lesser-included theory. *Id.* at 80. As relevant here, [Riggins](#) explained that "the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." *Id.* at 84 (emphasis in original). [*13]

Notably, [Riggins](#) was analyzing a lesser-included offense question, and therefore did not squarely address the issue here: namely, whether facts tending to show a legal inability to consent would be appropriate and relevant evidence on the issue of lack of consent. [Riggins](#) did explain in a footnote that despite the conceptual difference of "placing another in fear" and "without consent," that "evidence regarding whether the alleged victim . . . consented *could certainly be relevant to the fact-finder's determination* of whether the Government proved the placed-in-fear element beyond a reasonable doubt." [Riggins](#), 75 M.J. at 84 & n.6 (emphasis added). Thus, [Riggins](#) noted *both* the difference between proving facts showing an "inability to consent" and affirmatively proving "without consent," and the potential for evidentiary overlap between the two concepts.

So too here, on the flip-side of the [Riggins](#) footnote six coin. The DNA evidence made the sexual act here essentially undisputed. Thus, as charged, appellant's trial turned on the issue of consent. There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she [*14] did not consent. Our essential holding here is that this was one of many permissible ways for the government to attempt to prove "without consent." By way of logic, if the government proves that a victim is asleep or unconscious and therefore legally incapable of consenting at the time of a sexual act, that is strong evidence that the victim did not, in fact, consent.

We further hold that there was fair notice here notwithstanding that the government likely could have charged this case differently. On this point, the other two relevant subsections of [Article 120\(b\)](#) prohibit committing a sexual act upon another person:

[W]hen the person knows or reasonably should know that the other person is asleep, unconscious,

or otherwise unaware that the sexual act is occurring[; and] . . .

[W]hen the other person is incapable of consenting to the sexual act due to . . . impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by [the accused].

See [Articles 120\(b\)\(2\)\(B\)](#), and [\(b\)\(3\)\(A\)](#), respectively. These two charging theories facially address situations where the victim is intoxicated at the time of the sexual act. However, their presence in [Article 120](#) does not mean that the government [*15] is foreclosed from attempting to carry the arguably heavier burden of affirmatively proving a lack of consent when intoxication is at issue. Rather, this is simply one of many situations where the government exercised its discretion to charge one of multiple potential offenses. See, e.g., [United States v. Morton](#), 69 M.J. 12, 16 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused.").⁷⁷ We find no evidence in the legislative history or otherwise that the drafters of [Articles 120\(b\)\(2\)\(B\)](#) and [120\(b\)\(3\)\(A\)](#) meant to somehow preempt the [Article 120](#) field for cases involving alcohol. In reaching this conclusion we acknowledge the force of the contrary statutory interpretation analysis of our dissenting colleague as it relates to the disjunctive "or" between the three charging theories at issue here. See also [United States v. Weiser](#), 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020). We simply disagree that this statutory language requires the government to charge a particular theory of liability where the victim's intoxication is at issue. The fact that there is evidentiary overlap between all three theories of liability at issue here is not unusual in the criminal law.

Our sister Air Force court concluded likewise last year in a similar case. In [United States v. Williams](#), No. ACM 39746, 2021 CCA LEXIS 109, at * 18 (A.F. Ct. Crim. App. 12 Mar. 2021) (mem. op), the government charged Williams with the 2016 [*16] version of [Article 120](#), sexual assault by bodily harm, under a "without consent" theory. Thus, as here, in [Williams](#) the government had an affirmative duty to show that the victim did not consent. *Id.* at *18-19. As here, the [Williams](#) victim was highly intoxicated and did not

⁷⁷ Another option for the government here would have been to charge multiple [Article 120](#) offenses in the alternative based on exigencies of proof. [Morton](#), 69 M.J. at 16.

remember the sexual act, and the trial evidence focused on the victim's level of intoxication. *Id.* Like here, Williams contended that the government violated his due process right to fair notice, because, he claimed, he was "convicted under the theory that he engaged in sexual conduct with [the victim] when she was too intoxicated to consent," rather than the charged "without consent" theory. *Id.* at *48. The *Williams* court rejected this claim, explaining that it saw "no reason why" the government could not "use evidence of inability to consent" as "circumstantial evidence of the lack of actual consent." *Id.* at *57. The *Williams* court stated:

Therefore, we conclude evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial.

Id. at *57-58 [*17] (emphasis in original). We agree.⁸⁸ Cf. *United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539 (N.M. Ct. Crim. App. 10 Aug. 2017).

Finally, this is not a case where we have to decide whether "without consent" can be proved *solely* through showing an inability to consent because of intoxication or some other reason.⁹⁹ Rather, as detailed in the sufficiency analysis below, the government's proof included both evidence of the victim's intoxication alongside other evidence, including the appellant's own

⁸⁸ Williams petitioned the CAAF to review the Air Force court's denial of his due process claim, but the CAAF granted review only on one of Williams' other assignments of error and ultimately affirmed Williams' conviction and sentence. *United States v. Williams*, 81 M.J. 338 (C.A.A.F. 2021); *United States v. Williams*, 81 M.J. 450 (C.A.A.F. 2021).

⁹⁹ This seems possible notwithstanding the *Riggins* conceptual difference. For example, if a victim in a medically-induced coma became pregnant due to a sexual assault from a hospital orderly the victim had never met, it would seem to be a "reasonable inference," see, e.g., *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014), not only that the victim had the *legal inability* to consent because she was unconscious and in a coma, but also that she did, in fact, *not consent*. We are not called on to address this question here, because the government provided additional evidence of "without consent" above and beyond the victim's intoxication.

actions and words both before and after the sexual act.

A word on the panel instructions in this case. Consistent with the government's charging theory, the military judge instructed the panel that the government bore the affirmative burden of showing beyond a reasonable doubt that the sexual act was done "without the consent" of the victim. The military judge further defined "consent" as follows:

'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression or lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. A current or previous dating or social or sexual relationship by itself of the manner of dress of the person involved [*18] with the accused and the conduct at issue does not constitute consent. A sleeping or unconscious person cannot consent. All the surrounding circumstances are to be considered in determining whether a person gave consent.

The military judge further instructed the panel that the evidence had raised the possibility of the affirmative defense of an honest and reasonable mistake of fact as to consent, and explained that the government retained the burden of disproving mistake of fact as to consent beyond a reasonable doubt.

At trial, the defense objected to the military judge's instruction that a "sleeping or unconscious person cannot consent," although the defense's main submission was that the evidence did not show that the victim was, in fact, asleep or unconscious during the applicable time-frame, rather than the "fair notice" claim he now presses. The military judge overruled this objection and provided the instruction, which was a verbatim quote from the UCMJ's definition of "consent" at *Article 120(g)(7)(B)* (with the omission of the words "or incompetent").

Appellant has not pressed a free-standing claim of error in this court as to any of the above instructions. Nor could he successfully do so, because [*19] the military judge's instructions were correct statements of the law. Moreover, when taken as a whole, the instructions imparted to the panel that the government retained the burden of *affirmatively proving a lack of consent* consistent with the charge in this case, and not some

lesser burden. Cf, e.g., [United States v. McClour](#), 76 M.J. 23, 26 (C.A.A.F. 2017) ("When taken as a whole, the instructions clearly stated the proper burden of proof and left it to the members to determine whether the Government's evidence met that burden."). This is particularly true in light of the fact that the military judge instructed the panel on the mistake of fact as to consent.¹⁰¹⁰

II. Sufficiency

The above holding that the government's modality of proof was appropriate in light of the charged offense does not answer the separate question of whether that proof was *legally and factually sufficient* to prove sexual assault without consent. Appellant contends that it was not. While we find the sufficiency question close, we ultimately hold that the government's evidence was both legally and factually sufficient.

This court is obligated to review the legal and factual sufficiency of each court-martial conviction and only affirm those findings of guilty that are correct [*20] in law and fact. Article 66(c), UCMJ. We review questions of legal and factual sufficiency de novo. [United States v. Rosario](#), 76 M.J. 114, 117 (C.A.A.F. 2017). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and

making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*" *Id.* (cleaned up). For factual sufficiency, this court applies "neither a presumption of innocence nor a presumption of guilt" but must "make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." [United States v. Wheeler](#), 76 M.J. 564, 568 (C.A.A.F. 2017) (cleaned up). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." [United States v. King](#), 78 M.J. 218, 221 (C.A.A.F. 2019). "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, [*21] recognizing that the trial court saw and heard the witnesses." Art. 66(d)(1), UCMJ. The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. [United States v. Davis](#), 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

We find the sufficiency question close largely due to the victim's lack of memory. However, a constellation of factors, including but not limited to the victim's level of intoxication, ultimately shows that appellant's conviction was both legally and factually sufficient. First, as previously noted, the DNA evidence essentially takes the question of whether appellant performed a sexual act with the victim off the table, and narrows the question to one of consent. Second, it is uncontroverted that the victim was highly intoxicated at the time of the sexual act. Third, it was appellant who provided the victim alcohol at the barracks party. Fourth, it was appellant who volunteered to pull the first "watch" duty over the victim as she slept, thus putting himself in a position to be alone with her while she was vulnerable. Fifth, appellant's "help, she's taking off her clothes," text message—which it stands to reason he sent after the sexual act—is best [*22] read as a self-serving effort at "damage control" after the victim woke up. Sixth, appellant's "not me" statement when the victim was asking whether she had had sex with someone is demonstrably untrue based on the DNA evidence, and thus the most natural reading of that statement is that it was knowingly false. Seventh, having reviewed appellant's statement to CID the day after the event, we are struck by the level of detail he was able to provide

¹⁰¹⁰ We find that appellant was on fair notice of the charge against him and therefore do not find error at all, much less "plain or obvious" error. [Warner](#), 73 M.J. at 3. As such, we do not need to decide whether any arguendo error "materially prejudiced a substantial right of the accused." *Id.* Nevertheless, it bears mentioning that the relationship between the victim's intoxication and the question of consent was no secret at appellant's trial. The opening lines of trial defense counsel's opening statement to the panel was, "[l]ack of memory does not mean lack of consent. Consent does not require good judgment; and alcohol consumption does not mean inability to consent." The defense pressed this theme throughout the court-martial, thus evidencing its understanding of the importance of the intoxication issue to the question of consent. This cuts against any claim that the accused was prejudiced by a lack of notice of the government's theory of the case.

about his actions both before and after the sexual act, with his memory failing only during the very tight time-frame of the sex itself. This appears to us to be a classic case of "selective memory loss." We are allowed to consider what we assess are appellant's false exculpatory statements—both in the middle of the night and the next day to CID—as substantive evidence of guilt on the [Article 120](#) offense, and we do so here. See [United States v. Quezada](#), [M.J.](#), [82 M.J. 54, 2021 CAAF LEXIS 1098](#), at *15 (C.A.A.F. 20 Dec. 2021) ("A false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt.") (citations omitted). When taken together, this evidence paints a picture of appellant knowingly taking advantage of the victim while she was highly vulnerable, and then lying about it. We therefore [*23] find both that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and we ourselves are likewise "convinced of appellant's guilt beyond a reasonable doubt." [Rosario](#), [76 M.J. at 117](#).

CONCLUSION

Upon consideration of the entire record, the finding of guilty and the sentence are AFFIRMED.

Judge PARKER concurs.

Dissent by: WALKER

Dissent

Senior Judge WALKER, dissenting:

While I find that the government violated appellant's due process right to fair notice, I find that the error did not materially prejudice appellant's substantial rights. Further, I find the charged offense of sexual assault without consent in violation of [Article 120\(b\)\(2\)\(A\), UCMJ](#), factually insufficient and would set aside appellant's finding of guilty and sentence.

LAW AND DISCUSSION

A. The Government Violated Appellant's Due Process

Right to Fair Notice

The charged offense in this case properly alleged every element of the offense of sexual assault and adequately placed appellant on notice that he was charged under the theory of liability that he committed a sexual assault without consent, in violation of [Article 120\(b\)\(2\)\(A\), UCMJ](#). [Riggins](#), [75 M.J. at 83](#) (cleaned up). However, appellant alleges that he was tried and convicted of a distinct, and uncharged, theory of liability of sexual [*24] assault while a person is asleep, unconscious, or otherwise unaware that the sexual act is occurring, in violation of [Article 120\(b\)\(2\)\(B\), UCMJ](#), or under a theory that the victim was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, in violation of [Article 120\(b\)\(3\)\(A\), UCMJ](#). I agree that appellant was prosecuted under a theory of liability other than the one with which he was charged and denied his due process right to fair notice.

Determining whether the types of sexual assault outlined in [Article 120\(b\), UCMJ](#), are differing theories of liability is essential to determining whether appellant was given fair notice in this case. The statutory context, alone, dictates that [Article 120\(b\)\(2\)\(A\)](#), [120\(b\)\(2\)\(B\)](#), and [120\(b\)\(3\)\(A\), UCMJ](#), are separate and distinct theories of liability for the offense of sexual assault.¹¹¹¹ First, it is evident by the construct of statute that three distinct paragraphs within [Article 120\(b\), UCMJ](#), for sexual assault are differing types or categories of sexual assault based upon the construction and the context of the statute. The first paragraph, [Article 120\(b\)\(1\)](#), addresses sexual assault by inducement whether through threats, fear, fraudulent representation, or false pretenses. The second paragraph, [Article 120\(b\)\(2\)](#), addresses both sexual assault by lack of consent

¹¹¹¹ Whether these three types of sexual assault are distinct theories of liability is a question of statutory interpretation reviewed de novo. [Sager](#), [76 M.J. at 161 \(C.A.A.F. 2017\)](#). In reading these provisions, we must "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." [United States v. Pease](#), [75 M.J. 180 \(C.A.A.F. 2016\)](#) (cleaned up). Further, we must apply "the 'surplusage' canon—that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." [Sager](#), [76 M.J. at 161](#).

or [*25] sexual assault when a person cannot consent based upon a condition of being asleep, unconscious, or otherwise unaware of the sexual act occurring. The third paragraph, [Article 120\(b\)\(3\)](#), addresses sexual assault when a person is incapable of consenting due to physical impairment by a foreign substance or mental impairment. Each of these types of sexual assault are definitively different categories of sexual assault and thereby different theories of liability. [Sager, 76 M.J. at 161-62](#); see also [United States v. Weiser, 80 M.J. 635, 641 \(C.G. Ct. Crim. App. 2020\)](#).

Even more critical to appellant's assertion that he was denied his due process right to fair notice is whether the subparagraphs within [Article 120\(b\)\(2\)](#) are different theories of liability. In reviewing the language in [Article 120 \(b\)\(2\), UCMJ](#), I note that the two subparagraphs are separated by the disjunctive, "or." As the CAAF noted in [Sager](#), "[i]n ordinary use the word 'or' . . . marks an alternative which generally corresponds to the word 'either.'" [Sager, 76 M.J. at 161](#) (cleaned up).¹²¹² Statutory terms which are connected by a disjunctive should ordinarily be given separate meanings unless the overall statutory context dictates otherwise. [Id. at 161](#) (quoting [Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 \(1979\)](#)). As the majority opinion recognizes, the charged offense requires the government to affirmatively prove the victim *did not consent*, while the [*26] latter offenses require the government to prove the victim's *legal inability to consent*. [Riggins, 75 M.J. at 85](#); see also [Weiser, 80 M.J. 635 at 641](#). Our superior court has held that even the conditions of asleep, unconscious, or otherwise unaware are in and of themselves differing theories of liability. [Sager, 76 M.J. at 162](#).

While I agree with the majority that there is evidentiary overlap between the three theories of liability at issue, I part ways with the majority in its characterization of the manner in which the government tried this case in relation to the charged offense. I find that the record as a whole demonstrates that the government's charged theory of liability, sexual assault without consent, was not the theory upon which the government prosecuted

appellant at trial. Rather, the government tried appellant under the theory that the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. The tenor of the government's opening statement, presentation of evidence, and closing argument was that appellant took advantage of the victim while she was incapable of consenting as a result of her intoxication, and asked the panel members to infer she did not consent. Significantly, while the [*27] victim testified that she did not consent, she also admitted that she did not have any memory of sexual acts with appellant. The victim's complete lack of memory as to any sexual acts prevented her from providing any affirmative evidence as to whether or not she consented.

Given that the victim could not affirmatively tell the members she did not consent to the charged sexual acts, the trial nearly exclusively focused on the victim's apparent inability to consent. The government's opening statement and closing argument focused on the victim's condition by asserting the victim was "in and out of consciousness and falling over and mumbling her words," "passing out on the bed," "dead weight," "in her bed asleep or passed out," "[s]he's not awake," and "groggy." Testimony of soldiers who assisted the victim to her barracks room focused on her physical condition describing her as "passed out," "in and out of consciousness," "mumbling," "out of it," and "looked like she was asleep." The government began its closing argument with "[s]he was fucked up" in highlighting appellant's description to law enforcement of the victim's condition when assisting her to her barracks room. The government [*28] went on to argue that "[appellant] didn't care that she was passed out." To prove the victim's lack of consent, the government focused on: (1) witness testimony that the victim was "passed out," "unresponsive," and "mumbling;" (2) appellant's admissions to law enforcement that the victim was "passed out;" (3) the victim appearing as "dead weight" when being carried to her barracks room because "she's out;" (4) that after the barracks party the victim "was clearly incapacitated;" (5) that the victim could not have consented to sexual intercourse because "she is unresponsive, incoherent, unable to move herself from room to room and asleep in her bed while a bunch of soldiers mess with her things;" and, (6) refers to the victim as "[t]he drunk, unconscious girl."

More significantly, I also part ways with the majority in its position that the government may support its

¹²¹² While there are structural differences in the Art 120, UCMJ, at issue in [Sager](#) and the Article 120, UCMJ, at issue in this case, the canons of statutory interpretation for which the dissent cites [Sager](#) are not impacted by the statutory changes made to [Article 120](#) which went into effect in January 2019.

affirmative burden to prove lack of consent by solely relying upon evidence of the victim's *legal inability* to consent. I concur with the majority that the government bears the responsibility of deciding the manner, and theory of sexual assault, with which it will charge an accused. However, once the government makes that decision, **[*29]** it is bound by that decision. I do not agree with the majority that the government satisfies its responsibility of fair notice in charging an accused with a sexual assault without consent and then solely relying upon evidence of the victim's inability to consent at trial. A sexual assault charged by lack of consent requires affirmative proof of lack of consent beyond any evidence of a legal inability to consent. To hold otherwise renders the other theories of liability outlined in [Article 120\(b\), UCMJ](#), as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent. See [Sager, 76 M.J. 158](#). Certainly, evidence of intoxication is relevant evidence to the issue of a victim's competence to consent and whether a victim is incapable of consenting due to impairment by an intoxicant. However, the government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent.

Given that the case turned on the issue of consent, as the majority accurately points out, evidence of the victim's consumption of alcohol was a relevant "surrounding circumstance" as to the issue of the victim's competence to consent.¹³¹³ However, **[*30]** all of the government's evidence and efforts at trial focused exclusively on the victim's legal *inability* to consent and not whether the victim did, in fact, consent. The manner in which the government focused on the victim's level of intoxication through witness testimony, video surveillance evidence, and argument rose to a level that was more than just using that evidence as a

"surrounding circumstance" of whether the victim consented. It was obvious in the tenor of the government's presentation of evidence and arguments that it was prosecuting the case as one in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Therefore, I find that the government violated appellant's due process right to fair notice and that this error was plain and obvious given the manner in which the government prosecuted appellant.

B. Appellant Was Not Materially Prejudiced

While I find that the government violated appellant's due process right to fair notice, the inquiry does not end there. "An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." [United State v. Oliver, 76 M.J. 271, 275 \(C.A.A.F. 2017\)](#) (quoting [United States v. Wilkins, 71 M.J. 410, 413 \(C.A.A.F. 2012\)](#)). Appellant must demonstrate **[*31]** that "under the totality of the circumstances, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice." *Id.* (cleaned up).

Appellant argues he was prejudiced because the manner in which the government prosecuted him at trial denied him the opportunity to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Determining whether appellant was prejudiced requires a close review of appellant's trial strategy and specifically, "how the defense channeled its efforts and what trial defense counsel focused on or highlighted" at trial. [United States v. Treat, 73 M.J. 331, 336 \(C.A.A.F. 2014\)](#) (cleaned up).

The manner in which the case was contested diminishes appellant's argument that he was not on notice as to what he had to defend against in regards to the victim's inability to consent due to alcohol consumption. Prior to trial, defense counsel made a motion to preclude the government from presenting evidence that appellant and the victim were unlawfully consuming alcohol as minors in violation of a policy of possessing alcohol in the barracks. Trial defense counsel was also **[*32]** provided appellant's CID statement in which he refers to the victim as being "fucked up" and explains that he was intoxicated that night as well. At trial, the defense's strategy was to

¹³¹³ "'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 3A-44-2.d, note 5 (29 Feb. 2020) [Benchbook].

highlight the government's inability to prove lack of consent given that the victim had no memory of any sexual intercourse, presumably due to alcohol consumption. The defense theory at trial was that the victim's lack of memory did not mean she did not consent to sexual intercourse. The defense focused on the victim's competence to consent despite her alcohol consumption. At trial, the defense highlighted the victim's lack of substantial intoxication by eliciting evidence of: (1) the victim dancing with a few of the soldiers soon after arriving at the barracks party; (2) the victim's control of her motor skills in walking up and down the barracks hallway and swiping a key card to enter her barracks room in the moments just prior to the sexual intercourse; (3) the victim's ability to hold onto appellant while he carried her on his back (in and out of the building) and in his arms (on the way to her barracks room); and, (4) evidence that the victim coherently used her cell phone in the moments both before [*33] and after the short window of time in which the sexual intercourse occurred. The defense directly addressed the issue of the victim's consumption of alcohol that evening and how it impacted her mentally and physically. Given the defense's trial strategy of focusing on the victim's competence to consent despite her consumption of alcohol, I do not find that the appellant was unable to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting to a sexual act due to impairment by a drug, intoxicant, or other similar substance. He was aware that the victim's alcohol consumption was a key surrounding circumstance and recognized that her competence was implicated by the relevant statutory definition. Therefore, while I find that appellant was denied fair notice of the offense with which he was prosecuted at trial, I do not find he suffered material prejudice.

C. Legal and Factual Sufficiency of Sexual Assault Conviction

Appellant also asserts that his conviction is both legally and factually insufficient. Since I find that appellant was not prejudiced by the government's lack of fair notice, it is necessary to evaluate whether appellant's conviction [*34] is legally and factually sufficiency, as charged.

While I find that the evidence is legally sufficient as to the charged offense of sexual assault without consent, I

find that it is factually insufficient. In viewing the evidence in the light most favorable to the government, I do find that a rational factfinder could have found all of the essential elements of the charged offense beyond a reasonable doubt. However, I disagree with the majority that the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt. Specifically, I find there was no affirmative evidence of the victim's lack of consent to the sexual intercourse. The victim testified that she had absolutely no memory of any sexual intercourse with appellant. In fact, she has a lack of memory of several hours from the night of the charged offense. Despite the victim's testimony that she did not consent, such testimony is meaningless given the fact that she has no actual memory of any sexual act. The victim's testimony that she would not have consented to sexual intercourse is not evidence of lack of consent at the time of the sexual intercourse. The government is required to prove a lack [*35] of consent temporally linked to the sexual act. In this case, the victim cannot provide any affirmative evidence of her lack of consent at the moment of the sexual act. I acknowledge there is some circumstantial evidence that the victim may not have provided a freely given agreement to sexual intercourse with appellant given her level of intoxication and diminished consciousness in the moments leading up to the sexual act. However, I do not find such circumstantial evidence sufficient to satisfy the government's burden of proving lack of consent beyond a reasonable doubt, given the over thirty-minute period in which the victim was alone with appellant and given the victim's ability to engage in coherent text messages moments before the sexual act and mere moments after the conclusion of the sexual act. Further, unlike the majority, I do not find that appellant's false exculpatory statements, both when confronted by the victim immediately after the sexual act and in his statement to CID, to be affirmative circumstantial evidence of the victim's lack of consent. However, given the DNA evidence and the self-serving and bizarre story appellant provided to CID about what occurred while [*36] he was alone with the victim, I find his statements are clear indicators of consciousness of guilt. Unfortunately, I am bound by the government's decision to charge this case as a sexual assault without consent.¹⁴¹⁴ Based upon the evidence presented at trial,

¹⁴¹⁴ Had the government chosen to charge this case as a sexual assault while the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar

I am not convinced of appellant's guilt of the charged offense of sexual assault, without consent.

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substance, in violation of [Article 120\(b\)\(3\)\(A\), UCMJ](#), I would find the evidence is legally and factually sufficient for that theory of liability.

CERTIFICATE OF SERVICE, U.S. v. MENDOZA (20210647)

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]
[REDACTED] on the 25th day of January, 2023.

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