IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20220052
Private (E-2) **MATTHEW L. COE,** United States Army,	Appellant	Tried at Fort Benning, Georgia, on 7 January 2022 and 1-3 February 2022, before a general court-martial convened by Commander, United States Maneuver Center of Excellence, Lieutenant Colonel Trevor I. Barna, military judge, presiding.

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

Assignment of Error[1]

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMTTING SEXUAL ASSAULT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT WHILE INCAPABLE OF CONSENT.

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

Panel No 3

Statement of the Case

On 7 January and 1–3 February 2022, a military judge sitting as a general court martial convicted appellant, contrary to his plea, of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 820.[2] (R. at 690). The military judge sentenced appellant to confinement for twenty-four months, reduction to the grade of E-1, and a dishonorable discharge. (R. at 742). On 28 February 2022, the convening authority took no action on the findings and sentence. (Action). On 4 March 2022, the military judge entered judgment. (Judgment).

Statement of Facts

A. Appellant sexually assaulted [redacted] without her consent.

On 8 August 2021, appellant, PVT [redacted], and several other soldiers attended a gathering on the Chattahoochee River near Fort Benning, during which time they consumed alcohol and engaged in various individual and group sex acts. (R. at 259-358; Pros. Ex. 10-11, 13, 15-16, 19, 22). It is undisputed that early on during the gathering, appellant had consensual sexual intercourse with PVT [redacted]. (R. at 115; 264; 468-69). PVT [redacted] was not drinking during her first sexual encounter with

[2] The military judge found appellant not guilty of one specification each of obstruction of justice and making a false official statement. (R. at 690).

appellant. (R. at. 264). After PVT [redacted] first sexual encounter with appellant, they started playing drinking games. (R. at 265). Later that day, PVT [redacted] began going in and out of consciousness from alcohol intoxication and "blacked out." (R. at 268). PVT [redacted] testified that the next thing she could remember is looking at appellant with her clothes off and saying, "I do not want this," before blacking out again. (R. at 268–69).

B. The government charged appellant with sexual assault without consent, and focused on PVT [redacted] lack of consent throughout the court-martial.

The government charged appellant with one specification of sexual assault, in violation of Article 120, UCMJ. (Charge Sheet). More specifically, the government charged appellant with committing a sexual assault without consent, in violation of Article 120(b)(2)(A). (Charge Sheet); *Manual for Courts-Martial, United States* (2019 ed.) [MCM] pt. IV, ¶ 60.b.(2)(A). The specification in the Charge Sheet read:

> In that [appellant], did, at or near Fort Benning, Georgia, on or about 8 August 2021, commit a sexual act upon Private [redacted], by penetrating Private [redacted] vulva with [appellant's] penis, without the consent of Private [redacted]

At a military judge-alone trial, the military judge heard testimony and admitted evidence that when appellant had intercourse with PVT [redacted] the second time, he did so without her consent, including PVT [redacted] above testimony that she

said, "I do not want this." (R. at 268–69). Furthermore, Major [redacted], a Sexual Assault Medical Forensic Examiner who treated PVT [redacted], testified that PVT [redacted] told her that when she was assaulted, she said "no, stop." (R. at 432; Pros. Ex. 22, at 12). The government presented testimony and other evidence of text messages exchanged between appellant and PFC [redacted]. (R. at 419-20; Pros. Ex. 10). In that text message exchange, appellant responded, "Yes she was. She was wasted," in response to a message from PFC [redacted] phone stating that PVT [redacted] was too drunk to consent.[3] (R. at 420; Pros. Ex. 10).

The military judge heard appellant's statements to the Criminal Investigative Command (CID). (Pros. Ex. 11, 13). In those statements, appellant acknowledged that when he had sexual intercourse with PVT [redacted], she never gave verbal consent. (Pros. Ex. 11). When asked whether PVT [redacted] gave consent "by other means," appellant responded, "She didn't tell me to stop in any form." (Pros. Ex. 11). Appellant also stated that he did not look at PVT [redacted] while he had sex with her, "Because she was super drunk and it was wrong." (Pros. Ex. 11). Another witness, PVT [redacted] testified about a barracks stairwell conversation with appellant that occurred on the evening of 8 August 2022. (R. at 400–02).

[3] The government notes that for this text message exchange with appellant, a CID agent typed messages to appellant on PFC [redacted] phone while PFC [redacted] was present. (R. at 414-15).

According to PVT [redacted], a "downhearted" and "emotionally drained" appellant told her that "I fucked up" and that he should have waited to have sex with PVT [redacted] "until they were sober." (R. at 400–02).

Throughout appellant's court-martial, the government and trial defense counsel questioned multiple witnesses and offered arguments on the issue of consent. In opening and closing statements, trial counsel referenced PVT [redacted] attempts to verbally express her non-consent "no" as well as appellant's barracks conversation with PVT [redacted] on the evening of 8 August 2021. (R. at 117; 655). In closing argument, trial counsel repeatedly argued that PVT [redacted] had not consented. (R. 685–89).

Trial defense counsel asserted during opening statements that "consent" has a legal definition and argued that CID was "feeding [appellant] legal conclusions" with which appellant was unfamiliar because of his inexperience in the Army. (R. at 122–23). During the defense's cross-examination of PVT [redacted] observations of appellant's sexual activities with PVT [redacted], trial defense counsel asked, "So you can say [PVT [redacted] was consenting?" (R. at 233). Trial defense counsel also asked PVT [redacted] whether she believed PVT [redacted] consented to sexual acts with appellant.[4] (R. at

[4] Private BC and PVT [redacted] both affirmatively answered defense counsel's question. (R. at 233, 514). Yet as this court has recognized with respect to assessing witness credibility, the trial court enjoys a "superior position in making those determinations." *United States v. Feliciano*, No. ARMY 20140766, 2016 WL

514). Trial defense counsel later cross-examined the CID agent who took appellant's statement and challenged the agent's knowledge of the legal definition of consent and whether the agent explained that definition to appellant. (R. at 500).

Both parties examined the government's expert in forensic psychiatry on the issue of consent, including whether a person can consent to sexual activity during a blackout. (R. at 600–30). Then, in closing arguments, trial defense counsel argued that the government failed to meet its burden of proving PVT [redacted] did not consent to having sexual intercourse with appellant, while also asserting a mistake of fact defense as to consent. (R. at 661, 665-68, 672–75, 681).

Finally, the pretrial motions practice addressed, *inter alia*, the issue of consent. This included a defense motion in limine to admit evidence of PVT [redacted] sexual behavior with appellant to demonstrate consent, (App. Ex. II), and the prosecution's response. (App. Ex. XII). The military judge addressed those arguments in his decision. (App. Ex. XXXIX).

4446558, at *3 (A. Ct. Crim. App. Aug. 22, 2016), aff'd, 76 M.J. 237 (C.A.A.F. 2017) (citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)).

Assignment of Error

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHERE APPELLANT WAS CHARGED WITH COMMTTING SEXUAL ASSAULT WITHOUT CONSENT, BUT THE GOVERNMENT EVIDENCE AND THEORY WAS SEXUAL ASSAULT WHILE INCAPABLE OF CONSENT.

Standard of Review

When an issue is forfeited by failure to raise it during the trial, it is subject only to plain error review. *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). Under a plain error analysis, the appellant must demonstrate that "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant]." *United States v. Clifton*, 71 M.J. 489, 491 (C.A.A.F. 2013) (citing *United States v. Powell*, 49 M.J. 460, 464–65 (C.A.A.F. 1998)). Appellant bears the burden of establishing plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

Law

A. Due process

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 both provide an accused notice of the charge he is to defend against and a shield 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). *See also United States v. Roe*, 2022 CCA LEXIS 248, at *10 (A. Ct. Crim. App. Apr. 27, 2022) (mem. op.), *review denied*, 83 M.J. 83 (C.A.A.F. 2022).

B. Sexual assault

An individual commits sexual assault when he "commits a sexual act upon another person . . . without the consent of the other person." Article 120(b)(2)(A), UCMJ. "The term 'sexual act' means . . . the penetration, however slight, of the vulva . . . of another by any part of the body, with the intent to . . . arouse or gratify the sexual desire of any person." Article 120(g)(1)(C), UCMJ. 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." Article 120(g)(7)(A), UCMJ. Further, "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." Article 120(g)(7)(C), UCMJ.

Under Article 120(b)(3)(A), UCMJ, an individual commits sexual assault when he "commits a sexual act upon another person when 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 person."

Argument

A. There Was No due process violation in Appellant's Case.

There was no due process violation and no prejudice to appellant, and this court should therefore affirm the findings and sentence. Appellant was charged with sexual assault under Article 120(b)(2)(A), UCMJ, and appellant fails to demonstrate that he was convicted of anything else in a military judge-alone trial. (Charge Sheet; R. at 690). Put simply, the military judge found appellant guilty of The Specification of Charge I as charged, without exceptions or substitutions. (Statement of Trial Results; R. at 690).

As a threshold matter, appellant raised no objection to the government's presentation of evidence concerning PVT [redacted] level of intoxication. Because appellant did not present this claim to the military judge at his court-martial, this court should 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).

On the contrary, presumably anticipating that intoxication would be relevant in the case and intending to impeach PVT [redacted] appellant retained Dr. [redacted] as a

defense consultant on the topics of alcohol, memory, and forensic psychology. (R. at 594, 598). Appellant later called Dr. [redacted] as a defense expert witness concerning PVT [redacted] intoxication. (R. 594-614). Appellant's defense team even provided the government a proffer of Dr. [redacted] testimony on or about 3 January 2022, nearly a month before the merits portion of appellant's trial. (R. at 595). Finally, appellant did not request the military judge make special findings in accordance with R.C.M. 918(b). Thus, this court should review appellant's claims under a plain error standard.[5] *Harcrow*, 66 M.J. 154, 156; *Warner*, 73 M.J. at 3.

And under that elevated standard, the military judge committed no error, much less plain error. We presume that military judges know and follow the law. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). *See also United States v. Rapert*, 75 M.J. 164, 170 (C.A.A.F. 2016) (citing *Erickson*, 65 M.J. at 225). Nothing in this case— including the military judge's unambiguous guilty finding for the *unmodified* charged Article 120, UCMJ, offense— rebuts that presumption. (R. at 690); *Erickson* 65 M.J. at 225.

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[5] During closing arguments, trial defense counsel argued "too incapacitated is a charge, but that's not what was charged here." (R. at 668). While this concerns 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); *see also Roe*, 2022 CCA LEXIS 248, n.6 (citing same).

This court should therefore decline appellant's apparent invitation to divine a finding of guilty by the military judge for a different subsection of Article 120. There is nothing in the record that suggests the military judge was unaware of the applicable standard of proof or unwilling to hold the government to its burden. *Erickson*, 65 M.J. at 225 ("Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."); *Rapert*, 75 M.J. at 170 (applying this presumption and concluding the military judge "properly considered both the objective and subjective prongs of the offense" in finding the accused guilty).

In fact, as noted above, the government introduced extensive evidence— through appellant's own statements and those of multiple witnesses— that proved the statutory elements of the charged offense under Article 120(b)(2)(A), UCMJ. This included appellant's statements to CID (Pros. Ex. 11, 13); testimony from PVT [redacted] (R. at 268-69); testimony and reporting from the Sexual Assault Medical Forensic Examiner (R. at 432; Pros. Ex. 22); testimony and text messaging from PFC ZW (R. at 419-20; Pros. Ex. 10); and testimony from PVT [redacted] (R. at 400-02).

Notwithstanding the above, the government acknowledges the military judge heard evidence of PVT [redacted] intoxication during her assault. But this court should reject any assertion that the government's prosecution theory and evidence was "solely" premised on PVT [redacted] intoxication level. (Appellant's Br. 7). The evidence concerning consent described above belies any claim that the government

prosecuted appellant in a manner that avoided meeting its burden of proof under Article 120(b)(2)(A) by instead presenting a case under (b)(3)(A). (Appellant's Br. 5–6).

Moreover, evidence of PVT [redacted] intoxication was a surrounding circumstance that the military judge could properly consider when deciding whether the government proved beyond a reasonable doubt that PVT [redacted] did not consent to sexual intercourse with appellant. Article 120(g)(7)(C), UCMJ ("All the surrounding circumstances are to be considered in determining whether a person gave consent."); *United States v. Pease*, 75 M.J. 180, 183 (C.A.A.F. 2016) (affirming convictions and describing the military judge's instruction on consent using similar language); *Roe*, 2022 CCA LEXIS 248, at *21 ("[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.").

Finally, there was nothing improper about the "evidentiary overlap" between evidence that PVT [redacted] did not consent to sexual intercourse with appellant on one hand, and evidence of her intoxication on the other. *See Roe*, 2022 CCA LEXIS 248, at *13 (*citing Riggins*, 75 M.J. at 84 & n.6 (C.A.A.F. 2016)). As this court noted in *Roe*, "this is simply one of many situations where the government exercised its discretion to charge one of multiple potential offenses." *Id*. at 15. Furthermore, there is no "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." *Id*.; *see also 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."). Therefore, appellant's due process rights were not violated.

B. Appellant Failed to Establish Any Material Prejudice to His Substantial Rights.

Assuming, *arguendo*, that this court concludes the government presented an improper case theory or the military judge found appellant guilty of sexual assault based on PFC [redacted] legal inability to consent (rather than that PFC [redacted] did not actually consent), "an error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012). To prevail, appellant must establish that "under the totality of the circumstances, the Government's error resulted in material prejudice to his substantial, constitutional right to notice." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017) (internal citations omitted). Appellant cannot do so in this case based on the robust litigation of PFC [redacted] intoxication throughout the trial. "Ultimately, the manner in which the case was contested diminishes any argument that appellant was not on notice as to what he had to defend against." *Oliver*, 76 M.J. at 275.

From the onset, appellant's defense counsel prepared a case in which PVT [redacted] intoxication was an issue, as demonstrated by retaining Dr. [redacted] and proffering her testimony to the government. (R. at 594-95, 598). Appellant later called Dr. RB as a defense expert witness concerning PVT [redacted] intoxication. (R. 594-614). Appellant's pretrial motion in limine repeatedly referenced PVT [redacted] intoxication, including a suggestion that despite her intoxication, PVT [redacted] was capable of actions that gave rise to a mistake of fact (as to consent) defense. (App. Ex. II). In opening statements, trial defense counsel referenced the words "intoxication", "incompetent," and "incapacitated." (R. at 123).

Defense counsel also elicited specific facts from PFC [redacted] during cross-examination, including her drinking habits in general and her alcohol consumption at the gathering in particular. (R. 295–302). During that cross-examination, defense counsel presented evidence that at the gathering, PVT [redacted] consumed apple-flavored liquor that was thirty percent alcohol by volume. (R. at 294–301; Def. Ex. J). Defense counsel successfully moved to admit a photograph of a bottle of the same brand and flavor liquor. (Def. Ex. J; R. at 298-99). Defense counsel questioned other witnesses about PVT [redacted] demeanor when she drank alcohol and her level of intoxication at the gathering. (R. at 506–09, 523, 543–44).

In closing arguments, defense counsel argued that "drunk" does not mean "incompetent." (R. at 669). Defense counsel, referencing testimony from the

expert witnesses, also addressed the issue of how intoxication relates to the issue of consent, arguing that persons who have blacked out can "demonstrate signs of consent. (R. at 674).

In sum, defense counsel's witness selection, line of questioning, and arguments in this case clearly established that appellant was on notice to defend against a theory of sexual assault in which PFC [redacted] was legally unable to consent based on either her level of intoxication or unconsciousness. As a result, there was no material prejudice to appellant's substantial rights. *See Tunstall*, 72 M.J. at 197 (no prejudice where accused actually defended against both theories in the terminal element of Article 134, UCMJ).

Conclusion

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

[redacted]

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CERTIFICATE OF SERVICE U.S. v. COE (20200144)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 18th day of April, 2023.

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