

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**REPLY BRIEF ON BEHALF
OF APPELLANT**

v.

Docket No. ARMY 20220052

Private (E-2)

MATTHEW L. COE

United States Army

Appellant

Tried at Fort Benning, Georgia on 7 January and 1–3 February 2022, before a general court-martial appointed by Commander, U.S. 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

Statement of the Case

Appellant, Private (E-2) Matthew L. Coe, filed his initial brief on 29 December 2022. The government filed its answer brief on 18 April 2023. This is appellant’s reply.

Argument

The government failed to affirmatively present evidence to establish non-consent. The government cites only two parts of the record, (Gov’t Br. at 3-4), which were also referenced in appellant’s initial brief, (Appellant’s Br. at 7, n.3), but neither is evidence of non-consent to the charged offense. Private First Class (PFC) [REDACTED] statement “I do not want this,” references when Private [REDACTED] was engaged in sexual acts with PFC [REDACTED]. (R. at 268-69). At that time, PFC [REDACTED] alleged

appellant “was off to the side penetrating [REDACTED].” (R. at 269). Private First Class [REDACTED] statement of “no stop” in the Sexual Assault Forensic Examination Report relates to the same incident of her alleged moment of lucidity while engaging in sexual acts with Private [REDACTED]. (Pros. Ex. 22, p.4). The government otherwise only presented evidence concerning intoxication and PFC [REDACTED] resulting lack of memory in order to convict appellant on a theory of sexual assault for which he was not charged.

This court should review the issue presented as preserved error instead of plain error as the government requests. (Gov’t Br. at 7, 9). The sufficiency of error preservation is not dictated by “magic words”, but rather “of critical importance is the specificity with which counsel makes the basis for his position known to the military judge.” *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016). The issue presented is not, nor turns on, the general admissibility of “evidence concerning PVT [sic] [REDACTED] level of intoxication.” (Gov’t Br. at 9). During closing, the defense explicitly raised that appellant could not be convicted on an uncharged theory of “too incapacitated to consent.” (R. at 668). The military judge’s consideration of this argument and resulting conviction demonstrates the military judge’s “awareness of defense counsel’s specific grounds . . . , flatly disagreed with him, and there is no indication that further objection was likely to be successful.” *Id.*

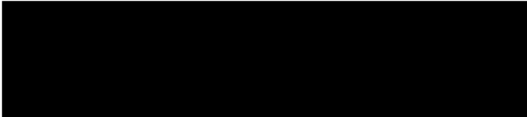
Even if this court applies plain error review, appellant still prevails because this court tests material prejudice of any non-structural constitutional error using the harmless beyond a reasonable doubt test. *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019). The government incorrectly suggests appellant bears the burden of establishing material prejudice here. (Gov’t Br. at 13). For a constitutional error, whether preserved or forfeited, appellant’s conviction must be reversed unless the *government* can establish beyond a reasonable doubt that “the error complained of did not contribute to the verdict obtained.” *Tovarchavez*, 78 M.J. at 463 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)); *United States v. Cueto*, 82 M.J. 323, 334 (C.A.A.F. 2022).

The government failed to prove that the due process violation was harmless beyond a reasonable doubt. In asserting that “robust litigation of PFC [REDACTED] intoxication throughout the trial” weighs against prejudice, (Gov’t Br. at 13), the government ignores that the defense litigated its case under the expectation that appellant could not be convicted under a “too incapacitated to consent” theory. (R. at 668). Any litigation of intoxication evidence only goes to further the defense theory that the government cannot achieve its affirmative burden of non-consent in reliance of a theory that does not fit the charge. Since the defense made this argument in its closing, the government can only now merely speculate whether or

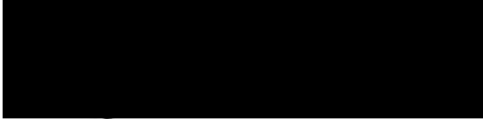
not the military judge improperly based his finding of guilty upon a theory for which appellant was not charged.

Conclusion


WHEREFORE, the appellant respectfully requests this honorable court set aside his conviction and sentence.




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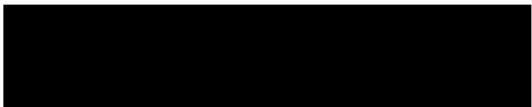
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the
Army Court and Government Appellate Division on 24 April 2023.



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