

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,)	BRIEF ON BEHALF OF
Appellee)	APPELLEE ON REMAND
)	
v.)	Docket No. ARMY 20210647
)	
Staff Sergeant (E-6))	Tried at Fort Riley, Kansas, on 20
ISAC D. MENDOZA,)	September and 6–8 December 2021,
United States Army,)	before a general court-martial
Appellant)	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

Granted Issue

**WHETHER APPELLANT’S CONVICTION FOR
SEXUAL ASSAULT WITHOUT CONSENT WAS
LEGALLY SUFFICIENT.**

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 8 May 2023, this court affirmed the findings and

¹ The military judge found appellant not guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ. (JA 016). All references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [2019 MCM].

sentence. On 7 October 2024, the Court of Appeals for the Armed Forces [CAAF] set aside this court's decision and remanded the case for a new legal and factual sufficiency review. *United States v. Mendoza*, No. 23-0210, 2024 CAAF LEXIS 590, at *23 (C.A.A.F. 7 Oct. 2024).

Summary of Argument

Appellant's conviction for sexual assault was legally and factually sufficient based on the evidence presented at trial. Ms. ■■■'s testimony and the objective evidence regarding her state of intoxication, along with appellant's admissions, false exculpatory statements, and inconsistencies provided a sufficient basis for any rational factfinder to have found all essential elements of sexual assault without consent beyond a reasonable doubt. Although Ms. ■■■ had no memory of the sexual assault, the government presented sufficient circumstantial evidence, in addition to the evidence of Ms. ■■■'s intoxication, that she did not, in fact, consent to any sexual acts with appellant. However, this issue is moot for the reasons stated below.

Although the evidence is otherwise legally and factually sufficient, the arguments put forth by the prosecution, in its pretrial motions and in response to trial defense counsel's R.C.M. 917 motion, could have led the military judge to improperly consider evidence that the victim's severe level of intoxication proved

that she was incompetent, could not consent, and therefore did not consent.² This is especially true in this case, where the prosecution expressly linked the evidence of severe intoxication to the term “competent person” rather than one of the “surrounding circumstances” that the factfinder could weigh when determining whether the victim did, in fact, consent. The prosecution’s arguments were based on a misunderstanding of the application of the term “competent person” within the definition of consent, and the CAAF’s subsequent clarification of the application of that definition in this case, raises due process concerns that warrant setting aside the findings and ordering a rehearing.

Statement of Facts

1. Events prior to the sexual assault.

On the night of 11 July 2020 and into the early morning of 12 July 2020, Ms. ■■■, 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). After observing Ms. ■■■ act flirtatiously toward another male soldier, appellant told that

² The government does not imply that these arguments were made to intentionally mislead the military judge but were merely based on a misunderstanding of ambiguous terms in the statute.

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. ■’s groin.³ (Pros. Ex. 1 at 14:06–14:10).

2. Appellant sexually assaulted Ms. ■ without her consent.

Approximately one hour after they entered his room, closed circuit television (CCTV) footage showed appellant exiting his room with Ms. ■ and walking— with Ms. ■’s arms around his shoulders and her body and head slumped against him for support—to Ms. ■’s 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. ■’s 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. ■’s shoes to her in her room later that morning. (R. at 33–34, 78–79; Pros. Ex. 1 at 21:13–22:13).

³ The military judge found appellant not guilty of touching Ms. ■’s groin without her consent. *Supra* n.1.

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 night 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. (R. at 34–35, 44, 55–56). Ms. ■ also stated 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 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 RL, Ms. ■'s 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 RL to the troop medical clinic (TMC) where Ms. JW received her SAFE. (R. at 152–53, 204). Specialist RL called Ms. ■'s phone

while he was in appellant's presence, handed his phone to appellant during the call, and appellant said to Ms. ■—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).

3. Appellant's admissions to CID.

At the TMC parking lot, appellant, who was not suspected of any crime at the time, told Criminal Investigation Division (CID) Special Agent (SA) DW, while SA DW was conducting canvassing interviews, that Ms. ■ was in his room at some point but that he did not know why she was there. (R. at 169–70).

Appellant initially told SA DW 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. ■ 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 SA DW that he did not know how Ms. ■ entered his room, (Pros. Ex. 2 at 1:18:13–26), but later admitted that he invited Ms. ■ to his room after she was hitting on him. (Pros. Ex. 2 at 1:24:10–1:26:44).

Appellant then described Ms. ■'s intoxication by stating that she was stumbling, told him she was going to throw up, and that he had to walk Ms. ■ to her room because she was “super drunk.” (Pros. Ex. 2 at 1:28:40–1:31:00).

However, in describing how Ms. ■ 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. ■ 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, SA DW showed appellant CCTV footage of him touching Ms. ■’s groin while walking with her to his room.⁴ (Pros. Ex. 2 at 3:16:20–55). After being confronted with the CCTV footage, appellant’s account changed dramatically. Appellant admitted that Ms. ■ 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. ■ 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 3:28:00–

⁴ Appellant told investigators nineteen times that “he did not touch [Ms. ■],” or words to that effect, and eight times that “he did not remember” prior to being confronted with footage of bringing Ms. ■ back to his room and touching her groin. (Pros. Ex. 2).

3:38:47; Pros. Ex. 6 at 2).

Appellant also stated that he removed Ms. [REDACTED] from his room because he “didn’t want to incriminalize (sic) himself.” (Pros. Ex. 2 at 2:17:24–30). In response to SA DW’s question of what made him decide to have sex with Ms. [REDACTED], appellant said he “made the conscious decision to just do it,” and “didn’t think about how [Ms. [REDACTED]] 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. [REDACTED] 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 SA DW 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).

Although appellant maintained that Ms. [REDACTED] was an active participant in sexual acts, his claims were internally inconsistent. For example, immediately after alleging that Ms. [REDACTED] was somewhat incoherent and that she did not say “yes,” appellant then claims that Ms. [REDACTED] was the sexual aggressor. (Pros. Ex. 2 at 3:27:36–3:28). Although appellant alleged that Ms. [REDACTED] was falling asleep, he

woke her up, they started talking and she said “show me what you got” (Pros. Ex. 2 at 3:28), when the agent confronted him with the implausibility of his account, he then stated, “I’ll come all the way clean. . . . I had to help her to her room.” (Pros. Ex. 2 at 3:32). When the interviewer asked, “Do you really think someone who looked like that coming out of that room could literally engage in and give consent?” (Pros. Ex. 2 at 3:37–38), appellant shook his head, no. (Pros. Ex. 2 at 3:37–38). Appellant agreed that his story of Ms. ■■■ being the sexual aggressor was untrue, maintained Ms. ■■■ was “not passed out,” but also admits that when he was conducting sex acts on her “[he] was in control.” (Pros. Ex. 2 at 3:37–39). Ultimately, appellant agreed that Ms. ■■■ was *both* incapable of giving consent, and that she was “severely impaired to the point where she did not give consent when [he] conducted sex acts on her.” (Pros. Ex. 2 at 3:46–48).

One thing appellant consistently maintained was that “everything about the bathroom is true, [Ms. ■■■] did go to the bathroom and turn the shower on.” (Pros. Ex. 2 at 2:22). Based on appellant’s timeline, Ms. ■■■ went to the bathroom, turned on the shower, and vomited in the bathroom shortly, if not immediately, after the sexual acts occurred. This is also consistent with what appellant told Ms. ■■■ the following day: that she had locked herself in the bathroom at one point. (R. at 37–40).

4. Trial defense counsel's motions regarding notice and due process.

During pretrial litigation, trial defense counsel motioned the military judge for a tailored instruction to address his concerns of notice and due process. (App. Ex. IX). The government responded to that motion and argued that the plain language and definition of consent put appellant on notice that he had to defend against a theory that the victim must be competent to consent. (App. Ex. XIII, p. 2). Specifically, the prosecutor focused on the meaning of the term “competent person” within the definition of consent. (App. Ex. XIII, p. 2). The military judge did not rule on the defense motion since the trial resulted in a military judge alone trial, and he stated that counsel could argue the motion in their closing arguments. (R. at 18).

At the conclusion of the government's case, trial defense counsel renewed their motion and moved for a dismissal of the charges. (R. at 247). The government argued that “there has been certainly some evidence presented by the prosecution's case that there was no consent” *and* “the statutory definition of consent regarding a competent person has certainly been established in this case.” (R. at 249). The military judge stated, “I tend to agree with the government that there is some [] evidence of [] each of the elements of both specifications. . . . So the motion is denied.” (R. at 250).

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

Law

Findings of guilt are factually sufficient when “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.” *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (quoting *Oliver*, 70 M.J. at 68). 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). 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).

Findings of guilt are legally sufficient when “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 omitted). When this court conducts a legal sufficiency review, it is 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.” *King*, 78 M.J. at 221 (cleaned up). 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.

The CAAF “has repeatedly held that the Government may meet its burden of proving an accused’s guilt beyond a reasonable doubt with circumstantial evidence.” *United States v. Mendoza*, __M.J.__, 2024 CAAF LEXIS 590, *10 (C.A.A.F. 2024) (citing *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021); *King*, 78 M.J. at 221. “The President has instructed that findings of guilt ‘may be based on direct or circumstantial evidence,’ without mention of any exception for certain offenses.” *Id.* (citing Rule for Court Martial [R.C.M.] 918(c)). The President’s instructions and the CAAF’s case law are consistent with the Supreme Court’s guidance that circumstantial evidence “is intrinsically no different from testimonial evidence.” *Id.* at *11 (citing *Holland v. United States*, 348 U.S. 121, 140, (1954)). “Accordingly, we reiterate once again that the absence of direct evidence of an element of an offense does not prevent a finding of guilty for that offense from being legally sufficient.” *Id.* at *11

To convict appellant of sexual assault of Ms. [REDACTED] without her consent as alleged in Specification 1 of The Charge, the government was required to prove

that: (1) appellant committed a sexual act upon Ms. ■■■; and (2) he did so without the consent of Ms. ■■■. 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]. The CAAF, when finding that “without consent” and “incapable of consent” constitute two distinct theories, expressly found that “without consent” criminalizes the performance of a sexual act upon a victim who *is capable of consenting* but does not consent. *Mendoza*, 2024 CAAF LEXIS 590, *17.

Consent is defined as “a freely given agreement to the conduct at issue by a competent person.”⁵ Article 120(g)(7)(A), UCMJ. The term “without” is “used as a function word to indicate the absence or lack of something or someone.”⁶ 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

⁵ Congress amended subsection (b) of section 920 of Title 10, United States Code, by repealing the “bodily harm” language and adding “without the consent of the other person.” National Defense Authorization Act for Fiscal Year 2017 Conference Report to Accompany S. 2943, 114 H. Rpt. 840. Although Congress amended the definition section of consent between 2016 and 2019, they did not amend the language at issue—“consent means a freely given agreement to the conduct at issue by a *competent* person.” Article 120(g)(7)(A), UCMJ.

⁶ See *Merriam-Webster Unabridged Online Dictionary*, <http://unabridged.merriam-webster.com/unabridged/without> (last visited Dec. 14, 2023).

considered in determining whether a person *gave* consent.”⁷ Article 120(g)(7)(B), (C), UCMJ. The Court explained, although evidence of a victim’s intoxication is one relevant “surrounding circumstance” in determining whether the victim consented, intoxication may not be used to prove that a victim was incapable of consenting, and therefore did not consent. *Id.* at *17–18.

Argument

1. The evidence is legally and factually sufficient.

The CAAF agreed that “even though there is no direct evidence that Appellant engaged in sexual intercourse ‘without the consent’ of ■■■, the Government presented significant circumstantial evidence on the point.” *Mendoza*, 2024 CAAF LEXIS 590, *19. “This evidence includes: (1) testimony that ■■■ had no prior relationship with Appellant; (2) testimony that ■■■ would never have sex while on her period; (3) testimony that ■■■ would not have pushed a tampon so far inside of herself; (4) testimony that ■■■ made a morning-after report to the CQ desk after she realized something was wrong; (5) testimony that ■■■ was upset; (6) testimony that Appellant initially denied that he had engaged in any sexual acts with ■■■; and (7) testimony that ■■■ locked herself in Appellant’s bathroom.” *Id.*

⁷ Additionally, “[a] sleeping, unconscious, or incompetent person cannot consent,” and the term “incapable of consenting” is defined as someone who is “incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating [unwillingness] to engage in, the sexual act at issue.” Article 120(g)(8), UCMJ.

Ms. ■■■'s testimony that she had never spoken to appellant, never would have sexual intercourse on her period, and never would have had sex with her tampon in, all make it less likely that she consented to sexual acts with appellant. (R. at 34, 56, 60); *see Flores*, 82 M.J. at 743 (finding that the victim's testimony that she "never, within her abilities of recall, had any desire or intent to engage in sexual activity with Appellant, nor had any physical attraction to him" to be "strong circumstantial evidence"). This evidence is more compelling when juxtaposed to appellant's evolving story about Ms. ■■■ allegedly being the sexual aggressor.

"[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt." *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021). Previously, this court relied on the fact that appellant's changing narrative was evidence of false exculpatory statements, which this court considered as substantive evidence of appellant's guilt. *United States v. Mendoza*, 2023 CCA LEXIS 198, *10–11 (Army Ct. Crim. App. 8 May 2023). Specifically, that "after being confronted, appellant's narrative evolved from him having no idea what happened, to the victim just falling asleep in his bed, to the victim then locking herself in his bathroom, to her then taking a shower and putting her shirt on backwards." *Id.* at *9.

Appellant admits Ms. ■■■ was falling asleep and he woke her up just prior to

the sexual assault. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellant conceded that Ms. ■ did not reply, “yes” to him asking her if “this was okay.” (Pros. Ex. 2 at 3:27:29–36). Appellant’s initial denial that any sexual acts occurred certainly is evidence of his consciousness of guilt, generally. (Pros. Ex. 2 at 1:28:20–37). However, appellant’s admission that Ms. ■ actually *did not* say “yes” in response to him asking “is this okay” during the sexual encounter, (Pros. Ex. 2 at 3:20:00–31), is significant evidence that Ms. ■ never actually gave appellant verbal consent, regardless of whether *he believed* she was capable of doing so.⁸ (Pros. Ex. 2 at 3:27:29–36) (SA DW asserting “she didn’t say yes, and you know that,” appellant said “yeah” and nodded in assent).

Importantly, appellant’s admissions that “he was in control the whole time,” Ms. ■ was “falling asleep,” throwing up, and eventually locked herself in his bathroom, presents a clear path for the factfinder to find that appellant performed the sexual acts on Ms. ■ without her consent. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). These facts directly contradicted the defense’s theory of the case—that Ms. ■ was a willing and active participant in the sexual acts.

Of course, someone who is falling asleep or throwing up is certainly less

⁸ The government is not required to prove verbal or physical resistance to prove a lack of consent. Article 120(g)(7)(A), UCJ; *United States v. Weiser*, 80 M.J. 635, 642 (C.G. Ct. Crim. App. 2020) (“Still, verbal or physical resistance is not required to show a lack of consent.”).

likely to *give* consent to sexual acts than someone who is awake and alert. *See Weiser*, 80 M.J. at 642 (“[T]he combination of [the victim’s] consumption of alcohol, level of intoxication, and fatigue were not intended to prove incapacity, but were, instead, relevant ‘surrounding circumstances’ for the members to consider in deciding whether [she] actually consented.”). Similarly, a reasonable inference was that Ms. ■■■ “locked herself” in appellant’s bathroom because she was trying to get away from appellant. The fact that she did not seek appellant’s assistance while highly intoxicated but rather sought to put a locked door between her and appellant is (at least) circumstantial evidence that she did not freely consent to what had just occurred.

Appellant’s actions after the sexual assault also show that Ms. ■■■ did not consent the night prior. Appellant’s overwhelming feelings of guilt and need to probe Ms. ■■■ for information contradict his story that she was a willing participant in the sexual acts.

2. Ms. ■■■’s level of intoxication may be considered as one of the surrounding circumstances when determining whether she freely gave consent.

Ms. ■■■’s level of intoxication was well-established at trial. Although the evidence may be used as one of the surrounding circumstances in determining whether a victim, in fact, consented, it may not be used to prove that a victim was incapable of consenting. *Mendoza*, 2024 CAAF LEXIS 590, at *21. The CAAF

found that it was an “open question”⁹ whether this court properly applied the evidence in appellant’s legal and factual sufficiency review. *Id.*

The evidence reasonably supports the inference that Ms. ■ was in-and-out of consciousness throughout (or at least immediately prior to) the sexual assault. (Pros. Ex. 2 at 3:28:00–3:38:47). It is also a reasonable inference that while Ms. ■ was capable of consenting, she did not consent to sexual acts with appellant. This is especially true in light of appellant’s admissions to Ms. ■ that she locked herself in his bathroom shortly after the sexual acts occurred.

In *United States v. Roe*, this court held that the government may “carry its burden of proving sexual assault without consent . . . by presenting, mainly but alongside other evidence, the fact of the victim’s extreme intoxication at the time of the sexual act.” 2022 CCA LEXIS 248, at *11 (Army Ct. Crim. App. 27 Apr. 2022). The CAAF’s decision in this case did not diminish that logic.¹⁰ The evidence here is analogous to that of *Roe*.¹¹ In *Roe*, this court, relying on the

⁹ However, if this court accepts the government’s concession, this issue is moot.

¹⁰ However, as stated below, the CAAF did clarify that if the factfinder convicts based on an inability to consent rather than an absence of consent, this would constitute a violation of appellant’s due process rights. *Mendoza*, 2024 CAAF LEXIS 590, *17. Here, the prosecutor argued both that Ms. JW’s severe intoxication proved, alongside the other circumstantial evidence in this case, that Ms. JW “would not consent. She could not. She did not consent.” (R. at 259). Based on the evidence presented and the government’s arguments during pretrial litigation and during the R.C.M. 917 motion, the government cannot say with confidence that this did not result in error.

¹¹ Unlike *Roe*, this case was decided by a military judge.

CAAF’s holding in *United States v. Riggins*, 75 M.J. 78, n.6 (C.A.A.F. 2016), acknowledged there was often evidentiary overlap between the “inability to consent” and “without consent.” 2022 CCA LEXIS 248, *13. This court properly held that a victim’s high degree of intoxication is “one of many permissible ways for the government to attempt to prove ‘without consent.’” *Id.* at *13–14. The CAAF endorsed this analysis in its opinion:

To be clear, our holding—that subsection (b)(2)(A) and subsection (b)(3)(A) create separate theories of liability—does not bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented. *See* Article 120(g)(7)(C), UCMJ (All the surrounding circumstances are to be considered in determining whether a person gave consent.). Nothing in the article bars the Government from offering evidence of an alleged victim’s intoxication to prove the absence of consent.

Mendoza, 2024 CAAF LEXIS 590, at *22.

The CAAF, in this case, remanded because this court’s opinion “[did] not explain how or why the evidence of [REDACTED]’s intoxication factored into its analysis[.]” *Mendoza*, 2024 CAAF LEXIS 590 at *3–4. Assuming this court followed the same logic that it applied in *Roe*, and viewed the victim’s intoxication as one factor in determining whether the victim did consent, then its legal and factual sufficiency analysis should not change.¹²

¹² Notably, the prosecution failed to cite this standard in their pretrial motion (App. Ex. XIII), or in response to the R.C.M. 917 motion. (R. at 247–50). Additionally, the government’s argument in its motion and in response to the

2. Based on the CAAF’s clarification regarding the law, the arguments made by the prosecutor, and the lack of clarity from the military judge’s rulings, the government cannot say with confidence that the military judge properly applied the evidence of the victim’s intoxication in appellant’s case.

“The 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 convicted. The Due Process Clause of the Fifth Amendment also 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). A specification is sufficiently specific if it “informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense.” *United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202, 206 (C.M.A. 1953).

Here, although the prosecution believed appellant was on notice of a theory of guilt based on the plain language of the statute (App. Ex. IX; XIII; R. at 18, 247, 249, 250), the CAAF’s subsequent ruling in this case disproved that theory and exposed an ambiguity regarding how the evidence of [REDACTED]’s intoxication was interpreted by the prosecution and potentially misapplied in appellant’s case.¹³

R.C.M. 917 motion did not take a nuanced approach as this court took in *United States v. Roe*, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 Apr. 2022) or *Coe*, 84 M.J. 537, 541 (Army Ct. Crim. App. 2024)—that evidence of alcohol consumption and the victim’s intoxication is not used to prove incapacity, but instead is a relevant surrounding circumstance for the factfinder to consider when determining if the victim freely gave consent.

¹³ The government does not imply that this will be true in all cases in which the

Mendoza, 2024 CAAF LEXIS 590, *19–20. This error is similar to the instructional error in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). There the CAAF found that “the muddled accompanying instructions implicate ‘fundamental conceptions of justice under the Due Process Clause by creating the risk that the members would apply an impermissibly low standard of proof” *Id.* at 357.

Here, unlike *Hills*, this case was tried by a military judge alone. Although “[m]ilitary judges are presumed to know the law and follow it, absent clear evidence to the contrary[,]” here, there is sufficient evidence to the contrary.¹⁴ In this case, the following factors contributed to overcoming this favorable presumption: the prosecutor’s arguments during pretrial litigation (and at trial), the military judge’s failure to expound upon his R.C.M. 917 ruling, and the ambiguity in the law at the time. Based on the above factors, the government cannot confidently say that the military judge did not misapply the law and therefore that any error was harmless beyond a reasonable doubt. *See Griffin v. United States*, 502 U.S. 46, 59–60 (1991) (“It is one thing to negate a verdict that, while

government used evidence of a victim’s intoxication to prove the absence of consent.

¹⁴ *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *but see United States v. Mann*, 54 M.J. 164, 167 (C.A.A.F. 2000) (“Because this was a bench trial, the potential for unfair prejudice was substantially less than it would be in a trial with members. We are satisfied that the military judge was able to sort through the evidence, weigh it, and give it appropriate weight.”).

supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.”) (quoting *United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991)).


Here, as the CAAF pointed out, the prosecution certainly could have charged appellant under either statute. *Mendoza*, 2024 CAAF LEXIS 590, *18. However, neither the prosecutor nor the military judge had the “benefit of [the CAAF’s] holding” in this case. *Id.* at *21. Therefore, the question whether the prosecutor’s argument led the military judge to convict appellant because the victim was incapable of consenting, remains an open one in this case. *Id.* The government cannot say that this error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Upon a finding that the verdict is not correct as a matter of law, this court may set aside findings and authorize a rehearing, in accordance with 10 U.S.C. § 866(f). Here, because the risk of error amounted to a misunderstanding of the law, analogous to an instructional error, this court should set aside the findings without prejudice and authorize a rehearing in accordance with its opinion. *See United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (setting aside the finding and sentence and authorizing a rehearing where the CAAF could not say the military


judge's erroneous instruction was harmless beyond a reasonable doubt).

Conclusion

WHEREFORE, the government respectfully requests this honorable court set aside the findings and authorize a rehearing in accordance with its opinion.


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

I certify that a copy of the foregoing was sent via electronic submission to
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