**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

| | |
|---|---|
| UNITED STATES,<br>Appellee | **BRIEF ON BEHALF OF APPELLEE ON REMAND** |
| v. | Docket No. ARMY 20220052 |
| Private (E-2)<br>**MATTHEW L. COE,**<br>United States Army,<br>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

## Granted Issue

**WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT IS LEGALLY AND FACTUALLY SUFFICIENT?**

## 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

**Panel No 2**

[UCMJ][1], 10 U.S.C. § 820.[2] (R. at 690); (Statement of Trial Results ["STR"]). 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). The convening authority took no action on the findings and sentence. (Action). On 4 March 2022, the military judge entered judgment. (Judgment).

On 17 August 2023, this court affirmed the findings and sentence. On 1 February 2024, upon reconsideration en banc, this court again affirmed the findings and sentence. On 20 October 2024, the Court of Appeals for the Armed Forces [CAAF] set aside this court's decision pursuant to *United States v. Mendoza*, __ M.J. __ (C.A.A.F. 2024) and remanded the case for a new legal and factual sufficiency review.

## Summary of Argument

Appellant's conviction for sexual assault as charged under Article 120(b)(2)(A) was legally and factually sufficient based on the evidence presented at trial. The victim's and other witness testimony, as well as appellant's post-assault demeanor and statements, provided a sufficient basis for any rational factfinder to find all essential elements of sexual assault without consent beyond a

[1] 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].
[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).

reasonable doubt. The military judge also heard evidence that the victim in this case specifically manifested non-consent, undermining appellant's claim that the military judge convicted appellant on the basis that the victim was incapable of consenting.

This same evidence was also sufficient to overcome the mistake of fact and motive to fabricate defenses raised by appellant during trial. This evidence included testimony about the victim's intoxication, which the factfinder (in this case, a military judge) may properly consider as a relevant, surrounding circumstance. We presume that military judges know and follow the law. Nothing in this case— including the military judge's unambiguous guilty finding for the unmodified charged Article 120(b)(2)(A), UCMJ, offense— rebuts that presumption.

## Statement of Facts

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

On 8 August 2021, appellant, PVT [redacted] [hereinafter "the Victim"], 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 the Victim. (R. at 115; 264; 468-69). The Victim was not

drinking during her first sexual encounter with appellant. (R. at. 264). After the Victim's first sexual encounter with appellant, they started playing drinking games. (R. at 265). Later that day, the Victim began going in and out of consciousness from alcohol intoxication and "blacked out." (R. at 268). The next thing the Victim remembered was looking at appellant with her clothes off and saying, "I do not want this," before blacking out again. (R. at 268–69). The Victim also told Major ("Major") MW, a Sexual Assault Nurse Examiner ("SANE") who treated her, that she recalled her clothes coming off and saying "no, stop" before blacking out again. (R. at 432; Pros. Ex. 22).

**B. The government charged appellant with sexual assault without consent and focused on Victim's lack of consent throughout the court-martial.**

The government charged appellant with one specification of sexual assault, in violation of Article 120(b)(2)(A), UCMJ. (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 [The Victim], by penetrating [The Victim's] vulva with [appellant's] penis, without the consent of [The Victim].

At a military judge-alone trial, the military judge heard testimony and admitted evidence that when appellant had intercourse with the Victim the second time, he did so without her consent; this evidence included the Victim's testimony that she said, "I do not want this" directly to appellant while he was having

intercourse with her. (R. at 268–69). Furthermore, MAJ MW, the SANE who treated the Victim, testified the Victim told her when she was assaulted that she recalled saying "no, stop." (R. at 432; Pros. Ex. 22). The government presented testimony and other evidence of text messages exchanged between appellant and PFC [redacted]'s. (R. at 419-20; Pros. Ex. 10). In that text message exchange, appellant responded, "Yes she was. She was wasted," to PFC [redacted] when PFC [redacted] stated the Victim was too drunk to consent.[3] (R. at 420; Pros. Ex. 10).

The military judge also heard statements that appellant made during his interviews with Special Agent (SA) JS with the Criminal Investigative Command (CID). (Pros. Ex. 11, 13). In those interviews, appellant admitted that when he had sexual intercourse with Victim, she never gave verbal consent. (Pros. Ex. 11). When asked whether the Victim 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 the Victim while he had sex with her, "Because she was super drunk and it was wrong." (Pros. Ex. 11). Another witness, PVT [redacted], testified how, during a barracks stairwell conversation the following evening, appellant appeared "downhearted," "emotionally drained," that appellant told her

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

"I fucked up," and that he should have waited to have sex with the Victim "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 Victim's attempts to verbally express her non-consent as well as appellant's barracks conversation with PVT [redacted] on the evening of 8 August 2021. (R. at 117-18; 655). In closing argument, trial counsel repeatedly argued that Victim 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 owing to his inexperience in the Army. (R. at 122–23). During cross-examination of PVT [redacted]'s observations of appellant's sexual activities with the Victim, trial defense counsel asked, "So you can say [the Victim] was consenting?" (R. at 233). Trial defense counsel also asked PVT [redacted] whether she believed the Victim consented to sexual acts with appellant.[4] (R. at

[4] Private [redacted] 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 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)).

514). Trial defense counsel later cross-examined SA JS challenging his/her knowledge of the legal definition of consent and whether he/she 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). Later in closing arguments, trial defense counsel argued the government failed to meet its burden of proving the Victim 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 the Victim's 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).

## Standard of Review

This court reviews questions of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). For factual sufficiency, "once an appellant makes a specific showing of a deficiency in proof, [this court] will

conduct a de novo review of the controverted questions of fact." *United States v. Scott*, 84 M.J. 583, 585 (Army Ct. Crim. App. 2024).

After a specific showing of a deficiency in proof is made, "the Court may weigh the evidence and determine controverted questions of fact subject to [] appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and [] appropriate deference to findings of fact entered into the record by the military judge. [If] the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (1 Jan. 2021) [FY21 NDAA].

## Law

### A. Legal Sufficiency.

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." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

During its legal sufficiency review, the court considers all available facts within the record and is "not limited to [an] appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). Further, in analyzing legal sufficiency, our superior court "has long recognized that the government is free to meet its burden of proof with circumstantial evidence." *King*, 78 M.J. at 221. "[T]he ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private." *Id.*

**B. Factual Sufficiency.**

In any case in which every finding of guilty entered into the record is for an offense that occurred on or after 1 January 2021, the court may consider whether the findings of guilty are correct in fact upon appellant's request if appellant makes a specific showing of a deficiency in proof. Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B) (2021); *United States v. Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, *5 (C.A.A.F. 2024); *see generally* Pub. L. No. 116-283, 134 Stat. 3611-12.

After appellant has made such a showing, the court may weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *5. In weighing the evidence, the court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence and findings of fact entered into the record by the military judge." UCMJ art. 66(d)(1)(B). "Appropriate deference" will depend on

the nature of the evidence at issue. *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *8. But it does not create a presumption that in reviewing a conviction, a court of criminal appeals presumes an appellant is in fact guilty. *Id*. at *12.

If the court is clearly convinced that the finding of guilty was against the weight of the evidence, the court may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ art. 66(d)(1)(B). This court must satisfy two requirements to be "clearly convinced" (i) that the evidence, as the court has weighed it, does not prove that the appellant is guilty beyond a reasonable doubt and (ii) of the correctness of this decision. *Harvey*, __ M.J. ___, 2024 CAAF LEXIS 502, at *11–12.

This court has explained that "[i]n cases where witness credibility plays a critical role in the outcome of trial, this court should hesitate to second-guess the trial court's findings." *United States v. Stanley*, 43 M.J. 671, 674 (Army Ct. Crim. App. 1995). Additionally, "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witness is at issue." *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015); *see also United States v. Jimenez-Victoria*, 75 M.J. 768, 771 (Army Ct. Crim. App. 2012) (affirming where the findings turned on witness credibility).

### C. Sexual assault without consent

To convict appellant of sexual assault of the Victim without her consent as alleged, the government was required to prove: (1) appellant committed a sexual act upon the Victim; and (2) he did so without the consent of the Victim. 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 legal 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

---

[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).

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."[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. *Mendoza*, 2024 CAAF LEXIS 590, *17-18.

**D. Due process**

"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

[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.

U.S.C.M.A. 202, 11 C.M.R. 202, 206 (C.M.A. 1953).

## Argument

### A. The evidence is legally and factually sufficient.

As noted above and in appellee's previous pleadings in this case before this court, the government charged appellant with sexual assault without consent under Article 120(b)(2)(A), UCMJ. (Charge Sheet). The military judge convicted appellant as charged and made neither special findings nor any findings with exceptions and substitutions. (R. at 690; STR).

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 videorecorded statements to CID (Pros. Ex. 11, 13); testimony from the Victim (R. at 268-69); testimony and reporting from the SANE (R. at 432; Pros. Ex. 22); testimony and text messaging from PFC [redacted] (R. at 419-20; Pros. Ex. 10); and testimony from PVT [redacted] (R. at 400-02). The military judge heard evidence from both the government and appellant and was able to afford it proper weight and credibility. *Stanley*, 43 M.J. at 674; *Davis*, 75 M.J. at 546; *see also Jimenez-Victoria*, 75 M.J. at 771.

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.

This court should therefore reject appellant's unfounded supposition that the military judge was "likely [laboring]" under an "erroneous view" of the law. (Appellant's Br. at 6). 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. *United States v. Sanchez*, 2017 CCA LEXIS 470, at *11 (Army Ct. Crim. App. July 17, 2017) (mem. op.) ("Although appellant cites to various misstatements by the trial counsel, we cannot presume the military judge adopted counsel's view of the law. What is missing is evidence of error on the part of the military judge, to whom the presumption attaches.") Thus, "given the absence of clear evidence to the contrary, we presume the military judge held the government to its full burden of proof beyond a reasonable doubt for each and every offense." *Id*. Again, while there was evidence at trial of the Victim's intoxication, trial counsel made clear in closing arguments before findings that the Victim had specifically manifested *non-consent* by saying "no, stop" and "I don't want this." (R. at 655-56).

### B. Victim's level of intoxication may be considered as one of the surrounding circumstances when determining whether she freely gave consent.

Notwithstanding the above, the government acknowledges the military judge heard evidence of the Victim's intoxication during her assault. But this court should reject any assertion that the military judge convicted appellant based on a conclusion the Victim was incapable of consenting to sexual activity with appellant. Moreover, the evidence concerning consent described above belies any claim the military judge convicted appellant in a manner that permitted the government to avoid meeting its burden of proof under Article 120(b)(2)(A) by instead presenting a case under (b)(3)(A). This court can confidently conclude the judge convicted appellant of the Article 120 offense as charged. (R. at 690; STR); *Erickson*, 65 M.J. at 225.

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 *Mendoza* did not diminish that logic. The evidence here is analogous to that of *Roe*.[8] In *Roe*, this court, relying on the

[8] Unlike *Roe*, this case was decided by a military judge. *See United States v. Mann*, 54 M.J. 164, 167 (C.A.A.F. 2000) ("Because this was a bench trial, the

CAAF's holding in *United States v. Riggins*, 75 M.J. 78 (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 *Mendoza* 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.

Thus, evidence of Victim's intoxication in appellant's case was a surrounding circumstance that the military judge could and did properly consider when deciding whether the government proved beyond a reasonable doubt that the Victim 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

---

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.").

(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.").

Indeed, there was nothing improper about the "evidentiary overlap" between evidence that the Victim 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.").

Finally, appellant's admission that he intentionally did not look at his intoxicated Victim when he was having sex with her is further evidence that the

Victim never actually gave appellant *he believed* she was capable of doing so.[9] (Pros. Ex. 11); *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."). For this and the above mentioned reasons, this court should find appellant's conviction legally and factually sufficient.

**Conclusion**

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

[redacted]

ANTHONY O. POTTINGER
LTC, JA
Appellate Attorney, Government
Appellate Division

[redacted]

RICHARD A. GORINI
COL, JA
Chief, Government Appellate
Division

[redacted]

JUSTIN L. TALLEY
MAJ, JA
Branch Chief, Government
Appellate Division

[9] The government is not required to prove verbal or physical resistance to prove a lack of consent. Article 120(g)(7)(A), UCMJ; *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.").

**CERTIFICATE OF SERVICE, U.S. v. COE (20220052*)***

I hereby certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 6th day of March, 2025.

[redacted]
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
[redacted]