IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **JAROD A. KUYKENDALL,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20230238 Tried at Fort Polk, Louisiana, on 5 January, 17 April, and 25–28 April 2023, before a general court-martial convened by Commander, Fort Polk, Louisiana, Colonel Maureen Kohn, Lieutenant Colonel Scott Hughes, military judges, presiding.

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

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE MOTION FOR A CONTINUANCE.

Assignment of Error II

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1, CHARGE I IS SUFFICIENT IN LIGHT OF *UNITED STATES V. MENDOZA*.

Assignment of Error III

EVEN IF SUFFICIENT UNDER *MENDOZA*, WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1, CHARGE I IS FACTUALLY SUFFICIENT BECAUSE EVIDENCE OF PFC KK'S INTOXICATION FAILS TO MEET THE BURDEN OF PROOF REQUIRED TO SHOW LACK OF

CONSENT AND THERE WAS EVIDENCE OF BOTH CONSENT AND REASONABLE MISTAKE OF FACT AS TO CONSENT.

Assignment of Error IV

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO CONTACT AND PRESENT EVIDENCE FROM ESSENTIAL WITNESSES IN SENTENCING.

Statement of the Case

On 28 April 2023, a general court-martial of officer and enlisted members convicted appellant, contrary to his plea, of two specifications of sexual assault without consent, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2019) [UCMJ]. (R. at 599; Statement of Trial Results [STR]). On 28 April 2023, the military judge sentenced to reduction to E-1, confinement for four years, and a dishonorable discharge.[1] (R. at 828; STR). On 26 June 2023, the military judge entered judgment. (Judgment). On 25 May 2023, the convening authority approved a request for deferment of reduction in rank and waiver of automatic forfeitures. (Action). The convening authority took no further action on the findings or the sentence. (Action).

Statement of Facts

On 8 and 9 July 2022, appellant sexually assaulted [redacted] without her consent. (Charge Sheet; R. at 599). The assaults occurred while the two were staying at an Airbnb near Louisville, Kentucky during a training exercise. (Charge Sheet; R. at 324–25). The first assault occurred on 8 July 2022 after [redacted] had become intoxicated, blacked out, and felt sick. (R. at 333–35). Although [redacted] admitted that she did not verbalize nonconsent, she recalled the

[1] "[T]o be confined four years; segmented as follows: For Specification 1 of Charge I, . . . four years; For Specification 3 of Charge I: . . . four years. All sentences will be served concurrently. (R. at 615).

sexual assault and stated that she did not consent to any sexual activities with appellant. (R. at 335, 347). The following night, on 9 July 2022, [redacted] was not intoxicated, and expressly stated she did not consent to any sexual activities. (R. at 339–40). After the sexual assaults, [redacted] confronted appellant and reported what happened to several friends and eventually the Criminal Investigation Division [CID]. (R. at 343, 346–47, 388, 408, 438–39).

1. Appellant and [redacted]'s relationship.

Appellant and [redacted] were in a dating relationship that had recently ended prior to the sexual assaults. (R. at 318–19). The two were medics in the same regiment at Fort Polk. (R. at 315–16). They met approximately two months prior to the sexual assaults at Cadet Summer Training [CST]. (R. at 315–16). Appellant was [redacted]'s senior medic and the two worked closely together before beginning a romantic relationship. (R. at 316). The relationship evolved into a romantic one in which the two engaged in consensual sexual encounters on two occasions. (R. at 318). At some point prior to the sexual assaults, the romantic relationship ended. (R. at 318–19). Despite ending the relationship, the two still spoke and appellant was still pursuing [redacted] romantically. (R. at 321–23).

2. The weekend.

On Friday 7 July 2022, Specialist [SPC] LJ contacted [redacted] and told her that she had forgotten her wallet at the barracks and asked [redacted] to bring it to

her. (R. at 324). Specialist LJ had booked an Airbnb with several other Soldiers, to include SPC JC, SPC RA, SPC DS. (R. at 325). [redacted] had a unit vehicle that she used to bring SPC LJ her wallet at the Airbnb. (R. at 324–25). Although [redacted] knew all the Soldiers, she was only friends with SPC LJ prior to this weekend. (R. at 325–26, 385). After bringing SPC LJ her wallet, the group invited [redacted] to stay at the Airbnb with them. (R. at 326). At some point, SPC RA received a text message from appellant stating that he wanted to join them at the Airbnb, but did not have a means of getting there. (R. at 326). [redacted] offered to pick him up and bring him to the house "because at the end of the day, they were more his friends than [hers]." (R. at 326).

[redacted] retrieved appellant from base and brought him to the Airbnb where they spent the night. (R. at 327). The group "hung out, . . . ate dinner together, watched a movie, [and] went to bed." (R. at 328). [redacted] did not drink any alcohol that night and fell asleep on the couch in the living room. (R. at 328). Appellant and SPC RA also slept in the living room on the floor. (R. at 329).

3. The day of the first sexual assault.

The following day, on Saturday 8 July 2022, [redacted] woke up and the group went to the store to buy alcoholic beverages. (R. at 330). At 1139, [redacted] texted appellant and asked him to get her Truly's, an alcoholic seltzer. (R. at 331).

A "little later after" the group returned to the house; they started drinking. (R. at 332). [redacted] recalls having two Truly's and one "margarita popsicle." (R. at 332). She recalled being "a lot more drunk than [she] should have been" because she had not had alcohol in a while. (R. at 332). Although she only recalled the two drinks and the alcoholic popsicle, she admits that its "possible" she drank more, but she cannot recall. (R. at 333). She recalls getting "really drunk" and not feeling well. (R. at 332). She went to the bathroom because she felt nauseous and sat "over the toilet for a little bit." (R. at 332).

At some point, someone came in and told her that she "should go lay down." (R. at 333). She was "helped over to the bedroom[,] laid down" but at "some point, went back over to the bathroom[.]" (R. at 333). [redacted] recalled feeling like everything was spinning, a little dizzy, stumbling around as [she] walked, [and] just felt very nauseous. (R. at 334). Eventually SPC JC brought her back to the bedroom, sat her up, and put a trash can between her legs. (R. at 333, 402). [redacted] fell asleep sitting up with the trash can between her legs. (R. at 333). Specialist RA originally told CID that he recalled her having five to six Truly alcoholic seltzers. (R. at 489). Specialist JC described her as "drunk" and "maybe a little more" drunk than the rest of the group. (R. at 402). At some point, SPC LJ and DS went out to dinner. (R. at 297). They

invited appellant, but he declined and stated, "he was staying [at the Airbnb] to make sure [redacted] didn't choke on her vomit." (R. at 297).

3. The first sexual assault.

The next thing [redacted] remembered was waking up and appellant "was sitting on the bed next to [her]." (R. at 335). She does not recall what was said and recalled only "snapshots" after that point. (R. at 335). She described herself as being "in and out of consciousness." (R. at 335). The next thing she remembered was appellant "flipped [her] over on [her] stomach and . . . was penetrating [her vagina with his penis]." (R. at 335–36). She was "mostly confused" and "still severely intoxicated." (R. at 336). [redacted] confirmed that she never consented to these sexual acts; of this, she had no doubt in her mind. (R. at 347). At first, she was "in denial" and "just wanted to move on." (R. at 337). She woke up, still felt a little drunk, but much more coherent, and ate dinner. (R. at 337). After dinner, [redacted] and appellant fell asleep in the same bed. (R. at 338).

4. The second sexual assault.

The following morning, Sunday 9 July 2022, [redacted] awoke to appellant "trying to make moves on [her], . . . trying to kiss [her] and [her] "pushing away." (R. at 338). She told him that she "didn't want to have sex with [him]" and he responded, "well, 'I'm not going to rape you." (R. at 339). Appellant then

proceeded to "flip [her] on [her] back and rape [her]." (R. at 339). [redacted] was dismissive, pushing appellant away, and not receptive at all. (R. at 339). He flipped her over on her back, took off her leggings and proceeded to penetrate her vagina with his penis. (R. at 339–41). She felt scared, confused, and angry. (R. at 340). She recalled that he was expressionless, made no sounds, and did not talk; and described him as "stone faced" during the sexual assault. (R. at 340). After the sexual assault, [redacted] cleaned herself up and helped the group clean up so they could check out of the Airbnb. (R. at 342).

5. The aftermath.

The group left the Airbnb, picked up food, and went to a nature preserve. (R. at 342). Prior to going to the nature preserve, [redacted] dropped SPC JC off at the base. (R. at 388). During that ride, [redacted] told SPC JC what occurred with appellant. (R. at 388, 408). Specialist JC was upset by what [redacted] told him. (R. at 408). Although the rest of the group drank, [redacted] did not drink. (R. at 342). At the nature preserve, [redacted] confronted appellant to see what he would say. (R. at 343). She mentioned something along the lines of "I'm sorry if the sex was bad last night because I wasn't really coherent. I wasn't capable of interacting, I guess." (R. at 343). At that point, SPC RA interrupted the conversation. (R. at 343). [redacted] explained that she phrased her statement to appellant that way because at the time, she was still in "denial that it

was wrong" and she "felt guilty at that point and time." (R. at 344). She really wanted to see what he had to say about it[, and] if he would have said anything about it." (R. at 344).

Shortly thereafter, appellant pulled [redacted] aside again to speak with her privately. (R. at 344). Appellant told her he "hate[d] his wife" and wanted to be with her. (R. at 344). She "wasn't having it" and tried to walk away, but he grabbed her to pull her back towards him. (R. at 344). The group saw the confrontation and intervened, separating appellant from [redacted] (R. at 344). At this point, [redacted] told SPC LJ (the only other female there) what occurred. SPC LJ "pointed out to [her]" what happened "was wrong." (R. at 344). Appellant proceeded to become severely intoxicated and laid down in the street. (R. at 345). Appellant again tried to confront [redacted] grabbed her by her face, and was again separated from her by his friends. (R. at 345). He eventually began vomiting, crying, and called his wife. (R. at 345).

After this incident, appellant called [redacted] "nonstop" eventually resulting in her blocking his number. (R. at 346). After that weekend she had a military protective order put in place. (R. at 346). On 19 July 2022, [redacted] reported the incident to CID. (R. at 346).

Assignment of Error I

WHETHER THE MILITARY ERRED BY DENYING THE DEFENSE MOTION FOR A CONTINUANCE.

Additional Facts

On 19 April 2023, the government informed trial defense counsel about two new investigations into [redacted] (App. Ex. XIII, p. 1). One investigation involved an inappropriate relationship with [redacted] and the other was for improper use of medical equipment and dereliction of duty. (App. Ex. XIII, p. 1). Defense knew the names of the individuals associated with the investigation and the name of the investigating officer by 23 April 2023. (App. Ex. XIII, p. 1). On 24 April 2023, defense informed the court and the government it was conducting its own investigation and requested a continuance. (App. Ex. XIII, p. 1). Regarding the dereliction of duty, the allegations were that [redacted] and several members of the unit had drawn blood from each other, wiped it on each other and a totem pole in the woods. (App. Ex. XIII, p. 2).

The inappropriate relationship investigation centered around PFC KK's alleged romantic relationship from 21 March to 3 April 2023 with another married Soldier, [redacted] (App. Ex. XIII, p. 2). Defense stated that they had limited information about the alleged incident, however, there was a distinct possibility that evidence might be unearthed that impacts the trial. (App. Ex. XIII, p. 3).

The parties litigated the motion to continue the trial on 25 April 2023. (R. at 59). Defense, largely resting on their brief, stated "I don't have too much more to add . . . we don't know exactly what we don't know." (R. at 60). The military judge pointed out that the investigations do not "involve honesty or truthfulness . . . or anything like that[,]" while also pointing out that the timeline of the alleged misconduct did not overlap with the allegations in the criminal trial. (R. at 61). The military judge asked, assuming the inappropriate relationship investigation is founded, how would it be admissible under M.R.E. 412? (R. at 61). Defense proffered that if she made statements about the incident and lied, then that would be admissible. (R. at 62). The military judge flagged this as "pure speculation" about what may occur at a future date. (R. at 62).

Defense continued to focus on what the investigation "could unearth" but failed to articulate how the allegations were relevant to appellant's court-martial. (R. at 62). When pushed on this topic, defense counsel again relied generally on the principle that the investigation could unearth relevant credibility evidence related to the victim. (R. at 62–63). Defense further asserted that an inappropriate relationship with a married Soldier is "conspicuously similar to the situation we're dealing with here." (R. at 63). Other than that comparison, defense counsel admitted he was "delving into the realm of speculation." (R. at 64). The military judge again stated,

> What I'm looking at is based upon the facts[,] to speculate there could be a false official statement. Well, there always could be some future false official statement. That's not what the IO is currently investigating. The IO is investigating whether or not there was an inappropriate relationship, that inappropriate relationship does not appear in any way shape or form to have been anywhere near the time of the alleged offenses. And so that inappropriate relationship would not be admissible even if it was founded.

(R. at 64–65). The military judge made similar statements regarding the dereliction of duty investigation, stating "nothing in the proffer set forth from the government would indicate things that go towards credibility which would be investigating her for truthfulness or for some type of something that goes to her character for honesty." (R. at 65). Defense counsel agreed that "[t]he facts we have before us, [] I admit that in and of themselves, they might not be admissible, but we don't know that." (R. at 65). Although the government agreed that the victim's credibility was clearly at issue in the trial, "there's absolutely no reason to believe either [of] these investigations deal with her credibility." (R. at 68).

After reviewing the appointment orders, defense proffered that the dereliction of duty investigation could represent either "hazing or larceny" and that larceny could go to the witness's character for truthfulness. (R. at 79–80). Defense also asserted that the investigation into the inappropriate relationship could have been going on for much longer and overlapped with appellant's alleged crimes. (R. at 80).

The military judge withheld her ruling until she and defense had an opportunity to look at the appointment orders, but ultimately denied defense's motion in an oral ruling on the record. (R. at 70). In her oral ruling, the military judge recited the facts as presently cited by the parties. (R. at 81–82). The military judge reflected on the standard as described under Article 60, Uniform Code of Military Justice [UCMJ]. (R. at 82). She then relied on *United States v. Miller*, and went through the factors she should consider. (R. at 83). After concluding that defense was timely in their request, she also found that:

> even taken the defense's argument . . . the court does concur the alleged victim's credibility is always at issue, but even look at these allegations and even if they were to be substantiated, first, regarding the inappropriate relationship, the court does not find that they would be relevant to the alleged victim's credibility and that particular evidence would be prohibited under MRE 412. There is no evidence to indicate that that relationship occurred at the time of the alleged offenses. Everything indicates that this occurred after the alleged offenses.
>
> The second allegation even if it were true, even taken in consideration, the specific finding of whether or not she violated her ethics still really does not go towards honesty or trustworthiness. Substitute testimony or evidence does not apply here because the evidence the court is finding is not relevant to the alleged victim's credibility or to the charged offenses. . . . I also find that there would not be a possible impact on the verdict. . . . The defense's motion for a continuance is denied.

(R. at 83–84).

When asked specifically about the allegation of larceny, the military judge stated:

> They're [the investigative officer appointing authority] asking whether or not her drawing the blood is considered larceny and that would not – and regarding the ethics, again, that would be ethics of a medic going to dereliction of duty. Did she improperly draw the blood? Not necessarily was she lying, is she an untruthful person. So that is why I find that it would not go towards the credibility that is allowed under 608."

(R. at 84–85).

Standard of Review

This court "review[s] a military judge's decision to deny a motion for a continuance . . . for an abuse of discretion. *United States v. Jacinto*, 81 M.J. 350, 353 (C.A.A.F. 2021) (citing *United States v. Brownfield*, 52 M.J. 40, 44 (C.A.A.F. 1999). The military judge clearly errs "when there is no evidence to support the finding, or . . . although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.*

Law

1. Continuances.

"The factors used to determine whether a military judge abused his or her discretion by denying a continuance include 'surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of

reasonable diligence by moving party, possible impact on verdict, and prior notice.'" *United States v. Miller*, 47 M.J. 352, 358 (1997).

2. Specific instances of alleged misconduct.

"A military judge has broad discretion regarding admissibility of impeachment evidence." *United States v. Miller*, 48 M.J. 49, 55 (C.A.A.F. 1998) (citing *United States v. Sitton*, 39 M.J. 307, 310 (CMA 1994)). A "sparse offer of proof" regarding "tangential" misconduct that is not temporally or otherwise directly linked to the charged offenses offered as "general evidence on [] credibility" is usually not "necessary for a fair determination of the issue of guilt or innocence." *Id.* (citing Mil. R. Evid. 609(d)). "Except for a criminal conviction under Mil. R. Evid. 609, extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." Mil. R. Evid. 608(b). A military judge may, on cross examination, allow them to be inquired into if they are probative of the character for truthfulness of [] the witness; or . . . [evidence of] bias, prejudice, or any motive to misrepresent . . . ." Mil. R. Evid. 608(b)(2), (c).

3. Mil. R. Evid. 412 evidence.

Evidence of a victim's past sexual behavior is generally not admissible unless the evidence falls into one of two narrowly defined exceptions or is constitutionally required to be admitted, and only after procedural requirements

including notice and offer of proof are met. Mil. R. Evid. 412(b) and (c). Upon determination that the offered evidence fits one of the rule's exceptions, is relevant, and the probative value of such evidence outweighs the danger of unfair prejudice, the evidence is admissible to the extent that the military judge specifies. Mil. R. Evid. 412(c)(3).

Argument

The military judge did not abuse her discretion in finding that the proffered evidence was inadmissible. Because the evidence was inadmissible, the military judge did not abuse her discretion in denying defense's motion for a continuance.

This court can rely on two dispositive factors when determining that the military judge did not abuse her discretion in denying defense's motion: 1) the nature of the evidence, and 2) the prejudice to appellant. *Miller*, 47 M.J. at 358. Here, the military judge properly reasoned that even when accepting the allegations against the victim as true, they were not admissible. The military judge properly exercised her "broad discretion" when determining the admissibility of impeachment evidence. Her finding that the evidence was not related to the charged offenses and were not related to her character for truthfulness was supported by the evidence in the record and not based on a clearly erroneous view of the law. Defense's proffer as to the relevancy of the evidence was unconvincing.

Evidence that the victim allegedly engaged in an inappropriate relationship with a married Soldier nearly one year after the sexual assault is not relevant to her character for truthfulness, nor does is show any bias or motive to fabricate the allegations against appellant. Evidence that the victim allegedly misused medical equipment or engaged in a hazing ritual is similarly not relevant. Although this evidence, if true, may have shown poor judgment, it did not reflect on her character for truthfulness and was in no way related to her allegations against appellant. There is no evidence that the alleged misconduct was discovered until long after her allegations against appellant. The evidence does not support any suggestion that she made the allegations to avoid responsibility for her own conduct. Defense's argument that the investigation may show that the victim lied or was untruthful was purely speculative and based on a chain of events that may occur at a later date.

Assignment of Error II

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1, CHARGE I IS SUFFICIENT IN LIGHT OF *UNITED STATES V. MENDOZA.*

Assignment of Error III

EVEN IF SUFFICIENT UNDER *MENDOZA*, WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1, CHARGE I IS FACTUALLY SUFFICIENT BECAUSE EVIDENCE OF PFC KK'S INTOXICATION FAILS TO MEET THE BURDEN OF PROOF REQUIRED TO SHOW LACK OF CONSENT AND THERE WAS EVIDENCE OF

BOTH CONSENT AND REASONABLE MISTAKE OF FACT AS TO CONSENT.

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).

This court does not have the "duty, and power, to review a conviction for factual sufficiency *absent* an appellant (1) asserting an assignment of error, and (2) showing a specific deficiency in proof.'" *United States v. Harvey*, 83 M.J. 127, 130 (C.A.A.F. 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. 10 U.S.C. § 866(d)(1)(B) (Supp. III 2019-2022). "[T]he degree of deference will depend on the nature of the evidence at issue." *Harvey*, 83 M.J. at 130.

Law

1. *United States v. Mendoza*.

In *United States v. Mendoza*, __M.J.__, 2024 CAAF LEXIS 590, *3–4 (C.A.A.F. 7 Oct. 2024), the CAAF held that the government could not charge an appellant with sexual assault without consent but meet its burden of proof by presenting evidence that a victim was incapable of consenting. By charging only

one theory but presenting evidence of a different theory, "raises significant due process concerns." *Id.* at *3.

To avoid these concerns, the CAAF held that the two offenses establish two separate theories of liability. *Id.* at *17. While incapacity due to an intoxicant criminalizes sexual acts upon a victim who is incapable of consenting, sexual assault without consent criminalizes sexual acts "upon a victim who is capable of consenting but does not." *Id.* However, the CAAF also expressly endorsed the government's ability to charge in the alternative when the facts of a case incorporate the possibility of both criminal theories of liability, stating "[o]f course, nothing prevents the Government from charging a defendant with both offenses under inconsistent factual theories and allowing the trier of fact to determine whether the victim was capable or incapable of consenting. *Id.* at *18 (citing *United Staes v. Elespuru*, 73 M.J. 326, 330 (C.A.A.F. 2014) (recognizing that the "complexity of Article 120, UCMJ, . . . make[s] charging in the alternative an unexceptional and often prudent decision"). In other words, often the finder of fact is best positioned to receive the evidence, weigh it, and determine an accused's theory of criminal liability based on the presentation of evidence.

2. Legal sufficiency.

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.

3. Factual sufficiency.

Once an appellant has asserted an assignment of error, and shown a specific deficiency in proof, this court will weigh the evidence. *Harvey*, 85 M.J. at 131. The court's analysis is subject to giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." *Id*. Generally, this may mean heightened deference to the trial court's assessment of the testimony of a fact witness, whose credibility was at issue, because the trial court had the opportunity see the witness testify. *Id*. In *Harvey*, the CAAF held that the quantum of evidence required remains unchanged, and thus this court must find, after giving appropriate deference to the trier of fact, that the evidence supports a conviction beyond a reasonable doubt. 85 M.J. at 131–32. However, Congress added, and the CAAF agreed, that this court must be "clearly convinced" when finding that the evidence *does not* support a finding of guilt beyond a reasonable doubt. *Id.* at 132.

Argument

1. The evidence as presented to the finder of fact did not raise any due process concerns in light of *United States v. Mendoza*.

In *Mendoza*, the CAAF "express[ed] no view on whether the evidence is factually or legally sufficient to support Appellant's conviction . . . ." 2024 CAAF LEXIS 590, at *23. In fact, the Court highlighted the "significant circumstantial evidence" presented. *Id.* at *19. Rather, the Court highlighted the "significant due process concerns" the government caused by only charging one theory of criminal liability but arguing a different theory of criminal liability. *Id.* at *19–20. Here, no similar concerns exist or are raised by appellant because 1) he was charged in the alternative, and 2) the victim recalled the sexual assault and stated that she had no doubt that she did not consent to the sexual acts. (Charge Sheet; R. at 347).

Additionally, the fact finder properly considered evidence of the victim's intoxication. As the CAAF expressly stated, "[t]o 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. Nothing in the article bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent." *Id.* at *22 (citations omitted).

Here, the government put forth substantial evidence regarding the victim's level of intoxication, to include her testimony, eyewitness testimony, and

appellant's admissions regarding his knowledge of her intoxication. (R. at 297, 332–36, 402, 485, 489). This evidence was properly considered as part of the surrounding circumstances that suggested she did not consent to sexual activities with appellant. Afterall, someone who is feeling nauseous, dizzy, and falls asleep sitting up with a trash can between their legs is far less likely to consent. *See United States v. Mendoza*, 2025 CCA LEXIS 294,*5-6 (Army Ct. Crim. App. 27 Jun. 2025) ("When we apply the CAAF's directive here, we again find the government's evidence sufficient. Like *Roe* and *Coe*, this case included *both* evidence of the victim's intoxication *and* other evidence of non-consent. While we recognize that our superior court held that it is insufficient to prove "without consent" by "merely" showing an incapacity to consent [] we find as a factual matter that is not what happened here.").

However, there was also evidence that she was capable of withholding consent, and that she did, in fact, do so. For example, although there were periods of the sexual assault she did not recall, she vividly remembered certain sexual acts with appellant, such as being "flipped over" on her stomach and penetrated. (R. at 335). Importantly, she stated that there was no doubt in her mind that she did not consent to those sexual acts. (R. at 347). In addition, the defense effectively cast reasonable doubt on the victim's intoxication level rising to a level in which she

was incapable of consenting. Specifically, her self-reported consumption of alcohol in conjunction with Dr. KF's expert testimony. (R. at 499).

The panel expressly found appellant not guilty of sexually assaulting the victim while she was incapable of consenting, dispelling any notion that he was convicted based on a misapplication of the law. However, the fact finder properly considered this evidence when determining whether the victim freely gave consent to the sexual acts. Article 120(g)(7)(C) ("All the surrounding circumstances are to be considered in determining whether a person gave consent.").

A. Appellant's argument requiring affirmative evidence was expressly rejected by CAAF.

Appellant argues that "[w]ithout PFC KK's ability to testify to affirmative displays of non-consent . . ., the government was forced to rely solely on circumstantial evidence to prove that [redacted] did not consent." (Appellant's Br. 23–24). Appellant's argument mirrors the argument that CAAF expressly rejected in *Mendoza*. As the CAAF stated, "Article 120(b)(2)(A) does not require 'affirmative' evidence." *Mendoza*, CAAF LEXIS 590, at *10. "This Court has repeatedly held that the Government may meet its burden of proving an accused's guilt beyond a reasonable doubt with circumstantial evidence." *Id.* (expressly rejecting appellant's argument that the government must offer "at least a *single* fact related to affirmative non-consent in order to deem a conviction for sexual assault without consent legally sufficient").

Even setting aside CAAF's finding, here the government offered direct evidence that the victim did not consent. (R. at 347). Appellant's assertions that the victim did not physically resist him or flee the room after the sexual assault does not constitute consent. UCMJ art. 120(g)(7)(A) ("Lack of verbal or physical resistance does not constitute consent."). As the Air Force CCA found in *United States v. Rodela*, "[j]ust as a victim's lack of verbal or physical resistance does not constitute consent, . . . a victim's lack of verbal or physical resistance, without more, is not some evidence of a reasonable belief that consent has been obtained (or given)." 82 M.J. 521, 529 (A.F. Ct. Crim. App. 2021).

B. The government's argument during closing, assuming arguendo it was improper, had no impact on the findings.

To the extent that the government conflated the two theories of criminal liability in their closing argument, any alleged error was harmless beyond a reasonable doubt. The court can be confident in this finding because the panel was properly instructed, appellant was charged with both offenses in the alternative, and the panel acquitted appellant of sexually assaulting the victim while she was incapacitated due to alcohol. (Charge Sheet; R. at 591–94, 599).

During closing argument trial counsel argued that consent is "[a] freely given agreement to the conduct, which is the sexual act[,] by a competent person.

Someone who's able to go into that freely given agreement. Whe[n she]'s draped over the toilet, draped over a trashcan. She has no idea what's going on. And she told you she didn't consent. She told you she couldn't consent." (R. at 567–68). Trial counsel went on to state, "[s]he didn't consent. She never consented and she told you about it." (R. at 574).

To the extent that portions of this argument were improper, it had no impact on the findings. The panel's finding of not guilty on Specification 2 of Charge I shows that they properly considered the evidence and found that the victim, in fact, did not consent. (R. at 599).

2. The evidence was otherwise legally and factually sufficient.

To convict appellant of sexual assault without consent as alleged in Specification 1 of Charge I, the government was required to prove that: (1) appellant committed a sexual act upon the victim; and (2) he did so without her consent. Article 120(b)(2)(A), UCMJ.

In applying this test for legal sufficiency, reviewing courts must remember that "[f]indings may be based on direct or circumstantial evidence." R.C.M. 918(c). As the Supreme Court has explained: "Circumstantial evidence . . . is intrinsically no different from testimonial evidence . . . . [With] both, the jury must

use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, [an appellate court] can require no more." *Holland v. United States*, 348 U.S. 121, 140 (1954). Here, there is sufficient evidence that [redacted] did not consent to sexual acts with appellant on 8 July 2022.

The government may meet 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[.]"[2] In *United States v. Roe*, this court analyzed a strikingly similar fact pattern and affirmed. 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 Apr. 2022). The CAAF denied further review. 83 M.J. 83 (C.A.A.F. 2022).

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 that rationale, as stated supra, in *Mendoza*. 2024 CAAF LEXIS 590, at *22. Similar to this case, but dissimilar to *Mendoza*, "this is not a case where [this court has] to decide whether 'without consent' can be

[2] *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, *10 (Army Ct. Crim. App. Apr. 27, 2022) *rev. denied Roe*, 2022 CAAF LEXIS 770 (C.A.A.F. Oct. 31, 2022); *see also United States v. Coe*, ARMY 20220052, 2023 CCA LEXIS 354 (Army Ct. Crim. App. Aug. 17, 2023); *United States v. Flores*, 82 M.J. 737, 743–44 (C.G. Ct. Crim. App. 2022) *rev. denied Flores*, 2023 CAAF LEXIS 390 (C.A.A.F., Jun. 7, 2023); *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. Mar. 12, 2021); *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167 (N.M. Ct. Crim. App. Apr. 4, 2018) *rev denied Gomez*, 2018 CAAF LEXIS 557 (C.A.A.F., Aug. 22, 2018).

proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id.* at*17. Here, like in *Roe*, the government presented direct evidence that the victim recalled the sexual assault and had no doubt in her mind that she had not consented. (R. at 347).

A. Appellant's reasonable mistake of fact defense was disproven beyond a reasonable doubt.

Appellant alleges that "there was a reasonable mistake of fact as to consent due to an alleged "hand-job" and interactions [redacted] and appellant had before and after the sexual assault, and [] [redacted]'s actions texting for food immediately after instead of asking for help, repeatedly choosing to sit with Appellant to eat, cuddling Appellant in front of others, and then telling SPC [RA] she wanted to sleep with Appellant again that same day provide a fair and rationale hypothesis that she did consent." (Appellant's Br. 25).

Appellant relies on the victim's counterintuitive behavior, which she explained, and the panel rejected, as a reasonable mistake of fact as to consent. Additionally, although she did not immediately outcry, she did do so close in time to the sexual assault. "The totality of contemporaneous and non-contemporaneous circumstances surrounding [a victim's] statement overwhelmingly support the statement's reliability." *United States v. Cleveland*, ARMY 20170496, 2020 CCA LEXIS 483, *17 (Army Ct. Crim. App. 28 Dec. 2020). As [redacted] testified, she did not *immediately* outcry because she was "in denial" and still processing what

had occurred. (R. at 337). However, she was isolated with a group of people who were friends with appellant, only one other female, and outcried to multiple people shortly after the sexual assaults. She also confronted appellant at her first opportunity to speak with him alone after the second sexual assault. Additionally, appellant's emotional outbursts and aggressive behavior following her confrontations show consciousness of guilt.

Ultimately, [redacted] was in a vulnerable state when appellant sexually assaulted her on 8 July 2022. She was in an unfamiliar place, highly intoxicated, and felt sick. Appellant knew of her vulnerable state and offered to remain behind with the victim in order to ensure she did not "choke on her vomit." (R. at 297). The victim had recently ended her relationship with appellant, a fact he was acutely aware of, and was upset by. His decision to pursue her sexually only once she was in a vulnerable and compromised state disproves any reasonable mistake of fact as to consent—especially after knowing and confirming that the romantic relationship was over.

B. Special RA's testimony was not credible.

Specialist RA's testimony that he was "80 percent" positive he saw the victim performing sexual acts on appellant was not credible. (R. at 483). First, the government effectively crossed SPC RA on his bias through his relationship with appellant. (R. at 481). Second, SPC RA's original omission to CID contradicted

his belated claim that he saw this occur. (R. at 481–82). Third, SPC RA's degree of certainty of what he saw was contradicted by his prior statements under oath that he was certain he saw these acts occur. (R. at 483). The details of his account were also inconsistent—originally stating that he saw the victim holding appellant's "bare penis" but testifying at trial that he saw the victim fondling him over his shorts. (R. at 483–84). Lastly, SPC RA, by all accounts, was extremely intoxicated and passed out drunk immediately prior to his alleged witnessing of these events. (R. at 526–29). In that vein, he testified it was dark and he could only see "figments" of what was occurring. (R. at 461–62). In sum, his testimony was not credible, and to the extent that the panel did not outright reject his testimony, it certainly did not rise to the level to cast reasonable doubt on appellant's crimes.

"[R]easonable 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. Defense's case at trial focused on minor inconsistencies, counterintuitive victim behavior, and circumstantial evidence suggesting [redacted] was interested in appellant. (R. at 575, 577–79). The court-martial panel had the opportunity to consider these arguments *and* assess the in-court testimony of the witnesses. They rejected defense's theories and so should this court.

Assignment of Error IV

WHETHER DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO CONTACT AND PRESENT EVIDENCE FROM ESSENTIAL WITNESSES IN SENTENCING.

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021).

Law & Argument

Military courts evaluate ineffective assistance claims using the Supreme Court's framework from *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* "Under *Strickland*, an appellant bears the burden of demonstrating that (a) defense counsel's performance was deficient, and (b) this deficient performance was prejudicial." *Id.* (quoting *Strickland*, 466 U.S. at 687).

"With respect to the first prong of this test, courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors that were unreasonable under prevailing

professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted).

"[A]s to the second prong, a challenger must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *Captain*, 75 M.J. at 103. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 M.J. at 694. In other words, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Argument

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Captain*, 75 M.J. at 103. Adhering to the CAAF's guidance, this brief will presume that trial defense counsels' failure to put on sentencing witnesses was deficient. However, even assuming as much, appellant cannot prove a substantial impact on the sentence.

Appellant was convicted of sexually assaulting [redacted] without her consent on two separate occasions, once while she was highly intoxicated and again after

she had just told him, "No." Appellant faced a maximum punishment of sixty years confinement, trial counsel asked for twelve years confinement, and defense counsel asked for three to six months for each specification. Appellant was only sentenced to a total of four years confinement for two sexual assaults—an objectively light sentence. This sentence was far closer to defense counsel's request of six months to one year than to the government's proposed sentence of twelve years. The likelihood of a different result based on appellant's family members or leadership's testimony is not sufficient to undermine the result of the proceedings. In other words, the likelihood of a different result may be conceivable, but it is not substantial. For those reasons, this court should affirm the sentence.

Conclusion

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

ANTHONY J. SCARPATI
CPT, JA
Appellate Attorney, Government
Appellate Division

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

CERTIFICATE OF FILING AND SERVICE,

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on this 10 day of July 2025.

[redacted]K
Senior Paralegal Specialist
Government Appellate Division,
U.S. Army Legal Services Agency
Fort Belvoir, VA 22060