IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 202240592
Sergeant (E-5) **TRENT V. GOINES,** United States Army,	Appellant	Tried at Fort Riley, Kansas on 12 March, 31 July, 14 November, and 2–5 December 2024 before a general court-martial convened by Commander, 1st Infantry Division and Fort Riley, Colonel Scott Oravec and Colonel Alexander Pickands, Military Judges, presiding.

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

Assignment of Error I[1]

WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

Assignment of Error II

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY TRIAL COUNSEL'S ARGUMENTS ABOUT UNCHARGED THEORIES OF LIABILITY.

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

Assignment of Error III

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS WERE ERRONEOUS IN LIGHT OF UNITED STATES V. MENDOZA AND WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT.

Assignment of Error IV

CAN THIS COURT BE CONFIDENT APPELLANT WAS CONVICTED UNDER THE CHARGED THEORY?

Statement of the Case

On 5 December 2024, a general court-martial comprised of one-third enlisted members, convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice,[2] 10 U.S.C. § 920(b)(2)(A) [UCMJ]. (R. at 608; Statement of Trial Results [STR]). The military judge sentenced appellant to reduction to E-1, fifteen months confinement, and a dishonorable discharge. (R. at 664; STR). On 19 December 2024, the convening authority took no action on the findings and approved the sentence. (Action). The convening authority disapproved the waiver for automatic forfeitures. (Action). On 14 January 2025, the military judge entered judgment. (Judgment).

[2] All references to the UCMJ are to the versions in the Manual for Courts-Martial, United States (2019 ed.) [MCM] with the 2020 and 2021 National Defense Authorization Act Amendments.

Statement of Facts

Sergeant [redacted] ("the victim") and appellant served in the same support company. (R. at 215). In May of 2022, the victim met appellant during a port detail while the two were on rotation in Poland. (R. at 218, 220). Appellant and the victim were friends outside of work, but the victim was never romantically interested in appellant. (R. at 221). On more than one occasion, appellant would tell the victim that he had a crush on her and she would reply, "I can't reciprocate it. I don't feel the same way." (R. at 221–22, 237).

On 12 June 2022, a month into the port detail, appellant and the victim planned to get food after work with another male coworker. (R. at 222). Appellant, the victim, and the coworker first went to get pizza, then went to play pool, and ended their evening out at the beach. (R. at 224). At this point, the victim testified that she was intoxicated and that everyone in their party continued to drink. (R. at 224). After visiting the beach, the victim's next memories involved: 1) paying for a hotel room (the party was past curfew); 2) tapping her card to get into the room; 3) and the layout of the hotel room. (R. at 225–26). The victim also remembered taking a shower that night. (R. at 227).

After the shower, the victim put on a bra, underwear, and a zip-up oversized jacket that came down to her thighs. (R. at 227). The victim slept in one of the two hotel beds while appellant and the coworker shared the other bed. (R. at 228). She

slept under the covers facing the wall, with her back to the two men in the other bed. (R. at 228). During the night, she remembered a hand on her jacket. (R. at 228). The victim shoved the hand away, and deduced it was appellant's hand based on the skin tone. (R. at 230). During cross examination, the victim clarified that the room was dark, but she could feel appellant's hand over her and playing with the zipper at the top of her jacket. (R. at 275, 229).

The victim recalled additional instances that night where she felt/saw appellant's hand on her zipper, or instances where she felt his hand attempting to come up under her jacket by her legs. (R. at 230). The victim testified that she awoke multiple times that night feeling a hand on her body in the same manner (hand on zipper, hand trying to come up her jacket by her legs). (R. at 230–31). During cross-examination, the victim testified appellant only touched her jacket and no other piece of clothing. (R. at 262). At some point in the evening, the victim got out of bed, tired of being woken up, and slept on a nearby chair. (R. at 232).

A. Post-incident text exchange between appellant and the victim.

Soon after the offense, the victim took screenshots of a text exchange between her and appellant. (R. at 234; Pros. Ex. 3). The victim testified that appellant started off the text exchange stating he had a crush on her, but this was "nothing new to her" to her. (R. at 237). The victim rebuffed appellant's advances,

in the text exchange, "[] I can't reciprocate those feelings and I really like our friendship." (R. at 237, Pros. Ex. 3).

The next series of texts the victim did not screenshot, but testified they included appellant asking whether she remembered what happened the night in the hotel. (R. at 239). The captured screenshots of appellant's text is as follows: "Nothing really happened because you said no and you don't want to because you weren't comfortable. And I said okay I understand and apologized." (Pros. Ex. 3). When the victim received these text messages, she was under the impression appellant's response of "nothing really happened" meant activity in the hotel room that did not go past touching her. (R. at 240, 273).

B. The victim's redeployment.

When the victim first arrived back to the United States in July of 2022, she gained weight and missed her period. (R. at 243). By September of that year, she fell out of formation, and at the urging of her mother, went to the emergency room to get checked. (R. at 244). A urine test and blood work came back positive for pregnancy. (R. at 244–46). On 15 September 2022, the victim went to Kansas City for an abortion; at the clinic, the Planned Parenthood doctor preserved the fetal tissue that law enforcement later retrieved for testing. (R. at 293, 306; Pros. Ex. 10). On direct examination, the Planned Parenthood doctor testified that the ultrasound showed the pregnancy was fifteen weeks and six days gestation, dates

consistent with a conception date of 12 June 2022. (R. at 293–94). The government also presented evidence that appellant's DNA profile featured a high parentage percentage to the fetal tissue at issue (R. at 344–45; Pros. Ex. 8, 9). Through cross examination and their case in chief, defense presented multiple theories such as: the victim's pregnancy without penetration, the victim's consent, and the victim fabricating rape allegations to solve her own cognitive dissonance from the night of the assault. (R. at 296, 416, 507, 524). Additional facts are incorporated below.

Summary of the Argument

The government concedes that considering *United States v. Mendoza*, the military judge's instructions that a "sleeping, unconscious or incompetent person cannot consent" in this case was erroneous. 85 M.J. 213 (C.A.A.F. 2024). While the evidence supports a conviction under Article 120(b)(2)(A), the instructions permitted the panel to convict on uncharged theories of liability. (App. Ex. XXV). Because of the instructional error, this court cannot determine whether the panel convicted appellant under a charged "without consent" theory or under alternative theories of liability. As such, this court should remand for a new trial.

Assignment of Error III[3]

WHETHER THE MILITARY JUDGE'S INSTRUCTIONS WERE ERRONEOUS IN LIGHT OF UNITED STATES V. MENDOZA AND

[3] For the purposes of this brief, the government will begin with the structural errors outlined in Assignment of Error III.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT.

Additional Facts

The military judge instructed the panel on Article 120(b)(2)(B) language stating, "a sleeping person cannot consent." (R. at 556–57). The military judge also instructed on the definition of an "incompetent person," consistent with an Article 120(b)(3)(B) offense. (R. at 558). The defense did not object to the military judge's instructions. (R. at 556; App. Ex. XXVII). The appellant was only on notice of one charged theory, sexual assault without consent under Article 120(b)(2)(A). (Charge Sheet).

Standard of Review

Whether a military judge properly instructed a panel is a question of law that is reviewed de novo. *United States v. Quezada*, 82 M.J. 54, 57 (C.A.A.F. 2021) (citations omitted). Instructional error (as to the elements of a crime) is tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Tovarchavez*, 78 M.J. 458, 463 (C.A.A.F. 2019) (citing *United States v. Payne*, 73 M.J. 19, 24-26 (C.A.A.F. 2014)). Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015); *United States v. Captain*, 75 M.J. 99 (C.A.A.F. 2016).

Law

A. The government's charging decision and *Mendoza*.

In *Mendoza*, the Court of Appeals for the Armed Forces [CAAF] held that Article 120(b)(2)(A) and Article 120(b)(3)(A) "establish separate theories of liability." 85 M.J. at 220. Subsection (b)(2)(A) "criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent," while subsection (b)(3)(A) "criminalizes the performance of a sexual act upon a victim who is incapable of consenting." *Id*. Applying *Mendoza*, the Navy-Marine Corps Court of Criminal Appeals held in *Grafton* that instructing members in the context of an Article 120(b)(2)(A) charge—that "a sleeping, unconscious, or incompetent person cannot consent," was error. No. 202400055, 2025 CCA LEXIS 375 (N.-M. Ct. Crim. App. 11 Aug. 2025)(unpublished), *cert. filed*, (C.A.A.F. 20 Nov. 2025). At the heart of these procedural protections lies the constitutional requirement of fair notice, that an accused know precisely what offense and legal theory form the basis of his prosecution. *United States v. Wells*, 85 M.J. 154, 158 (C.A.A.F. 2024) (citing *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)).

B. Ineffective assistance of counsel claims.

The Sixth Amendment of the United States Constitution guarantees than an accused shall have the assistance of counsel for his defense in all criminal prosecutions. U.S. Const. amend. VI. In 1984, the Supreme Court set out a two-part test—applicable to trials by courts-martial—to determine whether a counsel's

performance fell short of this guarantee. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987).

To prevail on an ineffective assistance of counsel claim, appellant must show: 1) that his counsel's performance was so deficient that he was not "functioning as the 'counsel' guaranteed by the Sixth Amendment;" 2) and the deficient performance prejudiced appellant such that he was deprived of a fair trial—one with an "unreliable result." *Strickland*, 466 U.S. at 687, 691. Courts need not apply the *Strickland* test in any particular order; rather, "[i]f 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 (citing *Strickland*, 466 U.S. at 697); *see United States v. Datavs*, 71 M.J. 420, 421 (C.A.A.F. 2012); *see also Scott*, 81 M.J. at 85.

In evaluating performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Captain*, 75 M.J. at 103 (C.A.A.F. 2016) *(*quoting *Strickland*, 466 U.S. at 689, 694). This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001) (citations omitted). Appellant must show that "counsel's representation fell below an objective standard of reasonableness" to demonstrate deficiency. *Strickland*, 466 U.S. at 688.

Further, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690. For example, while defense counsel would normally be expected to introduce potentially exculpatory evidence, their performance is not deficient when a tactical reason cautions against admission. *United States v. McIntosh*, 74 M.J. 294, 296 (C.A.A.F. 2015) (citations omitted).

Even where counsel has committed an unreasonable error, it "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. Appellant must "affirmatively prove prejudice." *Id*. at 693. This means appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, 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 U.S. 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). This requires consideration of "the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In short, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id.* at 687.

Counsel has "wide latitude" in tactical decisions, receiving a high level of deference. *Strickland*, 466 U.S. at 689. In analyzing ineffective assistance claims under *Strickland*, this court asks three questions:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's action in the defense of the case?
>
> 2. If they are true, did the level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers?
>
> 3. If ineffective assistance of counsel is found to exist, is there a reasonable probability that, absent the errors, the factfinder would have reasonable doubt respecting guilt?

United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

To establish prejudice, the appellant must demonstrate a "reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." *Scott*, 81 M.J. at 86 (quoting *Strickland*, 466 U.S. at 694).

C. Remedy.

Dismissal is a drastic remedy, and courts must first consider whether alternative remedies are available. *United States v. Shelby*, 85 M.J. 292, 294 (C.A.A.F. 2024) (citations omitted). When an error can be rendered harmless,

dismissal is not an appropriate remedy." *Id*; *see United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (finding dismissal appropriate only "when an accused would be prejudiced or no useful purpose would be served by continuing proceedings.").

When the record reveals that the lower court misunderstood or misapplied the law, the appropriate remedy is remand for review under correct legal principles—not dismissal. *United States v. Harvey*, 85 M.J. 127, 129 (C.A.A.F. 2024) (quoting *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022).

Argument

Here, the government charged Article 120(b)(2)(A), a "without consent" theory of criminal liability. (Charge Sheet). The military judge's instructions, which informed the panel that "a sleeping, unconscious, or incompetent person, cannot consent," permitted the panel to convict appellant on an uncharged theory of liability. (App. Ex. XXV). The government acknowledges this was error. The government respectfully submits the appropriate remedy is not dismissal, but remand for further proceedings with correct panel instructions.

A. This court should remand for a new trial.

Here, a rehearing is appropriate because while neither the panel nor this court can determine with confidence whether the panel convicted appellant under the charged theory or an uncharged theory (sleeping, unconscious, otherwise unaware, impaired by an intoxicant, etc.), the evidence does support the charged

theory. A rehearing will permit a properly instructed panel to evaluate the evidence under the correct legal framework.

Appellant cites an unpublished Air Force decision where the CCA affirmed the conviction as legally sufficient.[4] (Appellant's Br. 14 n.3). In *Hennesy*, the CCA found a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt because the victim's conduct—pulling away, later feigning sleep to stop the assault, fleeing, and immediately reporting—demonstrated non-consent. No. ACM 40439, 2024 CCA LEXIS 503 at *10-11. Here, the victim took similar actions to indicate non-consent, including moving appellant's hand away from herself and getting up to sleep in a nearby couch. (R. at 230–31). What is missing in this case is not proof, but proper panel instructions.

Ultimately, the interests of justice favor rehearing rather than dismissal. The government requests this court authorize a rehearing and permit the convening authority to refer properly charged specifications under Article 120(b)(2)(B) and (b)(3)(A).

B. Defense counsel was not ineffective.

To the extent this court considers the ineffective assistance of counsel claim,

[4] *United States v. Hennessy*, No. ACM 40439, 2024 CCA LEXIS 503 (A.F. Ct. Crim. App. 25 Nov. 2024) (unpublished), *review granted*, 2025 CAAF LEXIS 225 (C.A.A.F. 11 Mar. 2025).

this court should find no prejudice. *Captain*, 75 M.J. at 103. To establish prejudice, appellant must demonstrate "a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different." *Scott*, 81 M.J. at 86 (quoting *Strickland*, 466 U.S. at 694). Appellant cannot make that showing.

The evidence of non-consent independent of any incapacity theory was substantial. The victim told appellant she did not reciprocate his romantic interest. (R. at 221–22, 237). She testified she awoke to his touch and pushed his hand away. (R. at 230). Appellant's own text message—sent shortly after the assault—acknowledged she said "no." (Pros. Ex. 3). This is precisely the conduct Article 120(g)(7) and (g)(8) contemplates.

Appellant's ineffective assistance of counsel claim ultimately rests on speculation about the panel deliberation room, but speculation is insufficient to establish prejudice. *United States v. Bess*, 80 M.J. 1, 10 (C.A.A.F. 2019) (declining to order a DuBay hearing where claims "rested on pure speculation."). Further, because the panel instruction was error, whether the trial defense counsel was ineffective is moot.

The government concedes the military judge's instructions were erroneous under *Mendoza*. The government respectfully requests that this court set aside the findings and sentence and authorize a rehearing.

Assignment of Error I

WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

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) (quoting *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014)). Regarding factual sufficiency, only if appellant has made such a showing—assertion of error and showing of deficiency—may the court weigh the evidence and determine controverted questions of fact. UCMJ art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130.[5] Further, this court's assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

A. Legal Sufficiency.

[5] "Although it was long settled that the service courts applied a 'de novo' standard of review under the earlier versions of Article 66(d), UCMJ . . . the proper label for the standard of review under the newly amended Article 66(d)(1)B), UCMJ, is more difficult to describe . . . Although this Court explained how the new standard should be construed and applied in *Harvey,* we declined to place a label on it, neither endorsing nor rejecting the continued use of the phrase 'de novo' to describe the standard of review." *United States v. Downum,* __ M.J. __, *10-*11 (C.A.A.F. 2025).

The standard for legal sufficiency involves a very low threshold to sustain a conviction. *See United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019); *see also United States v. Long*, 81 M.J. 362, 367 (C.A.A.F. 2021). 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).

This standard gives full play to the factfinder's responsibility to resolve "conflicts in testimony, weigh evidence, and draw reasonable inferences form basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Importantly, the government may meet its burden of proving an accused's guilt beyond a reasonable doubt with circumstantial evidence. *Long*, 81 M.J. at 368. The legal sufficiency standard impinges upon jury discretion "only to the extent necessary to guarantee the fundamental protection of due process." *Jackson*, 443 U.S. at 319.

B. Factual Sufficiency.

Regarding 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 only if appellant makes a specific showing of a deficiency in proof. *See* UCMJ, art. 66(d)(1)(B); *see also Harvey*, 85 M.J. at 130; *see generally* Pub. L. No. 116-283,

134 Stat. 3611-12. Only if appellant has made such a showing—assertion of error and showing of deficiency—may the court weigh the evidence and determine controverted questions of fact. *See* UCMJ, art. 66(d)(1)(B); *Harvey*, 85 M.J. at 130.

In weighing the evidence, this court affords "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence[] [.]" UCMJ art. 66(d)(1)(B). "Appropriate deference" will depend on the nature of the evidence at issue. *Harvey*, 85 M.J. at 130. "For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify." *Id*. at 132.

If the CCA is clearly convinced that the finding of guilty was against the weight of the evidence, the CCA may dismiss, set aside, or modify the finding, or affirm a lesser finding. UCMJ, art. 66(d)(1)(B). Here, 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; (ii) and of the correctness of this decision. *Harvey*, 85 M.J. at 132.

C. Article 120(b)(2)(A).

It is a violation of Article 120(b)(2)(A), UCMJ for a person to commit a sexual act upon another person without the consent of the other person. "Sexual

Act" means, in relevant part, penetration, however slight, of the penis into the vulva. UCMJ art. 120(g)(1)(A). "Consent" means a freely given agreement to the conduct at issue by a competent person. UCMJ art. 120(g)(7)(A). An expression of lack of consent through words or conduct means there is no consent. *Id.* All the surrounding circumstances are to be considered in determining whether a person gave consent. UCMJ art. 120(g)(7)-(8).

Argument

Although the government concedes instructional error and requests a remand, the government submits that the evidence, when properly considered under the correct legal framework, supports a conviction.

A. The evidence is legally sufficient.

Appellant's legal sufficiency challenge fails. Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could find each element of the offense beyond a reasonable doubt. Appellant challenges whether the charged sexual act—penile penetration of the vulva—occurred and whether the victim's incapacity made her incapable to consent. (Appellant's Br. 11–15).

The victim became pregnant. (R. at 244–46). The Planned Parenthood doctor preserved the fetal tissue, which the lead special agent submitted for DNA analysis. (R. at 293, 307). The analysis established appellant's DNA profile presented a high parentage percentage to the fetal tissue. (R. at 344–45; Pros. Ex.

8, 9). Legal sufficiency is assessed based on the evidence presented and viewed in the light most favorable to the prosecution. *King*, 78 M.J. at 221. The evidence here (pregnancy, high DNA parentage percentage), permits only one rational inference: appellant penetrated the victim's vulva with his penis.

Secondly, the victim's testimony establishes non-consent through multiple independent sources. When appellant expressed romantic interest in the victim, the victim told him she did not reciprocate his feelings. (R. at 237; Pros. Ex. 3). The victim also testified he woke up to appellant's touch and pushed his hand away. (R. at 230). This is precisely the conduct contemplated by Article 120(g)(7)(A) and 120(g)(8)—a person demonstrating lack of consent through words and actions considering all the surrounding circumstances.

B. Appellant's "incapacity possibility" misunderstands legal sufficiency.

Appellant argues the evidence cannot be legally sufficient because it does not exclude the possibility of incapacity. (Appellant's Br. at 12). However, legal sufficiency does not require the government to disprove alternative theories. The level of inquiry is whether the evidence, viewed favorably to the prosecution, permits a rational factfinder to find the charged elements. *King*, 78 M.J. at 221. The victim testified she woke up, felt appellant's touch, pushed his hand away—and through appellant's own statements—she said no. (R. at 228–30; Pros. Ex. 3). Viewed in the light most favorable to the government, a rational factfinder could

conclude that a sexual act occurred without the victim's consent.

C. Mendoza does not change the legal sufficiency analysis.

Mendoza held that the government cannot prove "without consent" solely by proving incapacity. 85 M.J. at 220. It did not hold that evidence of incapacity negates otherwise sufficient evidence of non-consent. Indeed, CAAF expressly stated that "nothing in this opinion bars the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented." *Id*. at 217.

Here, the government presented independent evidence of non-consent: prior rejection, physical actions, verbal refusal (through the appellant's own text message), and flight. Intoxication is a surrounding circumstance that explains the victim's incomplete memory, but the evidence of non-consent stands on its own and is legally sufficient in the light most favorable to the prosecution.

D. Appellant has not made the threshold factual sufficiency showing.

Appellant's factual sufficiency argument does not provide a specific showing of deficiency in proof. Rather, appellant argues that the evidence does not "exclude" incapacity or "disprove" alternative theories. (Appellant's Br. 11–15). That is not a deficiency in proof—that is a request for this court to reweigh the evidence and draw different inferences.

Even assuming arguendo appellant made the threshold showing, the

evidence nevertheless shows appellant's guilt beyond a reasonable doubt. Through both direct and cross examination of the Planned Parenthood doctor, appellant argues that the victim could have gotten pregnant by some other means. (Appellant's Br. at 15; R. at 294–96). But this is not persuasive when juxtaposed with DNA evidence. The victim testified she consistently rejected appellant's romantic advances, including on the night in question, and when she redeployed, she found out she was pregnant. (R. at 220–21, 230, 245). DNA analysis of the preserved fetal tissue established a high percentage appellant was the biological father. (R. at 344–45).

In addition to the DNA evidence, this court owes high deference to the fact that the panel heard the victim testify, observed her demeanor, and weighed her credibility.[6] The evidence, properly weighed and with appropriate deference, establishes both penetration and non-consent beyond a reasonable doubt, satisfying factual sufficiency.

Assignment of Error II[7]

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY TRIAL

[6] "The deference given to the trial court's ability to see and hear the witnesses and evidence…reflects an appreciation that much is lost when the testimony of the live witnesses is converted into the plain text of a trial transcript[.]" *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127 at *11–12 (Army Ct. Crim. App. 29 Feb. 2016) (memo. op.), *aff'd* 76 M.J. 350 (C.A.A.F. 2017).

[7] Because AE II and AE IV address issues of notice, the government will address them together.

COUNSEL'S ARGUMENTS ABOUT UNCHARGED THEORIES OF LIABILITY.

Assignment of Error IV

CAN THIS COURT BE CONFIDENT APPELLANT WAS CONVICTED UNDER THE CHARGED THEORY?

Standard of Review

Whether an appellant received due process protections guaranteed by the Fifth Amendment is a question of law this court reviews de novo. *United States v. Oliver*, 756 M.J. 271, 273 (C.A.A.F. 2017); *see also United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (citing *United States v. Medina*, 66 M.J. 21, 26–27 (C.A.A.F. 2008)).

Law

The Fifth Amendment's Due Process Clause guarantees that an accused receives fair notice of the charges against him. *Jones*, 68 M.J. at 468; *see United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013); *see also United States v. Shafran*, 85 M.J. 420, 423 (C.A.A.F. 2025). This constitutional protection ensures that an accused knows precisely what offense and legal theory form the basis of his prosecution, enabling him to prepare an adequate defense. *Jones*, 68 M.J. at 468. 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).

To satisfy the due process requirements of the Fifth Amendment, the government must prove beyond a reasonable doubt every element of the charged offense. *United States v. Richard*, 82 M.J. 473, 479 (C.A.A.F. 2022) (citing *In re Winship*, 397 U.S. 358, 34 (1970)). The government cannot invite the factfinder to convict based on an uncharged theory.[8] *See In re Winship*, 397 U.S. at 364.

Argument

Although the government charged appellant with sexual assault under Article 120(b)(2)(A), trial counsel's closing argument invited the panel to convict on uncharged theories of incapacity. (R. at 597–98). Trial counsel explicitly disclaimed these theories while simultaneously arguing them:

> "[I]t's not the government's theory that she [] was passed out or blacked out or asleep. There's no real way to determine if that's what was happening. Our theory is that she did not consent. Our theory is that she said, no." (R. at 597)

Trial counsel next argued:

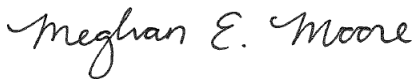
> "Dr. Brovko told you…[y]ou can be blackout drunk and have a full conversation…[a]gain we don't actually know and can't determine if she was blackout. We do know that she was tired. She could have been passed out. She could have been just really really tired." (R. at 598).

[8] "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilty with utmost certainty." *Id.*

The instructions compounded trial counsel's error. The military judge instructed the panel that "a sleeping, unconscious or incompetent person cannot consent"—language that permitted conviction on the very uncharged incapacity theories trial counsel argued. (App. Ex. XXV). When trial counsel argued "she could have been passed out" and the instructions told the panel that a sleeping or unconscious person cannot consent, the panel had an explicit roadmap to potentially convict on an uncharged theory. (R. at 598). For the reasons cited above, the appropriate remedy is a remand.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court set aside the findings and sentence and remand for a rehearing.



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CERTIFICATE OF SERVICE
UNITED STATES v. TRENT V. GOINES, ARMY 202240592

I 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 6 day of January 2026.

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