IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

SGT (E-5)
TRENT V. GOINES
United States Army

Appellant

Reply Brief on Behalf of Appellant

Docket No. ARMY 20240592

Tried at Fort Riley, Kansas on 12 March, 31 July, 14 November, and 2-5 December 2024 by a general court-martial convened by Commander, 1st Infantry Division, Colonel Scott Oravec and Colonel Alex Pickands, Military Judges, presiding.

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

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Panel No. 2

Argument

The defense maintains that the evidence is legally and factually insufficient where trial counsel conceded that various alternative hypotheses inconsistent with guilt were possible and could not be eliminated (A.E. I).

In the alternative, the government and defense agree that this Court cannot know whether the panel convicted on the charged theory of liability and that appellant's conviction cannot properly be affirmed because of this uncertainty (A.E.s II, III, and IV).

Appellant will first brief the issues where the parties find agreement and then the sufficiency of the evidence.

> **II. WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY TRIAL COUNSEL'S ARGUMENTS ABOUT UNCHARGED THEORIES OF LIABILITY.**
>
> **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.**
>
> **IV. CAN THIS COURT BE CONFIDENT APPELLANT WAS CONVICTED UNDER THE CHARGED THEORY?**

With regard to these three issues, the parties agree that trial counsel improperly argued uncharged theories of liability and the military judge's instructions erroneously permitted the panel to convict appellant on an uncharged

theory of liability. The synergy between these dual errors worsens the problem. *See* (Gov. Br. at 23) ("The instructions compounded trial counsel's error."). Individually and jointly, these circumstances create a situation where this Court cannot know whether appellant was convicted under the charged theory or an uncharged theory. *See* (Gov. Br. at 23) (noting that, due to the military judge's instructions and trial counsel's argument, "the panel had an explicit roadmap to potentially convict on an uncharged theory."). The parties agree that this Court cannot affirm appellant's conviction under these circumstances. While there is some divergence in the parties' analysis, there is more agreement than disagreement.

The government urges that a retrial should be authorized. *See, e.g.*, (Gov. Br. at 5). The general rule is that a retrial can be held when a charge is overturned on grounds other than the insufficiency of the evidence. *United States v. Scott*, 437 U.S. 82, 90-91 (1978). But appellant requests consideration of whether authorizing a rehearing would be proper under the unique circumstances of this case. For example, there is language in *United States v. Mendoza*, where CAAF seems to treat the due process violation that results from intermixing theories of liability as a subset of legal sufficiency. 85 M.J. 213 (C.A.A.F. 2024). The issue presented in that case was legal sufficiency. *Id.* at 217 ("We granted review to determine whether Appellant's conviction for sexual assault without consent was legally

sufficient."). But the thrust of the argument involved the intermixing of theories: "Appellant argues that his conviction was *legally insufficient* because the Government violated his due process rights by conflating two different theories of criminal liability. . . ." *Id.* (emphasis added). CAAF seemed to adopt this framing, as large portions of the opinion discussed the due process concerns that such conflation causes.[1] This case involves those same concerns. As such, overturning this case because of the intermixing of theories of liability that the government concedes may bar a retrial.[2]

I. WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

1. Specific showing of a deficiency in proof

The government argues that appellant has not made a specific showing of a deficiency in proof and, therefore, this Court should not conduct a factual

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[1] CAAF does not issue advisory opinions. *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024). And CAAF limits its review to the scope of issues before it. *United States v. Jacobsen*, 77 M.J. 81, 83 (C.A.A.F. 2017). As such, the fact that CAAF so thoroughly addressed these issues, when the granted issue was limited to legal sufficiency, suggests that CAAF agreed these considerations fell under the framework of legal sufficiency.

[2] Whether this analysis falls more squarely under these assignments of error or the legal sufficiency assignment of error is a difficult question, given the interconnectedness of all four. Perhaps that illustrates the point: these assignments of error cannot be so easily disconnected from legal sufficiency. Unlike CAAF, of course this Court's review is not cabined or limited by the scope of granted or certified issues.

sufficiency review at all. (Gov. Br. at 19). The specification at issue has two elements. *See* (R. at 555). Appellant contends that neither element was proven, that the evidence failed to preclude multiple reasonable alternatives inconsistent with guilt, and that the evidence failed to preclude the defense of mistake of fact as to consent. *See* (Appellant's Br. at 11-16). These are significant deficiencies and this Court should find them more than sufficient to trigger factual sufficiency review.

2. Appropriate deference

The government argues the "new" Article 66's "appropriate deference" language should factor in its favor. (Gov. Br. at 20). In particular, the government argues that "high deference" is appropriate with respect to the victim's testimony, because the panel was able to see and hear her testimony and weigh her credibility. (Gov. Br. at 20).

Appellant would ordinarily agree that higher deference may be appropriate for witness testimony. *See United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024) ("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."). However, given the specific dynamics of this case, this Court may find deference inappropriate with respect to the questions surrounding the sufficiency

of proof of the charged theory of liability – and the corresponding exclusion of the uncharged theories. *See* (Appellant's Br. at 11-15). As the government acknowledges, "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 cannot defer to the panel's conclusion on this issue because it cannot even know what conclusion the panel reached. Under these unique circumstances, this Court should find that the appropriate level of deference is very low or nonexistent, at least with respect to these questions.

3. Factual insufficiency

Assuming factual sufficiency is triggered, the government argues the evidence was sufficient to prove the uncharged theory beyond a reasonable doubt (despite the concession that this Court cannot know whether the panel actually reached that conclusion).[3] (Gov. Br. at 19-20).

But it is hard to reconcile this conclusion with the government's repeated assertions at trial that the victim could have been incapacitated or blacked out. *See* (R. at 597) (Trial Counsel in reference to the possibility of incapacity: "There's no real way to determine if that's what was happening."); (R. at 598) ("She could

[3] To be clear, appellant does not view the government's position here as contradictory. It is very possible that the government can present sufficient evidence, but the record can still fail to show that appellant was convicted under the proper legal standard.

have been passed out."); (R. at 598) ("Again, we don't actually know and can't determine if she was in a blackout.").

A classic formulation of reasonable doubt is the failure to exclude reasonable alternative possibilities. *See, e.g.*, *United States v. O'Neal*, 2 C.M.R. 44, 49 (C.M.A. 1952) (noting that one long-standing formulation of the beyond a reasonable doubt standard, though "often clothed in varying verbiage," is that it requires exclusion of every reasonable alternative hypothesis.). Similarly, the military judge's instructions in this case, as in every case, stated the government had to exclude "every fair and rational hypothesis except that of guilt."

The government cannot meet this burden when it repeatedly asserted at trial that alternative hypotheses were possible – and there was no way to determine between the charged theory and those alternative possibilities. *See* (R. at 597-98). Indeed, trial counsel's assertions on these points essentially mirrored the very definition of reasonable doubt.

4. Legal insufficiency

It is true that legal insufficiency is a higher hurdle, as the government gets the benefits of additional presumptions and more favorable standard of review. However, the same dynamic plagues the case in this regard. How could any factfinder (applying the proper legal standard) find proof beyond a reasonable doubt when trial counsel repeatedly stated that theories inconsistent with guilt were

possible and could not be eliminated? Additionally, as addressed above, there is some indication in CAAF precedent that the very due process concerns the government largely concedes in this case are themselves a subset of legal sufficiency.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically filed with the Army Court and Government Appellate Division on January 12, 2026.

[redacted]
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