IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.	Docket No. 20230185
Private (E-1) **KIASHAUN J. WILLIAMS-CLARK** United States Army, Appellant	Tried at Fort Stewart, Georgia, on 15 February, and 14 and 21–24 March 2023 before a general court-martial convened by Commander, 3d Infantry Division and Fort Stewart, Lieutenant Colonel Albert G. Courie III and Lieutenant Colonel Amy Fitzgibbons, Military Judges, presiding.

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

Assignment of Error I[1]

WHETHER SPECIFICATION 1 OF CHARGE I IS FATALLY AMBIGUOUS WHERE THE EVIDENCE SUPPORTED TWO DIFFERENT SEXUAL ACTS SEPARATED BY TIME, LOCATION, AND IMPULSE.

[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.

PANEL NO. 4

Assignment of Error II

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1 OF CHARGE 1 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 OF CHARGE I IS FACTUALLY SUFFICIENT BECAUSE THERE WAS EVIDENCE OF BOTH CONSENT AND A REASONABLE MISTAKE OF FACT AS TO CONSENT.

Assignment of Error IV

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 3 OF CHARGE I IS SUFFICIENT BECAUSE SPECIALIST AD WAS NOT A CREDIBLE WITNESS, AND APPELLANT HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

Assignment of Error V

WHETHER APPELLANT IS ENTITLED TO SENTENCING RELIEF FOR 545 DAYS OF UNREASONABLE POST-TRIAL DELAY.

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Statement of the Case

On 24 March 2023, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of rape and two specifications of sexual assault in violation of Article 120, Uniform Code of Military Justice,[2] 10 U.S.C. §§ 920(a)(1), 920(b)(2)(A) [UCMJ]. (R. at 629; Statement of Trial Results [STR]). The military judge sentenced appellant to a total of seven years of confinement[3] and a dishonorable discharge. (R. at 708; STR).[4] On 19 April 2023, the convening authority disapproved the request for deferred confinement and approved deferment of automatic forfeitures until entry of judgement. (Action). On 1 May 2023, the military judge entered judgment. (Judgment).

Statement of Facts (Assignments of Error I-III)

On 11 February 2021, Private Second Class (PV2) [redacted] (Victim 1) and her friend, Private (PVT) [redacted] went to appellant's apartment. (R. at 135). Appellant (who was PVT [redacted] team leader) invited the women to his apartment, offering to

[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.
[3] Specifically, two years for Specification 1 of Charge I and five years for Specification 3 of Charge I, to run consecutively for a total of seven years.
[4] Before sentencing, the military judge dismissed Additional Charge II, sexual assault without consent, contingent on Specification 3 of Charge I, rape by using unlawful force, surviving appellate review. (R. at 629–30; STR).

provide them alcohol and a "safe place to go and drink so [they] didn't get caught in the barracks," because they were under twenty-one. (R. at 132–35, 240, 646).

Victim 1 and PVT [redacted] took shots with appellant. (R. at 135, 189, 242). Appellant then left for the evening while Victim 1 and PVT [redacted] stayed in appellant's apartment. (R. at 139). Appellant's roommate was home, but Victim 1 did not see him again after appellant left. (R. at 139–40, 190). While appellant was out, Victim 1 and PVT [redacted] consumed about "four or five cups of the vodka with orange juice." (R. at 140–41, 190). Private [redacted] testified they were using "red solo cups;" Victim 1 testified the cups were "coffee mug size." (R. at 140, 190). At times, Victim 1 drank out of the vodka bottle. (R. at 142). Victim 1 felt "really groggy and tipsy" and "very tired and very out of it." (R. at 143, 147). Private [redacted] testified that Victim 1's intoxication was "8" on a scale of one to ten; she was "incoherent" and fell when she attempted to walk. (R. at 218, 220). Eventually, appellant returned and invited Victim 1 to his bedroom. (R. at 145–46).

A. The first sexual assault without consent.

When appellant and Victim 1 went to appellant's bedroom, Victim 1 removed her shirt because appellant had offered a bigger t-shirt to sleep in. (R. at 147). While Victim 1 put the bigger t-shirt on, appellant took her bra off. (R. at 148). Victim 1 then fell onto the bed as appellant began taking her shoes and leggings off. (R. at 149). Victim 1's torso was on the bed and her legs were off to

the side; Victim 1 testified she was crying before, during, and after the assault. (R. 148–49, 153). Victim 1 also testified that appellant moved "my panties over and he put his penis in my vagina." (R. at 148). Appellant ejaculated on Victim 1's back. (R. at 149). After the sexual assault, appellant relayed to Victim 1 that he did not want her "waking up the next morning and crying rape." (R. at 149). Appellant also said he wanted to make sure Victim 1 was "conscious enough" and asked her what her social was. (R. at 152). She did not remember whether she was able to answer him. (R. at 152).

B. The second sexual assault, while Victim 1 was sleeping.

After the first sexual assault, appellant left the room. Victim 1 then went to the bathroom and urinated blood. (R. at 150). Victim 1 testified her next memory was that she "woke up to [her]self snoring," and found appellant was on top of her with his penis in her vagina. (R. at 151).

Appellant asked if she had fallen asleep; Victim 1 began humming. (R. at 151). Appellant asked Victim 1 to kiss him; Victim 1 continued to hum and fell back asleep. (R. at 151). Victim 1's next memory was when appellant went to the bathroom and grabbed toilet paper to clean up ejaculate off her stomach. (R. at 152). The two went back to sleep in appellant's bed. (R. at 153). When asked at trial, "Did you want to have sex with the accused that night?", Victim 1 responded "no." (R. at 166).

C. Corroborating evidence.

While on the couch, PVT RM took a video focused on her face with sounds of a bed creaking and a male moan in the background.[5] (R. at 215; Pros. Ex. 8). Private [redacted] saw appellant leave the bedroom shirtless that night. (R. at 193). The next day, appellant texted PVT [redacted] asking if she "had his back." (R. at 226).

Specialist (SPC) [redacted], Victim 1's friend, testified that Victim 1 sent incoherent text messages the night of the assault. (R. at 247, 250, 252). Victim 1 also texted SPC [redacted]: "he's asking me to sleep with him tn." (R. at 263; Def. Ex. V). Victim 1 texted another friend who later asked if she had "hooked up" with appellant; Victim 1 responded "yes sorrrrr." (R. at 487; Pros. Ex. 14).

Victim 1 reported the assaults to the U.S. Army Criminal Investigation Division (CID) on 18 February 2021. (R. at 160). During the CID interview, Victim 1 conducted a pretext communication and mentioned the night of the assault. (R. 160–64; Pros. Ex. 1). Appellant stated, "Okay. Like I said before, I'm sorry. I can't stress that enough. I was drunk too." (R. at 182; Pros. Ex. 1).

[5] Prosecution Exhibit 8 is a recording of a recording, many of the sounds in the exhibit are muffled or inaudible. The video is timestamped at 2302 hours on 11 February 2021.

D. Government charging decision.

The government charged appellant under two distinct theories regarding Victim 1: "without consent" and "intoxication." (R. at 581).[6] The government did not charge under Article 120(b)(2)(B), UCMJ, when the person knows (or reasonably should know) that the other person is asleep. (Charge Sheet).

During closing argument, the government argued that the military judge could consider both charged theories for the "entire transaction and occurrence, without consent[.]." (R. at 581). Appellant was convicted only under the "without consent" theory of Specification 1 of Charge I. (R. at 629; Charge Sheet). During sentencing, Victim 1 gave an unsworn victim impact statement that relayed: "[T]he smallest things take me right back to the image of you on top of me while I'm sleeping." (R. at 647; App. Ex. XXI). Additional facts are incorporated below.

Assignment of Error I

WHETHER SPECIFICATION 1 OF CHARGE I IS FATALLY AMBIGUOUS WHERE THE EVIDENCE SUPPORTED TWO DIFFERENT SEXUAL ACTS SEPARATED BY TIME, LOCATION, AND IMPULSE.

[6] Specification 1 of Charge I is sexual assault without consent, Article 120(b)(2)(A), UCMJ. Additional Charge I is sexual assault when Victim 1 was incapable of consenting due to impairment by alcohol under Article 120(b)(3)(A), UCMJ. (R. at 629; Charge Sheet; STR).

Standard of Review

This court reviews questions of statutory construction de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)). This court reviews the ambiguity of a verdict (and thus whether factual sufficiency review is precluded) de novo. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010).

Law

A. The government's charging decision and notice concerns.

The initial charging decision rests squarely with the government. *United States v. Mendoza*, 85 M.J. 213, 230 (C.A.A.F. 2024); *see also United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010). *Morton* establishes that prosecutors have broad discretion to charge different offenses when the evidence could support multiple theories. 69 M.J. at 16. In some instances, there may be a genuine question as to whether one offense as opposed to the other is sustainable. *Id*. While *Morton* recognizes a prosecutor's discretion, *Mendoza* makes clear that this discretion has constitutional limits. 85 M.J. at 219. Yes, prosecutors can charge alternative theories, but they cannot "charge one offense under one factual theory and then argue a different offense and a different factual theory at trial." *Id*. 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. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

B. Ambiguous findings.

The government may charge under alternate theories of liability, and this court "can affirm the finding of guilt if either theory is legally sufficient." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019); *see also United States v. Vidal,* 23 M.J. 319, 325 (C.M.A. 1987) ("It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members.").

If findings of guilt are ambiguous, then an appellate court cannot perform a factual sufficiency review under Article 66(c), UCMJ. *United States v. Walters*, 58 M.J. 391, 396–97 (C.A.A.F. 2003); *United States v. Wilson*, 67 M.J. 423, 428 (C.A.A.F. 2009). To remedy an ambiguous finding, this court must set aside the finding of guilty for the affected specification and dismiss it with prejudice. *Wilson*, 67 M.J. at 429. However, the *Walters* ambiguity rule "applies only in those narrow circumstance[s] involving the conversion of a divers occasions specification to a one occasion specification through exceptions and substitutions by the members." *Walters*, 58 M.J. at 396; *see also United States v. Rodriguez*, 66 M.J. 201, 205 (C.A.A.F. 2008).

Argument

Here, the government charged Article 120(b)(2)(A), and alternatively, Article 120(b)(3)(A). (Charge Sheet). Appellant was punished for only one offense involving Victim 1. (STR). Charge I, Specification 1 highlighted one theory of criminal liability, sexual assault without consent. (Charge Sheet).

A. Charge I, Specification 1 only supports one theory, sexual assault without consent, and is not fatally ambiguous.

Appellant's claim of fatal ambiguity under *Walters* fails because statutory construction principles establish that only one of the two sexual acts could legally support the charged offense. As the surplusage cannon requires, statutes are interpreted "so as to avoid rendering superfluous" any statutory language. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Congress created distinct subsections under Article 120(b)(2); if both subsections applied to the same conduct involving sleeping victims, Congress' delineation of separate subsections would be rendered superfluous. The statutory framework demonstrates Congress' intent to create mutually exclusive categories based on the victim's capacity to consent.

Additionally, Article 120(g)(7)(B), UCMJ, states: "a sleeping, unconscious, or incompetent person cannot consent." This definition establishes a bright-line rule distinguishing victims who are not competent from those who are competent but withhold a freely given agreement. The government charging under subsection

(b)(2)(A) reflects a theory focused on the conscious victim's lack of consent, not "a sleeping, unconscious, or incompetent" victim's inability to consent.

Unlike *Walters*, where the panel's 'one occasion' finding left unclear which of the many drug uses the government proved, here, the military judge's conviction based on the first assault is the only incident fitting the charged theory of without consent. *Cf*. 58 M.J. at 395. *Walters* involved a specification that could encompass multiple criminal acts occurring over months. *Id*. at 392. The same is true in *Trew,* where the appellant was charged with indecent acts "on divers occasions." *United States v. Trew,* 68 M.J. 364, 365–66 (C.A.A.F. 2010). After the military judge excepted that language, CAAF reversed, holding that the CCA could not perform its Article 66 review. *Id*. at 365. Here, the case at bar involves one chargeable incident under the specification, eliminating any fatal ambiguity concerns.[7]

B. The statutory framework of 10 U.S.C. 920 § (b)(2)(B) resolves fatal ambiguity concerns.

Victim 1 testified she was asleep during the second sexual assault; that act, as a matter of statutory interpretation, cannot support a conviction under Article 120(b)(2)(A), ("without consent"). If that were to be the scenario as appellant

[7] In *Wilson*, the military judge excepted 'divers occasions' but failed to identify whether the bathroom or the bedroom rape formed the basis of the conviction. 67 M.J. 423, 427 (C.A.A.F. 2009). Here, the evidence shows one continuous criminal episode, and only one conscious assault satisfies the 'without consent' specification.

presumes, that statutory definition creates a legal impossibility—a sleeping person cannot withhold consent, because they cannot consent at all. Congress' inclusion of specific language addressing sleeping victims in subsection (b)(2)(B) demonstrates its intent to exclude certain conduct committed without an accused's requisite *mens rea*. Therefore, only the first sexual assault—where Victim 1 was crying but conscious—could legally support a conviction under the charged theory.

C. This case is distinguishable from the fact pattern in *Casillas*.

In CAAF's holding in *Casillas*, there was one continuous act that began while SF was asleep and continued after she awoke. __ M.J. __, 2025 CAAF LEXIS 692, *3 (C.A.A.F. 2025). Here, there are two separate acts separated by time and location. (R. at 150–51). In the second act, Victim 1 went to the bathroom, then returned and fell asleep before the second assault. (R. at 150–51).

In *Casillas*, SF testified that she woke up and was aware of what was happening. *Casillas*, __ M.J. __, 2025 CAAF LEXIS 692, at *13. Here, Victim 1 testified that she awoke to herself snoring, then began humming (rather than responding verbally), and fell back asleep—suggesting a state more akin to semi-consciousness rather than the aware-but-not-consenting state present in *Casillas*. *Id*. at *13. (R. at 151–52). The fact that Victim 1 briefly stirred during this assault (waking to her own snoring and humming) does not transform this (b)(2)(B)

scenario into a (b)(2)(A) offense.[8] Where *Casillas* involved one transaction during which the victim transitioned from sleeping to wakefulness, here, there are two separate assaults with an intervening break. (R. at 151). In the case at bar, only the first assault can legally support the conviction, therefore no ambiguity exists, and the conviction should be affirmed.

Assignment of Error II[9]

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 1 OF CHARGE 1 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 OF CHARGE I IS FACTUALLY SUFFICIENT BECAUSE THERE WAS EVIDENCE OF BOTH CONSENT AND REASONABLE MISTAKE OF FACT AS TO CONSENT.

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[8] The second assault also illustrates someone who is "otherwise unaware that a sexual act is occurring" under 120(b)(2)(B). Semi-consciousness is fundamentally different from a freely given agreement by a competent person. The ability to perceive stimuli or make a sound does not equate to the cognitive capacity necessary to consent or withhold consent. Additionally, the Air Force Court of Criminal Appeals' recent decision in *Moore* illustrates why this court should affirm. AF 40442, 2024 CCA LEXIS 485 at *5 (A.F. Ct. Crim. App. 13 Nov. 2024), certified issue pending, No. 25-0110/AF (C.A.A.F. 7 Mar. 2025). In *Moore*, the government attempted to obtain a conviction under 120(b)(2)(A) for conduct that fell under 120(b)(2)(b). *Id*. at *7. Our sister court found the appellant's conviction in *Moore* legally insufficient due to the fact the government only put on evidence that the victim was asleep. *Id*. at *17.

[9] Because AE II and AE III address substantially similar issues, the government will address them together.

Standard of Review and Law

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 only if appellant makes a specific showing of a deficiency in proof. *See* UCMJ, art. 66(d)(1)(B); *see also United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024); *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 [Court of Criminal Appeals] 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 131.

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 and (ii) of the correctness of this decision. *Harvey*, 85 M.J. at 132.

Citing *Mendoza*, appellant contends that "not consenting and not being able to consent are two separate and distinct legal concepts." (Appellant's Br. 12). The government agrees.

Argument

A. Appellant failed to make a specific showing of deficiency of proof.

Appellant has failed to make a specific showing of deficiency in proof that his conviction under Charge I, Specification 1 ("without consent") is factually insufficient. While appellant references Victim 1's flirting and "playful" behavior, his factual arguments do not address the dispositive evidence: Victim 1's unrebutted testimony that she was crying during the first assault and did not provide a freely given agreement. (Appellant's Br. 17–18; R. at 148-49). Appellant's evidence of prior flirting, even if credited, does not create a deficiency in proof regarding Victim 1's lack of consent during the actual assault.

B. To the extent this court finds claims of Victim 1's pre-assault behavior is a specific showing of deficiency, there was direct and circumstantial evidence for lack of consent.

To quote CAAF's *Mendoza* opinion, "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 a victim's intoxication when determining whether a victim consented." 85 M.J. at 221. Assuming *arguendo* the defense has alleged a specific deficiency, the government presented direct and circumstantial evidence for lack of consent.

The military judge, with substantial evidence of Victim 1's intoxication, acquitted appellant of Additional Charge I (sexual assault when Victim 1 was incapable of consenting due to impairment). (R. at 140, 190, 218, 220, 242); (Charge Sheet). The implication is that Victim 1 was capable of consenting.

Thus if Victim 1 retained the *capacity* to consent, the question becomes whether she consented. *See Mendoza*, 85 M.J. at 221. The military judge correctly resolved potential conflicts in testimony, weighed evidence, and drew reasonable inferences form basic facts to determine ultimate facts. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The conviction reflected the military judge's factual finding—that Victim 1did not make a freely given agreement to engage in sexual intercourse with appellant. *See* MCM pt. IV, ¶ 60.a.(g)(7)(A).

Appellant relies on two cases to argue factual insufficiency. (Appellant's Br. 12, 16); *see United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016); *see also United States v. Gumbs*, ARMY 20220066 (Army Ct. Crim. App. 5 Oct. 2023) (sum. disp.). The notice and evidentiary deficiencies that plagued these cases are wholly absent here.

C. The government avoided the notice problem in *Riggins* by identifying the specific criminal act at issue.

In *Riggins*, the appellant was charged under a "placing in fear" theory of Article 120(b)(1)(A) but convicted under an entirely different legal theory. 75 M.J. at 84. The military judge "developed and applied what was, in essence, a new legal theory—one that was never charged or argued by the Government—in the middle of his own deliberations in the case." *Id*. at 84.

Here, appellant was charged with sexual assault without consent under Article 120(b)(2)(A) and convicted under the same theory. (R. at 629; Charge Sheet). Appellant contends that the government is required to prove Victim 1 was capable of consenting but did not and cannot rely on showing Victim 1 was too intoxicated to consent. (Appellant's Br. 16). However, under *Mendoza*, the government may offer intoxication evidence to prove the absence of consent. 85 M.J. at 221; *see also* UCMJ, art. 120(g)(7)(C). While the majority opinion in *Mendoza* states that (b)(2)(A), "criminalizes engaging in a sexual act with a person capable of consenting who did not consent[.]," the actual test of Article 120(b)(2)(A) requires proof that the act was "without the consent of the other person," not that the person affirmatively withheld consent. 85 M.J. at 215; *Cf*. UCMJ, art. 120(b)(2)(a). It is enough that there was no freely given agreement.

D. The government avoided the ambiguous evidence problem in *Gumbs* through direct testimony, witness corroboration, and appellant's own exculpatory statements.

In *Gumbs*, this court found factual insufficiency when "there [was] no direct evidence appellant touched the victim's groin with his penis." 2023 CCA LEXIS 432, at *8–9. This court also held the DNA evidence was ambiguous as to whether "a finger, or whether appellant's penis caused the soreness in the victim's vagina, or what caused the DNA evidence to be in the underwear." *Id.* at *8–9.

Here, Victim 1 provided direct testimony that appellant moved "my panties over and he put his penis in my vagina." (R. at 148). There is no ambiguity about what body part was involved or what type of contact occurred. Here, the factfinder has Victim 1's explicit testimony about penetration corroborated by physical evidence (urinating blood after the first assault), audio evidence (PVT RM's timestamped video), and witness observations. (R. at 150, 215, 193; Pros. Ex. 8).

Victim 1 testified she was crying before, during, and after the first assault. (R. at 148-49, 153). *See* MCM pt. IV, ¶ 60.a.(g)(7)(A) ("An expression of lack of consent through words or conduct means there is no consent."). The military judge heard this testimony, observed Victim 1's demeanor, and weighed her credibility.[10]

[10] "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) (mem. op.), aff'd, 76 M.J. 350 (C.A.A.F. 2017).

Affording deference at the trial level, this court may dismiss, set aside, modify, or affirm a lesser finding only when they are "clearly convinced that the finding of guilty was against the weight of the evidence." UCMJ, art. 66(d)(1)(B)(iii).

D. Distinguishable facts in *Coe* that reinforce appellant's conviction.

The facts in *United States v. Coe* are most analogous to the present case and reinforce why appellant's conviction should be affirmed. ARMY 20220052, 2025 CCA LEXIS 419 (Army Ct. Crim. App. 28 Aug. 2025) (mem. op.). Sitting *en banc*, this court affirmed a conviction for sexual assault without consent post-*Mendoza* with significant circumstantial evidence of the victim's intoxication. *Id*. at *15. This court in *Coe* emphasized three categories of evidence supporting the conviction: 1) the victim's testimony that she verbalized lack of consent; 2) eyewitness testimony showing the victim was capable of consent but changed her behavior to indicate non-consent; (3) and the appellant's statements indicating he knew the victim did not consent. *Id.* at *14. The case at bar presents stronger evidence than *Coe* across all three categories.

First, while the victim in *Coe* testified that she said, "I do not want this," during group sexual activity (where initially witnesses considered her 'participatory'), here, Victim 1 testified that she was crying before, during, and after the first assault. *Id*. at *14 (R. 148–49, 153). Additionally, the circumstances of the encounter—a team leader purchasing alcohol for underage subordinates,

PVT RM's testimony about Victim 1's inability to walk, Victim 1's demeanor and physical positioning—all point to appellant having sex with Victim 1 without her consent. Victim 1 could also appraise the nature of the conduct at issue. Victim 1 was conscious and aware as appellant removed her clothes. (R. at 148). Victim 1 also got up to go to the bathroom soon after the first assault, confirming she retained physical capacity (R. at 150). While intoxicated and distressed, Victim 1 was not incapacitated within the meaning of Article 120(g)(8).

Second, eyewitness evidence clearly established Victim 1's lack of consent. The *Coe* court found the victim's change in behavior (initially willing to participate but then "appeared to be trying to cover her breasts") was probative evidence that the victim was capable of consenting, but did not actually consent[.]" *Id*. at *4, *16. Critically, *Coe* involved a group sexual encounter where the victim's capacity degraded over time. *Id*. at *17–*18. Here, [redacted] witnessed Victim 1's intoxication and later heard bed creaking and male moaning, but no female participation. (R. at 215, 218). [redacted] also witnessed Victim 1 wanting to leave the apartment immediately the next day. (R. at 223). Like *Coe*, [redacted] witnessed behavior indicative of non-consent, probative evidence that Victim 1 did not consent.

Third, appellant's consciousness of guilt is stronger than the evidence presented in *Coe*. *Id*. at *15. In *Coe*, when investigators asked if the victim was coherent enough to give consent, the appellant in *Coe* replied "No." *Id.* at *8. The

appellant did not look at the victim when he had sex with her because "she[] [was] super drunk and it was wrong." *Id*. The majority acknowledged these statements primarily focused on the victim's intoxication. *Id*. at *17.

Here, appellant's statements go beyond mere acknowledgement of Victim 1's intoxication. Immediately after the assault, appellant told Victim 1 he "did not want [] [Victim 1] waking up the next morning and crying rape." (R. at 149). Appellant also stated he wanted to make sure Victim 1 was conscious enough after sex and asked her what her social was, demonstrating a factfinder's reasonable inference that she was in a compromised state and did not give affirmative consent. (R. at 152). Appellant also texted PVT RM asking if she "had his back." (R. at 226). Whereas the appellant in *Coe* admitted wrongdoing based on the victim's intoxication, here, appellant's consciousness of guilt is more specific. Requesting Victim 1's social to see if she is conscious, admonishing her if she cries rape, texting PVT [redacted] if she "has his back"—this demonstrates guilt to specific sexual conduct, not merely regret over a victim's intoxication level.

E. Application of the *Harvey* standard.

Coe demonstrates that even when intoxication evidence exists, a conviction under a without consent theory can be affirmed post-*Mendoza* when there is sufficient additional evidence as to lack of consent. *Coe*, 2025 CCA LEXIS 419 at *17–18. Here, Victim 1's testimony, appellant's consciousness of guilt, the

circumstances behind the encounter, and corroborating witness testimony, make it appropriate for this court to give a high level of deference to the military judge's factual determination that Victim 1 did not consent. *See Harvey*, 85 M.J. at 131.

The military judge observed Victim 1 testify; she also heard and considered appellant's theory, presented through cross-examination and defense evidence, including text messages that defense counsel argued suggested consent. (R. at 487; Pros. Ex. 14; Def. Ex. V). The military judge, having seen and heard all witnesses and evidence, resolved credibility determinations in favor of the government and this court owes high deference to those determinations. *See Harvey*, 85 M.J. at 132.

Assignment of Error IV

WHETHER APPELLANT'S CONVICTION UNDER SPECIFICATION 3 OF CHARGE I IS SUFFICIENT BECAUSE SPECIALIST [redacted] WAS NOT A CREDIBLE WITNESS, AND APPELLANT HAD A REASONABLE MISTAKE OF FACT AS TO CONSENT.

Additional Facts

Specifications 2 and 3 of Charge I involve a second victim, SPC [redacted] ("Victim 2"). (Charge Sheet). On 19 March 2021, Victim 2 drove from Fort Rucker, Alabama, to visit her friend, SPC [redacted], at Fort Stewart, Georgia. (R. at 277). SPC [redacted] introduced Victim 2 to appellant via Facetime a week prior to her visit. (R. at 278, 325). Victim 2 was initially interested in appellant. (R. at 328, 343, 379). In the four to five days leading up to their first in-person meeting,

Victim 2 texted appellant that they needed to "take things slow," "we got to go slow," that they were not going to "do anything." (R. at 387–89; Pros. Ex. 11).

On the way to Georgia, Victim 2 texted appellant, "I'm coming baby." (R. at 329). Appellant texted Victim 2 that he would be on his "Ps and Qs," which she interpreted as being on his best behavior. (R. at 330). She replied, "No, you don't baby, enjoy yourself." (R. at 330). Victim 2 first met up with SPC [redacted]; they then picked up appellant and went to a pool hall. (R. at 282). They planned that at the end of the night, appellant and SPC [redacted] would sleep on SPC [redacted] couch and Victim 2 would sleep upstairs. (R. at 282, 342).

While at the pool hall, Victim 2 testified that appellant repeatedly "would come behind me and grab my butt and/or squeeze my breasts." (R. at 287–88). At trial, Victim 2's testimony ranged from discomfort to, "I didn't want to cause a scene in the middle of this pool hall," to, "I was having a night out with my friend. I just wanted to have fun." (R. at 287–89). On cross-examination, Victim 2 testified her time with appellant at the pool hall was "okay," that she giggled and held hands with appellant, and that she wanted him to spend the night at SPC [redacted] apartment. (R. at 332). Specialist [redacted] saw appellant and Victim 2 kiss, hug, and hold hands that night. (R. at 411). The party then returned to SPC [redacted] apartment. (R. at 289).

On the car ride back, appellant put his hand on Victim 2's inner thigh, she pushed his hand off, and appellant placed his hand on her inner thigh again. (R. at 289–90). The record is unclear as to how many times appellant did the hand-on-Victim-2's-thigh motion. At the apartment, Victim 2, appellant, and SPC [redacted] all sat on the sectional to watch a movie. (R. at 295). Specialist [redacted] started to fall asleep. (R. at 297, 336, 379). Five minutes in to sitting on the couch, Victim 2 got up to take a shower upstairs; she locked the bathroom door. (R. at 295, 297).

While in the shower, Victim 2 heard the doorknob twisting; appellant texted her asking if she wanted a massage. (R. at 297). Victim 2 testified that she did not want to have sex, but she agreed to the massage. (R. at 297, 339). Although she had a shot and a drink that night, she felt "fine." (R. at 298). Victim 2 walked downstairs after her shower; as she reached the bottom step, appellant's hand reached around the corner and grabbed her throat. (R. at 299). Appellant used his wrist to turn Victim 2 around, facing her back up the stairs, and then used his hand on her neck to push her upstairs to the spare bedroom. (R. at 299).

Appellant threw Victim 2 onto the bed, closed the door, and locked it. (R. at 299–300). Appellant straddled Victim 2 and put his hand under her shirt. (R. at 300). When SPC [redacted] knocked on the bedroom door, appellant removed his hand from underneath Victim 2's shirt, placed it over her mouth and said, "What's up?"

(R. at 301). Specialist [redacted] confirmed that he woke up, knocked on the door, and heard appellant state words to the effect that everything was ok. (R. at 415).

Appellant was charged with penetrating Victim 2's vulva with his penis using unlawful force. (Charge Sheet). However, the assault began with digital penetration. (R. at 301). Victim 2 testified appellant made comments such as, "How does it feel?," "Does that feel good?," and "Do you like that?," while appellant digitally penetrated her vagina with one hand and kept his other hand on her wrist. (R. at 301–02).

At first, Victim 2 was unable to respond to any of appellant's questions, but then she told him to stop and tried to push appellant off her. (R. at 302). Appellant grabbed Victim 2's throat with both of his hands; Victim 2 felt pressure on her windpipe, felt like she was about to lose consciousness, and felt like appellant was going to kill her. (R. at 302). On top of her with his hands still around her throat, appellant asked Victim 2 to perform oral sex on him. (R. at 303). She "told him if he put his penis anywhere near my mouth, I was going to bite it off." (R. at 303). Appellant removed Victim 2's pants and underwear. (R. at 303). Appellant also removed his hands to take his own clothes off, put one of his hands back around Victim 2's neck, and then penetrated her vagina with his penis. (R. at 304).

After appellant ejaculated on Victim 2's stomach, she went to the bathroom, put her clothes on, ran outside to her car, locked her car, and called SPC [redacted] from

inside her vehicle. (R. at 306). Victim 2 told SPC [redacted] that appellant had just raped her. (R. at 306). That night, SPC [redacted]s neighbor witnessed Victim 2 "so emotionally upset that she was like on the verge of throwing up." (R. at 397).

Standard of Review and Law

Adopted from Assignments of Error II and III.

Argument

Appellant challenges factual sufficiency of his conviction under two grounds: 1) Victim 2 was not a credible witness; 2) and appellant had a reasonable mistake of fact. (Appellant's Br. 19). However, attacking witness credibility, without more, fails to satisfy appellant's burden to demonstrate factual insufficiency. This court does not sit as a second jury to reweigh credibility; factual sufficiency requires a showing that the evidence itself cannot support a conviction.

A. The conviction is factually sufficient.

Within minutes of the assault, multiple witnesses saw Victim 2's severe emotional distress. (R. at 306, 309, 397, 470). She fled the apartment and called SPC [redacted] from her locked car, she drove back to Fort Rucker that day and obtained a Sexual Assault Forensic Exam (SAFE) exam two days later—evidence that is inconsistent with consensual sexual activity. (R. at 306, 419, 468). The evidence of her immediate outcry to multiple witnesses and statements within her SAFE corroborated her testimony. (Pros. Ex. 3). Thus, the evidence proved the

corroboration necessary to sustain the conviction despite acquittals on other specifications. (Charge Sheet).

B. Appellant's alleged mistake of fact was unreasonable.

A mistake of fact defense places the burden on the prosecution to prove that at the time of the charged offense the accused was not ignorant of the fact or under a mistaken belief. R.C.M. 916(b) Additionally, even if the accused was ignorant of the fact or under a mistaken belief— the ignorance or mistake had to be reasonable. *See* R.C.M. 916(j)(1); *see also United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017).

Appellant points to Victim 2's pre-assault conduct—her terms of endearment in text messages, her interactions at the pool hall, her willingness to accept a massage—as evidence supporting mistake of fact. (Appellant's Br. 25). However, when these facts are viewed in context with Victim 2's texts to "take things slow" and "not [do] anything," appellant was on notice that Victim 2, although interested in meeting appellant in person, was *not* interested in immediate sexual activity. (Pros. Ex. 11).

Additionally, SPC DC's account of what appellant told him the day after the rape is particularly probative: when appellant asked Victim 2 to join her in the shower, she said "no." (R. at 420). Appellant's party opponent statements highlight Victim 2 *declined* to shower naked with appellant immediately prior to the rape.

(R. at 420). A mistake of fact defense requires a reasonableness assessment. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). If a potential consensual sexual partner declined an activity that involved being naked temporally close to the rape (even though she accepted kisses, holding hands, and massages earlier in the night while fully clothed), it would be unreasonable to infer that she had consented to violent penetrative sex while being strangled.

Holding hands or kissing in a public pool hall does not give rise to a reasonable belief that a person consents to a violent rape in a locked bedroom. Victim 2's explicit warning texts before her visit, her testimony of physical resistance, and her corroborated account amongst witnesses demonstrate factual sufficiency and prove beyond a reasonable doubt that any belief of consent or mistake of fact was unreasonable.

Assignment of Error V

WHETHER APPELLANT IS ENTITLED TO SENTENCING RELIEF FOR 545 DAYS OF UNREASONABLE POST-TRIAL DELAY.

Additional Facts

The military judge sentenced appellant on 24 March 2023. (R. at 708; STR). On 5 April 2023, appellant demanded speedy post-trial. (Request for Speedy Post Trial; SJA Clemency Advice). The trial transcript is 709 pages, equating to nineteen audio hours of transcription. Government counsel completed their review

of the transcript on 14 May 2024, the Chief of Justice certified the transcript on 29 May 2024. The court reporter sent the record of trial to the military judge for certification on 31 May 2024. (Post-Trial Delay Memorandum). The military judge certified the record of trial on 1 July 2024. (Certification). This court docketed appellant's case on 19 September 2024, 545 days post-sentence. (Referral). From date of sentence to the military judge's certification, 434 days elapsed. (Post-Trial Delay Memorandum).

Standard of Review

This court reviews allegations of unreasonable post-trial delay de novo. *See United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law

Whether a post-trial processing timeline is reasonable or dilatory is determined on a case-by-case basis. *United States v. Toohey* (*Toohey I*), 60 M.J. 100, 102 (C.A.A.F. 2004); *United States v. Abdullah*, 85 M.J. 501, *11 (Army Ct. Crim. App. 2024). There are two separate avenues to provide relief for dilatory post-trial processing, the Due Process Clause of the Fifth Amendment; (2) and the statutory basis under Article 66, when there is no showing of actual prejudice. *Abdullah*, at *9.

In assessing potential due process violations, this court considers four factors from *Barker v. Wingo*: (1) length of delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; (4) and prejudice to the appellant. 407 U.S. 514 (1972). If no prejudice is found under the fourth *Barker* factor, a due process violation still occurs if "in balancing the three other factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Anderson*, 82 M.J. at 87 (quoting *United States v. Toohey* (*Toohey II*), 63 M.J. 353, 362 (C.A.A.F. 2006)).

Argument

This court should affirm the sentence as adjudged. The government did not violate appellant's due process rights. While acknowledging that post-trial delay in this case may be excessive, appellant's circumstances are distinguishable from the precedent cases appellant cited.

The 545-day delay presumptively satisfies *Barker's* first factor in favor of appellant and appellant asserted his rights under the third factor. (Post-Trial Delay Memorandum; Request for Speedy Post Trial). The government documented staffing shortages, which provide a partial justification under the second factor, though administrative backlogs cannot fully excuse such delays. *See United States v. Hotaling*, ARMY 20190360, 2020 CCA LEXIS 449, at *3 (Army Ct. Crim.

App. 11 Dec. 2020) (mem. op.) However, appellant has not demonstrated particularized prejudice under the fourth *Barker* factor—he points to no lost evidence, faded memories, or oppressive incarceration distinct from his sentence. Additionally, appellant highlights no anxiety beyond that inherent in any appeal or impaired defense. *Moreno*, 63 M.J. at 139–40. Absent actual prejudice or bad faith, the *Barker* factors do not establish a due process violation warranting relief.

Toohey II's holding is explicit: absent prejudice, only delays "so egregious that tolerating [them] would adversely affect the public's perception of the fairness and integrity of the military justice system," warrant relief. 63 M.J. at 362. Most recently, appellant's delay in *Monroe* was 650 days (with consistent documented non-responsiveness from the OSJA) and warranted only three months relief. ARMY 20220122, 2025 CCA LEXIS 447, *4 (Army Ct. Crim. App. 15 Sep. 2025) (summ. disp.). *United States v. Winfield* instructs that an excessive delay finding does not mandate relief. 83 M.J. 662, 666 (Army Ct. Crim. App. 2023) (finding post-trial processing of nearly 500 days was excessive but determining the sentence was appropriate and therefore declining to set it aside). Given appellant's serious misconduct and lack of prejudice, no relief is appropriate here.

Conclusion

WHEREFORE, the government respectfully requests This Honorable Court affirm the findings and sentence.

[redacted]

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CERTIFICATE OF SERVICE
UNITED STATES v. KIASHAUN J. WILLIAMS-CLARK, ARMY 20230185

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 11th day of November 2025.

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