UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING[1], and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ISAC D. MENDOZA
United States Army, Appellant

ARMY 20210647

Headquarters, 1st Infantry Division and Fort Riley
Steven C. Henricks and Ryan W. Rosauer, Military Judges
Colonel Toby N. Curto, Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Carol K. Rim, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Carol K. Rim, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Captain Cynthia A. Hunter, JA; Major Christopher H. Kim, JA (on brief).

8 May 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PARKER, Judge:

Appellant raises two assignments of error, one of which warrants discussion but no relief. Appellant alleges his conviction for sexual assault in Specification 1 of The Charge is factually insufficient. We disagree.

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[1] Judge EWING decided this case while on active duty.

BACKGROUND

Contrary to his plea, a military judge found appellant guilty of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].[2] Appellant was sentenced to a dishonorable discharge, thirty months of confinement, and reduction to the grade of E-1.

In July of 2020, appellant and the victim, Specialist (SPC) [redacted] were both stationed together in Korea. On 11 July 2020, the victim and other soldiers had gone off post for dinner and drinks. When they returned to the barracks, they joined soldiers, including appellant, who were outside having a barbeque, hanging out, and drinking. The victim testified she drank alcohol that night but remembers nothing after about 2300. Her next memory was the following morning when she awoke to appellant knocking on her barracks room door to return her shoes. The victim testified that it was then that she realized something was wrong, since she had on the same clothes as the night before but not her underwear, and that her tampon was pushed all the way inside of her, which caused her to start to panic.

Specialist RL, the victim's friend, testified at trial and provided some insight as to what happened at the barracks the night of 11 July 2020. He stated that the victim was drinking, that she was intoxicated based on her speech, grammar, and body language, and that she and appellant had their arms around each other while hanging out. Specialist RL testified that he escorted the victim to her room and then he went to his own room, and that the victim came to his room the next morning after she realized something was wrong. He described how she was crying and appeared confused about what had happened the night prior and that he then left to get a noncommissioned officer (NCO). The victim then went to the Charge of Quarters (CQ) desk to see if the CQ NCO knew anything about what happened the night before. The CQ NCO called a representative of the Sexual Harassment/Assault Response Prevention (SHARP) program, who came to the barracks and met with the victim. Soon thereafter, the victim went to the hospital for a medical exam.

Having been told by other soldiers that appellant was seen with the victim in the barracks later in the night after the victim came back out of her room, SPC RL went to appellant's room to find out what happened. Specialist RL testified that appellant told him that the victim had fallen asleep in his bed. While SPC RL was talking with appellant, the victim called SPC RL and SPC RL handed appellant the phone. The victim asked appellant what had happened, and appellant replied that nothing happened, and that the victim had locked herself in appellant's bathroom. Appellant then asked to ride with SPC RL to the hospital to see the victim. On the

[2] Appellant pled not guilty to and was found not guilty of abusive sexual contact in Specification 2 of The Charge.

way to the hospital, appellant told SPC RL that the victim had taken a shower in his room and then put her shirt on backwards.

Five other soldiers who were at the barracks barbeque and party also testified at trial. Generally, all five testified to seeing the victim that night, that she was seen drinking alcohol, seemed intoxicated, was slurring her speech, was stumbly and swaying back and forth, and unable to walk straight. Some of these soldiers testified that the victim was not her introverted self and was acting overly flirty with several of them. Some of these witnesses described seeing appellant drinking that night but that he had no trouble talking or functioning. One witness, SPC RC, said that once the party moved into the dayroom in the barracks, appellant pulled him into the hallway to inform him that the victim's behavior was very flirtatious, she appeared intoxicated, and that appellant was going to have her taken back to her room.

In addition to witness testimony, the government introduced CCTV footage from the barracks that night. The footage showed, among other things, the victim's intoxicated condition as she unsteadily navigated the barracks hallways before she entered appellant's room with him. Approximately an hour later, the footage showed the victim leaving appellant's room with him where it appears her arms are draped on appellant's shoulders for support. The victim testified she has no memory of having sexual intercourse with appellant and that she would never have sexnal intercourse with a tampon in or while on her period. At trial, an expert in the field of forensic psychology, who reviewed documents and toxicology reports from this case, estimated that the victim's blood alcohol concentration (BAC) range at the time of the offense was .175 to .19. Appellant admitted to a Criminal Investigation Command (CID) agent that he knew the victim had been drinking, that he penetrated her vagina with his penis in his barracks room, and that he knew she was overly intoxicated and was not capable of giving consent to the sexual intercourse. At trial, an expert in forensic biology testified that semen was identified on SPC [redacted] s cervical and vaginal swabs that matched a DNA profile consistent with appellant.

LAW AND DISCUSSION

This court reviews the factual sufficiency of each court-martial conviction and is obligated to only affirm those findings of guilty that are correct in law and fact. UCMJ art. 66(c). We review questions of factual sufficiency de novo. *United States v. Rosario,* 76 M.J. 114, 117 (C.A.A.F. 2017) (citation omitted). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt.*" *Id.* (cleaned up). For factual sufficiency, this court applies "neither a presumption of innocence nor a presumption of guilt" but must make its "own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J.

564, 568 (C.A.A.F. 2017) (cleaned up). This "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." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(d)(1). "The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case." *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *21 (Army Ct. Crim. App. 27 Apr. 2022) (mem. op.) (citing *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)).[3]

For appellant's conviction to stand, the government must have proven all elements of sexual assault in Specification 1 of The Charge: (1) that appellant committed a sexual action on SPC [redacted] and (2) he did so without SPC [redacted] consent. UCMJ art. 120(b)(2)(A). Appellant does not dispute whether a sexual act occurred here. He only disputes SPC [redacted] consent, as he was convicted of the sexual assault of SPC [redacted] without her consent.

At trial, the government argued the victim's level of intoxication was relevant evidence, along with other evidence, as to whether she consented to the sexual intercourse with appellant. The government argued that in line with this court's opinion in *United States v. Roe*, the government may "carry its burden of proving sexual assault 'without consent' in violation of Article 120(b)(2)(A) by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act[.]" 2022 CCA LEXIS 248, at *11.

Appellant argues that this conviction is factually insufficient because: (1) the CCTV footage of SPC [redacted] flirtatious behavior and physically intimate conduct toward appellant prior to the sexual intercourse is evidence SPC [redacted] consented, or that appellant reasonably believed she did; (2) SPC [redacted] s lack of consent fails to meet the burden of proof because she has no memory of the offense; (3) both SPC [redacted] and appellant were married and therefore had motives to lie, making their statements unreliable. Only appellant's second argument merits discussion.

To support his factual insufficiency claim, appellant argues that the government produced no evidence that the victim did not consent to the sexual

[3] Although not applicable in this case, we recognize that our factual sufficiency review under Article 66(d)(1)(B) has been amended with respect to cases in which every finding of guilty entered into the Entry of Judgment is for an offense that occurred on or after 1 January 2021. Pub. L. No. 116-283, § 542(e), 134 Stat. 3612 (2021); 10 U.S.C. § 866(d)(1)(B) (2018 & Supp. II 2021).

intercourse. Further, appellant asserts the government failed to establish that appellant's belief that the victim consented was anything other than honest and reasonable. They highlight there was no eyewitness to the offense and the victim has no memory of the sexual intercourse.

We find this case to be factually sufficient, despite the victim's lack of memory of the offense. Several factors and evidence lead us to this conclusion, including but not limited to: the victim's high level of intoxication, appellant's statement to CID, eyewitness testimony, and the CCTV footage.

First, we highlight that the DNA evidence and appellant's CID statement leave no question that appellant and the victim engaged in a sexual act, specifically, penetration of her vagina with his penis. Second, there is also no question that the victim was highly intoxicated at the time of the sexual act. Third, the eyewitness testimony by numerous soldiers as to the victim's heavy intoxication and the events that occurred the night of the offense are all generally consistent. Fourth, the CCTV footage provides corroboration of the witness testimony and the victim's intoxication. Fifth, appellant's intentional pulling aside of SPC RC to inform him of the victim's concerning level of flirting and intoxication is evidence appellant was aware of her high intoxication, enough to warn another soldier about it. Sixth, after being confronted, appellant's narrative evolved from him having no idea what happened, to the victim just falling asleep in his bed, to the victim then locking herself in his bathroom, to her then taking a shower and putting her shirt on backwards. We find appellant's changing narrative to be evidence of false exculpatory statements which we consider here as substantive evidence of appellant's guilt. *See United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021) ("[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt."). All evidence considered, we are left with a picture of appellant knowingly engaging in sexual intercourse with a victim whom he knew to be so highly intoxicated he even felt a need to warn another soldier to stay away and then lied about the sexual acts he engaged in while in his barracks room. We therefore find both that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and we ourselves are likewise "convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (emphasis omitted).

CONCLUSION

On consideration of the entire record, the finding of guilty to Specification 1 of The Charge and the sentence is AFFIRMED.

Judge EWING concurs.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court

Senior Judge WALKER, dissenting:

I find the charged offense of sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ, both legally and factually insufficient and would set aside appellant's finding of guilty and sentence.

This court is obligated to review both the legal and factual sufficiency of each court-martial conviction and only affirm those findings of guilty that are correct in law and fact. UCMJ art. 66(c). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up). As the majority properly recognized, the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Id.* (cleaned up). For factual sufficiency, this court applies "neither a presumption of innocence nor a presumption of guilt" but "must make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Wheeler*, 76 M.J. 564, 568 (C.A.A.F. 2017) (cleaned up). The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

While appellant does not raise the issue of legal insufficiency, I find that the evidence is legally insufficient as to the charged offense of sexual assault without consent. I reach this conclusion based upon analyzing the statutory construction of Article 120, UCMJ, in concert with the charged offense in this case and the evidence elicited at trial. The statutory language and construct of Article 120, UCMJ, reveals that there are several types of sexual assault outlined in the statute and various theories of liability. Sexual assault without consent outlined in Article 120(b)(2)(A), UCMJ, and sexual assault when a person is *incapable of consenting* due to impairment by a drug, intoxicant, or other similar substance outlined in

Article 120(b)(3)(A), UCMJ, are separate and distinct theories of liability for the offense of sexual assault.[4] To hold otherwise renders the other theories of liability outlined in Article 120(b), UCMJ, as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent. *See United States v. Sager*, 76 M.J. 158, 161-62 (C.A.A.F. 2017). Both of these types of sexual assault are relevant in this case because the government charged appellant with sexual assault without consent yet the government's primary evidence of *lack of consent* in this case was the victim's lack of memory due to intoxication and outward manifestation of intoxication which is evidence of an *inability to consent*.

First, it is evident by the construct of statute that the three distinct paragraphs within Article 120(b), UCMJ, are differing types or categories of sexual assault based upon the construction of the statute. The first paragraph, Article 120(b)(1), addresses sexual assault by inducement whether through threats, fear, fraudulent representation, or false pretenses. The second paragraph, Article 120(b)(2), addresses both sexual assault by lack of consent or sexual assault when a person cannot consent based upon a condition of being asleep, unconscious, or otherwise unaware of the sexual act occurring. The third paragraph, Article 120(b)(3), addresses sexual assault when a person is *incapable of consenting* due to physical impairment by a foreign substance or mental impairment. Each of these types of sexual assault are definitively different categories of sexual assault and thereby different theories of liability. *Sager*, 76 M.J. at 161-62; *see also United States v. Weiser*, 80 M.J. 635, 641 (C.G. Ct. Crim. App. 2020). Furthermore, in reviewing the language in Article 120(b)(2), UCMJ, I note that the two subparagraphs are separated by the disjunctive, "or." As the Court of Appeals for the Armed Forces noted in *Sager*, "[i]n ordinary use the word 'or'. . . marks an alternative which generally corresponds to the word 'either.'" *Id.* at 161. (cleaned up).[5] Statutory

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[4] Whether these types of sexual assault are distinct theories of liability is a question of statutory interpretation reviewed de novo. *Sager*, 76 M.J. at 161 (citation omitted). In reading these provisions, we must "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Sager,* 76 M.J. at, 161 (cleaned up). Further, we must apply "the 'surplusage' canon – that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Id.* at 162.

[5] While there are structural differences in the Article 120, UCMJ, at issue in *United States v. Sager* and the Article 120, UCMJ, at issue in this case, the canons of statutory interpretation for which the dissent cites *United States v. Sager* are not

(continued . . .)

terms which are connected by a disjunctive should ordinarily "be given separate meanings, unless the [overall statutory] context dictates otherwise[.]" *Sager*, 76 M.J. at 161 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Our superior court has held that even the conditions of asleep, unconscious, *or* otherwise unaware are in and of themselves differing theories of liability. *Sager*, 76 M.J. at 162.

The charged offense requires the government to affirmatively prove the victim *did not consent* and the government failed to satisfy its burden on this essential element. I do not find that a rational trier of fact, even in the light most favorable to the government, could have found all the essential elements of the charged offense beyond a reasonable doubt based upon the evidence the government presented at trial. There was no dispute at trial that sexual intercourse occurred between the victim and appellant on the date charged. Appellant admitted that he engaged in sexual intercourse with the victim by penetrating her vulva with his penis and his semen was detected on both the victim's cervical and vaginal swabs. Thus, the issue of contention at trial was whether the sexual intercourse occurred without consent.[6] Appellant's statement to law enforcement and closed-captioned video footage demonstrated the victim was flirting with appellant prior to agreeing to going to his barracks room. Appellant explained that the victim actively participated in the sexual intercourse in that she was awake, removed her own clothing, performed oral sex on him, and responded to appellant's requests for her to lie on her back or get on top of him. He never admitted that the victim verbally or physically manifested a lack of consent to the sexual intercourse. Rather, appellant admitted that she exhibited signs of intoxication, he assisted her in getting properly dressed after the sexual intercourse, and he knew she was incapable of consenting based upon her level of intoxication. The victim testified that she had no memory of the sexual intercourse and was thus, unable to provide any affirmative evidence of a lack of consent.

(. . . continued)
impacted by the statutory changes made to Article 120 which went into effect in January 2019.

[6] "'Consent'" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issues does not constitute consent." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 3A-44-2.d, note 5 (29 Feb. 2020) [Benchbook].

The government cannot rely exclusively on the victim's lack of memory due to intoxication as a proxy for satisfying its burden to prove a lack of consent, which is what occurred in this case. Certainly, evidence of intoxication is relevant evidence as to the issue of a victim's competence to consent. However, the government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent. While all of the surrounding circumstances must be considered by the fact finder in determining whether the government proved the essential element of the victim's lack of consent, the surrounding circumstances in this case do not support a lack of consent but rather, an *inability to consent,* which are distinct sexual assault offense separate and distinct elements. *United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (holding that assault consummated by a battery was not a lesser included offense of sexual assault and abusive sexual contact by placing in fear); *see also Weiser*, 80 M.J. at 640-41 (holding that sexual assault by bodily harm requires proof that "the victim did not, in fact, consent" and is distinct from the victim's "legal inability to consent"). The evidence before the fact finder was that the victim was coherent and actively participating in sexual acts and the sexual intercourse and provided a freely given agreement to the sexual intercourse through words and actions. The victim's lack of memory is not evidence of a lack of consent. At best, the victim's lack of memory, due to intoxication by alcohol, is circumstantial evidence of an *inability to consent.* Given the evidence elicited at trial, I do not find that a rational trier of fact could find the government met its burden of proving lack of consent beyond a reasonable doubt in this case.

Further, I also find that the charged offense is factually insufficient. Even after carefully reviewing the evidence and taking into consideration that the military judge personally observed the witnesses, I am not convinced of appellant's guilt of the *charged* offense beyond a reasonable doubt based upon the evidence presented. I disagree with the majority that the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt. Specifically, I find there was no affirmative evidence of the victim's lack of consent to the sexual intercourse. The victim testified that she had absolutely no memory of any sexual intercourse with appellant. In fact, she has a lack of memory of several hours from the night of the charged offense. The victim's testimony that she would not have engaged in sexual intercourse with a tampon inserted in her vagina, nor would she had done so while menstruating, is not evidence of lack of consent at the time of the sexual intercourse. The victim testified she could not even recall when she inserted the tampon she was wearing the morning after the assault. A reasonable hypothesis could have been that she did so after the sexual intercourse and simply does not remember doing so. The government is required to prove a lack of consent temporally linked to the sexual act. In this case, the victim cannot provide any affirmative evidence of her lack of consent at the moment of the sexual act. In fact, all evidence points to the contrary given appellant's statements to law enforcement describing the victim's active participation in the sexual intercourse. While there

was evidence that the victim exhibited some signs of intoxication and video footage of her condition upon leaving appellant's barracks room after the sexual intercourse, I do not find such circumstantial evidence sufficient to satisfy the government's burden of proving lack of consent beyond a reasonable doubt given the approximately sixty-minute period in which the victim was alone with appellant. Further, unlike the majority, I do not find that appellant's false exculpatory statements, both when confronted by the victim and CID the following morning, to be affirmative circumstantial evidence of the victim's lack of consent. It is reasonable to believe that appellant initially denied anything occurred with the victim because he was married at the time and concerned about the consequences of his having committed adultery.

Unfortunately, I am bound by the government's decision to charge this case as a sexual assault without consent. Based upon the evidence presented at trial, I am not convinced of appellant's guilt of the charged offense of sexual assault, without consent. Had the government chosen to charge this case as a sexual assault while the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance, in violation of Article 120(b)(3)(A), UCMJ, I would find the evidence is both legally and factually sufficient for those theories of liability.