UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, ARGUELLES,[1] and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E2 MATTHEW L. COE
United States Army, Appellant

ARMY 20220052

Headquarters, U.S. Army Maneuver Center of Excellence
Trevor I. Barna, Military Judge
Colonel Javier E. Rivera, Staff Judge Advocate

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

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Pamela L. Jones, JA; Lieutenant Colonel Anthony O. Pottinger, JA (on brief).

17 August 2023

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120(b), Uniform Code of Military Justice, 10 U.S.C. § 920(b) [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-four months, and reduction to the grade of E-1. The convening authority took no action on the sentence.

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

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises one assignment of error, which merits discussion but no relief.[2]

BACKGROUND

While in airborne training, the victim, appellant, and several other soldiers decided to spend an afternoon at the river. On the way to the river, they stopped to buy brandy. Almost immediately after arriving at the river, and before the heavy drinking started, appellant and the victim had consensual sex in a wooded area away from the group. Over the course of the afternoon the victim and a few (but not all) of the soldiers drank the brandy straight from the bottle, and the victim had sex with at least one of the other male soldiers and one of the female soldiers. When last observed by the others at the end of the day, the victim, who appeared to be very intoxicated, was having sex with another soldier in the presence of appellant. Although there were no witnesses to the act, appellant admitted to having sex with the victim for a second and final time at the end of the day, which formed the basis for the charge in this case.

The next time witnesses observed the victim, appellant and another soldier were helping her put her bathing suit bottoms back on and cleaning her off in the river. Multiple witnesses testified that the victim had trouble walking and appeared to be very intoxicated at that point. Her friends flagged down two non-affiliated soldiers who were in a car by the river. These soldiers helped carry the victim back to their car, where she sat for a while in the air conditioning and drank water. While in the car, the victim borrowed a friend's phone and made several attempts to call a male soldier. Although multiple witnesses testified that the victim and the soldier she tried to call in the car were in a serious relationship, the victim claimed that they were just friends.

At some point, one of the male soldiers in the group (not appellant) directed the driver of the car to take the victim to a hotel. Concerned for her safety, the driver instead took the victim back to her barracks, where other soldiers say she showed up disheveled and intoxicated, with her clothes all dirty, scratches on her back and legs, and twigs and dirt in her hair. There was also evidence that while at the barracks, the victim attempted to string up a hair dryer cord for the purpose of hanging herself.

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[2] We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit. We address appellant's factual sufficiency claim in greater detail below.

The victim testified at trial that after the drinking games started she became highly intoxicated and "blacked out . . . in and out of conscience." When asked the next thing she remembered, the victim testified:

V: Next thing I remember is looking up with my clothes off, looking at [appellant] saying "I do not want this," and then I blacked out again.

TC: Who was – what was happening at the time?

V: At the time, [another male soldier] was in front of me, sir, and then [appellant] was off to the side penetrating [another female soldier].

TC: What's the next thing you remember?

V: Next thing I remember is being in a vehicle.

As noted above, there is no dispute that appellant had sex with the victim after she stated "I do not want this" while looking at him.

A sexual assault forensic nurse also testified that the victim told her "that she remembers her clothes coming off, she doesn't remember who took them off, and she told them 'no stop,' and she looked into their eyes and they saw that she was scared and then she blacked out." Although the nurse did not clarify who the "them" was, this evidence tracks the victim's testimony about the statements she made to appellant and the other male soldier when she woke up with her clothes off, while appellant was having sex with another female.

The evidence at trial also revealed that appellant made several admissions: (1) he told the Army Criminal Investigation Command (CID) agent that he did not look at victim when he had sex with her the second time because "she was super drunk and it was wrong;" (2) when asked by the CID agent if he felt the victim "was coherent enough to give consent for sexual acts," appellant responded "No; " (3) another soldier testified that on the same night after the assault, appellant was "downhearted" and "emotionally drained" and that he told her he "f—d up" by not waiting to have sex with the victim "until they were sober;" and, (4) in a pretext text message stating that the victim was too drunk to consent, appellant replied "Yes she was. She was wasted."

LAW AND DISCUSSION

Appellant, who was charged with one specification of violating Article 120(b)(2)(A), sexual assault without the consent of the other person, now alleges that because the government's theory of the case, and the bulk of the evidence, pertained to the victim's level of intoxication, the government violated his due

process rights. Specifically, appellant asserts that it was error for the government to charge him under one theory of liability for sexual assault (without consent), but to then convict him under a different non-charged theory of sexual assault, that is upon a person who is incapable of consenting due to impairment by intoxicant in violation of Article 120(b)(3)(A).

Another panel of our colleagues recently addressed this very issue in *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 April 2022), pet. denied, 83 M.J. 83 (C.A.A.F. 2022). Although *Roe* was a nonbinding memorandum opinion, we agree with both the reasoning and holding of that case, and find it to be dispositive here. The court in *Roe* started its analysis by noting that the due process claim before it turned on the single question of whether 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?" *Id.* at *11. And in answering that question in the affirmative, the court explained:

> There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she did not consent. Our essential holding here is that this was one of the many permissible ways for the government to attempt to prove "without consent."

Id. at *13-14. The court in *Roe* also noted that because the government in any event presented additional evidence of "without consent" above and beyond the victim's intoxication, it was not required to "decide whether 'without consent' can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id.* at *17.

Applying the holding of *Roe* to this case: (1) it was permissible to prove lack of consent by introducing evidence of the victim's intoxication level; and (2) there is also additional evidence of lack of consent beyond intoxication level in this case. Among other things, the victim testified that she told appellant "I do not want this" before they had sex for the second time, she reported to the sexual assault nurse that she told "them" "no, stop." Likewise, although appellant's admissions to the CID agent and his statements to his fellow soldiers pertain to the victim's level of intoxication, they are nonetheless further evidence of his consciousness of guilt and the fact that he knew she was not a consenting partner. *Cf. United States v. Smith*, __ M.J. __, 2023 CAAF LEXIS 470 at *24 (C.A.A.F. 12 Jul. 2023). ("And although Appellant told AFOSI that SrA HS was an active, willing participant in the sexual activity, grinding on him and making out with him until he pulled away, he also

admitted that he knew it was wrong to engage in sexual activity with her because she was drunk.").[3]

As such, and like the court in *Roe*, we hold that because the military judge convicted appellant of the offense as charged, and not some other uncharged offense, appellant's due process claim is without merit.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge PENLAND concurs.

Judge MORRIS dissenting:

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[3] With respect to appellant's factual sufficiency claim, we note that even as amended, the most recent version of Article 66(d) still requires that in weighing the evidence we give "appropriate deference to the fact that the trial court saw and heard the witnesses and evidence." *See United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015), *aff'd on other grounds* 76 M.J. 224 (C.A.A.F. 2017) (holding that "the degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue"); *United States v. Crews*, ARMY 20130766, 2016 CCA LEXIS 127 at *11-12 (Army Ct. Crim. App. 29 Feb. 2019 (mem. op.) ("The deference given to the trial court's ability to see and hear the witnesses and evidence – or "recogni[tion] as phrased in Article 66, UCMJ – reflects an appreciation that much is lost when the testimony of the live witnesses is converted into the plain text of a trial transcript . . . . [the factfinder] hears not only a witness's answer, but may also *observe* the witness as he or she responds.") (emphasis in original). While we recognize that there are certainly alternative interpretations of the evidence that could support a finding of not guilty, we emphasize that our factual sufficiency review is *not* a *de novo* review in which we substitute ourselves for the factfinder and decide what verdict we would have rendered. In sum, after reviewing the entire record, to include the evidence supporting the guilty verdict as set forth immediately above, and giving deference to the military judge who was able to see and hear each witness, including the victim, as they testified, we respectfully disagree with our dissenting colleague that the finding of guilt was "against the weight of the evidence."

I respectfully disagree with the majority opinion in this case for two reasons: (1) the government's charging decision violated appellant's due process right to fair notice; and (2) in any event, the evidence is factually insufficient. As such, appellant's conviction and sentence should be set aside.

FACTUAL SUFFICIENCY

Appellant asserts in his *Grostefon* matters that his conviction is factually insufficient. Article 66(d)(1)(B), as amended by the National Defense Authorization Act for Fiscal Year 2021 provides:

> (B) FACTUAL SUFFICIENCY REVIEW
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> (i) In an appeal of a finding of guilty under subsection (b), the Court [of Criminal Appeals] may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
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> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
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> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (2) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to Article 66(d)(1)(B) applies only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

The question is whether we are clearly convinced the finding of guilty, which required the military judge to find beyond a reasonable doubt that that the sexual activity occurred without the consent of the victim, was against the weight of the evidence. I do not believe the government satisfied its burden of proving the

victim's lack of consent beyond a reasonable doubt and therefore, I am convinced that the finding of guilty was against the weight of the evidence.

The testimony from the victim and other soldiers who testified during appellant's court-martial established that a group of Airborne School students went down to the river to hang out and drink. Shortly after arriving at the river, appellant and the victim headed into the wood line and engaged in consensual sexual activity. Once they returned to their group of friends, appellant, the victim and one other soldier started playing drinking games and kissing. This kissing led to the victim and the other soldier engaging in consensual sexual activity, while appellant was nearby and continuing to kiss the victim's body. At some point two additional soldiers arrived, one male and one female, and the victim asked the female soldier to join, which she did. After she performed some sexual acts with the victim, the other female soldier began to have sexual intercourse with appellant. At some point, the victim who was at the time engaging in sexual acts with another soldier looked over to appellant and said, "I do not want this" and then the victim blacked out. When she woke up, she was crying and stated that she was disgusted with herself because she knew what happened. Others testified that she was yelling that she had cheated on her boyfriend. On cross-examination, the victim acknowledged that she could have said "yes to the group."

Other than the statements identified by the majority that appellant made to a CID agent in an interview where the agent used highly suggestive and manipulative interrogation techniques, the only direct evidence the government presented that the victim may not have been consenting was her statement that she looked at the appellant and said "I do not want this." Then, in the very next question when the assistant trial counsel asked her what was going on, she answered that the other soldier was in front of her and appellant was on her side having sex with the other female soldier. Just because the victim was looking at appellant does not mean that he saw or heard her. It is completely unclear if appellant ever heard the victim say "I do not want this" or had any idea at all that she was no longer consenting. Even worse, the military judge also confused this point. In response to the defense counsel's statement that the victim did not say "I do not want this," the military judge confirmed that "she did testify as such. That did come up when she made eye contact with Private Coe at some point." Only, that is not what the victim testified to. The victim said she looked at appellant, not that he made eye contact with her. She further testified that at the time appellant was having sexual intercourse with someone else, so it seems unlikely he would have made eye contact with the victim or been focusing on her at that moment. The military judge's mistaken characterization of the victim's testimony is particularly problematic because he was also the factfinder. Sometimes, as in this case, our ability to read the verbatim transcript affords us the opportunity to detect inconsistencies missed or misinterpreted by the factfinder.

Further conflicting evidence concerning consent came during the testimony of the sexual assault forensic nurse. Apparently, the victim told the nurse she did not remember who took her clothes off, but she told "them" "no, stop" and she looked into their eyes and they saw that she was scared and then she blacked out. It is not clear who "they" is in this statement. Adding to the confusion, this testimony from the nurse is also a different version of the "I do not want this" statement. And more confusing still is the fact that there were people around who were not involved in the sexual acts, who could have intervened, but did not, because at least from their perspective, it appeared the victim was enjoying the exchange.

The best evidence against appellant are the statements he made to CID in which the CID agent used highly suggestive and manipulative tactics and refused to take a "no" or alternate version of the facts when appellant tried to deny the agent's suggestions. The agent essentially told appellant if appellant did not agree with the agent's version of events, then maybe this was not a "one time mistake" and appellant was someone "that takes advantage and preys on girls that are drunk." Worse still, most of the negative characterizations recounted by the trial counsel in argument and again by the majority here came from appellant's statements to the CID agent which initiated with the agent as he was pressuring appellant to agree. On these facts, it is not clear how the factfinder found appellant guilty of sexual assault. The victim was capable of consenting at the outset of the activities. From a mistake of fact as to consent perspective, it is unreasonable to assume that any of the soldiers involved on this day could have ascertained when the line of incapable of consenting was crossed. The statements appellant made to his friends and to the CID agents after the fact were as his defense counsel argued, in retrospect. As another colleague pointed out in his dissent on factual sufficiency grounds in *United States v. Moellering*, ARMY 20130516, 2015 CCA LEXIS 270, at *29 (Army Ct. Crim. App. 29 June 2015) (Mem. Op.) (Haight, J., dissenting) circumstances are fluid in the "heat of the moment." It is highly unlikely appellant was that enlightened in the "heat of the moment."

While the majority believes the comments appellant made to another female soldier and during a pretext text communication were evidence of his consciousness of guilt, it is just as likely he was acknowledging a sexual best practice–that because the victim had been drinking, he should have waited. Another reasonable conclusion is that his responses were a showing of compassion for the victim because he witnessed her expressing regret about the sexual activity. Instead of piling on and further damaging the victim's reputation, appellant was honest about his own regrets and acknowledging her intoxication. However unartfully expressed, even if appellant's statement about waiting was taken literally, it was not a matter of waiting for sexual activity as his comment suggested, sexual activity was ongoing, so this statement on which the majority places so much emphasis does not make sense in the context of what was occurring at the time.

Unlike the sleeping victim in *Roe*, where despite finding the evidence factually sufficient, the majority claimed the factual sufficiency was a close call, here the victim was actively participating in and initiating the sexual activity. *See United States v. Roe*, ARMY 20220144, 2022 CCA LEXIS 248, (Army Ct. Crim. App 27 April 2022) (mem. op.). Then, despite declaring that she blacked out during the approximately 15-minute period, she seemed to remember enough about the sexual activity to exclaim that "she knew what happened," had "cheated on her boyfriend," and could have said "yes to the group." These statements from the victim are strong indications of consent. While it is abundantly clear that the victim regretted the sexual activity, it is less than clear that she ever manifested a lack of consent. Appellant's expressions of regret over the sexual activity have been used as evidence of consciousness of guilt. But regret for making poor decisions concerning sexual activity is not the same as committing a sexual assault. In light of the amount of evidence contrary to a finding that the victim did not consent to the ongoing sexual activity, I am clearly convinced that the finding of guilty was against the weight of the evidence.

UNITED STATES V. ROE

On its face, the charging decision made by the Government in this case is similar to the charging decision made by the Government in *Roe*. Specifically, in both cases, the Government elected to charge appellant with a specification of violating Article 120(b)(2)(A), when the Government's theory of the case was instead that the victim did not consent because she was incapable of consenting. In *Roe*, the Government's theory was the victim was asleep, which is captured in Article 120(b)(2)(B). In this case, the Government's theory was the victim was impaired by intoxication, which is captured in Article 120(b)(3)(A). As my esteemed colleague highlighted in her dissent in *Roe*, "the statutory context, alone, dictates that Article 120(b)(2)(A), 120(b)(2)(B), and 120(b)(3)(A), UCMJ, are separate and distinct theories of liability for the offense of sexual assault." *Id.* at *24 (Walker, J., dissenting). The elements the government is required to prove beyond a reasonable doubt in Articles 120(b)(2)(A) and 120(b)(3)(A) are separate and distinct. While Article 120(b)(2)(A) simply requires lack of consent to the sexual act, when charged, Article 120(b)(3)(A) requires the government to prove beyond a reasonable doubt both that the victim is incapable of consenting to the sexual act due to impairment by an intoxicant and that the accused knew or reasonably should have known of that condition. *See* 10 U.S.C. § 920(b)(3)(A).

Allowing the Government to in effect merge all theories of liability into one gives the Government an even greater unfair advantage and the ability to shore up weak evidence as to any element without also having to prove the other required elements of that overall offense. The majority in *Roe* seems to suggest that Article 120(b)(2)(A) carries a "heavier burden" of affirmatively proving a lack of consent when intoxication is at issue. *Roe* at *15. If that is the case, then the Government is

arguably using proof of the lesser burden of incapable of consent to prove that heavier burden. Even worse, the Government is proving the victim is incapable of consent without also having to prove appellant knew or reasonably should have known of the victim's inability to consent. This unfair advantage gives the government more than just the "discretion to charge one of multiple offenses" as the majority suggests in *Roe*, but it allows the government to unfairly "cherry pick" which elements from a group of similar offenses it would like to prove up, without giving appellant fair notice of which elements he must defend against. *Id.* (citing *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (It is the Government's responsibility to determine what offense to bring against an accused.").

The facts of this case better illustrate the risk of allowing the government to convict on a theory other than the one charged. Unlike the victim in *Roe*, the victim in this case was engaging in ongoing sexual acts with a group of fellow soldiers. In fact, it is undisputed that on the day in question, she had participated in consensual sexual activity with appellant before consuming large amounts of alcohol. Then, while continuing to consume alcohol with the group, she invited another woman to engage in sexual activity with her and started having sexual intercourse with yet another man. When that woman became uncomfortable and attempted to break away from the group, the victim knee-crawled over to encourage her to continue participating.

On this evidence, either theory adjudicated separately and distinctly would likely have failed, and thus appellant was materially prejudiced by the government's charging decision. Because the Government could not prove appellant's guilt beyond a reasonable doubt on either individual theory, it used elements from the uncharged theory to convict appellant of the charged theory. In other words, because the Government's evidence that the victim did not consent was weak, it used evidence that she was incapable of consenting to shore up the lack of consent element. In doing so, appellant's due process rights were violated by the government's election to charge him with sexual assault with a person unable to consent and then proving their case on a theory that the victim was too intoxicated to consent, which resulted in material prejudice to appellant.

In *Roe*, where material prejudice was not found, the facts supporting that victim's inability to consent were overwhelming. The victim in that case was sleeping and a team of fellow soldiers, including the accused, had set up a guard schedule to watch and care for her throughout the night. In this case, the facts concerning lack of consent or even inability to consent are weak at best and only shored up by the improperly merged theories. Thus, appellant was materially prejudiced by the Government's ability to merge theories of liability and elements of multiple offenses to prove lack of consent.

I would set aside appellant's finding of guilty and the sentence.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court