IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
NICHOLAS S. STEWART Captain (O-3) U.S. Marine Corps, Appellant	)	Crim.App. Dkt. No. 201000021 USCA Dkt. No. 11-0440/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Issues Granted

I.

UNDER *UNITED STATES V. PRATHER*, IS IT LEGALLY POSSIBLE FOR THE PROSECUTION TO DISPROVE AN AFFIRMATIVE DEFENSE BEYOND A REASONABLE DOUBT ONCE THE MILITARY JUDGE HAS DETERMINED THAT THE DEFENSE HAS BEEN PROVED BY A PREPONDERANCE OF THE EVIDENCE AND, IF NOT, IS THE MILITARY JUDGE REQUIRED TO ENTER A FINDING IN SUCH A CASE UNDER RCM 917?

II.

WHETHER THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING THE EVIDENCE FACTUALLY SUFFICIENT BEYOND A REASONABLE DOUBT TO SUSTAIN APPELLANT'S CONVICTION UNDER SPECIFICATION 2 BECAUSE IN DOING SO IT (1) VIOLATED THE PRATHER LEGAL-IMPOSSIBILITY PRINCIPLE AND (2) IMPERMISSIBLY FOUND AS FACTS ALLEGATIONS THAT HE WAS FOUND NOT GUILTY OF IN SPECIFICATION 1.

III.

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY REQUIRING THE DEFENSE TO PRESENT EVIDENCE ON THE DEFENSE OF CONSENT AT AN ARTICLE 39(A) SESSION PRIOR TO TRIAL.

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dismissal and more than one year of confinement. The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b) (2006). Appellant filed a timely petition for grant of review with this Court. Accordingly, this Court has jurisdiction over

the granted issues under Article 67(a)(3), UCMJ, 10 U.SC. § 867(a)(3) (2006).

Statement of the Case

A panel of members sitting as a general court-martial convicted Appellant, contrary to his pleas, of aggravated sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006). The Members sentenced Appellant to two years confinement and a dismissal from the Naval Service. The Convening Authority approved the sentence as adjudged.

Appellant submitted seven assignments of error to the lower court. The lower court affirmed the findings and sentence approved by the Convening Authority, and Appellant moved for reconsideration based on this Court's holding in *United States v. Prather*. After the lower court denied the motion for reconsideration, Appellant filed a timely petition for grant of review that this Court granted on August 10, 2011.

Statement of Facts

A. Charged Offenses.

On May 16-17, 2008, AN hosted a graduation party at her apartment to celebrate her graduation from George Mason University's Masters program. (J.A. 54.) Appellant also attended the party. (J.A. 188.) AN and Appellant had a brief sexual history, that according to AN never included intercourse,

which ended roughly six years before the graduation party. (J.A. 192.)

At approximately 2200, after her parents went home, AN began to drink multiple shots of liquor. (J.A. 57.) AN became intoxicated; her cousin, Lieutenant (LT) SW, USN, described her as "the worst I've ever seen her in levels of intoxication." (J.A. 38.) An expert in forensic toxicology as well as clinical pharmacology, stated that she believed AN to be in the confusion stage of intoxication, which is characterized by signs of disorientation, confusion, increased pain threshold, and a loss of muscle coordination. (J.A. 71.)

At approximately midnight, AN became intoxicated to the point that she had to be helped to her bedroom. (J.A. 39.) Two of AN's friends put her in her bed fully clothed, where she remained until the following morning. (J.A. 58.) After AN had been placed in bed, some of her friends came by to say goodbye and described AN as being "mildly responsive." (J.A. 52.)

At some point after AN had been put in her bed, Appellant, AN's brother, AN's roommate, and a friend of AN's, had gone to bed in the living room of AN's apartment. (J.A. 189.) At approximately 0400 Appellant left the living room and went to AN's bedroom. (J.A. 189.)

AN, who had been put in bed fully clothed, woke up without any clothes on, next to Appellant. (J.A. 58.) AN quickly put

clothes on and went back to bed. (J.A. 59.) After getting back in bed, AN remembered that Appellant entered the room after she had been put in bed by her friends. (J.A. 60.) She remembered that Appellant digitally penetrated her vagina with his finger, and tried to insert his penis in her vagina. (J.A. 60.) AN also remembered after waking up that morning, Appellant masturbating and ejaculating on her stomach. (J.A. 60.)

While AN continued to remember these events in the morning, Appellant began to masturbate next to AN. (J.A 62.) After masturbating, Appellant got out of bed and lay on the floor of AN's bedroom. (J.A. 62.) Appellant then asked AN: "Are you on the pill?" (J.A. 62.) When AN asked: "[w]hy?" Appellant responded: "[c]ause we didn't use a condom last night." AN had no recollection of having sexual intercourse with the Appellant or any other activity that would require Appellant to question if she was on the pill. (J.A. 62.)

On the Monday following the sexual encounter, AN sent Appellant an e-mail expressing how she was uncomfortable with what happened on the morning after her party. (J.A. 93.) In an e-mail sent on the Tuesday following the party, AN stated that she had fingerprint sized bruises on her thighs and that "something outside of my control and certainly outside of my approval took place." (J.A. 91.) Appellant responded: "I feel like I deserve to kill myself." (J.A. 89.)

Around a month later, AN discussed what happened with her brother, JN. (J.A. 62.) JN contacted Appellant and questioned him regarding the encounter. (J.A. 190.) Appellant told JN he raped AN and stated: "if you want to meet somewhere" and "bash my head in I will let you do that." (J.A. 190.) Appellant later text messaged JN and stated that he talked with his "superiors" about the situation and that he was willing to go prison if he had to. (J.A. 191.)

B. Motion to Dismiss at trial and severance of the duplicitous specification.

The sole Specification in this case alleged:

> In that [Appellant], U.S. Marine Corps, on active duty, did, at or near Fairfax, Virginia, on or about 17 May 2008, engage in a sexual act, to wit: using his penis to penetrate the vagina of [AN], who was substantially incapacitated or substantially incapable of declining participation in the sexual act.

Based on this Specification, Appellant moved the trial court to "require the Government to elect among the two alternative theories of criminal liability alleged in the Specification." (J.A. 195.) Civilian Defense Counsel, without citing any case law, asked the trial court to dismiss one of the two theories of guilt. (J.A. 178-79.) LtCol Robinson, the Military Judge presiding over the trial, denied the motion. (J.A. 200.)

After the case was continued, Civilian Defense Counsel asked the new Military Judge to reconsider Judge Robinson's

ruling. (J.A. 17.) The Government argued that the original Military Judge's ruling was correct that no dismissal was required, and that even if the Military Judge believed the defense argument had merit, the only proper remedy was not dismissal, but severance of the duplicitous specification. (J.A. 17.)

The Military Judge "declined to upset Judge Robinson's ruling" that the Government would not be forced to dismiss one of the two theories plead in the alternative. (J.A. 183.) He then informed the Defense that he would give an instruction to the Members that they could choose one or the other—— incapacitated or incapable. (J.A. 184.) The Military Judge also informed the Defense that they could choose either one specification with an instruction, or the Defense could force the Government to sever the specification because he believed the specification was duplicitous. (J.A. 23-24.)

The Defense elected the latter: "we request that the specification be severed to two separate specifications, alleging the two different theories." (J.A. 25.) The Military Judge later determined that he would instruct the Members that they could convict on neither Specification or either Specification, but not both. (J.A. 187.)

C. Article 39(a) hearing on the affirmative defense of consent.

Appellant elected trial by a panel of members. (J.A. 15, R. 113.) Later, during an Article 39(a) session, the Military Judge recognized the unique structure of affirmative defenses under the new Article 120(t)(16). (J.A. 26.) The Military Judge stated that he interpreted the new statute to "place[] a burden" on the defense to "show prove by preponderance of the evidence that an affirmative defense exists." (J.A. 26.) His interpretation continued: "if [the defense] does reach that burden, then it's beyond a reasonable doubt for the [G]overnment to show that such does not exist." (J.A 26.)

Consistent with his interpretation, the Military Judge considered whether the initial burden, by a preponderance of the evidence, was solely a factual matter, or instead a mixed matter of facts and law. (J.A. 27.) The Military Judge determined that whether an affirmative defense exists is "a question of mixed facts and law," and invited the Defense, outside the presence of the Members, to "show by a preponderance of the evidence the existence what [sic] they believe is consent in this case." (J.A 27.)

The Military Judge informed the parties that this procedure was necessary to ensure "no confusion with the Members as to

what burden of proof is where and how." (J.A. 27-28.) Civilian Defense Counsel objected:

> I object to you placing the burden on the defense. I object to the procedure; in that, it's contrary to the Benchbook . . . And I object to the characterization as it's a mixed question of law and fact. I think we don't know what it is because the Court of Appeals for the Armed Forces hasn't told us yet.

(J.A. 28.) The Military Judge noted the objection, and asked the Defense whether they had "evidence to present on this issue with regards to establishing an affirmative defense?" (J.A. 28.)

Civilian Defense Counsel then presented the following "evidence": (1) Appellant's statement to NCIS drafted with the assistance of counsel, which had been filed as an attachment to the Mil. R. Evid. 412 motion; and (2) a verbatim transcript of the cross-examination of the victim during the Article 32, UCMJ, hearing held in this case. (J.A. 29; J.A. 117, 199.) The Mil. R. Evid. 412 issues in this case had been the subject of a prior discussion where the Military Judge noted: "Now I don't know whether [Appellant's declaration to NCIS] is going to be attempted to be entered into evidence." (J.A. 181.) Civilian Defense Counsel responded: "I don't think I can admit it, but I'm certainly entitled to let the Members know, through the Government's NCIS witnesses, that my client made that statement." (J.A. 182.)

The Military Judge agreed with the Defense that as Military Judge he could consider hearsay "under [Mil. R. Evid.] 101," "at this stage." (J.A. 30.) The Government then informed the Judge that they planned on calling the Victim to testify at the hearing. (J.A. 32-33.) The Military Judge responded:

> Once again, remember, all we're asserting here, the only question this court is looking at is whether or not there has been enough evidence for this court to establish, by preponderance of the evidence, whether or not I'm going to allow——essentially, make a [sic] instruction with regards to consent, mistake of fact as to consent.
>
> The factual issues, obviously, gentlemen, you know don't belong to me. It belong [sic] to those members that we finally seat, when and if we do that.[1]

(J.A. 33.)

The Government decided for that stage of the proceedings to submit documentary evidence, but to not call the Victim to testify: "we're going to ask you to rely on the exhibits that's [sic] been submitted for your consideration." (J.A. 34.) The Military Judge then stated:

> Although, I've not read this exhibit, and I will read it, I am convinced based upon the documentation provided by both sides, that the defense has met their burden with regards to asserting the affirmative defense of consent; and for that matter, mistake of fact as to consent based upon, merely what I've seen thus far. I suspect that the information contained in those documents will also come forth during the case

[1] Here, the Military Judge references Appellant's motion to set aside the member selection, a matter that had not yet been ruled on. Appellant did not appeal the lower court's ruling on this issue.

> in chief of either side, if not both, so I feel comfortable in that.
>
> Government, as I mentioned before, if you feel some reason that——as you do not feel that for some reason this instruction should be given, I'll give you leave to bring a motion at that point in time, outside the hearing of the members.

(J.A. 34-35.)

During instructions on findings, the Military Judge informed the Members that in order to convict they must be convinced as to guilt "beyond a reasonable doubt as to each and every element of that offense." (J.A 77.) After discussing the elements of the charged offenses and the relevant definitions, the Military Judge instructed the Members that the "prosecution has the burden to prove lack of consent beyond a reasonable doubt." (J.A. 81.) In order to convict, "you must be convinced beyond a reasonable doubt that, at the time of the sexual act alleged, [AN] did not consent." (J.A. 81.) The Military Judge did not instruct the Members about any burden shift required by the statute under Article 120(t)(16), or any obligation by Appellant to prove the affirmative defense by a preponderance of the evidence or any other quantum of evidence.

D. Appellant's R.C.M. 917 Motion.

At the close of the Government's case-in-chief, Appellant moved to dismiss both Specifications under R.C.M. 917. (J.A. 74.) Civilian Defense Counsel argued that the Government

"failed to prove that there was any penetration of [the victim's] vagina by a penis." (J.A. 74.) The Government then responded by noting the following facts: (1) the accused, by his own admissions, admitted to having sex with AN; (2) Appellant told JN, the victim's brother that he "raped" JN's sister; and, (3) AN's testimony that Appellant "was trying to put his penis in there." (J.A. 74.) When the Government mentioned Appellant's "admissions" they were referencing his question posed to AN whether she was on the pill and reply to AN's answer "because we didn't use a condom last night." (J.A. 62.)

After hearing the Government's recitation of the evidence, the Military Judge denied Appellant's R.C.M. 917 motion stating: "As long as there [sic] some evidence, and all reasonable inferences, thereto, the government is entitled to have this presented to the [Members] based upon their case." (J.A. 74.)

E. Evidence introduced by Appellant on the merits.

Appellant's case in chief began by introducing documentary evidence about Appellant's flight status and military performance. (See Defense Ex. D.) Appellant then called two character witnesses, one retired Lieutenant Colonel, and one active duty Lieutenant Colonel. (J.A. 193, 194.)

Summary of Argument

The Military Judge correctly denied Appellant's R.C.M. 917 motion because the Government presented some evidence, when

viewed in a light most favorable to the Government, to satisfy all the elements of the offense. Appellant's argument that *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011), requires reversal because the Military Judge determined pre-trial and outside the presence of the Members that the affirmative defense was raised lacks merit. *Prather* merely states that due process is violated when members are instructed, specifically in Article 120(c) cases, both that (1) to convict the Government must prove beyond a reasonable doubt that the victim was incapacitated, and also (2) the accused then has a burden to prove to that same factfinder, by a preponderance of the evidence, that the victim consented.

Here, the Members were instructed that the "prosecution has the burden to prove lack of consent beyond a reasonable doubt." Thus, the dicta discussed in *Prather* about the "legal impossibility" of the Government proving a lack of consent beyond a reasonable doubt after the defense proved consent by a preponderance does not apply to this case because the trier of fact was never instructed that the Defense bore any burden.

Regarding the second granted issue, first, Appellant invited any purported error when he requested that the trial court sever the arguably duplicitous specification, then alleged on appeal that acquittal on one of the specifications required a dismissal with prejudice based on *United States v. Walters*.

Second, Congress, not the Military Judge's Benchbook, determines different theories under which an accused may violate a statute; and Article 120(c)(2) delineates two and the Members were free to select which one they believed better described Appellant's culpability. Acquittal on one specification did not require acquittal on the other. Finally, the *Walters* principle does not apply to this case because the lower court can be perfectly clear what facts the Members believed met the elements of the offense in this case. Accordingly, unlike *Walters* and its progeny, here, no ambiguity exists as to what Appellant was convicted of.

When Appellant, during an Article 39(a) session, relied on two documents that were already attached to the Record of Trial, he did not suffer material prejudice to a substantial right. Regardless of whether this Court determines that the Military Judge erred in creating a novel procedure, Appellant did not actually present anything not already found in the Record, and received a consent instruction that foreshadowed this Court's ruling in *United States v. Medina*. Thus, because Appellant received an instruction that required the Government to disprove the victim's consent beyond a reasonable doubt, Appellant suffered no prejudice.

Argument

I.

WHETHER A DEFENSE IS "RAISED" IS A MATTER OF LAW DETERMINED BY THE MILITARY JUDGE. THE MILITARY JUDGE HERE MERELY CONCLUDED THAT THE AFFIRMATIVE DEFENSE WAS RAISED, AND THAT AN INSTRUCTION ON THE DEFENSE, PURSUANT TO THE BENCHBOOK AND LATER ENDORSED BY *UNITED STATES V. MEDINA,* 69 M.J. 462, 463 (C.A.A.F. 2011), SHOULD BE GIVEN. BECAUSE THE INSTRUCTION ACTUALLY PROVIDED TO THE FINDER OF FACT HERE WAS HARMLESS BEYOND A REASONABLE DOUBT UNDER *MEDINA*, NO PREJUDICIAL ERROR OCCURRED.

A. Standard of Review.

This Court reviews the legal sufficiency of the evidence *de novo*. *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011). Likewise, should this Court style Appellant's argument as an "as applied" challenge to the constitutionality of Article 120, this Court reviews Appellant's claim *de novo*. *United States v. Neal*, 68 M.J. 289, 296-97 (C.A.A.F. 2010) (citations omitted).

B. The Military Judge's determination that the affirmative defense was "raised" by a "preponderance of the evidence" was an interlocutory decision irrelevant to the merits of Appellant's guilt. This interlocutory decision did not raise the "logical impossibility" discussed in *Prather* where the same finder of fact determines both that an affirmative defense is "proven," and yet is permitted to "reconvict" an appellant.

Appellant argues that *Prather's* ruling as to the legal impossibility of the "burden shift" instructions, when given to Members, extends to the current situation and requires that he

be acquitted. (Appellant's Br. at 10.) In *Prather*, this Court noted that although the issue was not before it, the "second burden shift" is a "legal impossibility." "If the *trier of fact* has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty." *Prather*, 69 M.J. at 345 (emphasis added).

In members trials, the determination of guilt is not given to military judges, but solely to the members. Unlike federal criminal trials, military law does not provide a mechanism for a trial judge to set aside a finding of guilt solely because the verdict goes against the weight of the evidence. *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A. 1988). While military judges may enter a judgment of acquittal based on "legal insufficiency," i.e. "legal error," this Court firmly rejected the notion that they are a "thirteenth juror" with the power to enter a judgment of acquittal because they disagree with the factual finding reached by the members. *Id*. Credibility is solely for the jury, and not judges, to determine. *United States v. Taylor*, 464 F.2d 240, 245 (2d Cir. 1972). No case Appellant cites——and the Government is aware of none——holds that an interlocutory finding of a military judge as to the existence of an affirmative defense "by a preponderance of the evidence,"

operates to usurp the factfinding province of the Members as to the ultimate issues of guilt, and requires a reversal *per se*.

The Military Judge here made it abundantly clear that his only determination at the pre-trial hearing concerned whether an instruction would be given. As such, he was acting in a gatekeeper capacity and reiterated that "[t]he factual issues, *obviously*, gentlemen, you know don't belong to me." (J.A. 33 (emphasis added).) He was not acting in any capacity as a trier of fact, nor would he have been authorized to do so. The trier of fact never found that the defense had proven the affirmative defense by a preponderance of the evidence; thus there is no "legally impossible" situation that was of concern to this Court in *Prather*.

Arguably, the Military Judge erred by applying a "preponderance of the evidence" standard to determine whether the affirmative defense had been raised. Ordinarily, affirmative defense instructions must be given when a military judge determines that the record contains "some evidence" of the affirmative defense to which the "military jury may attach credit if it so desires." *United States v. DiPaola*, 67 M.J. 98, 99 (C.A.A.F. 2009). Irrespective, any error in this regard was harmless because the Military Judge found that Appellant had met the burden and gave the instruction that the prosecution had to prove lack of consent beyond a reasonable doubt.

Appellant's argument about legal impossibility also overlooks the fact that he elected a trial by a panel of members. The Members in this case were instructed properly and were not required to employ any confusing or unconstitutional burden shifts. While there are certain instances where a Military Judge must find facts, he does not have the power to enter a judgment of acquittal prior to the presentation of evidence. Military law vests the Military Judge with the power to enter a judgment of acquittal under R.C.M. 917 only when he can do so without judging the credibility of the witnesses. *United States v. Davis*, 37 M.J. 152, 153 (C.M.A 1993). Thus, his determination in this case that AN "consented" by a preponderance of the evidence did not empower him to acquit Appellant.

Here, Appellant asked for, and received instructions on consent and the mistake of fact as to consent. Prior to trial on the merits, Appellant knew, by virtue of the pre-trial hearing, that these instructions would be provided. This operated to the defense's benefit because it disregarded the burden shift in the statute that placed a burden on the defense and allowed them to be certain during their pre-trial preparation and their opening statement that consent was "in issue." Because a criminal appeal turns on whether Appellant shows both error and prejudice, Appellant's argument fails.

"To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Stewart v. United States*, 366 U.S. 1, 11 (1961) (Frankfurter, J., dissenting). Here, there is no possibility that the standard enunciated by the Military Judge impacted Appellant's trial because he received the instructions he asked for and the Members received the appropriate instructions.

The Military Judge's unique procedure, which removed a potentially unconstitutional burden shift from the Members' consideration per the procedure in *Medina,* allows this Court to affirm the conviction. In *Medina*, this Court held that because no explanation for ignoring Congress' statute was given, "it was error for the military judge to provide an instruction inconsistent with the statute." *Id*. at 464. The crucial difference between *Medina* and *Prather* was that in *Medina*, "the members were never instructed in adherence to the objectionable statutory scheme. Thus, the instructions in [*Medina*], unlike those in *Prather*, did not reference the constitutional infirmity." *United States v. Medina*, 69 M.J. 462, 465 n.4 (C.A.A.F. 2011). Nonetheless, the procedure followed here, as in *Medina,* relieved the Members from any confusing instructions and was harmless beyond a reasonable doubt.

C. The standards for whether an affirmative defense has been raised and whether there is insufficient evidence to sustain a conviction under R.C.M. 917 are different; the Military Judge properly denied the R.C.M. 917 motion.

Under R.C.M. 917, a finding of not guilty will only be granted in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses. R.C.M. 917(d).

The Military Judge's pre-trial determination that the Defense had met the burden of demonstrating, by a preponderance of the evidence, that the defense of consent was at issue and would be instructed upon had absolutely no effect on whether the standard under R.C.M. 917 had been met once the Government had presented its evidence. Should this Court adopt Appellant's position, it would hold that he was entitled to an acquittal simply because the Military Judge determined, as a matter of law, that an affirmative defense instruction would be given. And the acquittal was required even before Appellant's choice of forum, officer members, ever actually heard any testimony or considered any evidence. Whatever standard the Military Judge applied in this case to the pre-trial determination of whether a consent instruction was required had no effect upon the Members'

consideration of the evidence in the case. Thus, any error in the Military Judge's enunciation of the standard for whether the affirmative defenses were raised was harmless beyond a reasonable doubt.

II.

APPELLANT INVITED ANY ERROR THAT OCCURRED WHEN THE MEMBERS CONVICTED HIM OF ONE OF THE SEVERED SPECIFICATIONS. ASSUMING ARGUENDO THAT THE INVITED ERROR DOCTRINE DOES NOT APPLY, *WALTERS* DOES NOT CONTROL THIS CASE BECAUSE THIS COURT AS WELL AS THE LOWER COURT CAN BE PERFECTLY CLEAR WHAT ACTIONS LEAD TO APPELLANT'S CONVICTION.

A. Standard of Review.

"Whether a verdict is ambiguous and thus precludes a CCA from performing a factual-sufficiency review is a question of law reviewed *de novo*." *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010).

B. Appellant invited any error by requesting severance of a duplicitous Specification. Where a party invites or provokes error at trial they may not complain of it on appeal.

"[A] party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit." *United States v. Wells*, 519 U.S. 482, 488 (1997). "An appellant cannot create error and then take advantage of a situation of his own making. *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996). This Court has "employed the doctrine of invited error on numerous occasions to deny relief." *United*

States v. Resch, 65 M.J. 233, 239-240 (C.A.A.F. 2007) (Stucky, J., dissenting) (citing *United States v. Dinges*, 55 M.J. 308, 311 (C.A.A.F. 2001) (holding any error in the admission of victim testimony was invited because the victim was called as a defense witness during sentencing).

Here, Appellant asked for and received severance of a duplicitous specification. "One specification should not allege more than one offense." R.C.M. 307(c)(3), Discussion (G)(iv). "The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification." R.C.M. 906(b)(5), Discussion.

Here, the specification as initially pled in this case, alleged in the alternative, that Appellant committed aggravated sexual assault because AN was "substantially incapacitated" or "substantially incapable of declining participation in the sexual act." (J.A. 8, 10; Manual, ¶ 45(b)(3)(c) (2008 ed.).) Aggravated sexual assault has two elements. First, that the "accused engaged in a sexual act with another person, who is of any age." Manual, ¶ 45(b)(3)(c)(i). Second, the Manual then lists a choice of the following: "(ii) [t]hat the other person was substantially incapacitated;" or "(iv) [t]hat the other person was substantially incapable of declining participation in the sexual act." Manual, ¶ 45(b)(3)(c)(ii, iv).

Appellant moved the trial court to force the Government to elect its theory of prosecution - either substantial incapacitation or substantially incapable of declining participation. (J.A. 195.) The Military Judge denied the motion but gave defense the option of severing the Specification in two where the jury would be instructed that they could choose to convict on either theory. (J.A. 25.) Appellant exercised this option and asked the Judge to sever the Specification. (J.A. 25.) Later, just before opening statements, the Military Judge informed the parties that he would instruct the jury that they may convict on either Specification, but not both. Neither side objected to this procedure. (J.A. 187.)

Now, Appellant claims that severance of the Specification, and conviction on the second specification rather than the first, created an irreversible *Walters* problem requiring dismissal of the charge with prejudice. (Appellant's Br. at 15.)

Appellant requested to have the Government sever the specification such that alleged two alternative theories. Now, he asks for a windfall acquittal based on the Member's finding of guilty on the Specification numbered 2 of 2. Of course, had the Members convicted Appellant of Specification 1 but acquitted him of Specification 2, Appellant would have no argument. The reversal of a criminal conviction for aggravated sexual assault

should not fatally turn upon whether a panel convicted on the first or second specification that was put before them. And this becomes more apparent when the jury only received two specifications because the defense elected to sever the original Specification in two. Where the Defense elects severance of a Specification, and the Military Judge properly instructs the Members that they may not convict Appellant of two separate offenses, the defense invites the error they are now complaining of that the specifications were so similar that an acquittal on one requires an acquittal on the other.

C. The *Walters* principle does not apply where the reviewing court can be perfectly clear what acts provide the factual basis for conviction. Even if this Court determines the *Walters* principle is applicable, Congress' determination that the two elements are separate binds this court, not the definition of the elements in an Army publication.

Where an accused stands convicted of an offense where "on divers occasions" was originally included but later excepted from the Specification, and no explanation exists on the record, the service courts of criminal appeals are foreclosed from reviewing, under Article 66(c), the ambiguous verdict. *United States v. Ross*, 68 M.J. 415, 417 (C.A.A.F. 2010) (citing *United States v. Walters*, 58 M.J. 391, 396 (C.A.A.F. 2003). Because excepting the words "on divers occasions" results in a guilty finding for only one occasion and a not guilty verdict as to the remaining occasions, the reviewing court cannot examine the

factual sufficiency of the evidence without risking violating the accused's double jeopardy rights. *Ross*, 68 M.J. at 417.

This concern is inapplicable to this case. Here, the purported issue arose because of Appellant's motion to "require the Government to elect among the two alternative theories of criminal liability" provided for in the Specification. (J.A. 195.) This motion had no legal basis based on the longstanding principle that it "makes no difference how many members chose one act or the other, one theory of liability or the other." *United States v. Rodriguez*, 66 M.J. 201, 205 (C.A.A.F. 2008) (citations omitted).

The fatal error in both *Walters* and *Ross* occurred because the reviewing court could not determine which acts the finder of fact determined met the elements of the offense. In *Walters*, the accused was convicted of one drug offense and acquitted of all others. Because the appellate court could not determine which occasions the members acquitted on, it could not review and affirm a conviction for one act of drug use without potentially infringing upon the right not to be placed in double jeopardy for the same offense. Likewise, in *Ross*, the service court could not be sure which of three media the military judge found the accused guilty of possessing and which he acquitted the accused of possessing.

Here, no doubt exists that the Members convicted Appellant of aggravated sexual assault for his actions in the early morning hours of May 17, 2008, when he engaged in a sexual act with AN when she was substantially incapable of declining participation in the sexual act. There is no ambiguity and no danger that the lower court affirmed that verdict as factually sufficient for a crime that the Members acquitted him of. Thus, the *Walters* principle does not apply, let alone require reversal.

Appellant's citations to two cases from service courts of criminal appeals that extend the *Walters* principle to cases that did not involve specifications charging a crime committed on divers occasions are equally inapposite. (Appellant's Br. at 14-15.) When the Government charged an accused with possession of twenty-two images of child pornography and the members convicted him of possession of four images, but did not specify the images that he was convicted of, the service court could not be sure which images it was reviewing for factual sufficiency. *United States v. Saxman*, 69 M.J. 540, 545 (N-M. Ct. Crim. App. 2010). Thus, again, the *Walters* problem existed because the appellate court could not determine which images the members acquitted the accused of possessing.

The other case cited by Appellant, *United States v. Karajman*, No. 20061003, 2007 CCA LEXIS 594, (A. Ct. Crim. App.

Sep. 10, 2007), set aside a conviction where the accused pled guilty but excepted certain language in the specification that occurred three separate times in the specification. (J.A. 176.) There, the court could not determine which facts formed the basis for the disrespect of a superior officer because of confusion about which words were excepted. Thus, neither *Karajman* nor *Saxman* supports Appellant's position.

Even if this Court holds for the first time that the *Walters* holding applies to cases that do not involve specifications charging criminal acts committed on divers or multiple occasions, some of which are excepted in a manner that leaves the record ambiguous as to what a court of criminal appeals is reviewing, Appellant's argument still fails. The premise behind Appellant's argument, that the language "substantially incapacitated" and "substantially incapable of declining participation in the sexual act" are identical is incorrect. (*See* Appellant's Br. at 7, 15.) While an appellate court may not find facts that contradict a finding of not guilty reached by the trier of fact in the case, that principle does not control this case because the Specifications at issue did not allege the same theory of liability. See *United States v. Smith*, 39 M.J. 448, 451-452 (C.M.A. 1994).

Congress defines criminal offenses and their constituent parts. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)

(citing *Liparota v. United States*, 471 U.S. 419 (1985). Here, Congress, via the text of Article 120(c)(2)(A-C), defined the language in this case as two separate theories that in the alternative could comprise a conviction for aggravated sexual assault. Neither Appellant's contention that they are the same, nor the Military Judge's Benchbook's instruction that they are the same, binds this Court. Congress' definition of the offense that includes them as separate possible elements controls. Thus, even if this Court applied *Walters* to this case, a case not involving a charge on divers occasions, and a case where this Court can be perfectly clear what acts caused the conviction, acquittal on Specification 1 does not equal a factual finding of not guilty on Specification 2.

D. There was no inconsistent verdict in this case.

"Each count in an indictment is regarded as a separate indictment, and a finding of not guilty on one cannot be pleaded as res judicata of the other." *United States v. Jackson*, 7 C.M.A. 67, 71 (C.M.A. 1956) (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932)). An inconsistent verdict is not normally cause for relief because the members may simply have given Appellant "a break." *United States v, Lyon*, 15 C.M.A. 307, 313 (C.M.A. 1965); *United States v. Powell*, 469 U.S. 57, 65-66 (1984) (inconsistent verdicts often product of jury lenity).

The specifications were severed at Appellant's request. The charge sheet was altered, at Appellant's request, to reflect two separate specifications. And, the Military Judge instructed the Members before findings——which instruction we presume they followed——that they may choose to convict Appellant on *only* one of the two specifications. Not only did Appellant invite the error, but *even assuming* the Members disregarded the Military Judge's instructions, the fact of Appellant's acquittal on Specification 1 has no bearing on this Court's analysis of the legal sufficiency of Appellant's conviction on Specification 2.

III.

THE MILITARY JUDGE'S REQUIREMENT TO PRESENT EVIDENCE OF CONSENT AT A PRE-TRIAL HEARING DID NOT VIOLATE APPELLANT'S RIGHT TO A FAIR TRIAL. THUS, NO ERROR OCCURRED. EVEN IF ERROR OCCURRED, APPELLANT WAS NOT PREJUDICED.

A. Standard of Review.

Appellant's assignment of error alleges that the Military Judge's pre-trial procedure regarding the issue of consent in this case infringed upon his right to a fair trial provided by the Due Process Clause, is an issue of law reviewed *de novo*. *United States v. Othuru*, 65 M.J. 375, 380 (C.A.A.F. 2007) (reviewing *de novo* whether post-trial delay violated an appellant's due process rights). Appellant's brief relies primarily on a prosecutorial misconduct case from the Circuit

Courts of Criminal Appeal. (Appellant's Br. at 20-24 (citing *United States v. Liburd*, 607 F.3d 339 (3d. Cir. 2010)). "In a due process analysis of prosecutorial misconduct this court looks at the fairness of the trial and not the culpability of the prosecutor." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2007) (citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982)).

B. Appellant's due process rights, unlike the accused in *Prather,* were never violated because the Members, the finder of fact Appellant chose, were instructed in a manner consistent with the Constitution. The pre-trial hearing where Appellant pointed to two documents already contained in the Record did not violate his right to due process.

The U.S. Constitution provides criminal defendants the "right to a fair trial" and due process of law. *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009). Likewise, "criminal defendants must be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). The question raised by this Court's granted issue is whether the pre-trial procedure developed by the Military Judge, where he required the defense to present evidence of consent at a pre-trial hearing violated Appellant's right to due process and if so, whether Appellant's suffered prejudice.

1. Appellant's statement did not come into evidence because neither party offered it during the trial.

Appellant's claims about the Members not receiving his statement to NCIS lies in an allegation based on the ineffective assistance of counsel, not the Military Judge's pre-trial procedure. Appellant never moved the trial court to admit his statement and Appellant conceded during an Article 39(a) session that he could not admit the statement. (J.A. 182.) Thus, the fact that the statement did not come before the finder of fact in this case can be squarely attributed both to its inadmissibility when offered by Appellant and the fact that Appellant never tried to introduce it. The idea that the Military Judge considering the documents at a pre-trial hearing, where he states that the Rules of Evidence do not apply, automatically converts those documents to admissible pieces of evidence that will be *sua sponte* received by the Members lacks merit and should be rejected.

2. The Military Judge's procedure did not deprive Appellant of a fair trial. And, it in no way resulted in prejudice.

In spite of difficulties with this statute's Article 120(t)(16) burden shift addressed by this Court in dicta in *Prather*, the law requires that the Military Judge convey crucial instructions regarding the elements of the offense to a panel of "ordinary mortals." *United States v. Bailey*, 444 U.S. 394, 406

(1980) (Supreme Court noted that the "administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors.").

The Military Judge's decision to instruct in a manner that did not present a confusing burden shift to a panel of Members prevented the outcome not present in, but discussed in *Prather.* 69 M.J. at 345. And, it allowed Appellant to receive the substantial benefit of an additional element, a lack of consent, which the Government must prove in order to convict.[2]

Trial in this case took place in September of 2009. At that time, this Court had not addressed the constitutionality of Article 120(e) in *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010), or the as-applied unconstitutionality of Article 120(c) in conjunction with the consent defense in *Prather.* 69 M.J. at 343. Thus, the Military Judge's decision that he would determine whether consent was in issue, just as he would any other affirmative defense in any other case, was not unreasonable. *See United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008).

To the extent the imposition of a pre-trial burden did not allow for the prosecution's own evidence to give rise to the

[2] Though both Appellant and the statute refer to consent in this case as an affirmative defense, Appellant did not admit the elements of the offense, thus he did not raise an affirmative defense.

affirmative defense instruction could constitute error. *Id*. ("The evidence to support a mistake-of-fact instruction can come from evidence presented" by the prosecution.) The procedure developed by the Military Judge did not impose such a heavy burden on Appellant that it violated his right to due process. In the limited context of this case, the few lines of text offered by Appellant's counsel during a pre-trial hearing inured to his benefit, did not violate Appellant's right to due process, and did not result in prejudice.

The touchstone of this Court's inquiry when addressing due process violations at trial is the fairness of the trial. *Cf*. *Edmond*, 63 M.J. at 345. Thus, the question before the Court becomes whether Civilian Defense Counsel's statement: "I would ask you to consider the attachment to my 412 motion" and the verbatim transcript of AN's testimony, "it is part of the Article 32 investigative report" violated Appellant's right to due process and if so, resulted in material prejudice. (J.A. 185-86.) Because no error occurred during the instructions provided the Members, this pre-trial procedure and Appellant's counsel's brief statement during that procedure provides the only action that this Court examines when assessing the prejudicial impact of the Military Judge's procedure.

C. Appellant's reliance on *Libburd* is misplaced. That case reaffirms that when the Government promises something it remains bound by that promise. That principle provides no support to Appellant.

Where the Government makes promises at trial, either in the context of a plea agreement or the presentation of evidence, and the defense relies upon those promises must be kept. *Compare Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") with *United States v. Libburd*, 607 F.3d 339, 343 (3d. Cir. 2010) ("Once prosecutors undertake such commitments [regarding whether they will introduce evidence,] they are bound to honor them.").

In *Libburd*, the court set aside a conviction because the prosecutor discussed evidence during his opening statement that he previously promised he would not introduce into evidence. *Id.* at 341-42. Then the prosecutor elicited during a direct examination, testimony referencing the evidence he promised not to present. *Id*. The court determined this was prejudicial error because the defense based his case theory around a trial where the forbidden evidence did not come into play. *Id*. at 344-45. Because the forbidden evidence eviscerated the defense theory of the case and the Government broke its own promise,

reversal was required despite other evidence in the record that pointed to guilt. *Id*.

This principle provides no support to Appellant. Here, the error Appellant alleges concerns the Military Judge's procedure rather than any form of prosecutorial misconduct. And in stark contrast to *Libburd* and Appellant's arguments to the contrary, here the error complained of had no effect on the evidence the Members received.

Appellant's argument relies on an incorrect factual premise. The Members did not receive Appellant's statement because Appellant did not offer the contents of it during his case-in-chief. (See Appellant's Br. at 19.) The idea that the Military Judge's pre-trial procedure caused Appellant to become confused about whether his statement, which he admitted that he could not offer into evidence, was before the panel lacks any logical basis and should be rejected by this Court. In criminal cases where an accused elects trial by jury and desires to exercise his right to present evidence, he must actually offer the evidence for admission and publish it to the jury. Appellant's failure to present evidence in this case about the factual contentions raised in his "Declaration to NCIS" was his own choice and was not improperly induced by any promises of the prosecution or the Military Judge's pre-trial procedure.

Contrary to Appellant's argument, Article 120a(t)(16) places Military Judges in an impossible position: the defense must prove an affirmative defense by a preponderance, and subsequently the Government apparently is allowed to disprove the same defense beyond a reasonable doubt. Thus, the Military Judge's decision to read the statute as requiring an interlocutory decision as to whether consent was raised by a "preponderance of the evidence," avoided both: (1) the illogical (t)(16) burden shift discussed in dicta in *Prather;* and (2) avoided instructing the Members as to both the burdens as to the defense of consent and element of incapacity, thus, avoiding the confusing burden shifting framework between Article 120(c)(2) and Article 120(t)(14). Thus, the instructions avoided what later proved unconstitutional in *Prather's* main holding.

Appellant's argument that his counsel's closing argument became "disastrous" in light of the statement not being in evidence is a red herring. (Appellant's Br. at 24.) Unless Appellant raises an ineffective assistance of counsel argument, he cannot now complain that his attorney's ignorance regarding a statement he never offered before the fact finder prejudicially impacted his trial. And, Civilian Defense Counsel admitted pre-trial that he could not offer the statement. (J.A. 182.) Finally, because the Military Judge reiterated during the pre-trial hearing that the factual issues do not belong to him,

Civilian Defense Counsel understood that a document he realized he could introduce was not before the fact finder. Thus, Appellant's arguments about the ineffectiveness of his counsel's closing argument should not impact this Court's determination of whether he suffered material prejudice to a substantial right.

The Military Judge's determination pre-trial that the affirmative defense here was raised avoided the illogical Article 120(t)(16) burden shift discussed, but not ruled on, in *Prather*. That determination pre-trial, as discussed in Section I is not a determination as to credibility or guilt, but only a determination that the defense is raised and may be instructed on. It does not rise to the level of prosecutorial misconduct discussed in Appellant's brief. Appellant received a fair trial and his decision not to offer evidence cannot be blamed on the Military Judge. Thus, Appellant's argument lacks merit.

Conclusion

The Government requests that this Court affirm the findings and sentence as approved by the lower court.

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