IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Private First Class (E-3)	)	Crim. App. Dkt. No. 20150199
MITCHELL L. BRANTLEY,	)	
United States Army,	)	USCA Dkt. No. 17-0055/AR
Appellant	)	

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

Issue Presented

WHETHER THE GOVERNMENT PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT KNEW OR REASONABLY SHOULD HAVE KNOWN THAT SR WAS "OTHERWISE UNAWARE" OF SEXUAL CONTACT.

Statement of the Case

On January 12, 2017, this Honorable Court granted appellant's petition for review. On February 10, 2017, appellant filed his brief with this Court. The government responded on March 13, 2017. Appellant files this reply in accordance with Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure.

Statement of Facts

Private First Class (PFC) Brantley relies upon the facts as stated in his original brief. Any additional relevant facts are discussed in the sections below.

Argument

The government contends Article 120(b)(2) creates a singular theory of liability, that SR was unaware of the sexual contact. This Court's opinion in *United States v. Sager*, No. 16-0418/AR, slip. op. (C.A.A.F. Mar. 21, 2017), effectively forecloses that argument. The government presented minimal evidence SR was asleep or unconscious. Nevertheless, it only charged the separate theory that she was otherwise unaware of the sexual contact. Because the evidence in the record does not support the government's self-imposed, narrow theory of liability, this Court must find PFC Brantley's conviction legally insufficient.

a. The government's position is inconsistent with *Sager*.

The government argues that under a plain reading of Article 120(b)(2), "Congress' listing of asleep, unconscious, or otherwise unaware in one paragraph of the statute, indicates that these require proof of the same element, that the accused knew or should have known that the victim was *unaware*." (Appellee's Br. 18)(emphasis added). The government based this argument upon the Navy-Marine Corps Court of Criminal Appeals' [hereinafter NMCCA] unpublished opinion and reasoning in *Sager*, which this Court recently overruled. (Appellee's Br. 22). This Court held the NMCCA erred in its interpretation when it "conclude[d] that asleep or unconscious are examples of how an individual may be otherwise unaware and are not alternate theories of liability." *Sager*, slip op. at 6-7 (citing *United States v.*

Sager, 2015 CCA LEXIS 571 at *9 (N-M. Ct. Crim. App. Dec. 29, 2015)). "Under the ordinary meaning" canon of construction, "asleep," "unconscious," or "otherwise unaware" as set forth in Article 120(b)(2) reflect separate theories of liability." *Id.* at 6.

b. The government concedes "impaired" is not "otherwise unaware."

Unlike their counterparts at trial, appellate government counsel recognize that committing sexual contact on a person who is "otherwise unaware" under Article 120(b)(2), UCMJ, is a different theory of liability than doing so on one who is incapable of consenting due to "impairment by any drug, intoxicant or other similar substance" under Article 120(b)(3)(A). "The major discernable difference between a victim who is unaware and a victim who is incapable of consenting due to impairment is that one who is incapable of consenting due to impairment could be either aware or unaware." (Appellee's Br. 23). This position undermines the trial counsel's argument that to prove SR was otherwise unaware, the government merely needed to prove she was impaired. (JA 280-281).

c. The government mischaracterizes evidence in the record.

Private First Class Brantley acknowledges that for a legal sufficiency review, the amount of evidence required to show any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt is not high. While the inherent weight and credibility problems with the evidence are not

part of this Court's analysis, the conviction must still be legally sufficient. At numerous points in its brief, the government either so overstates evidence favorable to its position or minimizes evidence that makes so that no one could find PFC Brantley guilty.

1. If SR was "passed out," that means she was unconscious.

The government cites to evidence in the record that PFC Brantley sent SR a text message stating "while you were passed out, I took out your breasts and masturbated to you." (Appellee's Br. 15 (citing JA 37)). It then argues that "passed out" means unaware. (Appellee's Br. 16). This argument is not consistent with either the definition of "pass out" or SR's own description of the state she was in during the night in question.

"Pass out" means "to lose consciousness." https://www.merriam-webster.com/dictionary/pass%20out (last visited March 22, 2017). When asked to describe what she remembered from the incident where PFC Brantley allegedly straddled her, SR answered the trial counsel's questions as follows:[1]

> Q: And, then what do you recall?
>
> A: After that I passed back out.
>
> Q: And, when you say the word passed out, what does that mean to you?

[1] In the Specification of Charge II, PFC Brantley was acquitted of assaulting SR by unlawfully straddling her thighs with his legs and pulling on her shorts with his hands. (JA 2).

A: I lost consciousness again.

(JA 31). Under both the plain meaning of the term and SR's own testimony, there is evidence SR may have been "unconscious" but not "otherwise unaware."

2. Private First Class Brantley never "confessed" to the charged offense.

The government devotes one-quarter of its brief to argue PFC Brantley's three "confessions" are sufficient evidence that SR was unaware of sexual contact. (Appellee's Br. 8-15). The government's characterization of testimony about alleged text messages that were never admitted at trial and of a failure to deny an accusation as a "confession" is a gross overstatement of the evidence.[2] At most, PFC Brantley's alleged text message to SR was an admission and his failure to deny PFC DS' allegation could be considered an admission by silence.

3. The government's theme at trial was "otherwise unaware" means "impairment."

After conceding the difference between the two theories of liability, appellate government counsel attempt to downplay the impact of trial counsel's erroneous argument that impairment and being otherwise unaware were equivalent. The government states, "while the trial counsel in this case emphasized the

[2] "Confession" means an acknowledgment of guilt. Mil. R. Evid. 304(a)(1)(B). An "admission" is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory. Mil. R. Evid. 304(a)(1)(C). The Manual for Courts-Martial has long recognized the concept of an admission by silence. *United States v. Cook*, 48 M.J. 236, 239 (C.A.A.F. 1998).

circumstantial evidence of intoxication supporting Mrs. SR's eventual unawareness, the charge of unaware remained unchanged." (Appellee's Br. 23). The trial counsel did not simply emphasize circumstantial evidence, he stressed that SR's level of impairment was the deciding element in the case by arguing, "[p]anel members, this case really comes down to just two things. Her impairment and his words." (JA 296).

The government's theme demonstrates its own misunderstanding of Article 120(b)(2) and highlights its erroneous interpretation of "otherwise unaware." On appeal, the government cannot run from the overarching effects the trial counsel's erroneous charging decision, presentation of evidence, and argument had on the court-martial.

d. Private First Class Brantley could not waive the right to be convicted only upon proof of every essential element beyond a reasonable doubt.

The government's final argument is that even if this Court finds PFC Brantley's arguments persuasive, any error is harmless because he was on notice of the government's charging theory and therefore, was not prejudiced. (Appellee's Br. 26-27). It then argues because PFC Brantley did not raise notice or variance before this Court or the CCA, he waived these issues. (Appellee's Br. 26).

First, PFC Brantley raised the exact issue before this Court at the Army Court, whether his conviction for abusive sexual contact was legally sufficient. He did so similarly arguing the government only presented evidence SR was incapable

of consent due to impairment by a drug and intoxicants, not that she was otherwise unaware. Private First Class Brantley sufficiently preserved this issue.

Second, the government's argument fails to comprehend the only issue specified by this Court, whether *it* proved the *charged* conduct beyond a reasonable doubt. Private First Class Brantley does not claim he was not on notice of the charged offense. He is not arguing a fatal variance because the military judge did not instruct the panel on findings by exceptions and substitutions. (JA 265). His position has always been the government did not understand the separate theories of liability in Article 120(b) when it charged him, did not present evidence to support its erroneously and narrowly charged theory that SR was otherwise unaware, and therefore, that his conviction is legally insufficient.

The government cites generally to *United States v. Lubasky* to argue, "asleep, unconscious, or otherwise unaware are so similar that if the panel had substituted one for the other, such would not have constituted a material variance." (Appellee's Br. 26 (citing 68 M.J. 260, 264 (C.A.A.F. 2010)). However, the government's pinpoint citation actually supports PFC Brantley's long-held position.

> While the question of whether a variance was fatal would be one we would answer if the factfinder had made findings by exceptions and substitutions, the findings in this case were made based on the charges and specifications *as drafted*. There were no exceptions and

> substitutions by the military judge—the factfinder in this case.

Id. at 264-265 (internal citation omitted). Like this Court found in *Lubasky,* PFC Brantley's conviction for abusive sexual contact when SR was otherwise unaware is legally insufficient, *as drafted*.

A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). While the government believes PFC Brantley has suffered no prejudice, the Constitution contends that prejudice is apparent when a conviction is legally insufficient. Evidence that SR was "otherwise unaware," meaning something different than asleep or unconscious, is absent from the record. Therefore, this Court must set aside and dismiss PFC Brantley's conviction for abusive sexual contact in the Specification of Charge I.

Conclusion

WHEREFORE, PFC Brantley respectfully requests this Honorable Court grant the requested relief.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitations of Rule 24(c) because this brief contains 1,537 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Brantley*, Army Dkt. No. 20150199, USCA Dkt No. 17-0055/AR, was electronically filed with the Court and Government Appellate Division on March 23, 2017.

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