IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim.App. No. 201400356
v.	)	
	)	USCA Dkt. No. 16-0418/NA
Jeffrey D. SAGER, Aviation Ordnanceman Airman (E-3) United States Navy Appellee	)	

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

JUSTIN C. HENDERSON
Lieutenant Commander, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar No. 36640

BRIAN K. KELLER
Acting Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar No. 31714

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar No. 36051

Index of Brief

Page

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

OTHER SERVICE COURTS OF CRIMINAL APPEALS

STATE COURTS

Uniform Code of Military Justice, 10 U.S.C. §§ 801-946:

STATUTES, RULES, BRIEFS, OTHER SOURCES

Issues Presented

I.

IN AFFIRMING THE ABUSIVE SEXUAL CONTACT CONVICTION, THE LOWER COURT RELIED ON FACTS OF WHICH THE MEMBERS ACQUITTED APPELLANT. WAS THIS ERROR?

II.

ARTICLE 120(d), UCMJ, PROHIBITS SEXUAL CONTACT ON ANOTHER PERSON WHEN THAT PERSON IS "ASLEEP, UNCONSCIOUS, OR OTHERWISE UNAWARE." DESPITE THESE SPECIFIC STATUTORY TERMS, THE LOWER COURT HELD THAT "ASLEEP" AND "UNCONSCIOUS" DO NOT ESTABLISH THEORIES OF CRIMINAL LIABILITY, BUT ONLY THE PHRASE "OTHERWISE UNAWARE" ESTABLISHES CRIMINAL LIABILITY. DID THE LOWER COURT ERR IN ITS INTERPRETATION OF ARTICLE 120(d), UCMJ?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad-conduct discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his plea, of one specification of abusive sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The Members sentenced Appellant to twenty-four months of confinement and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On December 29, 2015, the lower court affirmed the findings and sentence. *United States v. Sager*, No. 201400356, 2015 CCA LEXIS 571 (N-M. Ct. Crim. App. Dec. 29, 2015). On March 28, 2016, Appellant filed a Petition for Review, which this Court granted on May 31, 2016.

Statement of Facts

A. Appellant manually masturbated and performed oral sex on an intoxicated shipmate.

In March, 2013, Aviation Ordnanceman Airman (AN) TK was stationed aboard USS George Washington (CVN-73) with Appellant. (J.A. 97-98.) Appellant and AN TK had "hung out" before in group settings. (J.A. 99.)

On March 8, 2013, AN TK met friends on base at U.S. Fleet Activities Yokosuka, Japan. (J.A. 100.) AN TK consumed one and a half beers. (J.A. 101, 230.) AN TK and his friends then went to two local bars in Yokosuka, where AN TK had six mixed drinks and three shots of tequila. (J.A. 102-03, 106-07, 231-32.)

After the second bar, AN TK had consumed ten-and-a-half alcoholic drinks and "was feeling pretty drunk." (J.A. 106.)

He went to a third bar to charge his phone and meet Appellant, who was going to be his liberty buddy for the rest of the night. (J.A. 108-09.) At the third bar, AN TK consumed two more mixed drinks and still "was feeling pretty drunk." (J.A. 110.)

Appellant told AN TK that he thought that AN TK was too drunk to return to base and that AN TK could stay at Appellant's friend's off-base apartment with Appellant and his friends. (J.A. 111.) By the time AN TK arrived at the apartment, he felt "very drunk" and he "was stumbling and slurring [his] words." (J.A. 118-19.) Forensic toxicologist Dr. Aaron Jacobs estimated AN TK's blood-alcohol content to be "about a .226" twenty to thirty minutes after consuming his last alcoholic drink. (J.A. 245.)

In the apartment, AN TK was upset about his girlfriend and began to cry in front of Appellant as they sat talking on a futon in the living room. (J.A. 119, 198-99, 223.) AN TK then smoked a cigarette on the balcony, returned to the futon, and vomited in a bucket that Appellant gave him. (J.A. 120.)

AN TK removed his shirt, but kept on his jeans, boxer shorts, and belt. (J.A. 121.) Before "passing out" on the futon, AN TK remembered Appellant standing

next to the futon. (J.A. 120-21, 123-24, 200.) AN TK next remembered "waking up to" Appellant holding his penis. (J.A. 124, 234.)

Appellant then performed oral sex on AN TK, to which AN TK was "too intoxicated" to respond. (J.A. 126.) "I was too intoxicated. I couldn't really move or do anything." (J.A. 126.) "I couldn't move or I couldn't talk and I couldn't really think of any way out of it." (J.A. 129.)

B. Appellant moved to dismiss the original abusive sexual contact Specification, which was re-referred as an "Additional Charge."

The United States charged Appellant with two specifications of abusive sexual contact under Article 120(d), UCMJ. Specification 1 read:

> In that [Appellant] . . . did, at or near Yokosuka, Japan, on or about 9 March 2013, commit sexual contact upon [AN TK], to wit: touching the penis of [AN TK] when [AN TK] was incapable of consenting to the sexual contact due to [AN TK] being asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(J.A. 36.) Under Specification 2, Appellant was charged with penetrating his mouth with AN TK's penis while he was incapable of consenting due to impairment by an intoxicant, which Appellant knew or reasonably should have known.

Before the presentation of evidence, Appellant moved to dismiss Specification 1 for failure to state an offense, citing the absence of any language regarding knowledge of the accused about the condition of AN TK. (J.A. 73-76.) The Military Judge granted Appellant's Motion. (J.A. 87.)

The Specification was re-referred as an "Additional Charge" and read,

> In that [Appellant] . . . did, at or near Yokosuka, Japan, on or about 9 March 2013, touch the penis of [AN TK] with his hand when he knew or reasonably should have known that [AN TK] was asleep, unconscious, or otherwise unaware that the sexual contact was occurring, with an intent to arouse the sexual desire of either himself or [AN TK].

(J.A. 40.)

C. Appellant claimed at trial that AN TK was awake when Appellant manually stimulated his penis.

Trial Defense Counsel explained the Defense theory of the case in her opening statement: "Two men, intoxicated, swapping intimate stories[,] had a sexual encounter," which AN TK later characterized as nonconsensual only for reputational "damage control." (J.A. 95.)

After the prosecution rested, Appellant moved to dismiss the Additional Charge under R.C.M. 917, arguing that:

> the only evidence that has been presented so far is the testimony of [AN TK] that he was just out. That doesn't necessarily mean that he was asleep. The government's expert, Dr. Jacobs, testified that according to, in his opinion, it was most likely a fragmentary blackout. Fragmentary blackout is not asleep, unconscious or otherwise unaware.

(J.A. 260.) The Military Judge denied the Motion. (J.A. 263.)

Appellant testified in his own defense, and his account was consistent with AN TK's, with the exception of how the sexual activity initiated. (J.A. 264.) Appellant testified that as they were talking about relationship problems, AN TK

rested his head on Appellant's chest. (J.A. 264-65). AN TK had denied doing this, stating, "I would never lay my head on another man's chest." (J.A. 199.)

Appellant explained why that led him to put his hand on AN TK's penis:

> A. I kind of felt at the moment that we had connected on a different level, that there was more intimacy there. I've never laid in bed with a heterosexual male, having them place their head on my chest and talking and getting that close and that intimate with conversation before.
>
> Q. I know this is embarrassing, but we need to do this, so let me ask you, what happened next?
>
> A. Right after the conversation about us getting to know each other better and becoming closer friends and becoming a lot closer acquainted, I read into that a little more, and I put my hand on his stomach.
>
> Q. Why did you put your hand on his stomach?
>
> A. I read, you know, signs that he wanted to have relations. I wanted to test the waters to see if he was okay with what was, what I felt was happening, the connection that we had.
>
> Q. Was he awake?
>
> A. Yes, ma'am.

(J.A. 265.)

Appellant acknowledged that a previous version of events he gave to Naval Criminal Investigative Service on March 11, 2013, was "not forthcoming." (J.A. 270, 348.) In his statement to NCIS, Appellant had explained that he performed oral sex on AN TK "because he was having a bad day and I wanted to make him

feel better. He was fighting with his girlfriend before and crying. I don't know what else to say. . . . I don't remember doing it." (J.A. 348.)

At trial, Appellant re-iterated his testimony that AN TK was awake when Appellant manipulated his penis. (J.A. 271-72.) Appellant testified that, although AN TK was intoxicated, "we had legitimate conversation, me and him, just one-on-one. I figured he was very lucid, you know, cognizant." (J.A. 272.)

In closing argument, Trial Defense Counsel argued that at the time of the sexual act, AN TK "was walking, talking, texting, asked for a hanger, had a long conversation. . . . That is cognitive functioning." (J.A. 301.) Trial Defense Counsel again attributed AN TK's description of the sexual acts to "an internal struggle, frustrated, confused, internal struggle." (J.A. 302.)

D. Appellant had no objections to the Military Judge's instructions, including that an element of the Additional Charge was that Appellant "knew or reasonably should have known [AN TK] was asleep, unconscious, or otherwise unaware the sexual contact was occurring."

The Military Judge elicited inputs on findings instructions, which Appellant provided. (J.A. 358-85.) Each of Appellant's proposed instructions for the Additional Charge highlighted whether AN TK "was awake, conscious or aware," Appellant's mistaken belief that AN TK was "awake, conscious, or aware," and how voluntary intoxication impacted Appellant's knowledge of whether AN TK "was awake, conscious or aware." (J.A. 362-63, 381-82.)

The Military Judge instructed the Members that the elements of the Additional Charge were:

> One, on or about 9 March 2013, at or near Yokosuka, Japan, [Appellant] committed sexual assault [sic] upon [AN TK], to wit: touching the penis of [AN TK] with his hand;
>
> Two, when he, one, knew or two, reasonably should have known that [AN TK] was asleep, unconscious or otherwise unaware that the sexual contact was occurring.

(J.A. 319.)

Regarding consent, the Military Judge instructed the Members:

> [E]vidence that [AN TK] consented to the sexual contacts either alone or in conjunction with any other evidence in this case, could cause a reasonable doubt as to whether [Appellant] knew or two, reasonably should have known that [AN TK] was asleep or otherwise unaware that the sexual contacts were occurring.

(J.A. 320.)

Regarding knowledge, the Military Judge instructed the Members:

> [Y]ou must be satisfied beyond any reasonable doubt that [Appellant] knew or reasonably should have known that [AN TK] was . . . asleep, unconscious or otherwise unaware in the Additional Charge. Let me repeat that for you. I've instructed you that you must satisfied [sic] beyond any reasonable doubt that [Appellant] knew or reasonably should have known that [AN TK] . . . was asleep, unconscious or otherwise unaware in the Additional Charge. This knowledge like any other fact[,] may be proved by circumstantial evidence.

(J.A. 322-23.)

Finally, the Military Judge instructed the Members to record their findings, and specifically directed:

> The interesting part is you have to circle under the charge and specification the theory of the government you adopt if you convict. You'll notice that, Madam President, okay. It's he *knew or should have known issue* [sic] which I discussed with you earlier. All right. That means you're going to have to vote one that—on both theories, okay, that's how that happened. . . . The first vote is going be, okay, is he guilty or not guilty of the charge under the, the specification under the theory of "knew" he knew. Is he guilty or not guilty under the theory of "should have known" because the government has both theories rocking and rolling here, okay.

(J.A. 325 (emphasis added).)

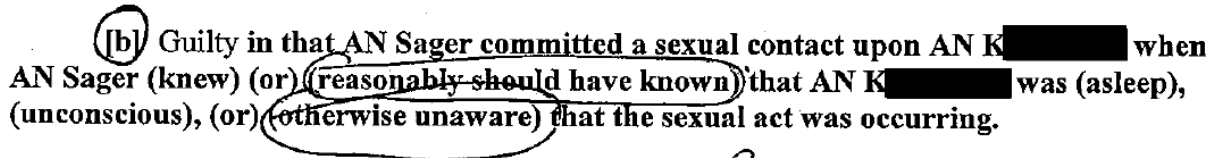
1. Appellant did not object to the Military Judge's instructions, nor did Appellant request the Members to find whether AN TK "was asleep" or "was unconscious."

Appellant did not object to the Military Judge's findings instructions. (J.A. 318.) Appellant also did not ask for findings that AN TK "was asleep" or "was unconscious" under the Additional Charge. (J.A. 318.) The Members were not instructed to and did not receive instructions to find that the Victim "was asleep" or "was unconscious," nor did they make any findings about whether the Victim was asleep or unconscious. (J.A. 62, 322-23.)

2. The Members used Appellant's requested Findings Worksheet to find Appellant guilty of the Additional Charge by circling the language "(otherwise unaware)."

The Members acquitted Appellant of Charge I and convicted Appellant of the Additional Charge. (J.A. 62, 327.) As instructed, the Members recorded their findings regarding the Additional Charge on a special Findings Worksheet,

formatted as Appellant requested. (J.A. 62, 332, 386.) The completed Findings Worksheet appeared:


[b] Guilty in that AN Sager committed a sexual contact upon AN K[redacted] when AN Sager (knew) (or) (reasonably should have known) that AN K[redacted] was (asleep), (unconscious), (or) (otherwise unaware) that the sexual act was occurring.

(J.A. 62.)

The Members circled the phrase "(reasonably should have known)" under the Additional Charge. (J.A. 62.) Although the Military Judge did not instruct them to do identify words in the clause "asleep, unconscious, or otherwise unaware that the sexual act [sic] was occurring," (J.A. 325), the Members also circled the phrase "(otherwise unaware)" on the Worksheet. (J.A. 62.)[1]

Post-trial, Appellant moved to dismiss the Additional Charge, claiming that because of the Members' Findings, the Charge was unconstitutionally vague facially and as applied. (J.A. 328, 386.) Appellant argued that the Members had determined that AN TK was not "asleep" or "unconscious," and that the remaining charged language, "otherwise unaware," was so vague as to fail to provide Appellant adequate notice. (J.A. 328, 390-94.)

[1] The lower court appeared to treat the Members' identification of "(otherwise unaware)" as a result of "[f]ollowing the Military Judge's instruction." *Sager*, 2015 CCA LEXIS 571, at *7-8.

E. The lower court rejected Appellant's constitutional-vagueness and factual and legal sufficiency arguments, and affirmed the Finding and Sentence.

At the Navy-Marine Corps Court of Criminal Appeals, Appellant renewed his argument that the language "otherwise unaware the sexual act was occurring" is unconstitutionally vague. *Sager*, 2015 CCA LEXIS 571, at *6. The lower court rejected the argument:

> [W]e conclude that asleep or unconscious are examples of how an individual may be "otherwise unaware" and are not alternate theories of criminal liability. A plain reading of the phrase is that a person cannot engage in sexual contact with another person when he/she knows or reasonably should know that the recipient of the contact does not know it is happening. . . . We also note the defense theory at trial was that AN TK was fully aware of the appellant's actions and the sexual encounter was either consensual or the appellant reasonably believed it was consensual.

Id. at *9-10.

In response to Appellant's challenge to the factual and legal sufficiency of his conviction, the lower court cited evidence including AN TK's testimony that

> when he awoke the appellant was already manually stimulating his penis. The Government introduced substantial evidence that AN TK was heavily intoxicated when he returned to FC2 DS's apartment and laid on the futon. Whether AN TK was asleep or unconscious due to alcohol consumption/exhaustion, or a combination of these things is only relevant as to whether the appellant reasonably should have known AN TK was "otherwise unaware" of the sexual contact.

Id. at *11.

Summary of Argument

The statutory language of Article 120(b)(2) permits a general verdict on the means of abusive sexual contact while a victim is "asleep, unconscious or otherwise unaware the sexual contact is occurring." The Members circled "otherwise unaware" on the Findings Worksheet that Appellant had requested, but made no findings on whether AN TK was "asleep" or was "unconscious" during the sexual contact and thus did not "acquit" Appellant of AN TK's physical condition. The lower court properly considered evidence of AN TK's physical condition in conducting its Article 66(c) review of this finding, which did not implicate Double Jeopardy.

Even assuming that Congress created alternate theories of liability in Article 120(b)(2), Appellant has not carried his burden to demonstrate prejudice: he does not claim any lack of notice; the Members convicted him of only one theory of liability; and the lower court affirmed his conviction on only one theory. Thus the lower court's reading of Article 120(b)(2) had no impact on its legal sufficiency review.

Argument

I.-II.

ARTICLE 120(b)(2) CREATES A SINGLE CRIMINAL LIABILITY THEORY, SUSCEPTIBLE TO A GENERAL VERDICT. BECAUSE THE MEMBERS MADE NO FINDINGS ABOUT THE VICTIM'S PHYSICAL CONDITION, THE LOWER COURT DID NOT CONTRADICT THE FINDINGS, WHICH IN ANY CASE DID NOT IMPLICATE DOUBLE JEOPARDY. IN CONDUCTING ITS ARTICLE 66(c) REVIEW, THE LOWER COURT WAS FREE TO CONSIDER ALL EVIDENCE OF THE VICTIM'S PHYSICAL STATE AT THE TIME OF APPELLANT'S SEXUAL CONTACT. BECAUSE THE LOWER COURT AFFIRMED ONLY ON THE LANGUAGE FOUND BY THE MEMBERS, THE COURT'S INTERPRETATION OF ARTICLE 120(b)(2) HAD NO IMPACT ON ITS REVIEW.

A. Standard of review.

Article 66(c) is an "awesome, plenary de novo power." *See, e.g.*, *United States v. Nerad*, 69 M.J. 138, 144; *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007). The scope and meaning of Article 66(c) is reviewed *de novo*. *Nerad*, 69 M.J. at 142 (citing *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008)).

This Court also reviews legal sufficiency *de novo*, asking whether the evidence, viewed in the light most favorable to the prosecution, would be adequate to permit any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *United States v. Sharpton*, 73 M.J. 299, 301 (C.A.A.F. 2014)

(citing *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014)); *United States v. Phillips*, 70 M.J. 161, 165-66 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)). And this Court reviews statutory interpretation *de novo*. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015).

B. Article 120(b)(2) creates a single theory of liability that is subject to a general verdict. Moreover, Appellant waived any argument that the three different ways to violate the statute were duplicitous or otherwise required separate charging, thus not susceptible to a general verdict finding.

"A court-martial panel, like a civilian jury, returns a general verdict and does not specify how the law applies to the facts, nor does the panel otherwise explain the reasons for its decision to convict or acquit." *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (quoting *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997)) (internal quotation omitted).

When a general verdict is entered upon various possible grounds, one of which is constitutionally invalid, then "it cannot be determined . . . the appellant was not convicted under that clause" and the conviction "must be set aside." *Stromberg v. California*, 283 U.S. 359, 368, 370 (1931). In contrast, when each possible legal theory presented to the trier of fact is constitutionally valid, and the Military Judge's instructions are not flawed, then this Court will not upset a general verdict." *See United States v. Piolunek*, 74 M.J. 107, 109, 112 (C.A.A.F. 2015).

In *Piolunek*, this Court reviewed whether a general verdict convicting the appellant of receipt and possession of twenty-two images child pornography on divers occasions was invalid when the Air Force court found that three of the twenty-two images at issue did not depict the "genitals or pubic area" and thus did not constitute child pornography. *Id*. at 109. This Court affirmed, noting that the military judge properly instructed the members, and that "in the absence of evidence indicating otherwise, a jury is presumed to have complied with the instructions given them by the judge." *Id*. at 111. This Court held that that the case "involves a straightforward application of the general verdict rule," which need not be disturbed when the panel is properly instructed. *Id*. at 111-12.

In *Brown*, this Court reviewed whether the military judge's instructions tainted a conviction of indecent assault. 65 M.J. at 356, 358. There, the military judge instructed the members that they could find the appellant guilty of the lesser-included offense of indecent assault if they found he assaulted the victim "by inserting his fingers and penis, or fingers, or penis into [PFC NB's] vagina." *Id*. at 358. The defense counsel did not object to the instruction and requested that the three factual scenarios be omitted from the findings worksheet. *Id*. at 357. The members acquitted the appellant of rape, but convicted on the indecent assault offense without specifying which factual scenario. *Id*. at 358.

This Court rejected the appellant's argument that the military judge's instruction created a fatal ambiguity. *Id*. at 359. The *Brown* court held that the members were not required to agree on the means, or theory, by which the appellant committed the indecent assault. *Id*. "We have recognized that military criminal practice requires neither unanimous panel members, *nor panel agreement on one theory of liability*, as long as two-thirds of the panel members agree that the government has proven all the elements of the offense." *Id*. (citing *United States v. Vidal*, 23 M.J. 319, 325 (C.M.A. 1987)) (emphasis added). To that end, the "factfinder may enter a general verdict of guilt even when the charge could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt." *Id*. (citing *Griffin v. United States*, 502 U.S. 46, 49-51 (1991); *Schad v. Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone.")).

1. The lower court correctly determined that the clause "asleep, unconscious, or otherwise unaware that the sexual act is occurring" created a single liability theory that is subject to a general verdict.

A general verdict is permissible when a criminal statute "lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses," in which case "jury unanimity is not required with

regard to the alternate theory." *People v. Asevedo*, 551 N.W.2d 478, 480-481 (Mich. Ct. App. 1996) (finding that bodily injury and mental anguish are not alternative theories upon which a jury is required to make independent findings) (citing *People v. Johnson*, 468 N.W.2d 307, 311 (Mich. Ct. App. 2001)). Determining whether the means listed in a statute constitute "separate and distinct offenses" is a matter of statutory interpretation, the difficulty of which Supreme Court has recognized. *Schad*, 501 U.S. at 643. "It is, as we have said, impossible to lay down any single analytical model for determining when two means are so disparate as to exemplify two inherently separate offenses." *Id.*

a. The lower court appropriately focused on the context and statutory purpose of the Article 120(b)(2) clause.

This Court "interpret[s] 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. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Schloff*, 74 M.J. at 314; *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997)). Courts of criminal appeals are similarly authorized to interpret statutory terms in execution of their Article 66 review authority. *Pease*, 75 M.J. at 184.

Article 120(b)(2) lists three alternative means by which an accused may commit a sexual assault upon a victim: when that victim is "asleep, unconscious, or otherwise unaware that the sexual act is occurring." 10 U.S.C. § 920(b)(2).

Congress has not defined the terms "asleep," "unconscious," or "unaware" in Article 120, UCMJ. 10 U.S.C. § 920. But by their ordinary meanings, each of these words' definitions overlap such that Appellant rightly did not object to duplicitous charging, and general verdicts remain possible:

- *Asleep* means, variously, "in or into a state of sleep;" "not attentive or alert; inactive;" and "having no feeling; numb." Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/asleep, (last visited July 27, 2016).

- *Unconscious* means, variously, "not conscious;" "done or existing without one realizing;" and "unaware of." Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/unconscious, (last visited July 27, 2016).

- *Unaware* means "having no knowledge of a situation or fact," Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/unaware, (last visited July 27, 2016), or "not having knowledge about something; not aware; ignorant." Merriam-Webster Dictionary, http://www.merriamwebster.com/dictionary/unaware (last visited July 27, 2016).

That Congress listed these terms together in a single statutory clause, suggests that that they were not intended as "means" that "are so disparate as to exemplify [three] inherently separate offenses. *See Schad*, 501 U.S. at 643.

Moreover, had Congress intended to create three independent, exclusive theories of liability in Article 120(b)(2), it would have manifested that intent in the statute's structure. Within the very next section of Article 120(b), Congress criminalized sexual acts upon a victim who is:

incapable of consenting to the sexual act due to—

> (A) impairment by any drug, intoxicant or other similar substance, and that condition is known or reasonably should be known by the person; or
>
> (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person.

Article 120(b)(3), 10 U.S.C. § 920(b)(3) (2012). Manifestly, when addressing a victim's condition under Article 120(b), Congress knows how create separate means that constitute separate offenses—e.g., *impairment* vice *disease*. Had Congress intended to do so in the preceding section, Article 120(b)(2), it would have placed "asleep," "unconscious," and "otherwise unaware that the sexual act was occurring" into distinct subsections.

Appellant's unitary focus on the word "otherwise," (Appellant's Br. at 16), ignores "the context in which the language is used, and the broader statutory context." *See Pease*, 75 M.J. at 184.

b. Because Article 120(b)(2) was intended to prevent sexual acts upon victims who were ignorant of the act, the means listed in the statute are not so disparate as to constitute separate offenses.

Consistent with *Pease*, the lower court held that a plain reading of Article 120(b)(2) reveals that the statute's purpose is to prohibit commission of a sexual act upon a victim who does not know that the act is happening. *Sager*, 2015 CCA LEXIS 571 at *9. The statute does not require Members to identify the theory of

unawareness—proof of the victim's ignorance is subject to a general verdict in the same way as the "genitals or pubic area," *Piolunek*, 74 M.J. at 111-12, the varied means of indecent assault, *Brown*, 65 M.J. at 359, and numerous other examples under the Code.[2]

2. Appellant waived any argument that the clause in Article 120(b)(2) created "inherently separate offenses."

"A duplicitous indictment is one that charges separate offenses in a single count." *United States v. Neblock*, 45 M.J. 191, 199, 1996 CAAF LEXIS 80, *26 (C.A.A.F. 1996) ("The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both.") Here, Appellant made no objection that the Additional Charge was duplicitous, nor any request at trial to sever the Additional Charge into separate offenses. Nor did he object to the Military Judge's instructions. (J.A. 319, 325.) He has waived any objection to the statute's susceptibility to a general verdict. *See* R.C.M. 905(e), Manual for Courts-Martial, United States (2012 ed.)

[2] *See, e.g.*, Article 118(2), 10 U.S.C. § 918(2) (permitting a general verdict on unpremeditated homicide when the accused unlawfully kills a human being when he intends to kill or inflict great bodily harm); *see also United States v. Valdez*, 40 M.J. 491, 495 (C.M.A. 1994); *see also United States v. Shelton*, 62 M.J. 1, 14 (C.A.A.F. 2005) (Baker, J., dissenting.)

C. Based on Appellant's requested Findings Worksheet—not the Military Judge's instructions—the Members circled "(otherwise unaware)," indicating how Appellant should have known about AN TK's ignorance of the sexual contact. The Members made no findings about whether AN TK "was asleep" or "was unconscious," and thus did not "acquit" Appellant of either of those facts.

In *United States v. Williams*, 21 M.J. 330, 332 (C.M.A. 1986), this Court affirmed a conviction for a lesser-included offense of indecent assault, despite the members' crossing out on the Findings Worksheet both the greater offense of rape and the acts required to constitute an indecent assault. The *Williams* court rejected the appellant's claim that the notations on the members' findings worksheet acquitted him of the specific acts. *Williams*, 21 M.J. at 331. The Court noted that the military judge's instructions had explained that the members were required to find that the appellant committed the acts in order to convict him of the indecent assault. *Williams*, 21 M.J. at 331. The Court also noted that the language on the findings worksheet added to the members' confusion, in that it directed them to "except not only the words 'with intent to commit rape' but also the description of the specific acts" if they desired to acquit the appellant of the greater offense of rape. *Id*. at 332.

Based on the format of the Appellant-requested Findings Worksheet here, without being instructed by the Military Judge the Members circled "(otherwise unware)" after circling "(reasonably should have known)." (J.A. 62, 319.) This action was not required for a general verdict. *See Brown*, 65 M.J. at 359.

The most that can be said for the Members finding is that they were convinced beyond a reasonable doubt *that Appellant reasonably should have known AN TK was unaware of the sexual contact*. The Members made no findings about whether AN TK *was* asleep" or whether he *was* "unconscious." As in *Williams*, the Findings Worksheet here does not indicate that the Members "acquitted" Appellant of the "facts" that AN TK was asleep or unconscious. *See Williams*, 21 M.J. at 331-32.

Likewise, their explicit acquittal on Charge I means only that the Members were not convinced beyond a reasonable doubt that while Appellant performed oral sex on AN TK, he either knew or reasonably should have known that AN TK was incapable of consenting due to impairment by an intoxicant. (J.A. 62.)

The lower court noted that AN TK testified "when he awoke the appellant was already manually stimulating his penis" and that the United States introduced "substantial evidence that AN TK was heavily intoxicated." *Sager*, 2015 CCA LEXIS 571 at *11. Neither of the lower court's references to the Record *contradicts* the Members' limited findings that Appellant reasonably should have known AN TK was unaware that the sexual contact was occurring.

D. Review of this finding does not implicate the Double Jeopardy Clause and Appellant cites no authority that restricts Article 66(c) review of convictions based on alternative theories of guilt.

When the United States charges one transaction under two or more theories of criminal liability, a conviction is sufficient if it is based on "one of the alternative theories of liability presented by the Government at trial." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008); *see also Chiarella v. United States*, 445 U.S. 222, 236-37 (1980). Even assuming, *arguendo*, that Article 120(b)(2) establishes independent and exclusive liability theories, appellate review of the Members' finding did not implicate Double Jeopardy concerns.

1. *Green* does not limit appellate review of findings based on alternative theories.

In *Green v. United States*, 355 U.S. 184 (1957), the Supreme Court adopted the view that a jury's conviction on a second-degree murder offense, accompanied by no finding on an available first-degree murder offense, constitutes an acquittal on the first-degree murder offense. *See Green*, 335 U.S. at 189-91. Even if extended to apply here, *Green* would only prohibit *retrial* on the theories of "asleep" or "unconscious." *See id*. at 191. Appellant cites to no case, and the United States is aware of none, that extends *Green* so far as to limit appellate review of findings based on alternative theories.

2. *Walters* is inapplicable when the findings are not ambiguous.

In *United States v. Walters* 58 M.J. 391 (C.A.A.F. 2003), the Members had excepted the words "on divers occasions" in finding the appellant guilty of wrongful use of "ecstasy," without identifying which one of several occasions supported the conviction. *Walters*, 58 M.J. at 392-94. This Court held that Double Jeopardy prevents Article 66(c) review of such a verdict, as the ambiguity may lead to affirming a conviction for an act on which the members had acquitted the appellant. *Id*.; *see also United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010). Unlike *Walters*, where the members excepted the "on divers occasions," or even *Williams*, where the members lined out on the worksheet the acts necessary to support the indecent assault conviction, the verdict here had no ambiguity, nor does Appellant claim any ambiguity. (J.A. 62, 327.) Moreover, the Members did not explicitly except any language in the Additional Charge.

3. *Stewart* does not apply because Appellant himself claims he was convicted and acquitted of distinguishable offenses.

In *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012), double jeopardy barred the lower court from affirming a conviction based on the same "factual theories" upon which the appellant was acquitted. (Appellant's Br. at 12.) There, the military judge instructed the members to vote on two separate specifications of sexual assault, but defined each offense identically, placing the members "in the

untenable position of finding Stewart both guilty and not guilty of the same offense." *Stewart*, 71 M.J. at 43. This Court held that

> [U]nder the unique circumstances of this case, the principles underpinning the Double Jeopardy Clause as recognized in *United States v. Smith* made it impossible for the CCA to conduct a factual sufficiency review of Specification 2 without finding as fact the same facts the members found Stewart not guilty of in Specification 1.

Id. (citing *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994)).

For *Stewart* to apply here would have required two separate, identically-defined specifications of abusive sexual contact, and concurrent guilty and not guilty findings. No such circumstances were present: the Members convicted Appellant of touching AN TK's penis while Appellant reasonably should have known that AN TK was otherwise unaware the sexual contact was occurring. (J.A. 62.) Appellant was never charged with, the Military Judge never instructed on, and the Members did not acquit Appellant of a separate, identical offense. (J.A. 35-40, 319.)

4. <u>*Smith* does not bind the lower court when the trier of fact enters no explicit findings of "not guilty" to any excepted language</u>.

In *Smith*, the appellant was charged with obstructing justice by endeavoring to influence the testimony of his daughter. *Smith*, 39 M.J. at 449. The military judge convicted the appellant, excepting the language "and convince her to change her testimony at the preliminary hearing scheduled for 21 September 1989" and entering a finding, "Of the excepted words, not guilty." *Id*. The Army Court of

Military Review affirmed, but twice cited as a fact the appellant's effort to change the testimony of his daughter. *Id*. at 450. This Court found the Army Court exceeded the scope of its authority under Article 66(c). *Id*. at 451.

Smith exclusively concerned statutory limits on service courts of appeal when reviewing explicit "not guilty" findings. *Smith* was silent as to cases like Appellant's, where the Members selected what was, at most, one of multiple alternative theories of liability.

E. Even if Article 120(b)(2) created three independent, exclusive liability theories, the lower court properly refused to confine evidence of AN TK's physical condition to a single theory of "asleep" or "unconscious."

Under Article 66(c), a court "may affirm only such findings and sentence that it: (1) finds correct in law; (2) finds correct in fact; and (3) determines, on the basis of the entire record, should be approved." *See Nerad*, 69 M.J. at 141 (citing *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002)); Article 66(c), UCMJ.

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson*, 443 U.S. at 318-19)). Courts' assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). In resolving questions of legal

sufficiency, the court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001).

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having personally observed the witnesses, the court is convinced of an appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

1. The lower court reviewed the legal and factual sufficiency of Appellant's conviction for touching AN TK's penis while he was unaware the sexual contact was occurring, which Appellant reasonably should have known.

In reviewing this particular conviction under Article 120(d), the lower court examined whether the evidence was factually and legally sufficient to prove beyond a reasonable doubt (1) that Appellant committed a sexual contact upon AN TK by touching AN TK's penis with his hand; and (2) that Appellant reasonably should have known AN TK was otherwise unaware that the sexual contact was occurring. (J.A. 40, 62, 327); 10 U.S.C. § 920(b)(2), (d).

The lower court explicitly stated the exact findings of the Members. *Sager*, 2015 CCA LEXIS 571, *10, applied the proper tests for reviewing the legal and factual sufficiency of the single conviction, *id.* (citing *Turner*, 25 M.J. at 325), and correctly identified the nature of Appellant's challenge to the legal and factual sufficiency of the conviction. *Id*. at *10-11. The court "carefully review[ed] the

entire record of trial, to include all testimony and admitted exhibits," before affirming. *Id*. at *11-12.

2. Appellant is not entitled to exclusive application of relevant evidence to only one charge or theory.

When the same evidence is offered in support of two charges, "an acquittal on one [may] not be pleaded as res judicata of the other." *Dunn v. United States*, 284 U.S. 390, 393 (1932). Nor is consistency in the verdicts necessary. *Id*.

The Supreme Court has explicitly rejected the notion that an inconsistent verdict provides an independent basis for relief on appeal. *United States v. Powell*, 469 U.S. 57, 66 (U.S. 1984). To the contrary, appellate review of a verdict's legal sufficiency is the very protection against inconsistent verdicts. *See id*. at 66-67 ("Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient.") (citations omitted.) "Because the court preferred to free [the appellant] on one specification alleging a more serious offense does not also mean it found that one particular element of a less aggravated offense was not established. . . . It is an acknowledged fact that verdicts are sometimes founded on leniency, compromise, or mistake, and if the accused is the beneficiary of compassion or error, he is not in a position to complain." *United States v. Jackson*, 7 C.M.A. 67, 71-72 (C.M.A. 1956).

In *United States v. Gutierrez*, 73 M.J. 172 (C.A.A.F. 2014), this Court conducted such a legal sufficiency review of a stalking conviction. There, the appellant had been acquitted of a rape charge involving the same underlying facts as the stalking charge. *Gutierrez*, 73 M.J. at 172. On appeal, he challenged the Government's reliance on these facts to satisfy the "course of conduct" requirement in the stalking charge, arguing that the Members acquitted him of those acts. *Id*. at 172-73. This Court found that, despite the acquittal on the rape charge, "the panel could independently consider the evidence supporting that [rape] incident while deliberating on the stalking charge." *Id*. at 175 (citing *Powell*, 469 U.S. at 59-60; *Jackson*, 7 C.M.A. at 71). This Court then considered the rape-charge facts to find the stalking conviction legally sufficient. *Gutierrez*, 73 M.J. at 176.

3. Evidence that AN TK was "heavily intoxicated" and "awoke" to Appellant's touching his penis is relevant to whether AN TK was unaware of the sexual contact.

Appellant did not contest the sexual contact at trial, as the lower court recognized. (J.A. 265, 271-72, 348); *Sager*, 2015 CCA LEXIS 571 at *10-11 ("In his testimony, the appellant admitted to the sexual contact . . . ."). With regard to the second element under the Additional Charge, the Members were properly instructed to determine whether Appellant knew or reasonably should have known that AN TK "was asleep, unconscious, or unaware otherwise unaware in the

Additional Charge. This knowledge like any other fact[,] may be proved by circumstantial evidence." (J.A. 322-23.)

Contrary to Appellant's argument that "evidence of sleep, unconsciousness and or/intoxication was the only evidence presented," (Appellant's Br. at 20), AN TK's testimonial account of "waking up" to Appellant masturbating him supported each of the putative liability theories in the second element. (J.A. 124, 234.) So too did the evidence that AN TK was "substantially intoxicated" before "passing out." (J.A. 120, 123-24).

As in *Gutierrez*, the Members here were permitted to consider this evidence, even assuming that the evidence went to conduct Appellant was "acquitted" of—the purported "sleep" or "unconscious" theories—while deliberating on the "otherwise unaware" theory. *See* 73 M.J. at 175; Cf. *United States v. Gallegos*, No. ACM 38546, 2015 CCA LEXIS 349, *22 (A.F. Ct. Crim. App. Aug. 26, 2015) (noting that charges of sexual assault under both Article 120(b)(2) and (b)(3)) were alternate ways of charging evidence that included victim's intoxication, closed eyes, not speaking, and waking to appellant assaulting her). The lower court here properly considered and cited to this evidence. *See Barner*, 56 M.J. at 134.

F. Appellant cannot establish any prejudice from the lower court's interpretation of Article 120(b)(2). He abandoned any notice argument, which would fail in any case; he was convicted on only one theory; and the lower court affirmed on only one theory, which was supported by the evidence at trial.

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 196 (C.A.A.F. 2013) (citations and quotation omitted). "An appellate court cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact." *Chiarella v. United States*, 445 U.S. 222, 236-37 (1980); *see also Dunn v. United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."); *Ober*, 66 M.J. at 405; *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999). Nor may an appellate court revise the basis on which an appellant was convicted. *United States v. Bennitt*, 74 M.J. 125, 128 (C.A.A.F. 2015) (citations and quotations omitted).

"[T]he requirement of notice to an accused may be met if the charge sheet 'make[s] the accused aware of any alternative theory of guilt.'" *United States v. Miller*, 67 M.J. 385, 389 n.6 (C.A.A.F. 2009) (citing *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008).

In *Ober*, this Court reviewed whether the Army Court of Criminal Appeals erred in affirming the legal sufficiency of a conviction under a different theory than that presented to the members. 66 M.J. at 394. The appellant in Ober was charged with "knowingly and wrongfully caus[ing] to be transported in interstate commerce child pornography by uploading pictures of child pornography to a shared internet file named 'KAZAA.'" *Id*. at 405. Moving to dismiss the specification at trial, the appellant argued that the prosecution evidence was exclusively that he had *downloaded* files to his computer. *Id*. at 400.

The Army court affirmed appellant's conviction, finding that his "method of acquiring child pornography through use of peer-to-peer file sharing constituted transportation by uploading." *Id*. Appellant argued that Army court affirmed on a theory different from that presented at trial. *Id*. at 405.

This Court affirmed the Army court, finding, "Although that specific ["uploaded"] description was not initially placed before the members in the prosecution's opening statement, it was referenced in the charging document ('uploading pictures of child pornography to a shared internet file named "KAZAA"') and it was presented through expert testimony during the course of the trial." The Court held that to be "sufficient under *Chiarella*." *Id*. (citing *Chiarella*, 445 U.S. at 236). Consequently, this Court concluded, "the theory of liability relied upon by the Court of Criminal Appeals was one of the alternative

theories of liability presented by the Government at trial, not a different theory." *Ober*, 66 M.J. at 405.

1. This Court does not need to interpret Article 120(b)(2), because even under Appellant's preferred interpretation, the Members convicted Appellant of committing sexual contact while he knew or reasonable should have known the Victim was "otherwise unaware."

Appellant was charged with committing sexual contact upon AN TK while AN TK was "asleep, unconscious, or otherwise unaware that the sexual contact was occurring" as Appellant knew or reasonably should have known. (J.A. 40.) Even assuming, *arguendo*, Appellant's claim that Article 120(b)(2) created three separate liability theories, the Members convicted Appellant of only one theory: "otherwise unaware." (J.A. 62, 327.)

Appellant is thus in no different position than if the United States had charged him with touching AN TK's penis while he reasonably should have known AN TK was "asleep," but the Members excepted "sleep" and substituted therefor "otherwise unaware that the sexual act was occurring." *See* R.C.M. 918, Discussion, Manual for Courts-Martial, United States (2012 ed.); *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006). To obtain relief from such a variance, Appellant would have to "show that the variance was material and that it substantially prejudiced him." *See Finch*, 64 M.J. at 121 (citing *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)). But Appellant here can show no such

prejudice. *See United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975) (citing *United States v. Craig*, 8 C.M.A. 218 (C.M.A. 1957).

2. Appellant has abandoned his claim that he lacked notice, which would fail even if he had raised it to this Court.

a. Appellant chose not to renew notice errors at this Court.

"When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case." *United States v. Savala*, 70 M.J. 70, 76 (C.A.A.F. 2011) (citing *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006)). Although Appellant raised notice errors both at the trial level, (J.A. 386), and the lower court, *Sager*, 2015 CCA LEXIS 571 at *2, 6, alleging that the language "otherwise unaware" was unconstitutionally vague, he has not raised any claim of lack of notice at this Court. He has thereby waived review of these due process or notice issues.

b. If this Court declines to apply the law of the case doctrine, Appellant's notice arguments still must fail in light of the abundant evidence that Appellant was on notice of the prosecution theory.

Appellant knew that the "otherwise unaware that the sexual contact was occurring" theory was in play based on the plain language of the Charge Sheets, (J.A. 35-40), which, as in *Ober*, contained the language that Appellant now contests. *Ober*, 66 M.J. at 405. Trial Defense Counsel cited the language in pretrial motions. (J.A. 114.) Appellant proposed two separate instructions for the Additional Charge regarding evidence that AN TK was "aware." (J.A. 362-63,

381-82.) Appellant raised no objections to the Military Judge's instructions on the "otherwise unaware" language. (J.A. 319-20, 322-23, 325.) And Appellant specifically requested the Findings Worksheet that separately bracketed the language "otherwise unaware." (J.A. 62, 332, 386.)

Most significantly, Appellant's theory at trial, characterized by his own testimony, was that AN TK was awake and conscious during Appellant's sexual contact. (J.A. 95, 264-65, 301-02.) The lower court properly recognized that this theory demonstrated Appellant had notice that the issue at trial was whether "the sexual encounter was either consensual or the appellant reasonably believed it was consensual"—not whether there was a nuance in the type of AN TK's "unawareness" about which Appellant was in the dark. *Sager*, 2015 CCA LEXIS 571 at *11.

3. The lower court affirmed only on one putative theory: otherwise unaware.

Although the lower court rejected Appellant's argument that Article 120(b)(2) contains three distinct legal theories, *Sager*, 2015 CCA LEXIS 571 at *8-9, the lower court nevertheless affirmed *only* on the theory of "otherwise unaware." *Id*. at *11 ("Whether AN TK was asleep or unconscious due to alcohol consumption/exhaustion, or a combination of these things is only relevant as to whether the appellant reasonably should have known AN TK was 'otherwise unaware' of the sexual contact. . . . we are convinced beyond a reasonable doubt

that the appellant reasonably should have known AN TK was otherwise unaware that the sexual act [sic] was occurring."). Thus, even if this Court were to adopt Appellant's reading of Article 120(b)(2), the lower court's review of his conviction would remain unscathed.

4. The evidence cited by the lower court was sufficient to allow a rational trier of fact to convict Appellant.

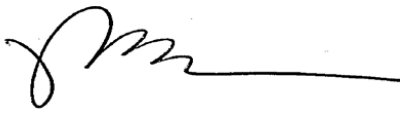
AN TK's testimony alone, viewed in the light most favorable to the prosecution, was sufficient to establish that he was "unaware" of Appellant's sexual contact. *See Jackson*, 433 U.S. at 319; *Sharpton*, 73 M.J. at 301; *Kearns*, 73 M.J. at 180; *Phillips*, 70 M.J. at 165-66. Along with AN TK's account of "passing out," (J.A. 120, 123-24), which was corroborated by "substantial evidence" of his intoxication that the lower court also cited, *Sager*, 2015 CCA LEXIS 571 at *11, the evidence was more than sufficient to establish the second element of his offense. Article 120(b)(2), UCMJ.

Conclusion

Wherefore, the United States respectfully requests that this Court affirm the decision of the lower court.

JUSTIN C. HENDERSON
Lieutenant Commander, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity

Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar No. 36640



BRIAN K. KELLER
Acting Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682
Bar No. 31714

MATTHEW M. HARRIS
Captain, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7430
Bar No. 36051

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 8,244 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2003 with 14 point, Time New Roman font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on August 1, 2016.

JUSTIN C. HENDERSON
Lieutenant Commander, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7679
Bar No. 36640