IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CHASE M. THOMPSON,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 22-0098/AF

Crim. App. Dkt. No. ACM 40019

BRIEF ON BEHALF OF APPELLANT

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WHETHER THE COURT OF CRIMINAL APPEALS ERRED BY REQUIRING THAT APPELLANT INTRODUCE DIRECT EVIDENCE OF HIS SUBJECTIVE BELIEF TO MEET HIS BURDEN FOR A REASONABLE MISTAKE OF FACT DEFENSE?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter "the Air Force Court") reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) (2019).[1] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

Airman First Class (A1C) Chase M. Thompson was tried before a military judge sitting as a general court-martial at Ramstein Air Base, Germany, from September 28-30, 2020. JA at 019. In accordance with his pleas, the military judge found A1C Thompson not guilty of one charge and five specifications of abusive sexual contact, in violation of Article 120, UCMJ. JA at 138. Contrary to his pleas, however,

[1] Appellant's case, which included charges and specifications allegedly occurring both before and after January 1, 2019, was referred to trial on May 5, 2019. Joint Appendix (JA) at 016-18. The acts described in the sole charge and specification at issue in this appeal, however, were alleged to have occurred after January 1, 2019. Accordingly, unless otherwise noted, all references to the punitive articles of the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.) (*MCM*).

the military judge found A1C Thompson guilty of one charge and specification of making a false official statement in violation of Article 107, UCMJ; one charge and specification of sexual assault of a child in violation of Article 120b, UCMJ; and one charge and specification of producing child pornography in violation of Article 134, UCMJ. *Id*.

A1C Thompson elected to be sentenced under the rules in effect prior to January 1, 2019, and the military judge sentenced him to be reduced to the grade of E-1, to be confined for 12 months, and to be dishonorably discharged from the service. JA at 021, 139. On November 10, 2020, the Convening Authority issued a memorandum taking no action on the findings of the case and approving the sentence. JA at 023. Three days later, the military judge signed the entry of judgment. JA at 021. On November 29, 2021, the Air Force Court set aside A1C Thompson's conviction for producing child pornography and dismissed that charge and its specification with prejudice. JA at 002. The Air Force Court affirmed the remaining findings and conducted a sentence reassessment. JA at 003. However, it determined that the previously adjudged sentence remained appropriate. JA at 003, 015.

Statement of Facts

At the age of 18, A1C Thompson entered active duty and was stationed at Aviano Air Base (AB), Italy, as his first duty assignment. *See* JA at 003, 205. During the charged timeframe alleged in the Article 120b, UCMJ, specification,

A1C Thompson was 20 years old.[2] *See* JA at 018, 205. On or about March 27, 2019, A1C Thompson met the named victim, VP, on the electronic dating application, "Bumble." JA at 003, 209. Unlike other dating applications, such as "Tinder," Bumble is designed so that only women are able to make initial contact with men—not vice versa. JA at 074, 115. That is, Bumble "differentiates itself in that instead of just being able to communicate as soon as you match, the female must reach out to the male to begin conversations . . . ." JA at 115. Consistent with how Bumble operates, VP initiated contact with A1C Thompson. JA at 209.

At the time, VP's Bumble profile picture contained "a text overlay with VP's first name followed by a number, indicating her age." JA at 003, 215-16. The Bumble application calculated VP's age automatically based on information she provided. JA at 003, 070, 118-19. Accordingly, her age would not have remained static; it would have changed with the passage of time. *See* JA at 118-19. As the Air Force Court later explained, at trial "[t]he Defense submitted two copies of this image, one showing VP's age reflected as 19 and one showing 20. The first one captured VP's profile as it appeared around the time of [A1C Thompson's] offenses, while the second was captured during an analysis by a defense expert a few days prior to [his] court-martial."

[2] This was the same charged timeframe alleged in the production of child pornography specification that the Air Force Court set aside and dismissed with prejudice for factual insufficiency. JA at 18. Additionally, consistent with this Honorable Court's Rules of Practice and Procedure, A1C Thompson's birthdate has been redacted from the Joint Appendix. It is included in Prosecution Exhibit (Pros. Ex.) 18 in the Record of Trial.

JA at 003, 215 (stating VP was 20 years old); 216 (stating VP was 19 years old). In addition to the automatically-calculated age which appeared on her Bumble profile, VP also included manually-entered text which stated: "Funny guys and a good taste in music. Looking for something casual, maybe I can even make you smile.//18// instagram: [VP's username]." JA at 215-16. VP's Bumble profile further stated, "I'm an undergrad" and denoted that she was "In college." *Id*.

On March 29, 2019, two days after VP initially reached out to A1C Thompson, they began conversing on the electronic messaging platform, "WhatsApp." JA at 153. This was the beginning of their "brief relationship." JA at 004. VP and A1C Thompson continued to message one another on WhatsApp through May 30, 2019. JA at 003, 204. In these messages, VP told A1C Thompson she drank alcohol, had been in relationships and had sex with other men, and had previously consumed "weed" by taking "an edible." JA at 156, 161, 167, 172, 174. The two also discussed VP's trips to Germany and London and the possibility of going away on a trip to Cape Town, South Africa together. JA at 003-04, 161-62, 180, 189-90, 198. In one message exchange occurring on March 30, 2019, A1C Thompson asked VP what she was taking a test for, and VP responded back by saying "COLLEGE." JA at 154. A1C Thompson then replied, "I know that I mean what class[?]" *Id*.

Contrary to the assertions in her Bumble profile and those she made to A1C Thompson over WhatsApp, VP was not an undergraduate student in college;

rather, she was a 15-year-old who lived with her mother and active duty stepfather. JA at 003, 024. Because she was homeschooled, VP "stayed home by herself with no supervision during the day while completing online classwork." JA at 005. The messages exchanged between A1C Thompson and VP indicate that he met VP at her home on more than one occasion during the charged timeframe. *See e.g.*, JA at 155, 171, 173, 177.[3] While VP expressed over WhatsApp that she did not want A1C Thompson to come over to her house while her mother or stepfather were home, she did not give a specific reason why.[4] *See* JA at 162-63. As the Air Force Court later explained, "[i]n the 918 WhatsApp messages admitted into evidence, VP never disclosed she was 15 to [A1C Thompson], and with the exception of one message, age was never discussed." JA at 008.

At some point during the charged timeframe, A1C Thompson and VP engaged in sexual intercourse as evidenced by a video recording the two made. *See* JA at 004. This video would eventually serve as the basis for production of child pornography

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[3] The Air Force Court specifically concluded the WhatsApp messages indicated that "on 30 March 2019, 5 April 2019, 11 April 2019, and 15 April 2019, [A1C Thompson] went to VP's residence and engaged in sexual activity with her." JA at 003.

[4] Although the Government previously argued before the lower court that A1C Thompson would have known VP was underage given that he "sneaked in and out of VP's house while her parents were at work," the Air Force Court did "not find this argument persuasive." JA at 012. As it explained, "[e]ven if VP was 18 years old, it is plausible [A1C Thompson] would have believed her parents would disapprove of her having sex with her boyfriend in their house, much less while she was supposed to be in school." *Id*.

charge and specification A1C Thompson faced at court-martial. JA at 004, 011-12. It also served as evidence against him for his sexual assault of a child charge and specification. JA at 004, 011. The Air Force Court later concluded, "[t]he WhatsApp messages introduced at trial strongly suggest that [A1C Thompson] filmed himself having sex with VP between 30 March 2019 and 15 April 2019, but not later than 30 April 2019." JA at 011. There was a "very short window in which the video could have been made." JA at 012.

Based on its review of the record, the Air Force Court found that even though A1C Thompson "and VP continued to communicate on WhatsApp from 15 April 2019 through 29 May 2019, there is no indication that they engaged in sexual activity during this timeframe." JA at 004. On the last day of the charged timeframe, May 30, 2019, agents assigned to the Air Force Office of Special Investigations (AFOSI), surveilled VP's residence and observed that A1C Thompson had parked down the street from her home. JA at 004-05. These agents later took photographs of A1C Thompson leaving VP's residence that day. JA at 005. But "other than AFOSI surveillance photos showing [A1C Thompson] leaving VP's residence, and VP showing [her friend] the sex video, there were no eyewitnesses or testimonial accounts about [A1C Thompson] and VP's relationship during the charged timeframe." JA at 013.

Additional Evidence and A1C Thompson's Court-Martial

At trial, the Government called Senior Airman (SrA) DN, who was also

stationed at Aviano AB and knew A1C Thompson. JA at 59-60. Like A1C Thompson, SrA DN met VP through Bumble. JA at 60. He testified that at the time she initiated contact with him in approximately April 2019, her profile stated that she was 18 years old. JA at 60-61, 68. VP also told SrA DN she was "a criminal justice major and a ballerina from Germany." JA at 66. SrA DN explained that VP initially identified herself as 18 years old, but when he pressed her she said she was actually 16 years old. JA at 66, 69. This was not true either; VP was only 15 in April 2019. *See* JA at 69. When SrA DN later learned from other friends that VP was 15 years old, he confronted VP and told her that she "could get guys in the Air Force in trouble about lying about [her] age . . . ." JA at 69, 73, 77-78. In response, VP expressed words to the effect of she had done it in the past, it was not illegal in Europe, "and she didn't think it was a big deal . . . ." JA at 81.

During the Defense's case–in-chief, it called one witness—Mr. JM, a digital forensics expert. JA at 107-08, 110. After reviewing a digital extraction of VP's phone, he found repeated instances of her lying about her age to other adult men and claiming to be 18 years old. JA at 111. Specifically, in his review of the extraction, Mr. JM found conversations where VP falsely told individuals who were apparently in their 20s, 30s, 40s, and 50s, that she was 18 years old. *Id*. In addition to being active on Tinder and Bumble, Mr. JM discovered that VP also portrayed herself as 18 years old on the dating application "Badoo" as well as the website "seeking.com." JA

at 112. As he explained, the latter "is designated towards individuals seeking dating or hook-up type of activities. And even in their own language they specifically state the term, sugar baby, sugar momma, and sugar daddy . . . ." *Id*. Mr. JM surmised that "the intention of this site, as [he had] seen before through case work, is that older individuals and younger individuals will collaborate to some kind of an arrangement that benefits both parties." *Id*. However, despite the fact that this website requires users to be at least 18 years old, VP was active on this website. *Id*.

During his closing argument, trial defense counsel argued that in the 52 pages of messages the military judge had before him, VP did "not sound like a child" given her talk "about doing drugs, dating all these men, not high school boys" and the fact she said she was "in college." JA at 131. In making this argument, trial defense counsel also asked the military judge to "imagine meeting a girl who says she's a college student or portrays herself as an 18-year-old and she talks about all of her sexual activities and how experience[d] she is with all these different men." JA at 133. Trial defense counsel proceeded to note that shortly after VP and A1C Thompson first met, VP told "him she's studying for college tests" which, as he argued, "goes to the accused's intent and *state of mind* . . . ." JA at 135 (emphasis added). After reiterating that VP was portraying herself as an adult, trial defense again invoked other matters which went to A1C Thompson's "*mindset* as to her age" such as the fact she was talking about doing shots and getting drunk. JA at 136 (emphasis added).

The military judge ultimately convicted A1C Thompson of producing child pornography in relation to the video that was made of A1C Thompson and VP having sex with one another, sexual assault of a child on divers occasions, and making a false official statement. JA at 138.

The Air Force Court's Opinion

On appeal before the Air Force Court, A1C Thompson argued that his convictions for producing child pornography and sexual assault of a child were legally and factually insufficient. JA at 002. The Air Force Court agreed in part. *Id*. Specifically, as to the charge and specification alleging production of child pornography, the Air Force Court concluded that A1C Thompson's conviction was factually insufficient because the Government failed to prove that he knew VP was under 18 years of age at the time they recorded a video having sex. JA at 012.

Despite finding the production of child pornography specification factually insufficient, the Air Force Court affirmed A1C Thompson's sexual assault of a child specification. JA at 013. In doing so, the Air Force Court stated, "[w]hile there was no direct evidence that [A1C Thompson] knew VP was 15 years old, if [he] wanted to defend against this element, he had to prove by a preponderance of the evidence that his ignorance or mistake of VP's age *existed in his mind and was reasonable under all the circumstances*." JA at 012 (emphasis in original). Noting the absence of direct evidence that would have supported A1C Thompson's subjective belief that V.P. was

of age, as well as the fact that A1C Thompson neither provided a statement to AFOSI nor testified at trial, the Court held that "although there was plenty of evidence for one to conclude that Appellant *could have had* a reasonable belief VP was at least 16, there was no direct evidence that this belief existed in Appellant's mind." JA at 013 (emphasis in original). Finding that the Defense failed to prove by a preponderance that the mistake of fact existed in A1C Thompson's mind "every time he had sex with VP," the Air Force Court concluded the conviction was legally and factually sufficient.

Summary of Argument

The Air Force Court correctly observed there was "plenty of evidence" at trial which would give rise to an objectively reasonable basis for A1C Thompson's mistake of fact as to age defense. JA at 013. Indeed, it overturned his conviction for producing child pornography as factually insufficient because the Government failed to establish that A1C Thompson knew VP was under the age of 18, much less under the age of 16. In upholding his conviction for having sex with VP while she was 15 years old, however, the Air Force Court erred by insisting that if A1C Thompson wanted to defend against this charge, he needed to rely upon *direct* evidence to establish that in his own mind, he subjectively believed VP was at least 16 years old. For the following reasons, A1C Thompson respectfully requests that this Honorable Court reject this analytical construct and remand his case to the Air Force Court for a renewed factual and legal sufficiency review under the appropriate legal framework.

First, the Air Force Court's opinion draws an illegitimate and legally insupportable distinction between direct and circumstantial evidence. "Findings may be based on direct *or* circumstantial evidence." R.C.M. 918(c) (emphasis added). Not only is there "no general rule for determining or comparing the weight to be given to direct or circumstantial evidence" (R.C.M. 918(c), Discussion), but "this Court has long recognized that the government is free to meet its burden of proof with circumstantial evidence." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). If *the Government* can meet its burden of proving an accused's subjective mental state beyond a reasonable doubt by relying solely upon circumstantial evidence, then it logically follows that *an accused* can do precisely the same in raising an affirmative defense under a much lower standard of proof. In faulting A1C Thompson for the lack of direct evidence of his subjective belief that VP was at least 16 years old, despite the abundant circumstantial evidence which supported this same conclusion, the Air Force Court upheld his conviction on the basis of an evidentiary distinction this Court has never made. Standing alone, this error in the Air Force Court's analysis warrants remedial action.

Yet, the Air Force Court's analysis proves erroneous for another reason as well. The plain language of Article 120b, UCMJ, does not require an accused to establish "direct evidence that this belief existed in [his] mind." JA at 013. Nor could it without almost assuredly running afoul of the Constitution in the vast majority—if not all—

instances. This case is one of them. A1C Thompson does not contest that "it is constitutionally permissible to allocate to a defendant the burden of proving an affirmative defense[.]" *United States v. Neal*, 68 M.J. 289, 305 (C.A.A.F. 2010) (Ryan, J., dissenting) (citing *Martin v. Ohio*, 480 U.S. 228, 234 (1987) and *Patterson v. New York*, 432 U.S. 197, 215 (1977)). But that is altogether different than requiring that which the Air Force Court insisted was necessary for him to do in this case.

Again, the Air Force Court recognized there was "plenty" of circumstantial evidence stemming from the Government's own exhibits and witnesses, as well as the testimony of the digital forensics expert the Defense called during its case-in-chief, "for one to conclude that Appellant *could have had* a reasonable belief VP was at least 16" years of age. JA at 013 (emphasis in original). But it declined to overturn A1C Thompson's conviction because "there was no *direct evidence* that this belief existed in [his] mind." *Id*. (emphasis added). While the Air Force Court did not explicitly state what type of "direct evidence" it would have required under such circumstances, the patent implication which permeates throughout its opinion is that A1C Thompson needed to testify in order to avail himself of this defense. This too was error, and one of constitutional dimension.

Because the Air Force Court relied upon a false evidentiary dichotomy and interpreted Article 120b, UCMJ, to effectively require that which the Constitution expressly proscribes, its factual sufficiency review was not only premised upon an

erroneous understanding of the law, but also operated to deny A1C Thompson due process given that, "once granted, the right of appeal must be attended with safeguards of constitutional due process[.]" *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) (internal quotations omitted). This same principle likewise applies to the mistake of fact as to age defense that Congress affirmatively included within the statutory scheme of Article 120b, UCMJ. The affirmative defense Congress created cannot be interpreted to require that which the Fifth Amendment prohibits.

Put differently, A1C Thompson had a constitutional right not to testify at his court-martial. Even if it wanted to, Congress could not create an end-around this fundamental protection by legislatively circumventing the Fifth Amendment, such that a statutorily created affirmative defense only springs into existence when an accused waives his constitutional right against compelled testimony. To be sure, A1C Thompson does not contend that Congress did any such thing when it adopted Article 120b, UCMJ. But the Air Force Court's erroneous *interpretation* of this punitive article—if left to stand—would effectively operate to do just that.

Argument

THE COURT OF CRIMINAL APPEALS ERRED BY REQUIRING THAT APPELLANT INTRODUCE DIRECT EVIDENCE OF HIS SUBJECTIVE BELIEF TO MEET HIS BURDEN FOR A REASONABLE MISTAKE OF FACT DEFENSE.

Standard of Review

Issues of statutory and constitutional interpretation are reviewed de novo. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017); *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016). Likewise, in this case the Air Force Court's interpretation of legal rules "and assessment of the reliability of trial proceedings are matters of law that [this Court] review[s] de novo, not only because the lower court's decision constitutes the recognition and formulation of legal standards, but because the reasoning upon which it is based shows it to be a matter of law." *United States v. Best*, 61 M.J. 376, 381 (C.A.A.F. 2005) (internal quotations omitted); *see also United States v. Evans*, 75 M.J. 302, 304 (C.A.A.F. 2016) (applying de novo review to the question of whether a Court of Criminal Appeals applied the correct legal standard). However, "the findings of fact made by a court below are accepted unless clearly erroneous." *Best*, 61 M.J. at 381.

Law

A. Servicemembers' Fifth Amendment Rights at Trial and on Appeal

The Fifth Amendment "provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *United States v. Mitchell*, 76 M.J. 413, 416 (C.A.A.F. 2017) (alteration in original) (quoting U.S. Const. amend. V). In addition to this constitutional privilege, servicemembers also maintain statutory and regulatory rights to remain silent. *United States v. Clark*, 69 M.J. 438, 443 (C.A.A.F.

2011). This Court has recognized that the protections afforded to servicemembers under Article 31, UCMJ, "are in many respects broader than the rights afforded to those servicemembers under the Fifth Amendment of the Constitution." *United States v. Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016).

Consistent with these privileges, "[i]t is well settled that the Government may not use a defendant's assertion of his Fifth Amendment rights as substantive evidence against him." *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (citations omitted); *accord Clark*, 69 M.J. at 443. "The Fifth Amendment cannot with one hand protect an accused from being compelled to testify and yet with the other hand permit trial counsel to argue that an accused's silent demeanor in response to an accusation of wrongdoing is tantamount to a confession of guilt." *Id*. at 446. As Justice Black observed in *Grunewald v. United States*, "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." 353 U.S. 391, 425-26 (1957) (Black, J., concurring).

In a similar vein, the Fifth Amendment does not cease to apply at the conclusion of trial; when conferred by statute, the right to an appeal must still conform with that which is required by the Fifth Amendment's Due Process Clause. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985). This is true even though the Government may have been under no constitutional obligation to create a right of appeal in the first place. *United States v. Larneard*, 3 M.J. 76, 79 (C.M.A. 1977).

> Neither the United States Constitution nor the common law confers upon an accused a right to appeal from a criminal conviction. Thus, the creature that our law knows as a criminal appeal is one solely of statutory origin. However, once granted, the right of appeal must be attended with safeguards of constitutional due process.

Id. (internal citations omitted); *accord Rodriguez-Amy*, 19 M.J. at 178.

Pursuant to Article 66(d), UCMJ, in any case where a Court of Criminal Appeals (CCA) has jurisdiction to consider an accused's timely appeal of his court-martial conviction, "[t]he Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(d)(1). Such review under Article 66, UCMJ, "is an appeal of right" in the military justice system. *United States v. Ribaudo*, 62 M.J. 286, 288 (C.A.A.F. 2006). And it is a "substantial right" at that. *See United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016). Given the scope of review by a CCA requires an independent factual sufficiency review, it also "differs in significant respect from direct review in the civilian federal appellate courts." *Id*. at 222-34 (quoting *United States v. Roach*, 66 M.J. 410, 412 (C.A.A.F. 2008)). "This awesome, plenary, *de novo* power of review grants unto the [CCAs] authority to, indeed, 'substitute [their] judgment' for that of the military judge. It also allows a 'substitution of judgment' for that of the court members." *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

B. Article 120b, UCMJ, and its Mistake of Fact as to Age Defense

The version of Article 120b, UCMJ, applicable to A1C Thompson's case provides, in pertinent part, that "[a]ny person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct." Article 120b(b), UCMJ. The statute defines a "child" as a "person who has not attained the age of 16 years." Article 120b(h)(4), UCMJ. It further provides:

> In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act . . . had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

Article 120b(d)(2), UCMJ.

Regulatory guidance in the *MCM* explains that when an accused raises a mistake of fact as to age defense in accordance with Article 120b(d)(2), UCMJ, "the accused has the burden of proving mistake of fact as to age by a preponderance of the evidence." R.C.M. 916(b)(3). A later subparagraph of R.C.M. 916 goes on to provide:

> It is a defense to a prosecution under Article 120b(b), sexual assault of a child . . . that, at the time of the offense, the child was at least 12 years of age, and the accused reasonably believed that the child had attained the age of 16 years. The accused must prove this defense by a preponderance of the evidence.

R.C.M. 916(j)(2).

The only other situation where an accused bears the burden of proving an affirmative defense under R.C.M. 916(b) is where the Defense raises a lack of mental responsibility. R.C.M. 916(b)(2). In those circumstances, the burden of proof is higher and requires "clear and convincing evidence." *Id*. In all other circumstances apart from mistake of fact as to age in an Article 120b, UCMJ, prosecution or lack of mental responsibility, where some evidence raises a defense, "the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist." R.C.M. 916(b)(1).

However, as the Discussion section which follows R.C.M. 916(b) explains, whether the defense is one of mistake of fact as to age, lack of mental responsibility, or any other, such a defense may nevertheless "be raised by evidence presented by the defense, the prosecution, or the court-martial." *See* R.C.M. 916(b)(3), Discussion (drawing no distinction between any type of defense falling within R.C.M. 916(b)); *see also United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998) (quoting from the version of R.C.M. 916(b) Discussion section contained within the 1994 edition of the *MCM*, which likewise provided that "[a] defense may be raised by the evidence presented by the defense, the prosecution, or the court-martial.").

C. Direct and Circumstantial Evidence

"Findings may be based on direct *or* circumstantial evidence." R.C.M. 918(c) (emphasis added). "'Direct evidence' is evidence which tends directly to prove or

disprove a fact in issue (for example, an element of the offenses charged)." R.C.M. 918(c), Discussion. By contrast, "'[c]ircumstantial evidence' is evidence which tends directly to prove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts or circumstances, one may reasonably infer the existence or non-existence of a fact in issue." *Id*. "There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence." *Id*. (emphasis added).

Even "[a]n intent to commit premeditated murder, *like any other mental state*, can be shown by direct or circumstantial evidence." *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998) (citing 2 W. LaFave and A. Scott, *Substantive Criminal Law* § 7.7(a) at 239 (1986)) (emphasis added); *see also United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014) (noting "the Government was free to prove Appellant's intent by circumstantial evidence."). In *Davis*, this Court acknowledged "there was no direct evidence" establishing premeditation, but nevertheless upheld his conviction based upon the fact that "there was circumstantial evidence of such an intent on his part admitted in this case which would support his conviction for attempted premeditated murder." *Davis*, 49 M.J. at 83.

More recently, and as this Court unanimously recognized last year in *United States v. Ozbirn*, given that "actual mind reading is impossible," a question as to what truly existed in a person's head at a given time "generally can be determined only by

the person's own admissions *or by drawing inferences from the person's statements and actions and from the context and circumstances*." 81 M.J. 38, 42 (C.A.A.F. 2021) (emphasis added). In upholding the appellant's conviction in that case where the Government bore the burden of proving a particular specific intent beyond a reasonable doubt, this Court reasoned that "inferences about specific intent depend on the totality of circumstances, and those circumstances in this case are such that a rational finder of fact reasonably could *infer* that Appellant had the requisite specific intent." *Id.* at 43 (emphasis added).

In situations where an accused has sought to invoke a mistake of fact defense, this Court has repeatedly rejected the proposition that he must first testify in order to avail himself of that defense. *See e.g.*, *Jones*, 49 M.J. at 91 ("the appellate court below erred to the extent it possibly suggested that an accused must testify in order that a mistake-of-fact instruction be given"); *United States v. Dipaola*, 67 M.J. 98, 100 (C.A.A.F. 2008); ("An accused is not required to testify in order to establish a mistake-of-fact defense. The evidence to support a mistake-of-fact instruction can come from evidence presented by the defense, the prosecution, or the court-martial.") (internal citation omitted). In *Jones*, this Court went so far as to say that "[s]uch a narrow view of the law on raising defenses at courts-martial, as relied on by the court below, is unacceptable." 49 M.J. at 91.

Analysis

A. A1C Thompson met his burden of proving, by a preponderance of the evidence, that he reasonably believed VP was at least 16 years old.

The lone charge and specification at issue before this Court alleged that between on or about March 30, 2019, and on or about May 30, 2019, A1C Thompson committed a sexual act upon VP—a child who had attained the age of 12 years but not the age of 16 years—on divers occasions, in violation of Article 120b, UCMJ. JA at 018. Under the plain language of Article 120b(d)(2), UCMJ, in order for A1C Thompson to raise a mistake of fact as to age defense, it was his burden to "prove by a preponderance of the evidence, that [he] reasonably believed that [VP] had attained the age of 16 years . . . ." Article 120b(d)(2). And he met this burden by relying upon a plethora of circumstantial evidence adduced at trial which established that he "reasonably believed" VP was at least 16 years old.

The two were less than five years apart in age; at the start of the charged timeframe A1C Thompson was approximately 20 years and four months old, while VP was approximately 15 years and eight months old. *See* JA at 024-25.[5] As evidenced by the pictures VP posted of herself to Bumble, this is not a case in which any age gap between the two would have been inherently apparent. *See* JA at 206-17.

[5] Consistent with this Honorable Court's Rules of Practice and Procedure, VP's birthdate has been redacted from the Joint Appendix. It is included in the transcript of the proceedings. *See* Transcript at 195; *see also* Pros. Ex. 18 (containing A1C Thompson's birthdate).

This is all the more true given that VP routinely told others (including at least one other airman) that she was 18 years old. JA at 007, 013, 111. Indeed, when SrA DN initially questioned her, she attempted to correct her lie with another lie by saying she was actually 16 years old, even though she was only 15 at the time. JA at 069, 084. SrA DN only learned VP's true age after a different group of friends informed him. JA at 069.

In addition to finding "there was no direct evidence that Appellant knew VP was 15 years old," the Air Force Court further found that VP consistently held herself out to be at least 16 to those she met on social media, and there was no discussion of VP's true age in the WhatsApp messages exchanged between VP and A1C Thompson. JA at 013. The Air Force Court then went on to list "numerous examples in the record which would support the reasonableness of a belief that VP was over the age of 16[,]" including: (1) VP's Bumble account said she was 18 years old and was an undergraduate college student; (2) VP talked to A1C Thompson about her alcohol consumption; (3) VP talked about her relationships with other, older men; (4) VP talked about consuming "edibles" (which the Air Force Court recognized as a reference to drugs); (5) VP told A1C Thompson she was taking a college class; and (6) VP left Italy to go to London and Germany for weeks at a time, when someone under the age of 18 years would ostensibly have been in school. *Id*.

Moreover, given that the Air Force Court overturned A1C Thompson's production of child pornography conviction for factual insufficiency—where the pertinent age is 18 rather than 16—this only further reinforces the objectively reasonable belief A1C Thompson held that VP was *at least* 16 years old. A1C Thompson agrees with the foregoing and takes no issue with this portion of the lower court's opinion. But he does submit that the Air Force Court subsequently erred by concluding that his failure to establish "direct evidence that this belief existed in [his] mind" was fatal to his case. *See* JA at 013. Simply put, the law imposes no such obligation.

B. A1C Thompson was not required to rely upon "direct" evidence to meet his burden of establishing mistake of fact as to age.

A factual determination as to whether an accused possessed a mistaken but reasonable belief as to the age of his sexual partner may be grounded in either direct *or circumstantial* evidence. This is true of any factual finding at courts-martial. *See* R.C.M. 918(c) ("Findings may be based on direct or circumstantial evidence."). There is no special exception in the statutory text of Article 120b, UCMJ to this general rule. Nor does R.C.M. 916(b)(3), which specifically addresses the burden that applies in these circumstances, suggest that it is necessary for an accused to rely upon "direct" as opposed to "circumstantial" evidence in order to prevail in raising an affirmative defense premised upon mistake of fact as to age. *See generally* R.C.M. 916(b)(3). That rule plainly states that "the accused has the burden of proving mistake of fact as

to age by a preponderance of the evidence," without in any way cabining what type of evidence he may rely upon in so doing. *See id*.

Therefore, contrary to the Air Force Court's opinion, A1C Thompson was free to (and did) meet his burden of proving by a preponderance of the evidence that he reasonably believed V.P. was at least 16 years old when they had sex by relying upon circumstantial evidence supporting this conclusion. A1C Thompson's position that direct evidence was not required is hardly novel. In the ordinary course, and when the shoe is on the Government's foot, this Court has recognized that "the ability to rely on circumstantial evidence is especially important in cases, such as here, where the offense is normally committed in private." *King*, 78 M.J. at 221. If "the government is free to meet its burden of proof with circumstantial evidence" (*id.*), then so too is an accused.

By way of example, when the burden of establishing an accused's state of mind rests upon the Government in a premeditated murder charge, "the finder of fact must often resort to circumstantial evidence of premeditation." *United States v. Cooper*, 28 M.J. 810, 816 (A.C.M.R. 1989); *see also United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (noting that "[t]he existence of premeditation may be inferred from the circumstances" and that the evidence "circumstantially established [the appellant's] premeditated design to kill his daughter . . . ."). Even crimes like larceny, which require the Government to prove the subjective state of an accused's mind by

establishing his or her specific "intent to steal may be proved by circumstantial evidence." *United States v. Hale*, 78 M.J. 268, 273 (C.A.A.F. 2019) (internal quotations omitted).

The Government is, after all, constitutionally compelled to prove each element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The Government can—and routinely does—meet this most onerous burden in cases where it is required to establish an accused's state of mind by relying solely upon circumstantial evidence. It, therefore, only stands to reason that an accused can do likewise in those situations where Congress affords him an affirmative defense that need only carry the day by a mere preponderance of the evidence. That is precisely what A1C Thompson did in this case, and the Air Force Court erred by holding him to an arbitrary distinction which finds no place in the *MCM*, the UCMJ, or this Court's precedents.

C. The Air Force Court erred by imposing an obligation to rely upon "direct evidence" in raising a mistake of fact as to age defense; if this is what Article 120b(d)(2), UCMJ, actually required, then it would run afoul of the Fifth Amendment in most, if not all, situations.

The Air Force Court's reliance upon an erroneous distinction between direct and circumstantial evidence alone warrants remand. However, this error also inherently and necessarily implicated A1C Thompson's regulatory, statutory, and constitutional rights protecting him from compelled testimony. By suggesting that circumstantial evidence would not suffice and that A1C Thompson needed to point to "direct"

evidence as to what he subjectively believed at the time he had sex with VP, it imposed a requirement that cannot be squared with his Fifth Amendment protection against compelled testimony. To be clear, A1C Thompson does not take the position Article 120b(d)(2), UCMJ, is facially unconstitutional. However, the Air Force Court's misinterpretation of what this statute requires would, in operation, make it so.

1. This Court has previously rejected that an accused must testify in order for a mistake of fact defense to apply.

This Court has plainly and repeatedly stated that "[a]n accused is not required to testify in order to establish a mistake-of-fact defense." *DiPaola*, 67 M.J. at 100 (C.A.A.F. 2008) (citing *Jones*, 49 M.J. at 91). And it has pointedly rejected at least one CCA opinion to the extent it "possibly suggested that an accused must testify in order that a mistake-of-fact instruction be given." *Jones*, 49 M.J. at 91. While that case concerned mistake of fact as to consent rather than age, the general admonition this Court struck in *Jones* was not so limited. It went on to say "[s]uch a narrow view of the law on *raising defenses* at courts-martial, as relied on by the court below, is unacceptable." *Id*. (emphasis added).

Yet, the dog whistle which can be heard throughout the opinion here is the concerning implication that A1C Thompson needed to testify if he wanted to prevail on his mistake of fact as to age defense. To be sure, the Air Force Court did not explicitly state this outright; in fact, in the "Law" section of its opinion, citing *Jones*, the Air Force Court correctly recited that "[a]n accused is not required to testify in

order to establish a mistake-of-fact defense." JA at 010. But, at the same time, it made a repeated point of noting that A1C Thompson chose not to testify or speak with law enforcement prior to trial. The first two times the Air Force Court did so was in its recitation of the facts. *See* JA at 008 ("When Appellant was brought in for questioning on 30 May 2019, he did not provide a statement to AFOSI"); *id*. ("VP did not testify at Appellant's trial; neither did Appellant). But the third time the Air Force Court made mention of this was in the "Discussion" section of the opinion applying the law to the facts of A1C Thompson's case. *See* JA at 013 ("Finally, Appellant did not provide a statement to AFOSI relating to VP, and at his trial, he exercised his right not to testify.").[6]

Despite the Air Force Court's brief citation to *Jones*, it is difficult to see how Appellant could have introduced "direct" evidence of his subjective belief about VP's age *except* by waiving his Fifth Amendment privilege against compelled testimony. As the Air Force Court saw fit to emphasize, "there was no direct evidence that this belief existed in Appellant's mind." JA at 013. This lack of "direct" evidence compelled the Air Force Court's ultimate conclusion that "the Defense failed to meet

[6] Unlike how some CCA opinions have caveated these observations, the Air Force Court did not include any disclaimer expressing it was "mindful that the appellant's choice not to testify cannot be held against him." *See e.g.*, *United States v. Pierce*, 40 M.J. 601, 606 n.4 (A.C.M.R. 1994); *United States v. Fuller*, No. ACM 9701004, 1999 CCA LEXIS 389, at *21 n. 3 (A. Ct. Crim. App. Sep. 1, 1999) (unpub. op.).

its burden to demonstrate by a preponderance of the evidence that a mistake of fact actually existed in Appellant's mind every time he had sex with VP." *Id*. If the Air Force Court had instead come to this determination after finding that all relevant surrounding circumstances simply did not support such a defense, that would be one thing. But this did not happen. The Air Force Court reached its conclusion even though it simultaneously found "there [were] numerous examples in the record which would support the reasonableness of a belief that VP was over the age of 16[.]" *Id*.

Given all of this, to the extent the Air Force Court did not seek to imply that A1C Thompson needed to testify in order to succeed on this affirmative defense, it begs the question as to what exactly it expected him to do in order to sustain such a burden if not through waiver of his regulatory, statutory, and constitutional rights not to testify. A1C Thompson exercised his right not to speak with law enforcement regarding VP when they investigated his case—that decision by itself could not be held against him. *See* Mil. R. Evid. 304(a)(2); *cf. Doyle v. Ohio*, 426 U.S. 610, 618 (1976). But even if he had spoken to them at the time, and the Defense wanted to introduce this prior statement at trial, the Military Rules of Evidence make clear that the *Government*—not A1C Thompson—held the key to that statement's admissibility. *See generally* Mil. R. Evid. 801(d)(2).

In addition, it was not as though the record lacks an abundance of contemporaneous statements made by A1C Thompson during the relevant timeframe.

The Government introduced 918 WhatsApp messages that were exchanged between A1C Thompson and VP between 29 March 2019 and 30 May 2019. *See* JA at 153-204. Yet, even these 918 electronic messages between the two (where VP said she was in college and never mentioned that she was actually 15 years old) did not sufficiently qualify as "direct" enough evidence of A1C Thompson's subjective state of mind as far as the Air Force Court was concerned.

Plainly put, based upon an entire reading of the lower court's opinion, the only way for the Defense to have provided *direct* evidence of what actually existed in A1C Thompson's mind was for him to take the stand. It is altogether unclear how A1C Thompson could have met the Air Force Court's formulation of this burden without being forced to waive his Fifth Amendment privilege. If this were indeed the state of the law and Article 120b, UCMJ, actually required "direct" evidence of an accused's state of mind in order to raise a mistake of fact as to age defense, then the statute *would be* subject to facial infirmity. But there is no such cause for concern here because the constitutionally problematic requirement for "direct" evidence from an accused does not derive from the text of either Article 120b, UCMJ, or R.C.M. 916(j)(2). It comes from language that the Air Force Court read *into* the statute.[7]

[7] The Air Force Court's misunderstanding of the law is further evinced by the fact it said "if Appellant wanted to defend against *this element* . . . ." JA at 012 (emphasis added). Knowledge as to age is not an "element" of the offense; if it were then the Government would have borne the burden of proving A1C Thompson's knowledge

Just as there is no requirement for the Government to meet its burden of proving a mental state with "direct evidence," neither was there a burden on Appellant to do so. But, as can be seen through the lens of this case, the reason *why* it would be particularly problematic to require an accused to put forth "direct evidence" establishing what was in his mind at the time is because it would impose a requirement upon an accused to waive his Fifth Amendment privilege in all but perhaps the most unique of circumstances. Moreover, by imposing such a requirement where none exists, the Air Force Court's opinion marked "the antithesis of textualism" by interposing "additional language into a rule that is anything but ambiguous . . . ." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020).

2. Even if Congress was under no obligation to afford a mistake of fact as to age defense in Article 120b, UCMJ, it did; therefore, the affirmative defense it created must still operate within the confines of due process.

It may be true that Congress had no constitutional obligation to afford such an affirmative defense to this crime, given that at common law mistake of fact as to age was not a defense to statutory rape. *See Morissette v. United States*, 342 U.S. 246, 276

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beyond a reasonable doubt. *See Patterson*, 432 U.S. at 210 ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."); *see also Martin*, 480 U.S. at 234 (recognizing that the government may not relieve itself of the requirement to prove each element of an offense beyond a reasonable doubt by shifting the burden of disproving an element to the defense, but that it may still constitutionally impose upon an accused the burden of proving other affirmative defenses which may apply irrespective of the elements of the charged offense itself).

n.8 (1952); *United States v. White Calf*, 634 F.3d 453, 457 (8th Cir. 2011). But the fact is Congress *did* create such an affirmative defense in crafting Article 120b, UCMJ. Therefore, in circumstances like this where the Government "opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). This principle has special force when the Government's discretionary creation implicates "an integral part of the system . . . for finally adjudicating the guilt or innocence of a defendant." *See id*. at 393 (alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

For this reason, the statutory mistake of fact as to age defense Congress created in Article 120b, UCMJ, could not circumvent the Constitution—even if the Constitution never compelled its creation in the first place. *Cf. Rodriguez-Amy*, 19 M.J. at 178. Congress saw fit to statutorily provide a mistake of fact as to age defense to the offense A1C Thompson faced at his court-martial. But the affirmative defense it created did not—because it *could not*—impose upon him a requirement to waive any of his Fifth Amendment rights, including the right against compelled testimony, in order to avail himself of this defense. The same would hold true of other constitutional rights. For example, Congress could not, consistent with due process or any other constitutional guarantee, create an affirmative defense by statute which required an accused to give up his Sixth Amendment right to counsel in order for it to

be invoked. Nor could Congress require that in order for an accused to raise a mistake of fact as to age defense, he must first agree to waive his right to confront adverse witnesses.

An accused's strategic decision to waive a constitutional privilege so as to capitalize upon an affirmative defense is a different matter entirely. In any number of cases it may well be that an accused will choose to waive a constitutional privilege because he believes doing so will ultimately be in his best interest for tactical reasons. But that does not mean the Government is free to create an affirmative defense which *requires* waiver of a constitutional privilege in order for it to apply. That is, Congress cannot create a statutory defense which foreordains a conviction *unless* an accused waives his constitutional privilege against testifying at court-martial. Nor did it. A1C Thompson does not contend that Article 120b, UCMJ—as drafted and properly read—purports to do any such thing. Rather, it is the Air Force Court's *interpretation* of this statute which—if left to stand—would operate to violate the Fifth Amendment.

CONCLUSION

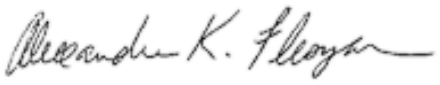
The Air Force Court erred by imposing an atextual requirement that an accused needs to establish "direct" evidence of his state of mind in order to prevail on a mistake of fact as to age defense pursuant to Article 120b(d)(2), UCMJ. A1C Thompson was free to—and did—meet his burden of proving that he reasonably believed VP had attained the age of at least 16 years at the time they had sex by relying upon an

abundance of circumstantial evidence which established just that. The Air Force Court's insistence upon the need to show "direct" evidence in such circumstances was an independent error of law warranting remand.

But this error also carried with it a separate, constitutional concern that was necessarily implicated in the Air Force Court's mistaken understanding of the law. Consistent with this Court's authority under Article 67, UCMJ, A1C Thompson respectfully requests that it remand his case to the Air Force Court for a renewed factual and legal sufficiency review of his conviction for sexual assault of a child so as "to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a 'correct view of the law.'" *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010).

WHEREFORE, A1C Thompson respectfully requests this Honorable Court remand the case to the Air Force Court of Criminal Appeals for consideration consistent with this opinion.

Respectfully Submitted,



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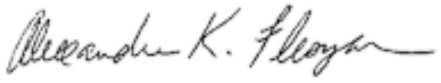
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on April 13, 2022.

Respectfully Submitted,



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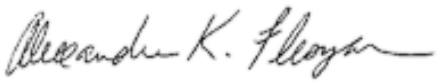
CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 9,002 words and 768 lines of text.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,



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Appendix

United States v. Fuller

United States Army Court of Criminal Appeals

September 1, 1999, Decided

ARMY 9701004

Reporter
1999 CCA LEXIS 389 *; 1999 WL 35021432

UNITED STATES, Appellee v. Sergeant PAUL J. FULLER, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Later proceeding at *United States v. Fuller, 54 M.J. 107, 2000 CAAF LEXIS 994 (C.A.A.F., 2000)*

Prior History: **[*1]** Headquarters, V Corps. P. E. Brownback III (arraignment) and F. Kennedy III (trial), Military Judges.

Core Terms

sex, Specification, alcohol, sexual, rape, beyond a reasonable doubt, drinking, indecent assault, barracks, recalled, factual sufficiency, intercourse, touched, remember, awoke, recollection, military, soldiers, evening, observe, tequila, sodomy, couch, bed

Counsel: For Appellant: Captain Scott A. de la Vega, JA (argued); Colonel Adele H. Odegard, JA; Major Holly S. G. Coffey, JA (on brief); Captain Kirsten V. Campbell-Brunson, JA.

For Appellee: Captain Arthur J. Coulter, JA (argued); Colonel Russell S. Estey, JA; Major Patricia A. Ham, JA (on brief); Lieutenant Colonel Eugene R. Milhizer, JA.

Judges: Before KAPLAN, MERCK, and BROWN, Appellate Military Judges. Judge KAPLAN and Judge MERCK concur.

Opinion by: BROWN

Opinion

MEMORANDUM OPINION

BROWN, Judge:

At a fully contested general court-martial, a panel of officer and enlisted members convicted the appellant of cruelty and maltreatment (three specifications), rape, sodomy (three specifications), indecent assault, unlawful entry, fraternization, and kidnapping, in violation of Articles 93, 120, 125, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 893*, *920*, *925*, and *934* [hereinafter UCMJ]. [1] The convening authority

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[1] The convictions for indecent assault and unlawful entry were lesser included offenses of the charged offenses of rape (*Article 120, UCMJ*) and burglary (*Article 129, UCMJ*), respectively. The military judge dismissed one specification of cruelty and maltreatment (*Article 93, UCMJ*) prior to pleas and dismissed one specification each of rape and indecent exposure (*Articles 120* and *134, UCMJ*, respectively) prior to findings. The panel acquitted the appellant of one specification each of attempted rape, cruelty and maltreatment, rape, and

approved the adjudged sentence of a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to Private E1. The appellant received sixty-four days of credit toward **[*2]** his confinement.

In reviewing this case under *Article 66, UCMJ*, we have examined the record of trial and considered the briefs submitted by the parties, as well as the matters personally raised by the appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We heard oral argument on the second of three [2] assignments of error, which was framed as follows:

> THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR INDECENT ASSAULT (SPECIFICATION 2 OF CHARGE III) WHEN PVT [I] COULD NOT EVEN TESTIFY THAT THE ACCUSED TOUCHED HER.

We conclude that the evidence is **[*3]** legally and factually sufficient to sustain the conviction of indecent assault (Specification 2 of Charge III).

BACKGROUND

The charges against the appellant initially arose out of an Army Regulation (AR) 15-6 investigation concerning alleged improprieties committed by Sergeant First Class (SFC) Davis. When the AR 15-6 investigating officer began to suspect criminal behavior, he referred the matter to the local Criminal Investigation Command (CID) office.

At the time of most of the charges, the appellant and SFC Davis were cadre members at the Darmstadt, Germany, Inprocessing Training Center (ITC). The mission of the ITC was to "assist **[*4]** soldiers and families in transitioning into Europe." Newly assigned soldiers, mostly in the ranks of specialist and below, processed through the ITC for approximately two to three weeks. While attached to the ITC, unaccompanied soldiers lived in ITC barracks and engaged in orientation activities such as driver training, German "Headstart" language training, and unit inprocessing. As the CID investigation developed, investigators interviewed numerous women soldiers who passed through the ITC while the appellant and SFC Davis were ITC cadre members. The investigation ultimately led to the preferral and referral of court-martial charges against the appellant.

In the instant case, the panel convicted the appellant of offenses against six women soldiers. In Specification 2 of Charge III, the government charged the appellant with the rape of Private E2 (PV2) I on or about 28 December 1996. The panel found the appellant guilty of the lesser included offense of indecent assault. We summarize below only the facts necessary to resolve the appellant's second assignment of error.

FACTS

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obstruction of justice (*Articles 80*, *93*, *120*, and *134, UCMJ*).

[2] The other two assignments of error are:

> [I]
>
> THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED THE ALLEGED VICTIMS TO SIT IN THE COURTROOM AND CRY DURING FINDINGS ARGUMENTS, THEREBY INFLAMING THE PASSIONS OF THE PANEL AND DEPRIVING SGT FULLER OF A FAIR SENTENCING PROCEEDING.
>
> III
>
> THE MILITARY JUDGE ERRED WHEN HE FAILED TO ORDER THE GOVERNMENT TO PROVIDE A VERBATIM TRANSCRIPT OF PVT [I]'S TESTIMONY IN THE COMPANION CASE OF U.S. v. DAVIS[,] THEREBY PREVENTING THE DEFENSE FROM CONDUCTING A PROPER CROSS-EXAMINATION AND IMPEACHMENT OF PVT [I] AT SGT FULLER'S TRIAL.

To have a complete picture of what transpired on the evening of 27 December and morning of 28 December 1996, we [*5] focus on the testimony and evidence pertaining to PV2 I and another victim, Private First Class (PFC) M.

On the evening of 27 December 1996, PV2 I started, a bit early, to celebrate her 21st birthday, which was on 28 December. The evening began at about 1900 hours when she and some friends, including PFC M, went to PFC Sepulveda's room and drank some Alize, a 32 proof (16% alcohol) cognac. Private I rapidly consumed over half a liter of Alize. She did not immediately feel the effects of the alcohol, but began to notice the effects at about 2200 hours as the group adjourned to the Rainbow Club, located on the same kaserne. At the Rainbow Club, PFC Sepulveda bought PV2 I two "Sex on the Beach" drinks, each containing approximately two shots, or ounces, of 48 proof (24%) liquor. Private I then purchased and drank at least one more "Sex on the Beach" and one or more shots of tequila.

Later that evening at the Rainbow Club at approximately 2300 hours, PV2 I and PFC M met the appellant and SFC Davis. Private First Class M spoke to them first, then told PV2 I that the appellant and SFC Davis wanted to take both women out for a drink to celebrate PV2 I's birthday. Private I testified that, at [*6] first, she did not want to leave, but she changed her mind when she thought that PFC M was going to go by herself. Private I testified that she only intended to be gone about an hour since she had friends still at the club who were going to wait for her. Before leaving, PV2 I told her friends that she was going to use the phone to call her aunt and that she would be back. She did this because the appellant and SFC Davis did not want anyone to know the four were leaving together. As the two women left the club, PFC Sepulveda noticed that PFC M seemed to hold PV2 I while walking because the latter was "a little stumbly at the club." The two women waited outside by the appellant's Chevrolet Blazer; the two men followed sometime thereafter.

Although the appellant and SFC Davis originally told the women that they would all go to a German club for a drink, the appellant and SFC Davis decided that they should not go because other ITC personnel might see the cadre with the two privates. Instead, they drove to a gas station where they picked up a bottle of tequila and a bottle of gin. They then drove some thirty minutes to the appellant's barracks room in Babenhausen. This was the first time [*7] PV2 I had ever left her Darmstadt kaserne since her arrival in Germany. No one drank any alcohol during the ride to Babenhausen.

The four of them eventually went to the appellant's barracks room on the second floor of his building. Private I recalled that she climbed the stairs without assistance. She accurately described the furnishings in the appellant's barracks room. Once inside, they all sat on the couch and toasted PV2 I's birthday. Private I drank at least three double shots of tequila from a drinking glass. At some point during this time, the appellant left the room for thirty to forty-five minutes. After the drinks, PV2 I felt very intoxicated. Also at this point, her recollection of ensuing events became very sporadic and fuzzy. She recalled lying back against the couch while thinking she would sleep for a second and then they would leave. When she awoke, she found SFC Davis on top of her, having sex with her. She does not remember what the appellant was doing at that time or if he was even present. She recalled lying flat on the bed, while going in and out of consciousness frequently. She awoke again to find SFC Davis sitting on her chest, placing his penis in her mouth. [*8] She was "shocked" and didn't want him to be doing this to her. She thought that the appellant and PFC M were on the bed beside her.

Private I next awoke during the early hours of the

morning when it was still dark outside. She got up, found her clothes, and at least partially dressed herself. She recalled walking down the hall to the bathroom, returning to the appellant's room, and engaging in a brief, unspecified argument with SFC Davis. She believed that SFC Davis tried to calm her down, although she could not specify why she needed to be calmed down. Sergeant First Class Davis then sat on the couch with her, undressed her again, and had sex with her again. Thereafter, she passed out for the rest of the night and had no recollection of any events until she awoke the next morning. When she awoke, she found the three others still asleep in the appellant's room. Private I had no recollection at all of engaging in any sexual activity with the appellant.

After the others awoke, they got something to eat at a kebab stand in Babenhausen, then headed back to Darmstadt. The men did not take the women back to the ITC barracks where they lived. Instead, the appellant and SFC Davis dropped the **[*9]** women off behind the shoppette and left.

On cross-examination, PV2 I added to her testimony concerning her sexual activities with SFC Davis, indicating that at some point during intercourse, she remembered being on top of him. She explained this by stating that "[w]hen you're scared you're willing to do anything, sir." She admitted that at the time, she "didn't know what to do, and so [she] made it seem like [she] was enjoying it." She further conceded that the four laughed and had a good-natured conversation during breakfast the next morning. Private I never filed a complaint. She only came forward when, during questioning, CID explained the term "rape," explained the effects of alcohol, and advised that she could have been too drunk to consent.

On redirect examination, PV2 I reiterated that she did not remember the appellant "performing sex on" her. When SFC Davis performed sex on her, she tried to move, "but everything was so dizzy. Everything was spinning . . . ."

Private First Class M's testimony essentially corroborated PV2 I's recollection regarding the meeting at the Rainbow Club and the trip to the appellant's barracks room. The only departures from PV2 I's testimony were that **[*10]** PFC M indicated that PV2 I was drinking "Jack [Daniels] and Coke" and that PV2 I had told her friends that she was going to call her "mom" versus her "aunt."

Once in the appellant's barracks room, the testimony of PFC M and PV2 I diverge in minor respects. For example, PFC M stated that the appellant left his room before the other three started drinking alcohol, but PV2 I recalled that they all toasted her birthday. Private I recalled drinking three glasses of tequila, but PFC M recalled that PV2 I had four or five large drinks.

From that point on, however, PFC M was able to fill in the lapses in PV2 I's recollection, if not her consciousness. She testified that PV2 I unbuttoned the first two buttons of her blouse. Private First Class M said that SFC Davis and PV2 I slow-danced together, undressed each other, and began to have sex together on the bed.

While SFC Davis and PV2 I were having sex, the appellant returned to the room, at which time he noted, "[W]ow, they're getting it on." The appellant and PFC M had some brandy, began to kiss, and engaged in sexual intercourse on the couch. Private First Class M testified that she did not want to have sex with the appellant, but she did not **[*11]** say anything to him, nor did he say anything to her. She testified, "Then Davis and [PV2 I] were still on the bed having sex, and Sergeant Fuller and I were on the couch. And then [the appellant] looked over at Davis and said, 'You've gotta get some of

this.' And they switched." Next, PFC M said she "felt Fuller get off me, then I looked up and I saw Sergeant Davis."

At the time of the switch, PV2 I was naked. The room lights were off and candles provided some light. Private First Class M recalled that, at one point, she looked over at PV2 I to see if she was okay. She saw PV2 I laying on her stomach on the bed with the appellant on top of PV2 I, thrusting into her. Although she could not observe actual penetration, PFC M believed that the appellant was engaging in vaginal intercourse with PV2 I. Private I's face was turned toward PFC M; her eyes were open. According to PFC M, PV2 I did not kiss, embrace, or encourage the appellant. She was "just lying there." Private First Class M did not hear the appellant and PV2 I exchange any words--he asked no verbal permission; she gave no verbal consent. At some later point, the men switched back to their original partners. During this third **[*12]** and last encounter, the appellant engaged in anal sodomy with PFC M (Specification 1 of Charge IV).

Colonel (COL) Ronald Hicks, an internist with considerable psychiatric training (one oral examination short of certification), was qualified by the military judge as an expert on the effects of alcohol on the human body. Posed with several hypotheticals by both the trial counsel and the trial defense counsel, COL Hicks rendered his expert opinion on the approximate blood/alcohol levels of PV2 I and PFC M at various times on the night of 27-28 December 1996. Because there were so many parameters and unknowns, his calculations understandably ranged widely. His attempts to reconcile the probable cognitive abilities and motor functions of PV2 I with her observed behavior seemed no more instructive.

Colonel Hicks, however, did explain that there was no correlation between unconsciousness (lack of cognitive functioning) and a "blackout" (the inability to "record" or remember what transpired). One could offer resistance, speak, and appear competent, yet simply not remember due to an alcohol "blackout." On redirect, COL Hicks testified that if one person is performing sex acts on another person **[*13]** who is not moving, the fact that the second person had her eyes open "really doesn't indicate anything to [him]." He went on to explain, "people can be absolutely, completely comatose and have their eyes open, and I've dealt with people because of alcohol and/or other circumstances, whether it be head trauma or other drugs, in which they will not respond to any stimuli and yet their eyes are staring straight ahead and are open."

At trial, the only statements from the appellant regarding PV2 I came via the testimony of CID Special Agent (SA) Wilkey, who had interviewed the appellant concerning some of the allegations against him. During the interview, SA Wilkey indicated to the appellant that PFC M made the allegations of rape and sodomy against him. The appellant became angry, saying, "I want to settle this right now!" He wanted SFC Davis, PFC M, PV2 I, and him to talk together in a room and "we'll square this away." Special Agent Wilkey emphasized several times during the interview that no such meeting would occur.

Concerning the evening in question, the appellant told SA Wilkey, "Well, first of all yeah we saw them at the Rainbow Club; we talked to them at the Rainbow Club; but after **[*14]** that that's it. They never got in my truck. I never took them out to Babenhausen. We never had sex with them, and I didn't rape either one of them." The appellant again began to complain about PV2 I. Special Agent Wilkey found it odd that the appellant kept coming back to the subject of PV2 I when it was PFC M who made the allegations. Special Agent Wilkey testified that the appellant said that PV2 I and PFC M were drunk at the Rainbow Club.

DISCUSSION

Under our *Article 66(c), UCMJ*, mandate, this court "may affirm only such findings of guilty . . . as [we] find[] correct in law and fact and detemine[], on the basis of the entire record, should be approved."

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. When testing for legal sufficiency, "this [c]ourt is bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Blocker, 32 M.J. 281, 284 (C.M.A. 1991)*. **[*15]** We have little hesitancy in concluding that the evidence in this case is legally sufficient for conviction.

The appellant asserts on appeal that we cannot sustain the indecent assault conviction because PV2 I could not testify that the appellant touched her. Although PV2 I did not (and could not) testify about the alleged rape, PFC M certainly could and did.

Private First Class M's uncontroverted testimony established each essential element of indecent assault. Although PFC M did not observe and, therefore, could not testify to the vaginal penetration necessary to establish rape, her testimony clearly established the unauthorized touching of PV2 I by the appellant, done with the requisite sexual intent. Additionally, PFC M testified that, from several feet away, she heard no words exchanged between PV2 I and the appellant and that PV2 I was motionless and unresponsive to the appellant's thrusts. Special Agent Wilkey testified that the appellant said that PV2 I was drunk at the Rainbow Club. Private First Class M and PV2 I testified that SFC Davis purchased two bottles of alcoholic beverages enroute to Babenhausen and that PV2 I consumed at least three double shots of tequila in the appellant's **[*16]** room. Considered in a light most favorable to the prosecution, a reasonable fact finder could have found beyond a reasonable doubt that the appellant sexually touched PV2 I without her consent and that PV2 I was incapable of consenting due to intoxication, unconsciousness, sleep, or a combination thereof.

The military judge also instructed the panel on the "mistake of fact" defense, which is specifically recognized in Rule for Courts-Martial 916(j) [hereinafter R.C.M.]. Once this defense has been raised by the evidence, the burden is on the government to prove beyond a reasonable doubt that the defense did not exist. *See* R.C.M. 916(b). Considered in a light most favorable to the prosecution, a reasonable fact finder could have found beyond a reasonable doubt that the appellant did not have an honest, mistaken, and reasonable belief that PV2 I consented to appellant's acts.

In applying *Jackson*, *Turner*, and *Blocker, supra*, we find that the evidence in this case is legally sufficient to sustain the appellant's conviction for the indecent assault of PV2 I. We next turn to our analysis of the factual sufficiency of the evidence.

The test for factual sufficiency "is whether, after weighing **[*17]** the evidence in the record of trial and making allowances for not having personally observed the witnesses," this court is itself convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325*.

Every determination of factual sufficiency is, by its very nature, unique. Challenges to factual sufficiency generally fall into two categories. First, the appellant can allege to this court that, as a threshold question, there is

not enough evidence to establish each element of the offense beyond a reasonable doubt. To draw a hypothetical example from this case (that clearly is not before our court), we might agree that there was insufficient evidence of penetration to establish the rape of PV2 I. Such factual sufficiency challenges focus on the failure of the government to produce, and the record to reflect, the quantum and quality of evidence to establish an element of the offense beyond a reasonable doubt, even if that evidence goes unrebutted.

The second type of challenge to factual sufficiency involves conflicting testimony or evidence that, because of the factual dispute, causes the government to fail to meet its burden of proving each element beyond a reasonable doubt. **[*18]** This type of factual dispute is common in sexual assault cases when testimony reveals two competing versions or interpretations of events. *See, e.g.,* United States v. Lauture, 46 M.J. 794 (Army Ct. Crim. App. 1997); United States v. Pierce, 40 M.J. 601 (A.C.M.R. 1994). Such factual disputes can exist even if the appellant did not testify at trial. [3] *See* Lauture, 46 M.J. at 797; Pierce, 40 M.J. at 604-05.

In the present case, while looking at all the evidence, we essentially must evaluate the first type of factual sufficiency challenge. As noted in our previous discussion of legal sufficiency, PFC M and PV2 I provided the only testimony of what transpired in the appellant's barracks room in Babenhausen. Only PFC M could testify about the appellant's alleged rape of PV2 I. Thus, while examining the entire record, we essentially must evaluate the testimony of PFC M to determine what transpired in the room. We can also look to the testimony of COL Hicks for help in interpreting PFC M's observations of PV2 I during the latter's encounter with the appellant.

After **[*19]** making allowances for not having personally observed the witnesses, we find PFC M to be a very credible witness. We are persuaded of her credibility because of her candor during her testimony. On direct examination, PFC M admitted that when the appellant asked her if she had ever engaged in anal intercourse, she did not remember how she responded. She never expressed any lack of consent. She testified that when the anal intercourse began to hurt her, she twisted away and the appellant stopped. During cross-examination, PFC M also admitted that she and the appellant had vaginal intercourse with her permission and that she could have said "no." This candor led, in large part, to the military judge's findings of not guilty to the rape specification involving PFC M (Specification 1 of Charge III) and to the forcible aspect of the anal sodomy with PFC M (Specification 1 of Charge IV), pursuant to a defense motion for a finding of not guilty. At the same time, the panel convicted the appellant of cruelty, maltreatment, and sexual harassment of PFC M (Specification 1 of Charge II), and consensual anal sodomy with PFC M (Specification 1 of Charge IV), evidencing the panel's belief in PFC M's **[*20]** credibility. Like the panel of officers and enlisted members, we find PFC M to be credible. We also find that PFC M had sufficient ability to observe the appellant's assault on PV2 I and to observe PV2 I's behavior during the assault. Based on PFC M's uncontroverted testimony and the evidence presented regarding the amount of alcohol that PV2 I consumed, we are convinced beyond a reasonable doubt that the government established each essential element of the appellant's indecent assault of PV2 I.

Concerning the mistake of fact defense, we find it implausible that the appellant could have had an honest and mistaken belief that PV2 I consented to his sexual

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[3] As always, "[w]e are mindful that the appellant's choice not to testify cannot be held against him." Pierce, 40 M.J. at 605 n.4.

assault. The appellant was simply a sexual predator who took advantage of an intoxicated woman. The appellant knew that PV2 I was drunk at the Rainbow Club and that SFC Davis purchased more liquor enroute to Babenhausen. After having sexual intercourse with PFC M, the appellant suggested to SFC Davis that they switch partners. Without either asking PV2 I or communicating with her, the appellant began sexually touching her. During the contact, PV2 I laid motionless on her stomach, unresponsive to the appellant's touch. Nothing that PV2 **[*21]** I did suggested to the appellant that she wanted or consented to be touched by him. Finally, even if the appellant had an honest and mistaken belief concerning PV2 I's consent, we are convinced beyond a reasonable doubt that, under the circumstances of this case, any such belief on the part of the appellant was entirely unreasonable.

Viewing all the evidence of record, we are convinced that the great weight of the evidence proved the appellant guilty beyond a reasonable doubt. On balance, the government's case was convincingly strong, and the defense's case was unpersuasive and weak.

We have considered the other two assignments of error and find that the military judge properly resolved each issue at trial. The matters personally raised by the appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, merit no comment or relief.

The findings of guilty and the sentence are affirmed.

Judge KAPLAN and Judge MERCK concur.
