

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	SUPPLEMENT TO PETITION FOR
Appellee)	GRANT OF REVIEW
)	
v.)	
)	Crim. App. Dkt. No. ARMY 20220562
Sergeant (E-5))	
ANDERSON A. ANTEPARA,)	USCA Dkt. No. /AR
United States Army,)	
Appellant)	
)	
)	

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

Table of Contents

Table of Authorities	1
Issue Presented.....	2
Reasons to Grant Appellant’s Petition.....	2
Statement of Statutory Jurisdiction.....	2
Statement of the Case.....	3
Statement of Facts.....	4
Argument.....	8
Standard of Review.....	9
Law and Discussion	9
Conclusion	14

Table of Authorities

Cases

<i>United States v. Antepara</i> , 2024 CCA LEXIS 350 (A. Ct. Crim. App. Aug. 15, 2024)(sum. disp).....	3
--	---

<i>United States v. Antepara</i> , 2026 CCA LEXIS 53 (A. Ct. Crim. App. Jan. 15, 2026)	4, 6, 9, 10, 12
<i>United States v. Hills</i> , 75 M.J. 350 (C.A.A.F. 2016)	11
<i>United States v. Mendoza</i> , 85 M.J. 213 (C.A.A.F. 2024)	3, 4, 10, 11, 12
<i>United States v. Moore</i> , 2026 CAAF LEXIS 73 (23 Jan. 26) (slip. op.)	13, 14
<i>United States v. Pease</i> , 75 M.J. 180 (C.A.A.F. 2016)	9
<i>United States v. Riggins</i> , 75 M.J. 78 (C.A.A.F. 2016)	11
<i>United States v. Rocha</i> , __ M.J. __, 2026 CAAF LEXIS 254 (C.A.A.F. March 16, 2026)(slip op.)	9
Statutes	
Article 120, UCMJ	3
Article 66, UCMJ	2
Article 67(a)(3), UCMJ	2

Issue Presented

WHETHER THE ARMY COURT FAILED TO COMPLY WITH THIS COURT’S REMAND WHEN IT LIMITED ITS REVIEW UNDER *MENDOZA* TO WHETHER THE ALLEGED VICTIM REGAINED CONSCIOUSNESS AT ANY RELEVANT TIME?

Reasons to Grant Appellant’s Petition

This Court should grant appellant’s petition concerning the presented issue because the Army court applied the law in a manner inconsistent with this court’s precedent.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2016)[hereinafter UCMJ]. This honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2016).

Statement of the Case

On December 16, 2021 and November 2-4, 2022, a panel consisting of officer and enlisted members sitting as a general court-martial tried Sergeant Anderson A. Antepara [appellant]. Contrary to his pleas, the panel convicted appellant of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2019) [UCMJ].¹ The military judge sentenced appellant to thirty-two months of confinement for sexual assault. Additionally, the military judge sentenced appellant to be dishonorably discharged from the military service and to be reduced to the grade of E-1. (R. at 470).

On August 15, 2024, the Army Court of Criminal Appeals [hereinafter Army Court] affirmed the findings and the sentence in a summary disposition. *United States v. Antepara*, 2024 CCA LEXIS 350 (A. Ct. Crim. App. Aug. 15, 2024)(sum. disp.)(Appendix A). On October 08, 2024, Appellant moved the Army Court to reconsider its opinion in light of *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). On October 10, 2024, appellant petitioned for a grant of review, while simultaneously moving this court to remand the matter to the Army Court for consideration of the reconsideration motion, while preserving appellant's ability to again petition for review. This court dismissed the petition, pending the outcome of the motion before the Army court. On January 13, 2025, the Army court

¹ The panel acquitted appellant of one specification of sexual assault.

granted appellant's motion to file for reconsideration out of time, and denied reconsideration. Appellant then timely petitioned this court for a grant of review. On March 14, 2025, this honorable court granted appellant's petition for review and remanded the case to the Army Court for a new Article 66 review in light of *United States v. Mendoza*. *United States v. Antepara*, 85 M.J. 399 (2025). On January 15, 2026, the Army Court again affirmed appellant's conviction. *United States v. Antepara*, 2026 CCA LEXIS 53 (A. Ct. Crim. App. Jan. 15, 2026)[*Antepara II*](Appendix B). On February 9, 2026, appellant timely moved the Army Court for reconsideration of *Antepara II*. On February 23, 2026, the Army Court declined to reconsider its decision. This appeal followed.

Statement of Facts

Petty Officer R.R., the alleged victim, frequently socialized with appellant and his wife. Their meetings often included alcohol. (R. at 199). In February, 2021, appellant and his family socialized during Winter Storm Uri. *Id.* Texas was unprepared for such a Winter Storm, which included significant freezing. (R. at 200). Appellant's home lost power and had no heat or electricity. (R. at 201). Due to the catastrophic nature of the storm, his residence had been without power or heat for two days. *Id.* Petty Officer R.R. invited appellant's household to stay with her because she had heat, water, and electricity. *Id.*

Appellant came over with his family around 1800. (R. at 230). They brought food and clothing. (R. at 202). Petty Officer R.R. testified inconsistently as to whether this was at her request. (R. at 202, 230). Petty Officer R.R. played the movie Jumanji. (R. at 230). Appellant and his family then ate. (R. at 202). After mealtime, at around 2000, the adults began drinking. (R. at 231). This was consistent with their usual behavior at meetings. (R. at 202). Petty Officer R.R. mixed her own drinks. *Id.* Wine, whiskey, and Crown and Coke were among the drinks which Petty Officer R.R. consumed. (R. at 231). While the adults enjoyed themselves, appellant's daughter periodically emerged from the movie she was watching to ask for snacks. *Id.* Petty Officer R.R. provided her with snacks. *Id.*

After drinking several drinks, Petty Officer R.R. claimed that she "blacked out." (R. at 206). She did, however, remember cooking pupusas with appellant and his wife. (R. at 232). She measured out ingredients by sight for this purpose. (R. a 233). Making pupusas is complicated process involving mixing, kneading, and frying. (R. at 234).

Petty Officer R.R. testified that she remembered fragments of a sexual act. (R. at 206). She "did not remember a lot of what happened last night." (R. at 212). She does not know whether she told appellant "no," "don't," or "stop." (R. a 262). She does not know what she said or did between when she was cooking and

laughing with appellant and when she perceived she was having sex with appellant. (R. at 205).

Petty Officer R.R. agreed that she had “vague memories” concerning sexual activity with appellant. (R. at 235). These vague memories included being moved around. *Id.* Despite earlier demonstrating great dexterity while cooking while drunk, she claimed to be unable to move. (R. at 243). These memories were interspersed with blackouts. (R. at 236-37). She did not remember events in any particular order and was not certain that her chronological memory was accurate. (R. at 208).

The Army Court found credible Petty Officer R.R.’s account that during the sex act she “had no control of anything, like, **I was unconscious**. I just remember briefly waking up and feeling these things and then, like, blacking out again. Like, **I couldn’t speak**, I couldn’t move, I couldn't do anything.” *Antepara II*, 2026 CCA LEXIS 53 at *2 (emphasis added).

The next morning, Petty Officer R.R. showered. (R. at 215). She then went with appellant’s daughter to the living room and began watching television with her. (R. at 212). Appellant’s wife came to cook breakfast for appellant’s daughter. *Id.* Petty Officer R.R. began chatting with her. *Id.*

Petty Officer R.R. underwent a Sexual Assault Nurse Examination [SANE]. Despite her close relationship with appellant, she told the SANE nurse that

appellant was “an acquaintance.” (R. at 229). The SANE nurse’s examination included a full body visual examination. (R. at 310). That examination did not reveal redness, bruising or tenderness on Petty Officer R.R.’s hips or legs or anywhere else. *Id.* Despite claiming that her hair had been pulled, Petty Officer R.R. did not have any redness or soreness on her head. (R. at 310). The vaginal abrasions which she did have were consistent with consensual intercourse. (R. at 311). Petty Officer R.R. told the SANE examiner that she could not recall whether she had lost consciousness. (R. at 317).

At trial, Lieutenant Colonel Christian Schrader was qualified as an expert in forensic psychiatry, and an expert in the effects of alcohol, behavior, thought processes and memory. (R. at 359). Dr. Schrader testified about alcohol related blackouts. *Id.* Alcohol is a sedative which first affects a person’s reasoning capacity and then affects a person’s ability to record memories. (R. at 360). When a person cannot encode memories because of alcohol intoxication, those missing memories are never subsequently encoded. (R. at 360). This situation is commonly known as a “blackout.” *Id.* A person who is in a blackout state may be interacting with others and socializing but is unable to remember the behavior afterwards. (R. at 360). A person may dance on tables and take off clothing when in a blackout state. (R. at 361). Frequently, a person in a blackout state may say or do things which she regrets or which are embarrassing. *Id.* A person undergoing a

blackout may substitute inaccurate memories because she cannot encode what she actually did during a blackout. *Id.*

During closing argument, Trial Counsel made the following argument:

“[L]adies and gentlemen, an incompetent person can also not consent.... A ‘competent person’ is a person who possesses the physical and mental abilities to consent. An ‘incompetent person’ is a person who is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation or communicating an unwillingness to engage in the sexual act at issue.”

(R. at 389).

The Military Judge did not give any instruction concerning competence or incompetence and did not instruct on whether an incompetent person could not consent. (App. Ex. XX). Incompetence was not a charged theory. (R. at Charge Sheet). The Military Judge did not issue a curative instruction distinguishing nonconsent from incapacity.

Argument

THE ARMY COURT DID NOT COMPLY WITH THIS COURT’S REMAND BECAUSE IT LIMITED ITS REVIEW TO WHETHER PETTY OFFICER R.R. REGAINED CONSCIOUSNESS AND IGNORED THAT SHE NEVER REGAINED CAPACITY

Standard of Review

This court reviews *de novo* whether a service court complied with the terms of a remand order. *United States v. Rocha*, __ M.J. __, 2026 CAAF LEXIS 254, *6 (C.A.A.F. March 16, 2026)(slip op.).

Law and Discussion

Conflation of consciousness with capacity

The Army Court erred when it conflated regaining consciousness with regaining capacity. A person who does not “possess the...physical ability...to communicate a decision regarding [consent]” is not competent. *United States v. Pease*, 75 M.J. 180, 183 (C.A.A.F. 2016). Here, during interludes of wakefulness concurrent with the alleged sexual acts, the alleged victim testified that she “had no control of anything, like, **I was unconscious**. I just remember briefly waking up and feeling these things and then, like, blacking out again. Like, **I couldn’t speak, I couldn’t move, I couldn’t do anything.**” *Antepara II*, 2026 CCA LEXIS 53 at *2 (emphasis added). During these periods, the alleged victim was incapacitated because, by her own account, she could not communicate consent. *Pease*, 75 M.J. at 183. Petty Officer R.R. was therefore incapacitated during all portions of her sexual congress with appellant.

The Army Court erred when it conflated regaining consciousness with regaining capacity. Although the Army Court found that Petty Officer R.R.

attempted to pull up her pants during the sexual encounter, Petty Officer R.R. did not testify that she pulled up her pants as a means of communication. Instead, the Army Court found persuasive Petty Officer R.R.'s testimony that she ““couldn't speak,”” move or do anything. *Antepara II*, 2026 CCA LEXIS 53 at *2 (emphasis added). In other words, although briefly conscious, Petty Officer R.R. was incapacitated because she could not communicate a decision about whether to engage in sexual activity. Therefore, under *Casillas*, the brief periods of wakefulness do not save appellant's conviction because Petty Officer R.R. never regained capacity. This court should grant review to correct the Army court's misapplication of this honorable court's precedent.

The Army Court failed to address Trial Counsel's constitutional error and misconstrued *Mendoza* and *Casillas*

The Army court failed to address Trial Counsel's constitutionally impermissible argument. This Court found that “charging [nonconsent] and proving [incapacity] ‘raises significant due process concerns.’” *United States v. Mendoza*, 85 M.J. 213, 220 (C.A.A.F. 2024). Although the government may use evidence of intoxication as proof of the unlikelihood of nonconsent, that is not what Trial Counsel argued. Contra *Antepara II*, 2026 CCA LEXIS 53 at *11. Instead, Trial Counsel argued that the alleged victim's intoxication rendered her incapacitated.

“[L]adies and gentlemen, an incompetent person can also not consent.... A ‘competent person’ is a person who possesses the physical and mental abilities to consent. An ‘incompetent person’ is a person who is incapable of appraising the nature of the conduct at issue or physically incapable of declining participation or communicating an unwillingness to engage in the sexual act at issue... She was so drunk, **she was so out of it** that when the accused grabbed her hair by the back of her head and lifted it up, when he let go, her head just popped forward because she **couldn’t control her body motions**. She told you she was **unable to speak**. She was **unable to respond**. If she was unable to do all of these things, then how was she **able to consent?**”

(R. at 389) (emphasis added).

This argument was constitutionally impermissible because “what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial. Doing so robs the defendant of his constitutional ‘right to know what offense and under what legal theory he will be tried and convicted.’” *Mendoza*, 85 M.J. at 220 quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (citation omitted) (internal quotation marks omitted).

The Army Court failed to apply the correct standard for review of constitutional error. “The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.” *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (internal citations omitted). Here, the

Army Court did not find beyond a reasonable doubt that Trial Counsel’s improper argument did not influence the panel. Instead, the Army court held that the government may use non-consent as an umbrella theory “so long as evidence of intoxication is not the *only* evidence of non-consent.” Contra Antepara II, 2026 CCA LEXIS 53, *12. According to the Army court, the government may charge consent but employ a dual theory of nonconsent and incapacity, so long as the government relies primarily on nonconsent as its theory. Contra Id. The Army court’s holding ignores this court’s instruction in *Mendoza* that conflation of the two theories is constitutional error.

On this incorrect basis, the Army Court determined that because the panel “*could* have found the essential elements of the crime beyond a reasonable doubt,” the Army court could be “convinced that appellant's finding of guilty was not against the weight of the evidence.” *Antepara II*, 2026 CCA LEXIS 53, *15 (emphasis added). This finding does not address whether the panel potentially found that even if the alleged victim gave actual consent, any consent she gave was ineffective because of her alcohol-fueled incapacity. The Army Court therefore erred when it affirmed appellant’s conviction despite the constitutional error. This court therefore should grant review for the purpose of setting aside the finding because this honorable Court cannot be certain beyond a reasonable doubt that the improper argument was harmless.

This court should grant review in light of its recent decision in *Moore*

This court should grant review because the Army Court failed to consider the lack of nonconsent prior to the start of sexual activity. A service court may not save a conviction based upon a theory of nonconsent where the alleged victim neither manifested nonconsent prior to the start of sexual activity nor regained capacity during sexual activity. *United States v. Moore*, 2026 CAAF LEXIS 73, *9-10 (23 Jan. 26) (slip. op.). In *Moore*, this court considered the case of an airman who engaged in physical contact with a competent female before she fell asleep. *Id.* at *4. After the female fell asleep, the *Moore* appellant inserted his fingers in the female's vagina. *Id.* The penetration continued after the female awoke and communicated her nonconsent. *Id.* at *4-5.

Based upon these facts, this court clarified that the government may charge nonconsent where an alleged victim who regains competence and sexual activity continues after the alleged victim manifests nonconsent, but that it may not charge nonconsent during incompetence. *Id.* Neither of these two principles support the Army court's holding in this case.

Unlike *Moore*, the government did not prove that the alleged victim here manifested non-consent at any time. In *Moore*, the alleged victim affirmatively manifested nonconsent after the start of physical contact but shortly before falling asleep. *Id.* Here, however, Petty Officer R.R.'s memory has huge temporal gaps.

She “did not remember a lot of what happened last night.” (R. at 212). She does not know whether she told appellant “no,” “don’t,” or “stop.” (R. a 262). She does not know what she said or did between when she was cooking and laughing with appellant and when she perceived she was having sex with him. (R. at 205).

Unlike *Moore*, in which the alleged victim testified that she did not consent in that period just before the initiation of sexual contact; here, it is not known whether Petty Officer R.R. consented because she does not remember what she said or did in the same pre-sexual period. (R. at 212, 262). Additionally, as discussed above, Petty Officer R.R. did not regain capacity during the sexual act, unlike the victim in *Moore*. Therefore, this Honorable court should grant review for the purpose of reversing appellant’s conviction.

Conclusion

WHEREFORE, appellant respectfully requests that this honorable Court grant his petition for review.



ROBERT FELDMEIER

Civilian Appellate Defense Counsel
THE LAW OFFICES OF ROBERT FELDMEIER
2920 Forestville Road
Suite 100-1076
Raleigh, North Carolina 27616
P: 336-416-2479
robert.a.feldmeier@gmail.com
CAAF Bar No. 35622

**Appendix A: United States Army Court of Criminal Appeals Opinion of
the Court in United States v. Antepara, Army Case No. 20220562, Dated**

August 15, 2024

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, MORRIS, and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant ANDERSON A. ANTEPARA
United States Army, Appellant

ARMY 20220562

Headquarters, 1st Cavalry Division
Tiffany D. Pond, Military Judge
Lieutenant Colonel Shari F. Shugart, Staff Judge Advocate

For Appellant: Captain Matthew S. Fields, JA; Robert Feldmeier, Esquire (on brief);
Robert Feldmeier, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Kalin P.
Schlueter, JA; Major Austin L. Fenwick, JA (on brief).

15 August 2024

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.*

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

* We have given full and fair consideration to appellant's ineffective assistance of

(continued . . .)

(. . . continued)

counsel (IAC) claims and find them to be without merit. Having considered the record and our superior court's guidance in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), we find ourselves capable of resolving appellant's IAC claim without ordering affidavits from counsel or a post-trial evidentiary hearing.

**Appendix B: United States Army Court of Criminal Appeals Opinion of
the Court in United States v. Antepara, Army Case No. 20220562, Dated
January 15, 2026**

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, MORRIS, and JUETTEN
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ANDERSON A. ANTEPARA
United States Army, Appellant

ARMY 20220562

Headquarters, 1st Cavalry Division
Tiffany D. Pond, Military Judge
Lieutenant Colonel Shari F. Shugart, Staff Judge Advocate

For Appellant: Captain Matthew S. Fields, JA; Robert Feldmeier, Esquire (on brief);
Robert Feldmeier, Esquire (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Kalin P.
Schlueter, JA; Major Austin L. Fenwick, JA (on brief).

15 January 2026¹

MEMORANDUM OPINION ON REMAND

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

MORRIS, Senior Judge:

Appellant's case returns to our court following remand from the Court of Appeals for the Armed Forces [CAAF]. In our first decision, we rejected appellant's factual sufficiency claim and affirmed his conviction for sexual assault without consent in a short-form per curiam opinion. *United States v. Antepara*, ARMY 20220562, 2024 CCA LEXIS 350 (Army Ct. Crim. App. 15 Aug. 2024) ("*Antepara I*"). The CAAF ordered us to revisit our sufficiency analysis consistent with its subsequent opinion in *United States v. Mendoza*. 85 M.J. 213 (C.A.A.F. 2024). We follow our superior court's instructions here and again find that the government's

¹ Corrected

evidence was sufficient to convict appellant for the charged offense, sexual assault without consent. We therefore affirm.²

BACKGROUND AND THE CAAF'S REMAND ORDER

Appellant engaged in rough sexual intercourse with the victim, RR, as she slept in her bed, next to appellant's five-year-old daughter. The incident occurred while appellant was a guest in RR's home and as appellant's wife slept in a nearby room. RR awoke to the sexual contact and attempted to pull her pants up. Appellant and RR had no romantic or sexual history.

Prior to this incident, appellant's family and RR's family were close. RR and her husband met appellant and his wife at a previous duty station. They became friends and spent most weekends together, often drinking. Eventually, appellant and his wife named RR and her husband godparents of their daughter. Upon appellant's reassignment to Fort Hood, RR's husband requested the same duty station to maintain the close friendship.

Appellant's family came to stay with RR during a severe ice storm. Winter Storm Uri slammed Texas with historically low temperatures, heavy snow, and freezing rain. The storm disabled power in appellant's home and after two days without heat, appellant's wife reached out to RR about their family's plight. Fortunately, RR's home maintained power, and she offered appellant's family refuge from the storm.

After arriving at RR's home, appellant and his wife watched movies and drank alcohol. RR joined them after making appellant's daughter comfortable in the master bedroom with snacks and a movie. Throughout the evening, the three adults drank a bottle of red wine, mixed drinks, and took shots of liquor. RR consumed more alcohol than appellant or his wife and eventually lost memory while in her kitchen. She eventually retired to her bedroom alone while appellant and his wife stayed up.

RR awoke and regained memory as appellant moved her around in her bed. She felt cold and could tell as she touched her legs that her pants had been pulled down. She struggled to pull her pants up but again blacked out. She regained memory as appellant inserted his fingers into her vagina but again blacked out. Next, she remembered appellant pulling her hair with enough force to lift her head off the bed. When appellant let go of her hair, her head fell freely onto the bed and

² Contrary to his plea, an enlisted panel found appellant guilty of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ]. Appellant was sentenced to a dishonorable discharge, thirty-two months of confinement, and reduction to the grade of E-1.

she blacked out again. She next felt appellant forcing his penis into her vagina before again losing memory. In her next memory, she described feeling her body position change in the bed so that she lay on her stomach with her lower half hanging off the bed. She felt appellant behind her, penetrating her with his penis. Next, she recalled seeing appellant's legs and clothing. Describing her mental and physical state at trial, RR said, "I had no control of anything, like, I was unconscious. I just remember briefly waking up and feeling these things and then, like, blacking out again. Like, I couldn't speak, I couldn't move, I couldn't do anything."

The next morning, RR woke up with her pants on and initially thought her memories were a bad dream. However, when she went to the bathroom and urinated, she felt a sharp pain consistent with rough sex. As she recalled her memories from the previous night, she grew aware of the gravity of what had occurred. After some brief hesitation, she told appellant's wife what she remembered. Appellant's wife related that at some point during the night she observed her husband leaving RR's bedroom. Appellant's wife then confronted appellant, leading appellant to apologize and say he was "drunk" and did not remember what happened.

Shortly thereafter, RR sought a medical examination from a sexual assault nurse examiner. The examiner observed an abrasion on RR's vulva large enough to be seen by the naked eye. The examiner also swabbed RR's vagina for further testing. These tests detected the presence of appellant's DNA in RR's vagina.

At the conclusion of the investigation, the government charged appellant with two specifications of sexual assault "without the consent of [RR]", one for penetration with his penis, the other for penetration with his finger. Appellant contested the charges at a general court-martial.

Although government counsel presented their case primarily as one of non-consent, they also included evidence that RR was intoxicated and "blacked out" multiple times during the assault. However, they did not elicit any testimony about RR's level of intoxication, ability to balance, speak coherently or reason. Nor did they request the assistance of an alcohol-related expert witness or consultant. They also did not overemphasize the fact that RR was asleep when the assault began.

Defense counsel, on the other hand, argued the government's case was based primarily on a theory of incapacity and presented evidence from their expert witness on the medical community's understanding of a blackout. As described by Dr. CS, a blackout is a period where people "can interact with their environment and other people . . . they're just not forming those memories of what occurred." He continued, "if you get to that level of impairment with blackout, you are not encoding or saving those memories." However, on the way to blackout, "you may get shoddy memories, maybe malformed memories or incomplete memories, snippets

of things that are remembered.” Under cross-examination, Dr. CS confirmed that there are distinctions between the way lay people and medical personnel use the term “blackout” and that it is important to capture what a lay person means when they use the term.

At the conclusion of the defense case, the trial counsel requested instructions on “competence” and “incompetence” to be presented to the panel. The military judge denied the request and additionally struck from the consent instruction definitions of “sleeping, unconscious, or incompetent person” The military judge further explained that she did so “based on the way that the government has charged it as *without consent*.” (emphasis added).

In closing argument, while discussing the “without consent” element, trial counsel also addressed the fact that the assault began while the victim was asleep and intoxicated. Without objection from defense counsel, he also included argument about the topics the military judge had excluded from her instructions. In his closing argument, defense counsel countered trial counsel’s arguments with his theory that not only was the victim’s level of intoxication unclear, but that she consented to the sex act and later regretted it. After arguments from both counsel, the military judge provided the standard instruction to the panel that arguments from counsel were not evidence and that her instructions should be followed, if there is a dispute between counsels’ statements and her instructions. Following deliberations, the panel convicted appellant of Specification 1 for the penile assault but acquitted him of Specification 2 for the digital penetration.

Our prior decision in this case, *Antepara I*, summarily affirmed the panel’s findings and the military judge’s sentence. Thereafter, we denied appellant’s motion for reconsideration and suggestion for *en banc* review. Upon petition from appellant, the CAAF set aside *Antepara I* and ordered remand for a new factual and legal sufficiency review in light of their holding in *Mendoza. United States v. Antepara*, No. 25-0079/AR, 2025 CAAF LEXIS 197 (C.A.A.F. 14 Mar. 2025)(order). *See generally* 85 M.J. 213.

LAW AND DISCUSSION

Subsequent to our decision in *Antepara I*, the CAAF distinguished sexual assault “without consent”, (Subsection (b)(2)(A)), from sexual assault “incapable of consent” (Subsection (b)(3)(A))³. *Mendoza*, 85 M.J. at 220; UCMJ art. 120(b)(2)(A), 10 U.S.C. § 920 (2018). The CAAF has held that these two statutes

³ “Subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim’s condition is known or reasonably should be known by the accused.” *Mendoza* at 220.

create “separate theories of criminal liability,” and that charging one and proving the other “raises significant due process concerns.” *Id.*

Alongside this potential due process issue, the *Mendoza* court provided the following guidance on how to properly consider intoxication evidence in the “without consent” sufficiency context:

In our view, the ACCA’s opinion presents an open question whether it improperly considered the evidence of JW’s intoxication as proof of JW’s inability to consent and therefore proof of the absence of consent. To be clear, our holding—that subsection (b)(2)(A) and subsection (b)(3)(A) create separate theories of liability—*does not bar the trier of fact from considering evidence of the victim’s intoxication when determining whether the victim consented.* See Article 120(g)(7)(C), UCMJ (“All the surrounding circumstances are to be considered in determining whether a person gave consent.”). Nothing in the article bars the Government from offering evidence of an alleged victim’s intoxication to prove the absence of consent. Conversely, nothing bars the defense from offering the same evidence to sow reasonable doubt. But what the Government cannot do is prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent.

Id. at 222 (emphasis added).

We review concerns of legal sufficiency de novo. *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018) (citation omitted). “The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 297-98 (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). Because we must draw “every reasonable inference from the evidence of record in favor of the prosecution[,]” the standard for legal sufficiency “involves a very low threshold to sustain a conviction.” *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (quoting *Robinson*, 77 M.J. at 298; *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)).

Concerning factual sufficiency, we apply the standard, as amended by the National Defense Authorization Act for Fiscal Year 2021. Publ. L. No. 116-283, § 542(b), 134 Stat. 3611-12 (applying when every finding of guilty is for an offense

which occurred on or after 1 January 2021).⁴ Appellant alleges a specific deficiency in proof, articulating a *Mendoza* claim. See *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024); 85 M.J. at 222. We may only set aside a finding as factually insufficient if, after giving “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence,” we are “clearly convinced that the finding of guilty was against the weight of the evidence” UCMJ art. 66(d)(1)(B). While the statute affords this court discretion in determining what level of deference is appropriate, in *Harvey*, CAAF held that “a CCA might determine that the appropriate deference required for a court-martial’s assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify.” 85 M.J. at 131.

Despite civilian defense counsel at trial and appellant’s assertions to the contrary,⁵ appellant was not convicted under a theory of incapacity. Though the Government counsel emphasized RR’s level of intoxication in their closing statement, they did not introduce expert testimony on intoxication, nor did they present any evidence on whether or not RR appeared too intoxicated to consent. Further, the military judge denied the government’s request to present incapacitation instructions to the factfinder.

“Nothing in the article bars the Government from offering evidence of an alleged victim’s intoxication to prove the absence of consent.” *United States v. Casillas*, __ M.J. __, 2025 CAAF LEXIS 692, at *12 (C.A.A.F. 20 Aug. 2025) (alteration and internal quotations omitted) (citing *Mendoza*, 85 M.J. at 222). As the CAAF noted, a victim’s intoxication can still be relevant under a “without consent” theory of liability, so long as evidence of intoxication is not the *only* evidence of non-consent. *Mendoza*, 85 M.J. at 222.

⁴ B) Factual Sufficiency Review.—(i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof. (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to— (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and (II) appropriate deference to findings of fact entered into the record by the military judge. (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

⁵ See Appellant’s Motion for Reconsideration and Suggestion for Reconsideration *en banc*.

While the evidence of the victim's intoxication is undisputed in this case, as defense counsel argued in his closing, the evidence of intoxication did not preclude RR's capacity to consent. The victim testified to her memory of every charged act of penetration. Much like the victim in *Casillas*, RR awoke to the assault in-progress and remembers trying to pull her pants up—evidence she was capable of consenting and did not consent before being penetrated. 2025 CAAF LEXIS 692, at *14 (“Critically, [the victim]’s testimony establishe[d] that she was awake and aware of what was happening for at least a short time when [a]ppellant was penetrating her, as alleged in the specification.”). Two things can be true: RR both had capacity and lacked capacity at different times of the assault. However, the military judge only instructed the panel on sexual assault “without consent” and did not include any portions of the incapacity instruction. In appellant’s case, evidence that RR was capable of consent and did not consent included that she struggled to pull her pants back up after appellant removed them and that she did not reciprocate appellant’s sexual contact.

Considering appellant’s conviction hung primarily on the testimony of RR, we give high deference to the panel who occupied a far better vantage to assess RR’s credibility. The panel witnessed the victim testify about the following “surrounding circumstances” concerning appellant’s stay at RR’s home, which served to establish RR would not and did not consent to appellant’s unprompted sexual acts. The circumstantial evidence of RR’s non-consent includes: (1) a lack of any prior sexual or romantic relationship with appellant; (2) the presence of a quasi-familial relationship with appellant; (3) RR’s decision to give appellant and his wife separate sleeping quarters; (4) RR’s retreat to her bedroom alone; (5) the presence of appellant’s daughter in the bed with RR when appellant initiated sexual intercourse; (6) the presence of appellant’s wife in the next room; (7) RR’s outcry the following morning first to appellant’s wife and then to the SANE nurse at the hospital; and (8) appellant’s apology and equivocation upon confrontation. There is overwhelming circumstantial evidence that RR did not consent to the charged sexual acts. Giving appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence, we are clearly convinced that the weight of the evidence supported the finding of guilty beyond a reasonable doubt.

Finally, the panel, in its fact-finding, was never instructed on incapacity as a possible sexual assault theory. Despite the government’s specific requests to include definitions for competence, incompetence or incapacity in her instructions to the panel, the military judge declined to do so, explaining that her decision was “based on the way that the government ha[d] charged it as without consent.” “Members are presumed to follow a military judges’ instructions to consider evidence for a proper purpose” *United States v. Collier*, 67 M.J. 347, 355 (C.A.A.F. 2009)(citation omitted). In following the military judge’s instructions, the panel could only have found the victim did not consent, not that she could not consent.

In this case, the panel heard RR testify to struggling against appellant to pull her pants back on, and that despite her intoxication, she recalled all elements of the offense to include penetration by appellant's penis without her consent. While the victim testified to experiencing "blackouts" during this time, her intoxication level, at times, was below "blackout," because she was able to lay down some memories during the assault. As Dr. CS described, a person suffering a "blackout" as the medical community describes it, would not lay down any memories at all.

Although trial counsel requested an incapacitation instruction, the military judge denied the instruction and properly advised the panel on consent. Additionally, the military judge reminded the panel before deliberation to make their determination on the evidence presented and not the argument of counsel. Accordingly, in addition to finding that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we are also convinced that appellant's finding of guilty was not against the weight of the evidence. Based on our review of the record, we conclude that appellant's conviction is legally and factually sufficient under both *Mendoza* and *Casillas*.

CONCLUSION

On further review and consideration of the entire record, the finding of guilty to Specification 1 of The Charge and the sentence are AFFIRMED.

Senior Judge FLEMING and Judge JUETTEN concur.

FOR THE COURT:


JAMES W. HERRING, JR.
Clerk of Court

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Cpygr etc,"
Crim App. Dkt. No. 20242782, USCA Dkt. _____/AR was electronically filed
with the Court and Government Appellate Division on March 33, 2026.



Louis S. Steiner
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0668
USCAAF Bar No. 38052