IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201800276
Thomas E. MADER III, Sergeant (E-5) U.S. Marine Corps Appellant	)	USCA Dkt. No. 20-0221/MC

JENNIFER JOSEPH
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 37262

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Senior Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7686, fax (202) 685-7687
Bar no. 37261

NICHOLAS L. GANNON
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37301

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

Index of Brief

Page

Table of Authorities

Page

COURTS OF CRIMINAL APPEALS CASES

STATE COURT CASES

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

REGULATIONS, RULES, OTHER SOURCES

Issue Presented

CONSENT IS A DEFENSE TO ASSAULT CONSUMMATED BY A BATTERY. THE LOWER COURT FOUND THAT EVEN THOUGH APPELLANT HAD MISTAKENLY BELIEVED OTHER MARINES CONSENTED, NO PERSON IN ANY SIMILAR CIRCUMSTANCE COULD EVER LAWFULLY CONSENT. DID THE LOWER COURT ERR?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad-conduct discharge. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of two specifications of failure to obey a lawful general order or regulation and four specifications of assault consummated by battery in violation of Articles 92 and 128, UCMJ, 10 U.S.C. §§ 892, 928 (2012). The Members sentenced Appellant to 190 days of confinement, reduction to E-1, and a bad-conduct discharge. The Convening Authority approved the sentence and, except for the punitive discharge, ordered it executed.

The lower court affirmed, holding that Appellant's mistaken but honest belief in the junior Marines' consent was not reasonable because the junior Marines could not lawfully consent to being burned with cigarettes "based on society's need to protect victims from this time of harm." *See United States v. Mader*, 79 M.J. 803, 816–18 (N-M. Ct. Crim. App. 2020). Appellant filed his brief in response to this Court's Order granting review. (Appellant's Br., Sep. 14, 2020.)

Statement of Facts

A. The United States charged Appellant with hazing and assaulting junior Marines.

The United States charged Appellant with two Specifications of hazing junior Marines in violation of "paragraph 3.b. of Enclosure (1) of Marine Corps Order 1700.28B" and five Specifications of assault consummated by a battery against junior Marines. (J.A. 32–34.)

The hazing Specifications alleged that Appellant (1) forced a junior Marine to drink twelve to sixteen ounces of hard liquor; and (2) called a junior Marine a "beaner." (Charge Sheet.) The assault Specifications alleged that Appellant, in relevant part: (1) burned Private First Class (PFC) Bravo's chest with a lit cigarette (2) burned PFC Echo's chest with a lit cigarette; and (3) burned Lance Corporal (LCpl) Delta's shoulder with a lit cigarette. (J.A. 32–34.)

B. At trial, the junior Marines testified Appellant assaulted them by burning them with a cigarette.

PFC Bravo, LCpl Delta, and PFC Echo, who all worked with Appellant, testified that Appellant burned them with a cigarette without their consent, (J.A. 134, 224, 264), a few days before he left the command, (J.A. 133). Appellant was one of the junior Marines' direct supervisors. (J.A. 137.)

The assaults took place in the barracks soon after most of the battalion had returned from an exercise which resulted in some Marines being relieved for poor performance. (J.A. 211, 285–56.) Appellant was talking and drinking with the junior Marines that night, (J.A. 108, 363), and discussion turned to low morale, (J.A. 287, J.A. 077). Appellant mentioned that he received a burn from his "senior Marines when [he] was a junior Marine" upon his arrival to the unit. (J.A. 262, 385.)

1. PFC Bravo testified that Appellant burned him with a cigarette without his consent.

PFC Bravo testified that he was intoxicated that night and did not remember many details but did "not remember consenting to anything." (J.A. 112, 159, 177.) He did not remember if he pulled down his shirt or if Appellant did to inflict the burn. (J.A. 159.) He was standing at parade rest during the assault in an effort to look and feel more sober. (J.A. 116, 198.) He did not ask Appellant to give him a

burn and did not want Appellant to give him a burn. (J.A. 134.) The burn left a scar. (J.A. 134.)

2. LCpl Delta testified that he watched Appellant burn the other Marines without their consent before burning him.

LCpl Delta testified that Appellant lit a cigarette and asked PFC Bravo "Okay, where do you want it?" (J.A. 222.) Appellant then went over to PFC Bravo, pulled his shirt down, put the cigarette to his chest, and took a drag from it. (J.A. 222.) After Appellant burned PFC Bravo, he went over and burned PFC Echo's chest. (J.A. 224.) LCpl Delta stated that PFC Echo did not ask to be burned. (J.A. 224.)

Appellant then came up to LCpl Delta, pulled up his shirt sleeve, and burned him on his shoulder. (J.A. 224, 247.) He did not ask Appellant to pull up his shirt or give Appellant permission to burn him. (J.A. 248.) Appellant only asked the group, "Where do you want it?" (J.A. 239.) LCpl Delta had only been in the fleet two weeks at the time of the incident. (J.A. 246.)

3. PFC Echo testified that he pulled down the neckline of his shirt because Appellant, his superior, told him to do so.

PFC Echo testified that Appellant lit a cigarette, told the junior Marines he received a burn when he first got to the unit, and showed them marks on his arm. (J.A. 262.) Appellant did not say anything prior to burning them. (J.A. 262.) Appellant lifted LCpl Delta's shirtsleeve to burn his shoulder. (J.A. 264.)

Appellant burned PFC Echo on the chest below the neckline of his shirt. (J.A. 264.) PFC Echo pulled down his own shirt when Appellant came up to him to burn him. (J.A. 289.) He explained that he pulled down his shirt because Appellant, his superior, told him to do so. (J.A. at 308.)

C. Appellant testified that the junior Marines consented to being burned.

Appellant testified at trial. (J.A. 345.) Appellant testified, when he first lit the cigarette, he intended to burn the junior Marines. (J.A. 389.) He claimed that LCpl Delta wanted and asked for a burn. (J.A. 388.) Appellant stated he avoided burning the junior Marines on the forearms because that location was easily visible. (J.A. 394.) Appellant testified PFC Echo said he wanted a burn and pulled his own shirt down; Appellant burned him on his chest to avoid "medical [seeing]" the burn mark. (J.A. 396.) Appellant then stated he went up to PFC Bravo to burn him, who agreed and pulled down his own shirt. (J.A. 398.)

Appellant felt "kind of bad" about burning the junior Marines. (J.A. 399.) Despite identifying the scars as "tradition" for Marines in communications, Appellant admitted he never burned any other Marines in the division. (J.A. 447–46.)

D. The Military Judge instructed the Members on mistake of fact as to consent.

1. The Military Judge denied a Defense-requested instruction on consent because the standard instructions encompassed the same point.

The Defense requested an additional instruction regarding consent for the assault consummated by a battery Specifications. (J.A. 492.) Appellant argued that the standard assault instruction, that "the act must be done without legal justification or excuse and without lawful consent of the victim," was insufficient because it did not define consent. (J.A. 492.) Appellant proposed:

> [T]he defense has raised the issue of consent as part [sic] of [PFC SG, LCpl TF, and LCpl JM] to the alleged touching in Specifications I, II, and IV of Charge 2. In any prosecution, the complaining witnesses consent to the conduct alleged or to the result thereof is a defense if the consent negatives an element of the offense.
>
> The burden is on the prosecution to prove beyond a reasonable doubt that the complaining witness did not consent to the conduct alleged or the result thereof. If the prosecution fails to meet it's [sic] burden, then you must find the accused not guilty.

(J.A. 492.)

The Military Judge ruled the proposed instruction was cumulative and did not provide amplifying information. (J.A. 494.) He then denied Appellant's request. (J.A. 496.)

2. The Military Judge instructed the Members that mistake of fact as to consent was a defense to assault consummated by a battery.

The Military Judge provided the Members the standard instruction on consent. (J.A. 505.) He instructed the Members that mistake of fact as to consent was a defense to the three Specifications of assault consummated by a battery for burning the junior Marines:

> [Appellant] is not guilty of the offense of assault consummated by a battery for these offenses if, one, he mistakenly believed that [the junior Marines] lawfully consented to the touching related to themselves or mistakenly believed that the touching alleged as bodily harm would not be offensive to [the junior Marines]; and, two, if such belief on the accused [sic] part was reasonable.
>
> To be reasonable the belief must have been based on information or lack of it which would indicate to a reasonable person that the alleged victims consented to the touching or that the touching alleged as bodily harm would not be offensive to the alleged victims.
>
> You should consider the accused's age, education, and experience along with all other evidence on this issue. The burden is on the prosecution to establish the accused's guilt. If you're convinced beyond a reasonable doubt that, at the time of the charged offenses of assault consummated by a battery . . . that the accused was not under the mistaken belief that these alleged victims lawfully consented to the alleged touching or that the touching alleged as bodily harm was not offensive to the alleged victims, then the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the alleged victims lawfully consented, or that the touching alleged as bodily harm was not offensive to the alleged victims, if you are convinced beyond a reasonable doubt that, at the time of these charged offenses, the accused's mistake was unreasonable, the defense of mistake does not exist.

(J.A. 505–07, 586–87.)

E. The Members convicted Appellant and sentenced him.

The Members convicted Appellant of hazing for forcing one junior Marine to drink alcohol and for calling another Marine a "beaner." (J.A. 580–81.) They convicted Appellant of assault consummated by a battery for burning the three junior Marines with a cigarette. (J.A. 580–81.)

The Members sentenced Appellant to 190 days of confinement, reduction to E-1, and a bad-conduct discharge. (J.A. 582.)

F. The service court found: (1) the Military Judge did not abuse his discretion in rejecting the Defense's requested consent instruction; and (2) despite Appellant's honest belief in the junior Marines' consent, the consent was not lawful and hence his belief was unreasonable.

First, the lower court found that the Military Judge did not err in not giving Appellant's requested instruction on consent, which "placed mistake of fact closer to the elements of assault consummated by a battery," *Mader*, 79 M.J. at 810, because the standard instruction already pressed the "salient point . . . upon the [M]embers that the Government was required to prove beyond a reasonable doubt that [Appellant's] mistake of fact as to the consent of some of the junior Marines was not reasonable," *id.* at 812–13.

Second, the court conducted a factual sufficiency review and affirmed Appellant's convictions for assault consummated by a battery for burning the junior Marines because, despite Appellant's honest belief that they consented, that

consent was "not lawful and hence not reasonable" and that "under these circumstances a victim cannot consent to this type of injury." *Id.* at 818.

Argument

IN FINDING APPELLANT'S CONVICTIONS FACTUALLY SUFFICIENT, THE LOWER COURT CORRECTLY HELD THAT, AS A MATTER OF LAW, THE JUNIOR MARINES COULD NOT LAWFULLY CONSENT TO THE CIGARETTE BURNS. THE LOWER COURT'S HOLDING IS A LIMITED, WORKABLE STANDARD THAT TRACKS WITH THIS COURT'S RECOGNITION IN *BYGRAVE* OF THE BROAD MILITARY AND SOCIETAL INTERESTS IN DETERRING CRIMINALIZED CONDUCT TO WHICH CONSENT IS NOT LEGALLY COGNIZABLE.

A. This Court reviews de novo a lower court's factual sufficiency analysis for the application of correct legal principles.

Courts of Criminal Appeals must conduct a factual sufficiency review by determining whether the evidence at trial proves an appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012).

The service Courts of Criminal Appeals have broad authority under Article 66 to disapprove findings, but that authority is not unfettered. *United States v. Nerad,* 69 M.J. 138, 140 (C.A.A.F. 2010). Article 66 must be exercised in the context of legal and not equitable standards, subject to appellate review. *Id.* (citing *United States v. Quiroz,* 55 M.J. 334, 339 (C.A.A.F. 2001)). While Article 66(c), UCMJ, affords the service courts broad powers, when faced with a constitutional statute a service court "cannot, for example, override Congress'

policy decision, articulated in a statute, as to what behavior should be prohibited." *Nerad,* 69 M.J. at 140 (quoting *United States v. Oakland Cannabis Buyer's Coop*., 532 U.S. 483, 497 (2001)). In *Nerad,* this Court set aside the service court where it was "unclear from the [lower court]'s opinion whether it exceeded its authority by disapproving a finding with reference to something other than a legal standard." 69 M.J. at 140. This Court in *Nerad* looked at the substantially similar 2006 version of Article 66, focusing on the "should be approved" clause—but as to the entirety of Article 66, including the "correct in law and fact" clause, it is also "clear that CCAs are not equitable courts, and they are not policy-making bodies. They are empowered to decide cases based on principles of law applied in the context of Article 66, UCMJ." 69 M.J. at 148–40 (Baker, J., concurring).

Although Article 66(c) is an "awesome, plenary de novo power," *see United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007), the lower court's "'application of the law to the facts *must . . . be based on a correct view of the law*,'" *United States v. Pease*, 75 M.J 180, 184 (C.A.A.F. 2016) (emphasis in original) (quoting *United States v. Leak*, 61 M.J. 234, 242 (C.A.A.F. 2005)). Thus, this Court can review "a lower court's determination of factual insufficiency for application of correct legal principles." *Leak*, 61 M.J. at 241.

In *Pease*, this Court reviewed de novo the Navy Marine Corps Court of Criminal Appeals' finding of factual insufficiency based on the lower court's

judicially defined interpretation of "incapable of consent." 75 M.J. at 184 (citing *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014)).

Here, the lower court found Appellant's assault convictions factually sufficient because Appellant's mistaken but honest belief that the junior Marines consented was not reasonable because the junior Marines could not, as a matter of law, consent to the cigarette burns. *Mader*, 79 M.J. at 816–18.

The posture of Appellant's case is more like *Pease*, and his reliance on *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002), is misplaced. (*See* Appellant's Br. at 13). In *McDonald*, this Court reviewed de novo whether a jury was properly instructed, which is not at issue here. *See* 57 M.J. at 20. As in *Pease*, 75 M.J. 184, this Court should conduct a de novo review of the lower court's factual sufficiency review "for application of correct legal principles," *Leak*, 61 M.J. at 241.

B. A mistaken belief in consent to assault consummated by a battery must be reasonable under all the circumstances.

An assault consummated by a battery is "bodily harm to another . . . done without legal justification or excuse and without the lawful consent of the person affected." Manual for Courts-Martial (MCM), United States (2016 ed.), Part IV, para. 54.c(1)(a), (2)a). "Bodily harm" is defined as "any offensive touching." MCM, Part IV, para. 54.c(1)(a).

Consent "can convert what might otherwise be offensive touching into nonoffensive touching." *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting *United States v. Greaves*, 40 M.J. 432, 433 (C.M.A. 1994)). Even if a victim did not actually consent, an accused cannot be convicted of assault consummated by a battery if the accused mistakenly believed the victim consented and that belief was "reasonable under all the circumstances." R.C.M. 916(j)(1). Thus, a "reasonable and honest mistake of fact as to consent constitutes an affirmative defense in the nature of legal excuse." *Greaves*, 40 M.J. at 433.

This Court recognizes that consent must be "legally cognizable" for a victim's consent to be relevant to the unlawful force element of assault; if not legally cognizable, then consent is not a defense. *See United States v. Bygrave*, 46 M.J. 491, 493 (C.A.A.F. 1997). For example, a victim can legally consent to a backrub—a touching that, without consent, may constitute assault consummated by a battery. *See Johnson*, 54 M.J. at 70. But a victim cannot consent to a touching that otherwise constitutes aggravated assault, *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016), or assault likely to produce death or grievous bodily harm, *United States v. Outhier*, 45 M.J. 326, 330 (C.A.A.F. 1996).

C. The lower court's holding that the junior Marines' consent to the burns was not lawful is consistent with the *Bygrave* court's recognition of "broad military and societal interests in deterring" criminalized conduct to which consent is not legally cognizable.

This Court looks to "legislative enactments for determinations of public policy." *United States v. Falcon*, 65 M.J. 386, 390 (C.A.A.F. 2008). For example, this Court noted in *Bygrave* that the "appellant [] offered valid public-policy reasons" for decriminalizing the sexual transmission of HIV, but declined to follow the appellant's proposed public-policy rationale because Congress had not yet created a carve-out for HIV transmission from the ambit of Article 128. *Bygrave*, 46 M.J. at 494. However, this Court nonetheless recognized that consent may be irrelevant in certain circumstances "because of the broad military and societal interests in deterring" criminalized conduct. *See id*. at 493 n.4.

However, in recognizing that "consent is not generally a valid defense to aggravated assault," the *Bygrave* court did not rely on a Congressionally carved-out exception for consent to aggravated assault in Article 128 itself, *see id.* at 493, as there is none, *see generally* Article 128, UCMJ. Rather, the court cited its own precedent and secondary materials, *see id.*, likening aggravated assault to the "numerous other crimes under the Uniform Code of Military Justice," such as dueling, "in which the consent of the immediate 'victim' is irrelevant because of

the broad military and societal interests in deterring the criminalized conduct," *see id*. at 493 n.4.

The lower court's likening of the junior Marines' unlawful consent to other crimes like dueling, where consent is lawfully irrelevant, is no different than the *Bygrave* court's likening of aggravated assault to other offenses where consent is irrelevant and its acknowledgment of the broad military and societal interests in deterring criminalized conduct. *Compare Mader*, 79 M.J. at 817, *with Bygrave*, 46 M.J. at 493 n.4. The broad military interests in deterring assault consummated by a battery are no less implicated just because burning a junior Marine with a cigarette may not rise to the level of aggravated assault. Just as *Bygrave* focused on "legally cognizable" consent, 46 M.J. at 493, the lower court emphasized that the "operative term is *lawful* consent" in acknowledging the societal "need to protect victim's from this type of harm," *Mader*, 79 M.J. at 818 (emphasis in original).

Thus, the lower court's holding provides another data point on the scale of offensive touchings that cannot be rendered lawful by the victim's consent. *See Mader*, 79 M.J. at 817 ("Here, we are considering cigarette burns, which were not charged and—under these facts—might not have qualified as aggravated assaults under Article 128, but they simply cannot be equated to an unwelcome backrub or other minor 'offensive touchings.'"). That is, while mistake of fact as to consent

may apply to minor offensive touchings like backrubs, *see Johnson*, 54 M.J. at 70, the lower court held that "as a matter of law" the junior Marines could not lawfully consent to the cigarette burns, *Mader* 79 M.J at 818. In this way, the lower court exercised its Article 66(c) powers and established a legal standard, *see Nerad*, 69 M.J. at 140, that consent to cigarette burns cannot render such touching lawful, *see Mader*, 79 M.J. at 817–18. Thus, the lower court's holding echoes *Bygrave's* recognition of military and societal interests in deterring criminalized conduct to which consent is not legally cognizable, *see Bygrave*, 46 M.J. at 493 n.4.

1. Drawing from *Bygrave* and finding the victim's consent not legally cognizable, the Army court in *Arab* held consent was not a defense to some non-aggravated assaults.

The Army Court of Criminal Appeals looked to *Bygrave* in evaluating the appellant's claim that his convictions for non-aggravated assault of his wife were legally and factually insufficient, given a prior consensual "sadomasochist marital relationship." *United States v. Arab*, 55 M.J. 508, 515 (A. Ct. Crim. App. 2001). With *Bygrave* as a framework, *id.* at 516, the *Arab* court analyzed: (1) whether the victim's consent, if any, was legally cognizable; (2) if such consent could be a defense, whether the victim actually consented; and, (3) if she did not consent, whether the United States proved beyond a reasonable doubt that the appellant did not have an honest and reasonable mistaken belief in that consent. *Id*. at 516.

The *Arab* court considered the "military and governmental interests" in the victim's wellbeing and was "unwilling . . . to recognize consent as a defense to the appellant's acts which caused" injury to the victim, including cigarette burns, even though they did not constitute aggravated assault. *Id.* at 518. The court concluded that even if the victim could have consented, the appellant's belief was unreasonable as to some of injuries where: (1) the record indicated her prior non-consent to similar injuries; (2) that she cried during some of the injuries; and, (3) that some injuries exceeded the scope of consent. *Id.* at 519.

2. Despite Appellant's claims that *Arab* is an outlier, *Arab* is consistent with the *Bygrave* court's recognition of broad military and societal interests in deterring criminalized conduct.

Appellant's reliance on *Petee* to cast doubt on *Arab* is misplaced. (*See* Appellant's Br. at 26.) *Petee* did not question the validity of *Arab*; it merely held that the appellant's inquiry was insufficient to establish such criminal liability in the context of a guilty plea. *United States v. Petee*, No. 20130128, 2014 CCA LEXIS 709, at *3 (A. Ct. Crim. App. Sep. 24, 2014); *see also United States v. Outhier*, 45 M.J. 326, 332 (C.A.A.F. 1996) (finding military judge did not adequately address issue of consent during inquiry). Moreover, since *Petee*, the Army Court of Criminal Appeals has cited *Arab* for authority that actual consent may not render lawful a battery that would otherwise be unlawful, recognizing the military's "interest in protecting people from harm and disorder . . . as a matter of

policy." *United States v. Conner*, No. ARMY 20180240, 2019 CCA LEXIS 322, at *5 (A. Ct. Crim. App. Aug. 9, 2019).

Thus, Appellant's insistence that this Court view *Arab* so narrowly, (*see* Appellant's Br. at 23–24), is inconsistent with the Army Court of Criminal Appeals' treatment of it in both *Petee* and *Conner*. Moreover, the lower court's reliance on *Arab* is not at odds with this Court's recognition of broad military and societal interests in deterring the criminalized conduct of servicemembers. *Compare Mader*, 79 M.J. at 818 (recognizing "society's need to protect victims from this type of harm"), *with Arab*, 55 M.J. at 516 (recognizing the "law protects a societal interest in ensuring its members are free from injury or harm"), *and Bygrave*, 46 M.J. at 493 n.4 (recognizing "broad military and societal interests in deterring" criminalized conduct).

Appellant's likening of the cigarette burns he inflicted on the junior Marines to the injuries of the dismissed specification in *Arab* overemphasizes the distinction between "deep wounds" and "superficial cuts," (*see* Appellant's Br. at 25), and overlooks the United States interest in deterring the infliction of even superficial cuts by servicemembers against other servicemembers, regardless of consent, *see Bygrave*, 46 M.J. at 493 n.4.

3. Appellant reads the lower court's opinion past its logical limits: the consent defense remains for touchings that can be lawfully consented to, such as the workplace backrub in *Johnson*.

The defense mistake of fact as to consent remains available for touchings to which this Court has recognized the possibility of lawful consent, such as workplace backrubs. *See Johnson*, 54 M.J. at 70.

In the wake of the lower court's holding, the defense of consent to assault consummated by a battery remains intact if the mistaken belief is reasonable; here, the lower court found it was not. *See Mader*, 79 M.J. at 818. The lower court's holding does not "remove a subset of assaults from the protections of the defense," (*see* Appellant's Br. at 28), so much as it limits the circumstances in which the defense may not apply because the consent is unlawful such that belief in that consent cannot be reasonable: the lower court narrowly held that Marines cannot lawfully consent to being burned with cigarettes, and hence belief in that consent cannot be reasonable, *see Mader*, 79 M.J. at 817–18.

Thus, Appellant's fear that the lower court's holding "assumes consent could never be a defense to any assault or battery" and "evicerat[es]" the "consent defense" is beyond the opinion's logical limits. (*See* Appellant's Br. at 22–27.) The defense "remains in its settled state," (*see* Appellant's Br. at 28), for batteries such as a workplace backrub, where this Court has recognized the possibility of lawful consent, *see Johnson*, 54 M.J. at 70.

D. The lower court's holding fits within the scale of binding precedent of what types of batteries can and cannot lawfully be consented to and is a narrow, workable standard.

1. Appellant cites no binding precedent which holds that consent is a failsafe defense to all non-aggravated assault.

In *Helton*, the Court of Appeals of Indiana listed several circumstances where consent was not a defense to the charge of battery, including "atrocious or aggravated assault" and breaches "of the public peace" or "an invasion of the victim's physical security." *Helton v. State*, 624 N.E.2d 499, 514 (Ind. Ct. App. 1993) (citation omitted).

In relying on *Helton*, Appellant overlooks that court's recognition that consent is not a defense in other circumstances beyond aggravated assault, regardless of whether it could have been charged as hazing. (*See* Appellant's Br. at 21.) Appellant cites to no authority from either this Court or any state court that expressly holds consent is a failsafe defense to all forms of non-aggravated assault. (*See* Appellant's Br. at 20–21.)

2. The lower court's holding that Appellant's mistaken belief was unreasonable because the junior Marines could not legally consent does not lower the United States' burden.

The *Riggins* case considered the service court's affirmation of convictions for assault consummated by battery that were not lesser included offenses of the charged sexual assault and abusive sexual contact. *United States v. Riggins*, 75

M.J. 78, 80 (C.A.A.F. 2016). The charged offenses did not require the United States, in *Riggins,* to prove lack of consent for Article 120, UCMJ, offenses. *Id.* But it was required to prove lack of consent for the Article 128, UCMJ, offense of which Appellant was convicted. *Id.*

Thus *Riggins* held that the requirement to prove "a set of facts that resulted in [the] . . . legal inability to consent . . . was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] did not, in fact, consent." *Id.* at 84. The *Riggins* appellant was not on notice to defend against the charges by contesting lack of consent and thus was "deprived of his right to know what offense and under what legal theory he was going to be tried and convicted." *Id.*

In *Oliver,* mistake of fact as to consent was a statutory affirmative defense available at trial. *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017). Finding no prejudice, this Court distinguished *Oliver* from *Riggins*, where the appellant had no notice to defend against the issue of lack of consent. *Id.* at 275. In contrast, the *Oliver* appellant was required "to prove the affirmative defense of consent by a preponderance of the evidence, at which time the Government would have the burden of proving beyond a reasonable doubt that the defense did not exist." *Id.*; *see also United States v. Motsenbocker,* No. 201600285, 2017 CCA LEXIS 539, at *21 (N-M. Ct. Crim. App. Aug. 10, 2017) (distinguishing *Riggins*

from instant case in which appellant was convicted as charged), *rev. denied*, 2018 CAAF LEXIS 129, (C.A.A.F., Feb. 13, 2018.)

a. Appellant's case is distinguishable from *Riggins* and *English*. Appellant was convicted as charged on a charging theory that was before the court-martial.

Lack of consent is not an element of assault consummated by a battery. *See Outhier*, 45 M.J. at 330; (*contra* Appellant's Br. at 15). Rather, the "definition of criminal battery" is an "'*unlawful* application of force'" such that "'the decisive question is not whether the harmful contact was with or without consent, but whether it was lawful or unlawful.'" *Id.* at 331 (emphasis in original) (quoting R. PERKINS & R. BOYCE, CRIMINAL LAW 1082 (3d ed. 1982)).

To the extent that consent was relevant to Appellant's convictions for assault consummated by a battery, it was only relevant to the element of unlawful force because lack of consent is not an element of assault consummated by a battery. *See Outhier*, 45 M.J. at 330–31. Because lack of consent is not an element of assault consummated by a battery, *see id.*, Appellant's reliance on *Riggins* is inapt, (*see* Appellant's Br. at 15). The *Riggins* appellant was convicted under an erroneous lesser included offense theory of a crime with which he was not originally charged. 75 M.J. at 80. In contrast, Appellant was convicted as charged—not by exceptions and substitutions or by erroneous conviction of a lesser included offense.

Thus, *Riggins*' holding that legal inability to consent is not equivalent to proving lack of consent *for the purpose of determining a lesser included offense* should not be read as an applicable limit on the lower court's holding here that the junior Marines' unlawful consent rendered Appellant's mistaken belief unreasonable. *See Oliver*, 76 M.J. at 275.

b. The Military Judge instructed the Members on the elements and that Appellant's belief in the consent must have been reasonable; thus, unlike *English*, the lower court did not affirm on a theory not before the court-martial.

In *English*, the lower court improperly found a charge factually insufficient yet nevertheless affirmed the conviction on a theory not litigated at trial. *United States v. English*, 79 M.J. 115, 122 (C.A.A.F. 2019).

Appellant's reliance on *English* gains no further traction than his reliance on *Riggins*. (*See* Appellant's Br. at 17.) Here, the Military Judge instructed the Members that the "burden is on the prosecution to establish the accused's guilt" and that if they were "convinced beyond a reasonable doubt that, at the time of the charged offenses … the accused was not under the mistaken belief that [the junior Marines] lawfully consented" or that "the accused's mistake was unreasonable" then the "defense of mistake does not exist." (J.A. 505–07, 586–87.) Thus, the lower court's holding that Appellant's mistaken belief was not reasonable because the junior Marines could not lawfully consent was not a "substantial chang[e]" to

"the theory of the case . . . not considered by the court-martial," (*see* Appellant's Br. at 17).

The Members were instructed that Appellant's mistaken belief in the junior Marines' lawful consent would not be a defense if unreasonable, and the Members presumably followed that instruction and found Appellant's belief was unreasonable under the circumstances—regardless of the lower court's reasoning reaching the same conclusion. *See United States v. Loving*, 51 M.J. 213, 235 (C.A.A.F. 1994) (presuming members follow instructions); *see also United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (noting that test for factual sufficiency is if reviewing court, looking at the same evidence as members, is convinced of accused's guilt beyond a reasonable doubt).

3. Similar to the judicial interpretation affirmed by this Court in *Pease*, the lower court's holding provides a workable standard on a narrow circumstance in which belief in consent will not be reasonable as a matter of law.

In *Pease*, this Court held that the lower court was "not bound by the military judge's trial instructions in conducting its" factual sufficiency review. 75 M.J. at 182. That is, the Court recognized the lower court's authority to "define statutory terms that were not defined at trial." *Id.* The Court rejected the United States' argument that the lower court's definition of "incapable of consenting" would unduly limit future prosecutions and increase its burden. *Id.* at 185–86. This Court

found "no basis to conclude that the CCA's definition was otherwise incorrect, unnecessarily restrictive, or inconsistent with statutory intent." *Id.* at 186. Thus, the lower court's definition withstood "legal scrutiny, and arguments about whether the definition is broad enough for . . . prosecutorial purposes are unavailing." *Id.*

Lower courts have since evaluated military judges' instructions for compliance with the *Pease* definition. *See, e.g.*, *United States v. Gomez,* No. 201600331, 2018 CCA LEXIS 167, at *25 (N-M. Ct. Crim. App. Apr. 4, 2018) ("[T]he military judge's instructions on capacity and consent were accurate and consistent with . . . the definition of key terms in *United States v. Pease*."); *Motsenbocker*, 2017 CCA LEXIS 539, at *14–15 (concluding language of military judge's *Pease* instruction was not confusing or contradictory).

a. Just as military judges must determine whether to give a *Pease* instruction, military judges can use the lower court's opinion as guidance to determine whether the defense is available.

If a military judge is presented with similar facts involving Marines apparently consenting to burning each other with cigarettes, then an accused's mistaken belief in that consent would be unreasonable as a matter of law and, similar to the trial counsel's requested "*Pease* definitions" in *Gomez*, *see* 2018 CCA LEXIS 167, at *26, the military judge would accordingly rule that an

instruction on mistake of fact as to consent is unavailable, *see Mader*, 79 M.J. at 813 (noting military judge did not tailor instruction to address the lawfulness of the junior Marines' consent or the reasonableness of Appellant's mistaken belief in that consent).

Contrary to Appellant's read of the lower court's opinion, the lower court did not hold that "hazing implications" removed consent as a defense such that military judges are now left to "refer[ee] vague policy" arguments. (*See* Appellant's Br. at 17–18.) First, the lower court's holding that Appellant's mistaken belief in the junior Marines' consent was unreasonable stands regardless of "attendant hazing implications." *Mader*, 79 M.J. at 818. Second, as the lower court's holding did not remove consent as a defense—but rather found the consent was not legally cognizable under the circumstances—the defense remains. *See id*.; *see also Bygrave*, 46 M.J. at 493.

To the extent that the lower court's opinion "shift[s] the responsibility" onto trial judges to determine the proper instruction of mistake of fact as to consent, (*see* Appellant's Br. at 18), it is no more an undue or onerous task for military judges than is fashioning an instruction based on the *Pease* standard, *see Motsenbocker*, 2017 CCA LEXIS 539, at *14. In the same way that military judges have proven capable of determining at trial when to instruct on whether a victim is incapable of consent, military judges can and should be able to apply the lower court's narrow

holding that mistake of fact as to consent does not apply to Marines burning each other with cigarettes.

4. The lower court's holding conflicts with neither *Johnson* nor *Outhier*, cases which involved categorically different touchings and are thus distinguishable from Appellant's case.

In *Johnson*, this Court considered whether, given the "nature of the physical contact involved in the friendly relationship" between the appellant and his subordinate, a "reasonable factfinder could conclude beyond a reasonable doubt that" the appellant rubbed his subordinate's back without her consent. 54 M.J. at 69. The subordinate testified that she regarded the appellant as a friend and they had on occasion engaged in consensual hugging. *Id.* The subordinate testified that, although the backrubs made her uncomfortable and interrupted her work, she did not report the appellant's conduct because she did not feel it was "necessary" at the time. *Id.* at 68. The lower court affirmed the conviction, concluding that failing to "confront appellant and verbalize that his improper touching bothered her could not have raised an honest and reasonable belief in the mind of" the appellant, an experienced noncommissioned officer, that she consented. *Id.* at 69 (quotation marks and citation omitted).

a. *Johnson* recognized that while a backrub could be considered a battery without consent, the facts presented did not suggest non-consent such that the appellant's belief was unreasonable.

This Court reversed, "not persuaded that appellant was on notice that [the subordinate] did not consent to the backrubs" such that a rational factfinder could have found the elements of assault consummated by a battery beyond a reasonable doubt. *Id.* at 70. Although this Court noted the "unique situation of dominance and control" between the appellant and his subordinate and that the evidence might have shown the "appellant's bad judgment or violation of other social or military norms," the evidence did not support a criminal conviction for assault consummated by a battery. *Id.* at 69 (quotation marks and citation omitted). While there was "no question that a backrub could, under some circumstances, constitute an offensive touching," this Court held that was not what the evidence indicated "[u]nder the facts presented here" such that the appellant's mistaken belief was unreasonable. *Id.*

b. *Outhier* turned on the appellant's insufficient inquiry and did not definitively hold that consent was a defense to assault consummated by a battery.

In *Outhier*, this Court held that the appellant's guilty plea was improvident because the facts the appellant admitted to during the providence inquiry did not establish aggravated assault and his mere "recited conclusions of law" were

insufficient. 45 M.J. at 332. Although *Outhier* does definitively support that "one cannot consent to an act which is likely to produce grievous bodily harm or death," *id.* at 330, the appellant could not be convicted of the lesser included offense of assault consummated by a battery because "the issue of consent, *if any*, was not explored in the plea inquiry," *see United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (emphasis added) (citing *Outhier*, 45 M.J. at 332).

c. The lower court's holding conflicts with neither *Johnson* nor *Outhier*; rather, it fits within the scale of batteries where consent is and is not recognized as a defense.

In neither *Johnson* nor *Outhier* was it relevant that the offenses could have been charged under a different theory, just as it is irrelevant to the lower court's holding that the offenses could have been charged as hazing. *See Mader*, 79 M.J. at 818 (holding junior Marines could not lawfully consent even with "with no attendant hazing implications"). Rather, the lower court cites to *Johnson* and *Outhier* in a string of precedent that demonstrates the range of batteries where consent may or may not provide a valid defense. *See Mader*, 79 M.J. at 817. The lower court acknowledged that while mistake of fact can apply to "certain touchings that are not generally objectively offensive" and which can be consented to, such as the backrub in *Johnson*, *id.* at 817 n.94 (citing *Johnson*, 54 M.J. 67), some touchings cannot be consented to, such as the aggravated assault in *Outhier*, *id.* at 817 n.89 (citing *Outhier*, 45 M.J. at 330).

The lower court did not deviate from precedent by declining to equate cigarette burns to an "unwelcome backrub or other minor 'offensive touchings,'" *Mader*, 79 M.J. at 817. Thus, the lower court's holding that, as a matter of law, a cigarette burn is a more objectively offensive touching than a backrub, which can be consented to, but is below aggravated assault, which cannot be consented to, *see id.* at 817–18, fits within the scale of precedent from *Johnson* to *Outhier*. That is, the lower court remained mindful of *Johnson's* consideration of the possibility of consent "[u]nder the facts presented here." *Compare Johnson,* 54 M.J. at 69 (finding appellant could have reasonably mistaken victim's consent "[u]nder the facts presented here"), *with Mader*, 79 M.J. at 818 (affirming conviction because apparent consent was not lawful and hence not reasonable "under these circumstances").

Just as the lower court distinguished the type of injury here from the backrub in *Johnson*, the type of injury in *Outhier* is also distinguishable. *Outhier*, 45 M.J. at 329. Appellant misreads *Outhier* as this Court's affirmative holding on the validity of a consent defense to the risk of drowning and asks this Court to extend that consent to such risk to consent to "single cigarette burn." (Appellant's Br. at 19.)

However, Appellant's cited authority of instances where this Court has "regularly affirmed consent as a defense in the face of actions theoretically

criminal under the UCMJ" are of much more limited application than Appellant suggests. (*See* Appellant's Br. at 19.) First, *Outhier* cannot be read as this Court's acceptance of the victim's consent to the risk of drowning, because *Outhier* turned on this Court's application of Article 45(a) and the military judge's failure to conduct any inquiry on how and if the appellant obtained consent for the lesser included simple assault and battery. *See Outhier*, 45 M.J. at 332. Second, Appellant's only other cited case, (*see* Appellant's Br. at 20) (citing *United States v. Booker*, 25 M.J. 114, 117 (C.M.A. 1987)), is a limited holding in the context of rape, *see Booker*, 25 M.J. at 116 ("[W]e have indicated that only consent obtained by fraud in the inducement is a defense to rape.").

Thus, the lower court did not "ignore[] precedent," (Appellant's Br. at 18), as its holding does not conflict with *Johnson*, *Outhier*, or *Booker*.

5. Appellant overemphasizes the lower court's discussion of hazing statutes, which are irrelevant to its holding.

Appellant misinterprets, (*see* Appellant's Br. at 22–23), the lower court's drawing of parallels to hazing statutes as turning on the fact that this was a "clear instance of hazing and could have been charged as such," *Mader*, 79 M.J. at 818. To the extent that the lower court did draw parallels to hazing statutes, hazing served as an example of a type of battery, along with mutual affray and dueling, where consent is not a defense. *See id.* at 816–18; *see also Bygrave*, 46 M.J. 493

n.4. The lower court made effort to note that its analysis did not turn on any hazing parallel, as its emphasis on the operative term of "*lawful* consent" would hold even "with no attendant hazing implications." *Id.* at 818 (emphasis in original).

Thus, it is of no moment that Appellant could have been charged with hazing for the same misconduct, (*see* Appellant's Br. at 22) just as other charging theories may have been possible in *Johnson* and *Outhier*, *see* analysis *supra* Part I.D.4. Rather, the United States has a "clear and unequivocal right to criminalize this type of behavior, *Mader*, 79 M.J. at 818, and here the United States chose to charge this as assault consummated by a battery, *see United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994) (citing *Ball v. United States*, 470 U.S. 856, 859 (1985) ("[T]here is prosecutorial discretion to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s)."), *overruled on other grounds by United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009).

E. <u>If this Court determines the lower court applied incorrect legal principles in its factual sufficiency review, it should remand for further consideration</u>.

This Court in *Leak* remanded to clarify an ambiguity in the standards applied by the lower court in conducting its factual sufficiency review, which may have

been based on incorrect law. 61 M.J. at 248. This Court set aside the lower court's decision and remanded the case for further consideration. *Id.* at 249.

Thus, the posture of Appellant's case is like that of *Leak*. Appellant's request, (Appellant's Br. at 28), of this Court to set aside his convictions goes beyond the scope of its limited Article 67(c) authority to only act with respect to findings set aside as incorrect in law. *See* Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2012); *see also Leak*, 61 M.J. at 239. This Court's setting aside the findings at issue in *Johnson* and *Outhier* is inapplicable, (*see* Appellant's Br. at 18–19); the issue in *Johnson* was framed as legal insufficiency, *Johnson*, 54 M.J. at 68, and *Outhier* was a guilty plea case alleging the lower court applied an incorrect legal standard, *Outhier*, 45 M.J. at 328.

As recognized in *Leak*, matters of law decided on the grounds of factual sufficiency are not beyond the reach of this Court. 61 M.J. at 242. However, if this Court determines the lower court's finding of factual sufficiency was incorrect in law, it should set aside only the lower court's decision—not Appellant's convictions—and remand the case for further consideration, as in *Leak*. *See id.* at 249.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

JENNIFER JOSEPH
Lieutenant, JAGC, U.S Navy
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 37262

KERRY E. FRIEDEWALD
Major, U.S. Marine Corps
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Bar no. 37261

NICHOLAS L. GANNON
Lieutenant Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37301

BRIAN K. KELLER
Deputy Director
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 7,563 words.

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

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on November 18, 2020.

JENNIFER JOSEPH
Lieutenant, JAGC, USN
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-4623, fax (202) 685-7687
Bar no. 37262

Appendices

A. *United States v. Gomez,* No. 201600331, 2018 CCA LEXIS 167 (N-M. Ct. Crim. App. Apr. 4, 2018)

B. *United States v. Motsenbocker,* No. 201600285, 2017 CCA LEXIS 539 (N-M. Ct. Crim. App. Aug. 10, 2017)

United States v. Gomez

United States Navy-Marine Corps Court of Criminal Appeals

April 4, 2018, Decided

No. 201600331

Reporter
2018 CCA LEXIS 167 *; 2018 WL 1616633

UNITED STATES OF AMERICA, Appellee v. GERARDO R. GOMEZ, Lance Corporal (E-3), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Motion granted by United States v. Gomez, 2018 CAAF LEXIS 320 (C.A.A.F., June 4, 2018)

Motion granted by United States v. Gomez, 2018 CAAF LEXIS 344 (C.A.A.F., June 19, 2018)

Review denied by United States v. Gomez, 2018 CAAF LEXIS 557 (C.A.A.F., Aug. 22, 2018)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Major M.D. Sameit, USMC. Convening Authority: Commanding General, 1st Marine Division (REIN), Camp Pendleton, CA. Staff Judge Advocate's Recommendation: Major M.J. Stewart, USMC.

Core Terms

military, competence, sexual contact, bodily harm, consented, specifications, instructions, sex, alcohol, intoxication, notice, sexual assault, convicted, shower, penetration, impairment, competent person, conversation, incompetent, quotation, marks, lack of consent, sexual act, apartment, sexual, beyond a reasonable doubt, argues, drunk, penis, alcohol consumption

Case Summary

Overview
HOLDINGS: [1]-A complainant's testimony that a servicemember had sexual intercourse with her after she consumed substantial amounts of alcohol and was unable to resist, and that he placed his fingers in her vagina without her permission, was corroborated by text messages and admissions the servicemember made in a recorded telephone call, and was sufficient to affirm the servicemember's convictions for sexual assault and abusive sexual contact, in violation of UCMJ art. 120, 10 U.S.C.S. § 920; [2]-There was no merit to a servicmember's claim that the Government violated his due process right to notice because it charged him with sexual assault by causing bodily harm, in violation of UCMJ art. 120(b)(1)(B), but convicted him under a theory that he had sexual intercourse with a person who was incapable of consenting due to impairment by alcohol.

Outcome
The court affirmed the findings and sentence.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN1[] **Procedural Due Process, Scope of Protection**

The Due Process Clause of the Fifth Amendment to the U.S. Constitution requires fair notice that an act is forbidden and subject to criminal sanction before a person can be prosecuted for committing that act. The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The Due Process Clause also does not permit convicting an accused of an offense with which he has not been charged.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN2[] **Military Offenses, Rape & Sexual Assault**

"Bodily harm" for purposes of Unif. Code Mil. Justice ("UCMJ") art. 120, 10 U.S.C.S. § 920, means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact. UCMJ art. 120(g)(3), 10 U.S.C.S. § 920(g)(3).

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN3[] **Military Offenses, Rape & Sexual Assault**

"Consent" is defined by Unif. Code Mil. Justice art. 120(g)(8)(A), 10 U.S.C.S. § 920(g)(8)(A), as a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself, or the manner of dress of the person involved with an accused in the conduct at issue, does not constitute consent.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN4[] **Military Offenses, Rape & Sexual Assault**

The definition of "consent" in Unif. Code Mil. Justice art. 120(g)(8)(A), 10 U.S.C.S. § 920(g)(8)(A), as "a freely given agreement to the conduct at issue by a competent person" provides notice that when the "bodily harm" alleged is a sexual act or contact, the victim's competence is at issue.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN5[] **Military Offenses, Rape & Sexual Assault**

Lack of consent is not an element in all sexual assaults under Unif. Code Mil. Justice art. 120(b), 10 U.S.C.S. § 920(b).

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6[] **Instructions, Requests for Instructions**

While counsel may request specific instructions, a military judge has substantial discretionary power in deciding on the instructions to give. A military judge's denial of a requested instruction is reviewed for abuse of discretion. The United States Navy-Marine Corps Court of Criminal Appeals applies a three-pronged test to determine whether the failure to give a requested instruction is error: (1) the requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its effective presentation. All three prongs must be satisfied for there to be error.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7[] **Trial Procedures, Instructions**

Whether a court-martial panel was properly instructed is a question of law the United States Navy-Marine Corps Court of Criminal Appeals reviews de novo. A military judge has an independent duty to determine and deliver appropriate instructions. In that regard, a military judge bears the primary responsibility for ensuring the members are properly instructed on the elements of the offenses raised by the evidence, as well as potential defenses and other questions of law.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8[] **Plain Error, Definition of Plain Error**

Where there is no objection to an instruction at trial, the United States Navy-Marine Corps Court of Criminal Appeals reviews for plain error. An appellant bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. To establish plain error, all three prongs must be satisfied. The third prong is satisfied if an appellant shows a reasonable probability that, but for the error claimed, the outcome of the proceeding would have been different.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN9[] **Trial Procedures, Judicial Discretion**

In military jurisprudence, the "law of the case" doctrine only applies to final rulings and does not restrict a military judge's authority or discretion to reconsider and correct an earlier trial ruling.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN10[] **Military Offenses, Rape & Sexual Assault**

The definition of "consent" in Unif. Code Mil. Justice ("UCMJ") art. 120, 10 U.S.C.S. § 920, is a freely given agreement to the conduct at issue by a competent person. UCMJ art. 120(g)(8)(A), 10 U.S.C.S. § 920(g)(8)(A). Therefore, a full definition of consent includes the definition of competence to consent.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN11[] **Courts Martial, Court-Martial Member Panel**

Absent evidence to the contrary, the United States Navy-Marine Corps Court of Criminal Appeals may presume that members of a court-martial panel follow a military judge's instructions.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Governments > Legislation > Vagueness

Military & Veterans Law > Military Offenses

HN12[] **Procedural Due Process, Scope of Protection**

Due process requires fair notice that an act is forbidden and subject to criminal sanction. It also requires fair notice as to the standard applicable to the forbidden conduct. "Void for vagueness" simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which a defendant is charged. The United States Court of Appeals for the

Armed Forces has found such notice in the Manual for Courts-Martial, federal law, state law, military case law, military custom and usage, and military regulations.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13[] **Judicial Review, Courts of Criminal Appeals**

The United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") reviews the findings of a court-martial for both legal and factual sufficiency de novo. When reviewing for legal sufficiency, the NMCCA asks whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. In evaluating factual sufficiency, the NMCCA determines whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, it is convinced of an appellant's guilt beyond a reasonable doubt.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN14[] **Plain Error, Definition of Plain Error**

Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error. Mil. R. Evid. 103(d), Manual Courts-Martial (2016). A timely and specific objection is required so that the court is notified of a possible error and has an opportunity to correct the error and obviate the need for appeal. To show plain error, an appellant has the burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.

Counsel: For Appellant: Lieutenant Commander William L. Geraty, JAGC, USN.

For Appellee: Lieutenant Commander Jeremy R. Brooks, JAGC, USN; Lieutenant Commander Justin C. Henderson, JAGC, USN.

Judges: Before HUTCHISON, PRICE, and FULTON, Appellate Military Judges. Senior Judge HUTCHISON and Judge FULTON concur.

Opinion by: PRICE

Opinion

PRICE, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of violation of a lawful general order, three specifications of sexual assault, and one specification of abusive sexual contact, in violation of Articles 92 and 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892 and 920.[1] The members sentenced the appellant to five years' confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. **[*2]**

The appellant raises seven assignments of error (AOEs): (1) the government violated his due process

[1] Following announcement of the findings, the military judge ruled specifications 2-4 of Charge II constituted an unreasonable multiplication of charges and merged those specifications for findings and sentencing. Record at 548-50.

right to notice when it charged him with sexual assault under a bodily harm theory, but convicted him under an incapable of consenting due to impairment by alcohol theory; (2) the term *incompetent* as applied at trial was unconstitutionally vague; (3) the military judge abused his discretion by admitting evidence of the alleged victim's alcohol consumption; (4) the military judge abused his discretion by instructing the members on the alleged victim's competence and capacity to consent, after ruling that competence and capacity were not at issue, denying the appellant a fair trial; (5) the military judge erred by declining to provide a defense-requested instruction addressing the alleged victim's capacity to consent and the relevance of her intoxication; (6) the military judge improperly instructed the members on the alleged victim's competence and capacity to consent; and (7) the evidence is legally and factually insufficient to prove any violation of Article 120, UCMJ.

Having carefully considered the record of trial, the parties' submissions, and oral argument, we conclude the findings **[*3]** and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights.[2] Arts. 59(a) and 66(c), UCMJ.

I. Background

RMR, a civilian, was staying with a friend, Mrs. U, and her husband LCpl U, near Camp Pendleton, California. When RMR found herself locked out of the Us' apartment she contacted the appellant, whom she knew through social media but had never met in person. The appellant picked up RMR and drove her onboard Camp Pendleton where they spent several hours together, first talking in his barracks room and later socializing with a group of Marines. The appellant asked RMR to spend the night with him, but she declined.

At approximately 1800, the appellant drove RMR to the Us' apartment and left to meet some friends. Over the next several hours, RMR and Mrs. U consumed half a bottle of vodka, and RMR also drank one beer. Between 2016 and 2335 the appellant and RMR exchanged over 100 text messages. During the text conversation RMR agreed to spend the night with the appellant in his barracks room and said she was "[t]rying to get somewhat drunk but [kept] losing [her] drunk vibe."[3] After consuming the vodka and beer, RMR exhibited signs **[*4]** of alcohol impairment and vomited in the Us' bathroom.

While the appellant was enroute to the Us' apartment, Mrs. U sent a text to the appellant telling him that RMR was drunk and impatiently awaiting his arrival. LCpl and Mrs. U told RMR it was a bad idea for her to leave the apartment, but RMR insisted that she was fine and that she wanted to go with the appellant. LCpl U testified that RMR decided on her own to leave with the appellant. When the appellant arrived at the Us' apartment shortly after midnight, Mrs. U helped RMR walk to his car, and LCpl U informed the appellant that RMR was pretty drunk.

The appellant drove RMR to his barracks, stopping several times along the way so she could vomit or spit. Due to her physical state, the appellant carried RMR from his car to his barracks room. RMR felt sick and went into the appellant's bathroom and laid on the floor and toilet. The appellant told RMR, "we're dudes—we pee everywhere[,]" and she responded that she did not care because she needed to throw up.[4] RMR then vomited in the appellant's toilet. The appellant told RMR she could not lie in his bed smelling like "throw-up," and encouraged her to take a shower.[5]

RMR testified that **[*5]** she was an inexperienced drinker and had limited recall of events after drinking at the Us' apartment. RMR's inability to remember the evening's events was consistent with alcohol-induced blackout as described by expert witnesses. She did not recall the content of many of the texts she exchanged with the appellant including her agreement to stay in his room or coordinating her pick-up from the Us' apartment because of her self-described intoxication. She also did not recall the circumstances surrounding her departure from the Us' apartment or how she got to the appellant's barracks room. She remembered vomiting into the appellant's toilet and recalled him saying "that [her] friend told him to shower me," which caused her to think something "wasn't right" because she had showered a few hours earlier.[6]

---

[2] We heard oral argument in this case on 31 October 2017 at the Georgetown University Law Center as part of our Outreach program.

[3] Prosecution Exhibit (PE) 4 at 9.

[4] PE 12.

[5] *Id.*

[6] Record at 194.

RMR also remembered being in the appellant's shower, seeing her feet while "bent over," with the appellant behind her "having sex with [her]."[7] She testified she experienced difficulty moving and speaking but nudged or elbowed the appellant several times in an effort to get him to stop, and then told him "no."[8] She also recalled being "laid down on [her] side," and feeling the appellant's **[*6]** fingers and then his penis inside her vagina.[9] She testified that she "tried to get him to stop . . . with [her] arm again, tried to nudge, and then . . . after making a couple noises, like 'Uh-uh' . . . implying no, [she] finally said, 'No.'"[10] She did not recall if he stopped after she said no but assumed he did.

While driving RMR back to the Us' apartment the next morning, the appellant said he wished he had "made better decisions that night."[11] RMR told Mrs. U that she had been sexually assaulted and reported the alleged offenses to the Naval Criminal Investigative Service (NCIS).

In cooperation with NCIS special agents, RMR engaged in a text-message conversation with the appellant. The appellant expressed regret throughout the conversation, texting, "I'm so sorry of [sic] what happened that night," and "I'm sorry for having sex with you."[12] Later, in a phone conversation recorded by NCIS, the appellant again expressed regret to RMR, described how intoxicated she was, and admitted he had sex with her in the shower and on the bed. He also informed RMR he had performed oral sex on her, wore a condom only during sexual intercourse in the shower, and that he ejaculated while not wearing **[*7]** a condom. RMR had not recalled or reported the oral sex and did not know if the appellant had worn a condom or ejaculated.

The appellant was arraigned on eight sexual offenses, which essentially alleged the same four acts of sexual misconduct under two different theories of liability—incapability to consent due to impairment by alcohol and bodily harm. He was charged with three specifications of sexual assault in violation of Article 120(b)(3)(A) (penetration of RMR's vulva on three separate occasions when she was incapable of consenting due to impairment by alcohol), three specifications of sexual assault in violation of Article 120(b)(1)(B), UCMJ (penetration of RMR's vulva on three separate occasions by causing bodily harm), and two specifications of abusive sexual contact in violation of Article 120(d) (by placing his mouth on her vulva when she was incapable of consenting due to impairment by alcohol and by placing his mouth on her vulva, by causing bodily harm).[13]

Before the appellant entered pleas, the government withdrew and dismissed the four incapacity specifications. At an ensuing Article 39(a), UCMJ, hearing, the military judge questioned the trial counsel (TC) about the relevance **[*8]** of evidence of RMR's alcohol consumption. The TC responded that RMR's "level of intoxication is relevant to the matter of consent; not her capacity to consent, but whether or not she, in fact, did consent" to the three incidences of penetration.[14] With respect to the aggravated sexual contact offense, RMR had no independent recollection of the appellant placing his mouth on her vulva. Thus the TC asserted that there was "potential to argue that [RMR] did not have capacity [to consent] and she was not competent for that sexual contact."[15]

The trial defense counsel (TDC) argued that RMR's actions demonstrated that she had the capacity to consent since she expressed a lack of consent through physical actions and by verbally saying "No."[16] He then expressed concern that evidence of RMR's lack of memory "opens the door to capacity now becoming an argument" and that such an argument might mislead the members or cause them to conclude that RMR did not "have the capacity to consent."[17] The TDC then argued that the government should be precluded from arguing competence and capacity.

Based on the TDC's concerns, the military judge substantially limited the TC's ability to argue that RMR did not have the **[*9]** capacity to consent. The military judge acknowledged that RMR's alcohol use was

---

[7] *Id.*

[8] *Id.* at 195-97.

[9] *Id.* at 198.

[10] *Id.* at 199-200.

[11] *Id.* at 203.

[12] PE 3.

[13] Charge Sheet.

[14] Record at 36.

[15] *Id.* at 36-37.

[16] *Id.* at 37-38.

[17] *Id.* at 38.

relevant to the issue of consent. But he reasoned that since the government would seek to prove that the appellant committed bodily harm in order to sexually assault RMR, and because the government had dismissed the specifications alleging that RMR was incapable of consenting due to alcohol, he "d[id] not find that competence and capacity [wa]s in issue" based upon the parties' proffers and the exhibits he had examined.

The military judge directed the government to "limit [its] argument to whether or not this was by bodily harm" and precluded argument "that [RMR] was not competent in this case."[18] In response to a question from the TC, the military judge clarified that they were not to argue RMR lacked capacity but could argue all the surrounding circumstances.

The defense theory at trial was that RMR was competent to engage in sexual activity and that she either consented to the alleged sexual activity or, as the result of a reasonable mistake of fact, the appellant believed she consented to the sexual activity.

Additional facts necessary to resolution of the AOEs are included below.

II. Discussion

A. Due Process [*10] and notice

The appellant argues that his Due Process rights were violated when he was "convict[ed] of an offense that was different from the charged offense."[19]

1. Law

HN1[] The Due Process Clause of the Fifth Amendment "requires 'fair notice' that an act is forbidden and subject to criminal sanction" before a person can be prosecuted for committing that act. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)). "The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (internal quotation marks and citation omitted)). "'[T]he Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged.'" *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)) (alteration in original).

2. Analysis

The appellant argues he was charged with sexual assault and abusive sexual contact alleging bodily harm but prosecuted and convicted of those offenses under a different legal theory--that the putative victim was incapable of consenting due to impairment by alcohol. He asserts this violated his due process right to know what offense and legal theory of liability he had to defend against. We disagree and conclude the appellant was convicted of the offenses of which he was charged.[20]

First, **[*11]** the appellant was informed of the sexual offenses charged and the applicable legal theory—bodily harm—and then convicted of those offenses. *Tunstall*, 72 M.J. at 192.

He was charged with three specifications of violating Article 120(b)(1)(B), UCMJ—sexual assault by causing *bodily harm*—and one specification of violating Article 120(d), UCMJ—abusive sexual contact by causing *bodily harm*.

The sexual assault specifications alleged he penetrated RMR's vulva on two occasions with his penis and once with his finger "without her consent, by causing bodily harm to her, to wit: an offensive touching however slight."[21] The abusive sexual contact specification

[18] *Id.* at 38-39.

[19] Appellant's Brief of 31 Mar 2017 at 17.

[20] *See generally United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539 at *19-23 (N-M.Ct.Crim.App. 10 Aug 2017) (we found no merit in the appellant's argument that he was not on notice of what "he was required to defend against" where the government charged sexual assault by causing bodily harm and abusive sexual contact by causing bodily harm in violation of Articles 120(b)(1)(B) and 120(d), UCMJ), *rev. denied*, 77 M.J. 266, 2018 CAAF LEXIS 129 (C.A.A.F. Feb. 13, 2018).

[21] Charge Sheet. Article 120(b)(1)(B), UCMJ, states "[a]ny person . . .who . . . (1) commits a sexual act upon another person by . . . (B) causing bodily harm to that other person . . .

alleged he "plac[ed] his mouth on [RMR's] vulva, without her consent, by causing bodily harm to her, to wit: an offensive touching however slight."[22]

Bodily harm is a defined term in the relevant punitive article, and it put the appellant on notice that the government would have to prove lack of consent;[23] that consent "means a freely given agreement to the conduct at issue by a competent person[;]"[24] and that "*[a]ll the surrounding circumstances* are to be considered in determining whether a person gave consent[.]"[25] The specifications, therefore, provided the appellant notice **[*12]** that RMR's consumption of alcohol and level of intoxication were potentially relevant as "surrounding circumstances" in the court's determination of whether RMR consented to the sexual conduct in issue. In fact, prior to commencement of trial on the merits, the military judge explicitly (and correctly) found that "evidence that [RMR] was drinking is part of those surrounding circumstances and should be allowed in on the issue of consent."[26]

HN4[↑] The statutory definition of consent as "a freely given agreement to the conduct at issue by a competent person" provides notice that when the "bodily harm" alleged is the sexual act or contact, as in this case, the victim's "competence" is at issue.[27] The plain language of the statute provided the appellant fair notice of the offense and legal theory under which he was convicted. *See United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first cannon [of statutory interpretation] is also the last: judicial inquiry is complete.") (citation and internal quotation marks omitted).

Second, the appellant's argument that he was prosecuted under **[*13]** a legal theory that RMR was incapable of consenting due to impairment by alcohol is unsupported by the record.

The military judge precluded the TC from arguing incapacity, and the TC complied throughout the trial. The TC mentioned a "competent person" only once in his closing argument when he paraphrased the military judge's instruction and then immediately detailed the factual bases for determining that RMR did not consent to the sexual conduct. Rather than focus on RMR's ability—or lack of ability—to consent, he highlighted RMR's physical and verbal resistance: "We have physical resistance. We have a verbal, No, in this case. This is important."[28] Consistent with the military judge's limitation, the TC also discussed the circumstances surrounding RMR's refusal to consent. RMR was intoxicated, sick, and had difficulty moving and speaking. But he did not argue that RMR was incapable of consenting due to alcohol intoxication. He closed his argument with "There was never that agreement. She told him, No."[29]

The only explicit reference to RMR's capacity, in argument, came from the TDC. In his opening the TDC stated: "And before I sit down, I want to emphasize this is not about capacity. As **[*14]** a matter of law and fact, the complaining witness was capable of consenting. [The appellant] had a reasonable mistake based on all of the evidence that the complaining witness consented to sex."[30]

In closing, the TDC argued:

> Make no mistake members, [RMR is] not too drunk. That is not [an] issue before you. It's not — [an] issue. . . . it is not an element of the charges. . . .

---

is guilty of sexual assault[.]"

[22] Charge Sheet. Article 120(d), UCMJ, states "[a]ny person . . .who commits or causes sexual contact upon another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act is guilty of abusive sexual contact[.]"

[23] ***HN2***[↑] Bodily harm means "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Art. 120(g)(3), UCMJ.

[24] ***HN3***[↑] Art. 120(g)(8)(A), UCMJ. Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

[25] Art. 120(g)(8)(C), UCMJ (emphasis added).

[26] Record at 38.

[27] Art. 120(g)(8)(A), UCMJ.

[28] Record at 511.

[29] *Id.* at 512.

[30] *Id.* at 175-76.

> Don't be distracted by this red herring for one minute to think that the complaining witness lacked the capacity to participate in a sexual encounter that took place that night.[31]

The appellant contends the limited evidence almost certainly means his abusive sexual contact conviction was based upon an incapacity theory and that there is a "substantial possibility" he was also convicted of the three sexual assaults under this same incapacity theory.[32] We disagree.

The limited evidence of which the appellant speaks is his admission to performing oral sex on RMR. His spontaneous, recorded admission was both credible and direct evidence this sexual contact occurred. In response to RMR's questions regarding what happened that night, the appellant admitted he did some "pretty crazy things like [placing his mouth on her vulva]." **[*15]** [33] After RMR expressed shock and disgust the appellant commented "you weren't the one doing it."[34] Significantly, the appellant did not claim or even imply RMR consented to the oral sex. Having listened to the recording of this exchange ourselves, we believe it likely that this evidence resonated with the members, particularly in light of the appellant's tone and self-absorbed focus on his thoughts, physical and sexual actions driven by his sexual desires, and the absence of any mention of RMR's consent or active participation in the sexual conduct. The effect of this evidence was undoubtedly amplified by the appellant's later remorse.

We likewise find the appellant's argument that the abusive sexual contact conviction raised a substantial possibility that he was also convicted of the three sexual assaults under this same incapacity theory to be contrary to the weight of the evidence.

Third, we are unpersuaded by the appellant's assertion that "when viewed together with the other enumerated theories of liability" within Article 120, UCMJ, "the bodily harm theory of liability is more simply understood as applying to situations where a lack of consent can be shown by words, conduct, or circumstances **[*16]** not amounting to incompetence."[35] He argues the bodily harm theory of criminal liability "could be construed to encompass all theories of sexual assault since all types of sexual assault involve a lack of consent, i.e., a 'bodily harm'" and argued his more narrowed interpretation "produces the greatest harmony and . . . the least inconsistency."[36] The appellant's premise is flawed. ***HN5***[] "Lack of consent" is not an element in all sexual assaults under Article 120(b), UCMJ.[37]

Fourth, "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017). The appellant's trial strategy focused on RMR's pre-sexual encounter behavior, memory gaps and discrepancies attributable to alcohol intoxication, the potential for her unintentional memory creation, and, alternatively, the appellant's alleged mistake of fact as to consent. Like the appellant in *Oliver*, the appellant cannot argue he was not on notice that the victim's competence was at issue in the case. *Id.* ("Whether abusive sexual contact or wrongful sexual contact, Appellant knew which **[*17]** part of the body he was alleged to have wrongfully touched [as] his theory throughout the court-martial was [consent]"); *see also Tunstall*, 72 M.J. at 197 (no prejudice where accused actually defended against both theories in the terminal element of Article 134, UCMJ).

The TDC was aware of the distinction among lack of consent, competence, and capacity. That he convinced the military judge to preclude the government from arguing capacity and competency with respect to the abusive sexual contact offense—an offense RMR could not even recall—further erodes his claim that he lacked

---

[31] *Id.* at 516.

[32] Appellant's Brief at 18-19.

[33] PE 12.

[34] *Id.*

[35] Appellant's Brief at 22.

[36] *Id.*

[37] *See United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016) ("[l]ack of verbal or physical resistance or submission resulting from . . . placing another person in fear [necessary to prove violation of Article 120(b)(1)(A)] does not constitute consent. . . . the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove [the victim] *did not, in fact, consent*") (alteration in original) (citation, internal quotation marks, and footnote omitted). *See also Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9, ¶ 3-45-14 at 577, Note 9 (10 Sep 2014) ("Evidence of consent. Generally, the elements of an Article 120(b) offense require the accused to have committed sexual conduct "by" a certain method . . . . Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element.").

notice. The TDC disclosed his awareness of these key distinctions in this colloquy while discussing instructions:

> MJ: So you knew the whole time that I was going to be reading the law and the definition of consent, that only a competent person could give consent.
> DC: We would agree, Your Honor. I don't know how that changes our detrimental reliance on the government's position at the beginning of the case though.[38]

The TDC was aware that the government was required to prove lack of consent beyond a reasonable doubt and that "all the surrounding circumstances [we]re to be considered in determining whether [RMR] gave consent[.]" Art. 120(g)(8)(C), **[*18]** UCMJ. He was also aware that RMR's alcohol consumption was a key surrounding circumstance and recognized that her competence was implicated by the relevant statutory definitions.

We are satisfied that the appellant received the requisite due-process notice of the elements he was required to defend against at trial. The specifications alleged nonconsensual sexual acts—insertion of his penis or fingers into RMR's vulva—and nonconsensual sexual contact—placing his mouth on RMR's vulva. The appellant received "fair notice" and knew both the offense and under what legal theory he was tried and convicted. *Tunstall*, 72 M.J. at 192.

B. Instructions

The appellant asserts three separate instructional errors by the military judge. First, the military judge erred by declining to provide a defense-requested instruction addressing RMR's capacity to consent and the relevance of her intoxication. Second, the military judge abused his discretion by instructing the members on RMR's competence and capacity to consent, after ruling that competence and capacity were not an issue, denying the appellant a fair trial. Third, the military judge improperly instructed the members on RMR's competence and capacity to consent. We disagree. **[*19]**

1. Defense-requested instruction

The appellant argues that the novel instruction his counsel requested at trial was correct and necessary, and the military judge erred by refusing to give it.

a. Law

HN6[] "While counsel may request specific instructions . . . the [military] judge has substantial discretionary power in deciding on the instructions to give." *United States v. Carruthers*, 64 M.J. 340, 345 (C.A.A.F. 2007) (quoting *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (additional citations omitted)). "[A] military judge's denial of a requested instruction is reviewed for abuse of discretion." *Id.* at 345-46 (citations omitted). "'We apply a three-pronged test to determine whether the failure to give a requested instruction is error: (1) [the requested instruction] is correct; (2) it is not substantially covered in the main [instruction]; and (3) it is on such a vital point in the case that the failure to give it deprived [the accused] of a defense or seriously impaired its effective presentation.'" *Id.* at 346 (quoting *United States v. Gibson*, 58 M.J. 1, 7 (C.A.A.F. 2003) (additional citation and internal quotation marks omitted) (alterations in original)). "All three prongs must be satisfied for there to be error." *United States v. Bailey*, 77 M.J. 11, 14 (C.A.A.F. 2017) (citation omitted).

b. Analysis

The TDC requested the military judge instruct the members that:

> [T]he question of [RMR's] capacity to consent is not before you. **[*20]** Put another way the government concedes that [RMR] had the capacity to consent despite her possible intoxication.
> Persons who have consumed an intoxicant, such as alcohol, often exercise free will and make conscious decisions for which they are legally responsible. This is true even if the person does not later recall making the decision or if they later regret the decision. . . .
> Evidence of intoxication in this case has been admitted merely on the question of whether the complainant consented, or the accused had a reasonable belief that she consented, and for its impact upon her memory. . . .[39]

The requested instruction is not a correct statement of law or fact and thus fails the first prong of the *Carruthers* test. Specifically, the language that "[RMR's] capacity to consent is not before you . . . [and] . . . the government concedes that [RMR] had the capacity to consent

[38] Record at 413.

[39] Appellate Exhibit (AE) XX.

despite her possible intoxication" does not comport with the relevant statutory language or the facts of this case. Our conclusion is grounded in the definition of "bodily harm," which requires proof of lack of consent, and the definition of "consent," which "means a freely given agreement to the conduct at issue by **[*21]** a competent person." These two statutory definitions implicate the putative victim's "competence" in the sexual assault and abusive sexual contact specifications alleged here.[40] The appellant's assertion that the government conceded RMR's capacity to consent is also inaccurate. Before voir dire, the TC asserted his belief that capacity was relevant to the aggravated sexual contact offense, "due to [RMR's] lack of memory, there is the potential to argue that she did not have capacity and she was not competent for that sexual contact."[41] Indeed, the military judge cited the absence of governmental concession as a reason for not providing the defense-requested instruction—"given that the government is not conceding on the issue of competence within the definition of consent, I am not going to give your instruction."[42]

We conclude the remainder of the defense-requested instruction was substantially covered in the military judge's instructions, and that his declination to give any portion of the proposed instruction did not deprive or seriously impair any defense. *Carruthers*, 64 M.J. at 346. The appellant has therefore failed to satisfy any of the three prongs of the *Carruthers* test. *Bailey*, 77 M.J. at 14.

Accordingly, we conclude the military **[*22]** judge was well within his discretion when he declined to give the defense requested instruction.

2. Competence and capacity-to-consent instructions

The appellant argues the military judge abused his discretion by instructing the members on RMR's competence and capacity to consent, after ruling that competence and capacity were not at issue, and that the instructions provided by the military judge on capacity and consent were inaccurate and incomplete. We disagree.

a. Law

HN7[] "Whether a panel was properly instructed is a question of law which we review *de novo." United States v. Mott*, 72 M.J. 319, 325 (C.A.A.F. 2013) (citations and internal quotation marks omitted). "The military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citation omitted). In this regard, the military judge bears the primary responsibility for ensuring the members are properly instructed on the elements of the offenses raised by the evidence, "as well as potential defenses and other questions of law." *Id.* (citations and internal quotation marks omitted).

HN8[] Where there is no objection to an instruction at trial, we review for plain error. *United States v. Robinson*, 77 M.J. 294, 2018 CAAF LEXIS 184 at *12-13, (C.A.A.F. Mar. 26, 2018). "[The appellant] bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; **[*23]** and (3) the error materially prejudiced a substantial right." *Id.* at *13 (citing *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017). "To establish plain error, 'all three prongs must be satisfied.'" *Id.* (quoting *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (additional citation omitted). "The third prong is satisfied if the appellant shows 'a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different.'" *Id.* (quoting *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017)).

b. Analysis

The appellant argues that he detrimentally relied on the government's concession and the military judge's ruling that competence and capacity were not at issue. He contends the military judge's decision to instruct the members on RMR's competence and capacity to consent violated his due-process right to a fair trial. He also asserts that the instructions provided by the military judge were inaccurate and incomplete because the instructions failed to identify the condition that could have rendered RMR incompetent to consent and also failed to provide the scienter[43] necessary to discourage arbitrary or discriminatory enforcement. We disagree.

First, the military judge did not finally rule, nor did the government concede, that competence and capacity were not at issue.

---

[40] Charge sheet.

[41] Record at 37.

[42] *Id.* at 418.

[43] "The terms 'scienter' and 'mens rea' are often used interchangeably." *United States v. Haverty*, 76 M.J. 199, 204, n.7 (C.A.A.F. 2017).

The military judge's ruling was limited to precluding **[*24]** the government from arguing competence and capacity and not a final ruling that competence and capacity were not at issue in this case.[44] We understand the military judge's ruling in the context in which it was made—following the government's dismissal of the incapacity offenses and prior to trial on the merits and based on proffers by the parties, review of available documents, and abbreviated argument. The ruling cannot be fairly taken to be a legally dubious alteration of the remaining offenses, all of which implicated the "freely given agreement to the conduct at issue by a competent person." Art. 120(g)(8)(A), UCMJ. If, as the appellant implies without citation to authority, this preliminary order was not subject to modification by the military judge, it would be contrary to the "law of the case doctrine"[45] as well as the military judge's "primary responsibility for ensuring the members are properly instructed" on matters *raised by the evidence. Ober*, 66 M.J. at 405 (emphasis added) (citation and internal quotation marks omitted). The appellant's argument also ignores a military judge's explicit authority to change "a ruling made by that or another military judge in the case except a previously granted **[*25]** motion for a finding of not guilty, at any time during the trial." RULE FOR COURTS-MARTIAL (R.C.M.) 801(e)(1)(B), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2012 ed.). To the extent the TDC thought that he had convinced the military judge to remove part of the statutory definition of *consent* from the trial, he cannot claim unfair surprise at the military judge's decision to ultimately adopt a correct view of the law—one that the TDC seemed to share—particularly when the TDC was responsible, in part, for introduction of evidence that placed RMR's competence in issue.[46]

Nor did the government concede that competence and capacity were not at issue. To the contrary, the TC argued capacity and consent were potentially relevant to the abusive sexual contact specification since RMR had no independent recollection of the appellant performing oral sex on her. And the military judge acknowledged the government had not conceded this issue when he declined to provide the defense-requested instruction discussed above.

Second, the military judge's instructions on capacity and consent were accurate and consistent with the statutory definition of consent,[47] and the definition of key terms in *United States v. Pease*.[48]

After the military judge **[*26]** declined to give the defense-requested instruction that RMR's capacity to consent was not an issue for the members to decide, the TDC acknowledged that he wanted the military

---

[44] Record at 36-39.

[45] *United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998) (***HN9***[↑] In military jurisprudence the "law of the case [doctrine] only applies to final rulings and does not restrict a military judge's authority or discretion to reconsider and correct an earlier trial ruling.") (citation omitted).

[46] Record at 366-67, 381, 442; AE XIX.

[47] Record at 496-97 ("[T]he government also has the burden to prove beyond a reasonable doubt that [RMR] did not consent to the physical acts. 'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. . . . Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or cease [sic] to resist only because of another person's actions. A sleeping, unconscious, or incompetent person cannot consent to a sexual act. The government has a burden to prove beyond a reasonable doubt that the consent to the physical acts did not exist. . . . Consent means a freely given agreement to the conduct at issue by a competent person. A competent person is simply a person who possesses the physical and mental ability to consent. An incompetent person is a person who lacks either the mental or physical ability to consent. To be able to freely give an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

A person is incapable of consenting when she lacks the cognitive ability to appreciate the sexual conduct or the physical or mental ability to make and communicate a decision about whether she agrees to the conduct."). *See also* Art. 120(g)(8)(A)-(C).

[48] 75 M.J. 180, 185 (C.A.A.F. 2016) (approving definitions of three Article 120, UCMJ, terms including: (1) "competent person as a person who possesses the physical and mental ability to consent;" (2) "incompetent person as one who lacks either the mental or physical ability to consent due to a cause enumerated in the statute," and (3) "incapable of consenting as lack[ing] the cognitive ability to appreciate the sexual conduct in question or [lacking] the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct") (citations and internal quotation marks omitted).

judge to provide the "*Pease* definitions."[49] Because the TDC did not object to the draft instructions provided for his review by the military judge, or to the instructions ultimately given to the members, we review for plain error.[50]

HN10[] The statutory definition of consent is "a freely given agreement to the conduct at issue by a *competent* person."[51] Therefore, "[a] full definition of consent includes [the] definition of competence to consent." *United States v. Long*, 73 M.J. 541, 545 (A. Ct. Crim. App. 2014) (citations omitted).[52] As a result, we find no error with the military judge's decision to instruct the members regarding what constitutes a "competent person" for purposes of defining consent, nor do we find error in the instructions provided.

Significantly, the military judge's instructions neither transformed the charged specifications into Article 120(b)(3)(A), UCMJ, specifications nor alleviated the government's affirmative responsibility to prove beyond a reasonable doubt that RMR did not, in fact, consent. The military judge instructed the members that the government had the **[*27]** burden to prove beyond a reasonable doubt that RMR did not consent at least three times. ***HN11***[] "Absent evidence to the contrary, [we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citations omitted).

Third, the appellant failed to establish that the instructions provided by the military judge were inaccurate, incomplete or constituted plain error.

Even if we were to assume without deciding that any instruction should have identified the condition that rendered RMR incompetent to consent and should also have required that the appellant "knew or reasonably should have known" of that condition, and that the military judge erred in failing to so instruct, the appellant has not established plain error. Specifically, the appellant has not met his burden of showing "a reasonable probability that, but for the [errors claimed], the outcome of the proceeding would have been different." *Lopez*, 76 M.J. at 154 (citation and internal quotation marks omitted).

It is uncontroverted that prior to engaging in the charged sexual misconduct the appellant: knew RMR had consumed enough alcohol to render her very drunk; knew she was sick and vomited more than once due to the alcohol she consumed; and knew she was **[*28]** so physically impaired by the alcohol she consumed that she had to be carried to his barrack's room. It is also uncontroverted that the appellant performed oral sex on RMR and that RMR had no independent recollection of that sexual contact. Therefore, if the military judge had instructed the panel members on the presumed appropriate listed condition and mens rea, the panel would have found that RMR was severely impaired by alcohol, and that the appellant knew of this impairment prior to engaging in the charged sexual conduct.

The appellant failed to demonstrate "a reasonable probability that, but for [the the military judge's failure to instruct on the specific condition that caused RMR's incompetence and the mens rea requirement], the outcome of the proceeding would have been different." *Id.* Because the appellant failed to establish the required prejudice, we conclude that the military judge did not plainly err in instructing the members.

We find no error, and certainly no plain error, in the military judge's instructions or in his decision to use the *Pease* instruction to further explain to the members what constitutes a competent person.

C. Vagueness

The appellant argues, as applied **[*29]** in this case, the term *incompetent* was unconstitutionally vague because it neither provided him notice of the prohibited conduct nor defined a standard of guilt that avoids arbitrary enforcement.

The government avers that the TDC waived any objection to the definition of *incompetent* when he requested and received the *Pease* instruction. The government argues that even absent waiver the appellant is entitled to no relief as the CAAF has endorsed the definition in *Pease*, and the appellant identified no binding authority in support of the proposition that an ordinary person cannot understand that definition. We agree the appellant is entitled to no relief.

---

[49] Record at 418-19.

[50] *Id.* at 491.

[51] Art. 120(g)(8)(A), UCMJ.

[52] In *Long*, the military judged instructed the members that "[c]onsent means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person." 73 M.J. at 543.

1. Law

HN12[] "Due process requires fair notice that an act is forbidden and subject to criminal sanction." *Vaughan*, 58 M.J. at 31(citation and internal quotation marks omitted). "It also requires fair notice as to the standard applicable to the forbidden conduct." *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 755, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974)). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker*, 417 U.S. at 757 (citation and internal quotation marks omitted). "In determining the sufficiency of the notice a statute must of necessity **[*30]** be examined in the light of the conduct with which a defendant is charged." *Id.* (citation and internal quotation marks omitted). The CAAF has found such notice in the Manual for Courts-Martial, federal law, state law, military case law, military custom and usage, and military regulations. *Vaughan*, 58 M.J. at 31.

2. Analysis

The appellant avers that the term *incompetent* is unconstitutionally vague because it neither provided him notice of the prohibited conduct nor defined a standard of guilt that avoids arbitrary enforcement. He argues, even assuming the Government could prosecute bodily harm on a theory of incompetence due to intoxication, that Article 120(b)(1)(B) fails to delineate the applicable standard for whether a person is competent to consent.

Bodily harm in this case is a nonconsensual sexual act or contact, where consent means a freely given agreement to the conduct at issue by a competent person. At trial, the military judge instructed on the meaning of both an "incompetent person" and a "competent person" in accordance with *Pease*. Between the two instructions, the military judge provided the members a reasonably understandable standard for determining whether a person is competent to consent **[*31]** to sexual conduct.

We find the appellant's arguments that the term *incompetent* is void for vagueness unconvincing. The appellant was on reasonable notice that his conduct was subject to criminal sanction. This issue is without merit.

D. Legal and factual sufficiency

The appellant avers the evidence is both legally and factually insufficient to prove any of the charged sexual offenses or, alternatively, that the evidence is factually insufficient to overcome his reasonable mistake of fact as to consent. Specifically, he alleges there is no evidence that RMR communicated, through words or conduct, a lack of consent prior to the sexual activity, nor are there words, conduct, or circumstances sufficient to show the appellant had reason to believe that RMR was not consenting to the sexual activity. We disagree.

HN13[] We review for both legal and factual sufficiency *de novo. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)); *see also* Art. 66(c), UCMJ. When reviewing for legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). In evaluating factual sufficiency, we determine whether, **[*32]** after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Id.* at 325.

The appellant was convicted of sexually assaulting RMR by penetrating her vulva with his penis twice, once in the shower and moments later on his bed, and penetrating her vulva with his finger on his bed. He was also convicted of abusive sexual contact for placing his mouth on her vulva. A conviction for each sexual offense required proof beyond a reasonable doubt of the alleged sexual act or contact and that the act or contact was without RMR's consent.

1. Evidence of the sexual acts and sexual contact

The evidence that the appellant committed the alleged sexual acts and sexual contact is overwhelming and undisputed.

RMR testified the appellant penetrated her vulva with his penis in the shower and then penetrated her vulva with his finger and penis on his bed. Her testimony was corroborated, in part, by the appellant and by forensic evidence. The appellant admitted penetrating RMR's vulva with his penis in the shower and on his bed, and performing oral sex on RMR during the NCIS-recorded phone **[*33]** conversation with RMR and apologized for

having sex with RMR during that call and on other occasions. In addition, his DNA, including spermatozoa found on swabs taken from RMR's vagina, and his semen DNA, found in her underwear, corroborated penile penetration.

The appellant is the sole source of evidence that he placed his mouth on RMR's vulva. During the recorded phone conversation he informed RMR that he "did some pretty crazy things" like performing oral sex on her, commenting that it was his "first time."[53] We are convinced beyond a reasonable doubt that the appellant committed the charged sexual acts and sexual contact.

2. Evidence of bodily harm and lack of consent

We find beyond a reasonable doubt that each sexual act and contact constituted "bodily harm" and that RMR did not consent to the sexual conduct at issue.

First, RMR's testimony that she expressed her lack of consent through words and conduct is credible, notwithstanding her limited memory. Her testimony that she remembered being bent over in the shower with the appellant behind her, penetrating her vagina with his penis was consistent with his admission of engaging in intercourse in the shower. Her recollections of experiencing **[*34]** difficulty moving and speaking and having to concentrate to move her arm and speak were consistent with her level of intoxication. We find her testimony that she tried to nudge or elbow the appellant, then stood up, turned around, and said "No," compelling and consistent with the type of traumatic memories often recalled in such circumstances, according to expert testimony. Likewise, we find her testimony about being "laid down on [her] side," feeling the appellant's fingers and then his penis inside her vagina, and trying to get him to stop first using her arms and then saying 'No,'" consistent with her level of intoxication and and also consistent with the type of traumatic memories often recalled in such circumstances.[54]

Second, we find RMR's testimony that she did not consent to the sexual acts or contact credible and corroborated, in part, by the appellant's statements.

Notably, in three conversations with RMR after the charged misconduct, the appellant made no claim that she consented to the sexual conduct. Instead, he admitted engaging in the charged sexual acts, evaded or provided unconvincing answers to RMR's probing questions, and repeatedly apologized.

While driving RMR back **[*35]** to the Us' apartment the morning after the charged misconduct and after RMR acknowledged that she was "mad" at the appellant, he said, "he just wishes he made better decisions that night."[55] In a later text conversation, the appellant neither disputed RMR's claim that he knew she was not interested in sexual activity nor claimed that she consented. When RMR asked how he could justify undressing her and putting her in the shower without her consent, he unconvincingly replied, "I was drunk I liked you idk (sic) I thought you were thinking the same as me that's why I'm saying I'm sorry . . . Truth you were drunk so was I okay[.]"[56] During that conversation, the appellant said he was sorry at least five times and after additional prompting texted, "I'm sorry for having sex with you."[57]

Several weeks later, the appellant repeated this pattern in the NCIS-recorded phone conversation. He admitted to committing the sexual acts and again apologized to RMR with no claim that she consented. He also provided new insight into what he did and why. When RMR asked why he had sex with her in the shower when she was "super drunk" and smelled of vomit, he answered, "you were cleaning yourself — such a turn **[*36]** on — that's a turn on yeah."[58] In response to RMR's questions regarding what happened that night, the appellant admitted he did some "pretty crazy things like [performing oral sex on her]."[59] RMR had not recalled or reported the oral sex. The recording of this entire exchange is particularly significant evidence.

We find the absence of any assertions or plausible evidence of consent in these last two recorded conversations significant as they followed RMR's representations that she was blacked out due to alcohol intoxication and could not remember details of what happened. We also find the appellant's repeated apologies evidence a consciousness of guilt. *See United States v. Quichocho*, No. 201500297, 2016 CCA LEXIS

[53] PE 12.

[54] Record at 198-200.

[55] *Id.* at 203.

[56] PE 3 at 4-5.

[57] *Id.* at 6.

[58] PE 12.

[59] *Id.*

677, unpublished op. (N-M. Ct. Crim. App. 29 Nov 2016).

3. Mistake of fact as to consent

After careful review of the evidence, we are convinced beyond a reasonable doubt that the appellant did not honestly hold the mistaken belief that RMR consented, and even if he did, any such mistaken belief was not objectively reasonable. *See* R.C.M. 916(j)(1).

In conclusion, we find RMR's testimony to be credible, consistent even through the crucible of extensive cross-examination, and corroborated by other evidence. The appellant's admissions that he committed the **[*37]** two charged acts of penile penetration and oral sex, and his later remorse evidencing his consciousness of guilt weigh heavily in our determination.

Based on the record before us, and considering the evidence in the light most favorable to the government, a reasonable fact finder could have found all the essential elements of the charged offenses beyond a reasonable doubt. *Turner*, 25 M.J. at 324. After weighing all the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt. *Id.* at 325.

E. Erroneous admission of evidence

The appellant avers the military judge abused his discretion by admitting evidence of RMR's consumption of alcohol.

HN14[] "Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error." *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007) (citing MILITARY RULE OF EVIDENCE 103(d), MCM, UNITED STATES (2016 ed.)). "A timely and specific objection is required so that the court is notified of a possible error, and so has an opportunity to correct the error and obviate the need for appeal." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014) (citation and internal quotation marks omitted). The appellant "has the burden of establishing (1) error that is (2) clear or obvious **[*38]** and (3) results in material prejudice to his substantial rights." *Id.* (citing *Brooks*, 64 M.J. at 328).

The appellant did not object to the evidence of RMR's consumption of alcohol. In fact, the TDC acknowledged the relevance of this evidence. The relevance of RMR's consumption of alcohol to each sexual offense alleged is readily manifest in this case. *See* Art. 120(g)(8)(B), UCMJ ("[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent"); *See also United States v. Clifton*, 35 M.J. 79, 81 (C.A.A.F. 1992).

There was no error, much less plain error, in admitting evidence of RMR's consumption of alcohol.

III. Conclusion

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge HUTCHISON and Judge FULTON concur.

End of Document

United States v. Motsenbocker

United States Navy-Marine Corps Court of Criminal Appeals

August 10, 2017, Decided

No. 201600285

Reporter
2017 CCA LEXIS 539 *

UNITED STATES OF AMERICA, Appellee v. SEAN L. MOTSENBOCKER, Operation Specialist Second Class (E-5), U.S. Navy, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Reconsideration granted by, in part, Decision reached on appeal by United States v. Motsenbocker, 2017 CCA LEXIS 651 (N-M.C.C.A., Oct. 17, 2017)

Motion granted by United States v. Motsenbocker, 77 M.J. 135, 2017 CAAF LEXIS 1169 (C.A.A.F., Dec. 18, 2017)

Motion granted by United States v. Motsenbocker, 2018 CAAF LEXIS 1 (C.A.A.F., Jan. 3, 2018)

Review denied by United States v. Motsenbocker, 2018 CAAF LEXIS 129 (C.A.A.F., Feb. 13, 2018)

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Commander Heather D. Partridge, JAGC, USN. Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA. Staff Judge Advocate's Recommendation: Commander Andrew R. House, JAGC, USN.

Core Terms

military, consenting, instructions, incapable, convicted, quotation, comments, marks, closing argument, sexual assault, prosecutorial misconduct, defense counsel, civilian, training, words, mental ability, notice, sexual contact, plain error, rebuttal, trial counsel, communicate, assault, sexual, bed, beyond a reasonable doubt, judge's instruction, improper argument, lack of consent, misconduct

Case Summary

Overview
HOLDINGS: [1]-A military judge did not err during a servicemember's trial on charges alleging that he committed sexual assault and abusive sexual contact on a female servicemember ("victim"), in violation of UCMJ art. 120, 10 U.S.C.S. § 920, by touching the victim without her consent and digitally penetrating her vagina, when he included a definition of a "competent person" in his instructions to assist the panel in evaluating the evidence so it could determine if the victim consented to the sexual contact; [2]-There was no merit to the servicemember's claim that trial counsel engaged in prosecutorial misconduct by making arguments contrary to the military judge's preliminary instruction, calling the servicemember a "liar," bolstering the victim's testimony, mischaracterizing the evidence and inserting his personal opinion during argument, and shifting the burden to the defense.

Outcome

The court affirmed the findings and sentence.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

***HN1*[] Military Offenses, Rape & Sexual Assault**

Unif. Code Mil. Justice art. 120(b)(1)(B), 10 U.S.C.S. § 920(b)(1)(B), states that any person who commits a sexual act upon another person by causing bodily harm to that other person is guilty of sexual assault. Manual Courts-Martial ("MCM") pt. IV, para. 45.a.(b) (2012). "Bodily harm" is defined as any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact. MCM pt. IV, para. 45.a.(g)(3).

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN2*[] Plain Error, Definition of Plain Error**

Whether a court-martial panel was properly instructed is a question of law the United States Navy-Marine Corps Court of Criminal Appeals ("NMCCA") reviews de novo. When there is no objection to an instruction at trial, the NMCCA reviews for plain error. Under plain error analysis, an appellant must demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. Failure to establish any one of the prongs is fatal to a plain error claim. The plain error doctrine is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Courts Martial > Judges

Military & Veterans Law > ... > Trial Procedures > Instructions > Elements of the Offense

Military & Veterans Law > ... > Trial Procedures > Instructions > Special Defenses

***HN3*[] Military Offenses, Rape & Sexual Assault**

Military judges have an independent duty to determine and deliver appropriate instructions. In that regard, a military judge bears the primary responsibility for ensuring the members of a court-martial panel are properly instructed on the elements of offenses raised by the evidence, as well as potential defenses and other questions of law. Indeed, a military judge must tailor instructions in order to address only matters at issue in each trial and provide lucid guideposts to enable the court members to apply the law to the facts. In a case involving a defense theory that the victim consented to sexual acts or contacts, the instructions should be structured so as to clearly distinguish between the Government's requirement to prove the victim did not consent and the potential for reasonable doubt based on evidence that the victim did consent.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

***HN4*[] Military Offenses, Rape & Sexual Assault**

A person incapable of providing consent may still, nonetheless, make or communicate their declination to participate in sexual conduct. In United States v. Pease, the United States Navy-Marine Corps Court of Criminal Appeals' definition of "incapable of consenting" identified three groups of individuals who are incapable of consenting: (1) those who do not possess the mental ability to appreciate the nature of the conduct; (2) those who do not possess the physical ability to make or communicate a decision regarding such conduct; and (3) those who do not possess the mental ability to make or communicate a decision regarding such conduct. Therefore, a person who does not have the mental ability to appreciate the nature of any particular conduct may still be able to offer resistance to whatever bodily

harm the person did appreciate at the time. Similarly, a person that does not possess the physical ability to make or communicate a decision, may nevertheless be able to articulate, in some fashion, a declination to participate in sexual conduct. And, finally, a person who does not possess the mental ability to make or communicate a decision may still manifest a physical unwillingness to engage in the sexual conduct.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Defenses

HN5 **Military Offenses, Rape & Sexual Assault**

The statutory definition of "consent" is "a freely given agreement to the conduct at issue by a competent person." Manual Courts-Martial pt. IV, para. 45.a.(g)(8)(A). Therefore, a full definition of consent includes the definition of competence to consent.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN6 **Military Offenses, Rape & Sexual Assault**

In United States v. Pease, the United States Court of Appeals for the Armed Forces adopted the United States Navy-Marine Corps Court of Criminal Appeals' ("NMCCA's") definition of "competent person" as "a person who possesses the physical and mental ability to consent," and noted that the NMCCA's definition properly incorporates three statutory requirements: (1) the person must be "competent" to consent, Unif. Code Mil. Justice ("UCMJ") art. 120(g)(8)(A), 10 U.S.C.S. § 920(g)(8)(A); (2) the person cannot consent if she is asleep or unconscious, UCMJ art. 120(g)(8)(B), 10 U.S.C.S. § 920(g)(8)(B); and (3) the person is incapable of consenting if she is impaired by a drug, intoxicant, or other substance, or if she is suffering from a mental disease or defect or physical disability, UCMJ art. 120(b)(3)(A) and (B), 10 U.S.C.S. § 920(b)(3)(A) and (B).

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 **Trial Procedures, Instructions**

Absent evidence to the contrary, the United States Navy-Marine Corps Court of Criminal Appeals may presume that court-martial panel members follow a military judge's instructions.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8 **Trial Procedures, Instructions**

If instructional error is found when there are constitutional dimensions at play, an appellant's claims must be tested for prejudice under the standard of "harmless beyond a reasonable doubt." 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 a defendant's conviction or sentence. In other words, to find that an error did not contribute to a conviction is to find the error unimportant in relation to everything else the members of a court-martial panel considered on the issue in question, as revealed in the record.

Legal Ethics > Prosecutorial Conduct

Military & Veterans Law > Military Justice > Counsel

HN9 **Legal Ethics, Prosecutorial Conduct**

Prosecutorial misconduct occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. "Prosecutorial misconduct" can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual for Courts-Martial rule, or an applicable professional ethics canon.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 **Trial Procedures, Arguments on Findings**

Improper argument is one facet of prosecutorial misconduct. Prosecutorial misconduct in the form of improper argument is a question of law the United States Navy-Marine Corps Court of Criminal Appeals reviews de novo. The legal test for improper argument is (1) whether the argument was erroneous, and (2) whether it materially prejudiced the substantial rights of the accused. In application, an argument by a trial counsel must be viewed within the context of the entire court-martial, and as a result, an appellate court's inquiry should not be on words in isolation, but on the argument as viewed in context. This inquiry, however, remains objective, requiring no showing of malicious intent on behalf of a prosecutor and unyielding to inexperience or ill preparation.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN11 **Trial Procedures, Arguments on Findings**

When a proper objection to a comment is made at trial, the issue is preserved and the United States Navy-Marine Corps Court of Criminal Appeals reviews for prejudicial error. Until very recently, when trial defense counsel failed to contemporaneously object, the issue was forfeited and the NMCCA reviewed for plain error. To succeed under a plain error analysis, an appellant had to demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. However, the United States Court of Appeals for the Armed Forces' decision in United States v. Ahern has called into question whether appellate courts may still conduct plain error review of improper argument when the issue is not preserved by an objection at trial. In Ahern, the CAAF analyzed the difference between "forfeiture" and "waiver" and recognized that courts review forfeited issues for plain error but cannot review waived issues because a valid waiver leaves no error to correct on appeal. "Forfeiture" is the failure to make a timely assertion of a right, while "waiver" is the intentional relinquishment or abandonment of a known right.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN12 **Trial Procedures, Arguments on Findings**

Analyzing R.C.M. 919(c), Manual for Courts-Martial in light of the United States Court of Appeals for the Armed Forces' decision in United States v. Ahern, the United States Army Court of Criminal Appeals held in United States v. Kelly that the failure to object to Government counsel's closing argument constitutes waiver, leaving nothing to review on appeal. The United States Navy-Marine Corps Court of Criminal Appeals agrees. Like Mil. R. Evid. 304, Manual Courts-Martial ("MCM"), R.C.M. 919(c), MCM, provides no provision for plain error review, and therefore, when a defense counsel fails to object to improper argument of Government counsel, the defense waives the issue on appeal.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN13 **Trial Procedures, Arguments on Findings**

An accused is supposed to be tried on the legally and logically relevant evidence presented. Thus, a prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty. As a result, a military court of appeals may find prosecutorial misconduct where trial counsel has

repeatedly and persistently violated the Rules for Courts-Martial and the Military Rules of Evidence contrary to instructions, sustained objections, or admonition from a military judge.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN14 **Judicial Review, Standards of Review**

Whether an appellant has waived an issue is a question of law reviewed de novo. The determination of whether there has been an intelligent waiver must depend, in each case, upon the particular facts and circumstances surrounding that case.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN15 **Trial Procedures, Arguments on Findings**

The United States Court of Appeals for the Armed Forces has warned that calling an accused a "liar" is a dangerous practice that should be avoided. That caution recognizes that a prosecutor's goal is not that he or she shall win a case, but that justice shall be done. Ultimately, disparaging comments have the potential to mislead the members of a court-martial panel, and to detract from the dignity and solemn purpose of court-martial proceedings. However, describing a defendant as a "liar" does not equate to per se error. Notably, trial counsel are permitted to forcefully assert reasonable inferences from the evidence. Therefore, the use of the words "liar" and "lie" to characterize disputed testimony when a witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory. In other words, it is appropriate for trial counsel to comment on conflicting testimony unless using language that is more of a personal attack on a defendant than a commentary on the evidence.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN16 **Trial Procedures, Arguments on Findings**

It is an exceedingly fine line which distinguishes permissible advocacy from proper excess. One factor in determining if trial counsel has crossed this line is whether counsel ties his or her comment to evidence in the record. Where trial counsel has explained why the jury should come to the conclusion that the accused lacks credibility, a military appellate court may find permissible advocacy. However, where trial counsel's statements are unsupported by any rational justification other than an assumption that the accused is guilty, and not coupled with a more detailed analysis of the evidence adduced at trial, the comments turn improper. Such untethered assertions convey an impression to the jury that they should simply trust the Government's judgment that the accused is guilty because trial counsel knows something the jury does not.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Witnesses

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Counsel

HN17 **Trial Procedures, Arguments on Findings**

It is well-established that it is the exclusive province of court members to determine the credibility of witnesses. To protect the integrity of this province, trial counsel should not imply special or secret knowledge of the truth or of witness credibility, because when a prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore that witness's views. Thus, improper vouching occurs when trial counsel places the prestige of the Government behind a witness through personal assurances of the witness's veracity. Such assurances may be evidenced by the use of personal pronouns in connection with assertions that a witness was correct or to be believed, such as "I think it is clear," "I'm telling you," and "I have no doubt."

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

HN18 **Trial Procedures, Arguments on Findings**

Not all forms of vouching are improper in a trial by court-martial. Closing arguments and rebuttal may properly include reasonable comment on the evidence in the case, including references to be drawn therefrom, in support of a party's theory of the case. R.C.M. 919(b), Manual Courts-Martial ("MCM") (2016). Specifically, trial counsel may comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. R.C.M. 919(b), Discussion, MCM. Thus, it is not improper vouching for trial counsel to argue, while marshalling evidence, that a witness testified truthfully, particularly after the defense has vigorously attacked the witness's testimony. Such permissible language includes "you are free to conclude," "you may perceive that," "it is submitted that," or "a conclusion on your part may be drawn."

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN19 **Trial Procedures, Arguments on Findings**

Prosecutorial comments must be analyzed in the context of the full record. As the United States Supreme Court has said, it is important that both the defendant and prosecution have the opportunity to meet fairly the evidence and arguments of one another, and the United States Navy-Marine Corps Court of Criminal Appeals follows the United States Court of Appeals for the Armed Forces' principle that an appellant cannot create error and then take advantage of a situation of his own making.

Criminal Law & Procedure > Counsel > Prosecutors

Legal Ethics > Prosecutorial Conduct

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN20 **Counsel, Prosecutors**

A prosecutor may strike hard blows against a defendant, but is not at liberty to strike foul ones. Indeed, it is a fundamental tenet of the law that attorneys may not make material misstatements of fact in summation. At the same time, counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

HN21 **Defendant's Rights, Right to Fair Trial**

A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Criminal Law & Procedure > Counsel > Prosecutors

Legal Ethics > Prosecutorial Conduct

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN22 **Counsel, Prosecutors**

The United States Supreme Court has long-recognized

that a prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. Certainly, it is a breach of a prosecutor's duty to refrain from overzealous conduct by commenting on a defendant's guilt and offering unsolicited personal views on the evidence. Thus, improper interjection of a prosecutor's views constitutes prosecutorial misconduct because it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed. However, improper interjection is not found by merely counting the number of pronouns, but rather must be examined for possible effect on the jurors.

Legal Ethics > Prosecutorial Conduct

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN23 **Legal Ethics, Prosecutorial Conduct**

Mirroring trial counsel's duty to refrain from inserting personal opinions, it is also improper for a trial counsel to attempt to win favor with the members of a court-martial panel by maligning defense counsel. Thus, the United States Navy-Marine Corps Court of Criminal Appeals may declare prosecutorial misconduct where one attorney makes personal attacks on another, creating the potential for a trial to turn into a popularity contest. In addition to detracting from the dignity of judicial proceedings, personal attacks can cause a jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the true facts of the case. This squarely violates the core legal standard of criminal proceedings, that the Government always bears the burden of proof to produce evidence on every element and persuade the members of guilt beyond a reasonable doubt. R.C.M. 920(e)(5)(D), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN24 **Trial Procedures, Burdens of Proof**

For trial counsel to shift the burden to an accused is an error of constitutional dimension accompanied by a high threshold.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN25 **Harmless & Invited Error, Harmless Error**

While a criminal trial is a serious effort to ascertain truth and an atmosphere of passion or prejudice should never displace evidence, it is also a practical matter which can hardly be kept free of every human error.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26 **Trial Procedures, Arguments on Findings**

A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. Accordingly, relief will be granted if trial counsel's misconduct actually impacted on a substantial right of the accused (i.e., resulted in prejudice). When analyzing the record for prejudice, a military appellate court must assess whether the misconduct is not slight or confined to a single instance, but pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential. Reversal is necessary when a trial counsel's comments, taken as a whole, were so damaging that the United States Navy-Marine Corps Court of Criminal Appeals cannot be confident that the members convicted an appellant on the basis of

the evidence alone.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN27 **Trial Procedures, Arguments on Findings**

The United States Navy-Marine Corps Court of Criminal Appeals employs a three-factor balancing test to evaluate prejudicial impact of trial counsel's misconduct during his argument on a verdict: (1) the severity of the misconduct; (2) any curative measures taken; and (3) the strength of the Government's case. Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge.

Military & Veterans Law > ... > Trial Procedures > Instructions > Curative Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN28 **Instructions, Curative Instructions**

Generally, potential harm from improper comments can be cured through a proper curative instruction. However, the extent of curative effect depends on how specifically the instruction targets the misconduct. Indeed, the United States Court of Appeals for the Armed Forces has repeatedly emphasized that corrective instructions at an early point might dispel the taint of counsel's remarks. The United States Navy-Marine Corps Court of Criminal Appeals will find a curative instruction insufficient where it is impossible to say that an evil influence upon the members of a trial counsel's acts of misconduct was removed by mild judicial action.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN29 **Courts Martial, Court-Martial Member Panel**

Conclusively, the members of a court-martial panel are presumed to follow a military judge's instructions.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN30 **Judicial Review, Standards of Review**

The United States Court of Appeals for the Armed Forces has found that the weight of the evidence supporting an accused's conviction may be strong enough to establish lack of prejudice in and of itself.

Counsel: For Appellant: Lieutenant Commander Donald R. Ostrom, JAGC, USN.

For Appellee: Major Kelli A. O'Neil, USMC; Lieutenant Robert J. Miller, JAGC, USN.

Judges: Before CAMPBELL,[1] FULTON, and HUTCHISON, Appellate Military Judges.

Opinion by: HUTCHISON

Opinion

[1] Former Senior Judge Campbell took final action in this case prior to detaching from the court.

HUTCHISON, Senior Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of abusive sexual contact and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. The members sentenced the appellant to six months' confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

The appellant asserts four assignments of error (AOEs), the first three of which are related:[2] (1) the government violated the **[*2]** appellant's right to fair notice by introducing an uncharged theory of liability under Article 120(b)(3)(A) in closing arguments; (2) the military judge erred by instructing the members on the definition of consent; (3) the trial counsel (TC) committed prosecutorial misconduct by arguing an uncharged theory of liability under Article 120(b)(3)(A) in closing argument; and (4) the TC committed prosecutorial misconduct by making arguments contrary to the military judge's preliminary instruction, calling the appellant a liar, bolstering the victim's testimony, mischaracterizing evidence, inserting personal opinion during argument, and shifting the burden to the defense. Having carefully considered the record of trial, the parties' submissions, and oral argument on all four AOEs, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

On the evening of Friday, 5 September 2014, the appellant threw a party at his residence attended by approximately fifteen to twenty individuals including Petty Officer Third Class (PO3) AD, who was invited by a mutual friend. **[*3]** Immediately upon arriving, PO3 AD began drinking—at least one cocktail and four to six shots of liquor throughout the course of the night—in order to loosen up. PO3 AD testified at trial that within two hours she blacked out, though she recalled a number of subsequent events from the night, including being questioned by the police and being sexually assaulted.[3]

At trial, the testimony of other party-goers and the appellant helped fill in events that occurred between PO3 AD's arrival and the sexual assault. PO3 AD spent the greater part of the evening with PO3 PC playing beer pong, drinking, and making out with him for a short period of time in the kitchen. There was little to no interaction between PO3 AD and the appellant—though the appellant testified to witnessing PO3 AD's interactions with PO3 PC—until the appellant was informed later that night that someone was sick in the bathroom.

When the appellant entered the bathroom, he discovered PO3 AD on the floor grasping the toilet. PO3 AD testified that she remembered vomiting into a toilet, and then stumbling into an adjacent bedroom and lying down on the bed. The appellant testified that he assisted PO3 AD off the bathroom floor and **[*4]** into his bedroom. In both versions of the story, PO3 AD was then left alone in the appellant's bedroom. The appellant testified that later that night, after using the restroom, he noticed PO3 AD had vomited a small amount in the bed, and that he cleaned it up with a towel from the bathroom before returning to the party.

Around midnight, the police arrived due to a noise complaint. The police found PO3 AD asleep in the bedroom and woke her for questioning. PO3 AD only recalled the police asking for her ID, which she indicated was in her purse, but did not recall any further questions or interaction with the police. The appellant testified at trial that the police told him that PO3 AD "shouldn't go home" and "that she shouldn't drive tonight."[4] Shortly after the police arrived, the party ended.

Later that night, after all the other guests had departed, the appellant entered the bedroom where PO3 AD was sleeping. At trial, the appellant's and PO3 AD's recollections of what transpired next differed greatly. PO3 AD testified that as she was lying in the "fetal position" on the bed, the appellant removed his bow tie and shirt, climbed into bed with her, pressed the front side of his body against **[*5]** her back side—in a spooning-type fashion—and began to rub her back with

[2] We have renumbered the AOEs.

[3] Record at 390-98.

[4] *Id.* at 683. The appellant also recounted this statement from the police during his NCIS interrogation, but only stated the police instructed him "that she shouldn't leave" without reference to driving. Prosecution Exhibit (PE) 4; Appellate Exhibit (AE) XXV at 14.

his hands.[5] PO3 AD testified that she was "terrified" to find herself in such a "strange situation" and did not have the strength to get up and leave or to "fight off anyone"; she believed that "if [she] just laid there that maybe he would just leave."[6]

However, PO3 AD testified that the appellant did not just leave. After rubbing her back, PO3 AD testified that the appellant tried to "make out with [her],"[7] explaining:

> I just kept moving back over onto my side [of the bed] thinking that maybe if I wasn't engaging in what was happening that he would understand that I didn't want to do anything, but this went back and forth maybe about three or four times . . . and then finally, I guess because he [was] sick of it he rolled me over one final time and pinned me down with his arm sort of like on my shoulder area and then with his leg on one of my legs, so I was unable to roll over again, and that is when I started to say, "No" and "Off."[8]

PO3 AD testified that the appellant responded to her pleas of "no" and "off" by whispering in her ear, "I'm sorry, you're just too tempting," before subsequently rubbing her breasts **[*6]** with his hands and penetrating her vagina with his fingers.[9] She further testified that although she was unable to physically resist the appellant—she "couldn't move"; "was pinned down"; and "completely terrified"—she repeatedly told the appellant "no" and to get "off" of her.[10] PO3 AD's testimony that she did not consent to the appellant's actions was corroborated by numerous contemporaneous text messages she sent to her friend, PO3 ZA, during the assault. In these text messages she relays to PO3 ZA that she is being assaulted but is "too drunk" to get away from her attacker.[11]

Conversely, the appellant testified that when he entered the room, PO3 AD was awake in the bed on her phone, and that she said "yes" when he explicitly asked if he could lie down in the bed with her.[12] He stated that after lying in bed for a short time, he began to "rub PO3 AD's back in a comforting manner."[13] After a few minutes, he began to rub her hip, caressing her from her waist down to her thigh. The appellant testified that PO3 AD was positively responding to everything he was doing, evidenced by the movement of her body so that the two were "kind of spooning."[14] The appellant then testified that PO3 AD rolled **[*7]** onto her back and the two began kissing for approximately ten minutes. Believing PO3 AD was consenting, the appellant began to rub PO3 AD's breasts with his hands. He testified that because of the manner in which she continued to respond—the noises she was making (though no verbal confirmations of affirmative consent) and her body movements—he proceeded to digitally penetrate PO3 AD's vagina, and then perform oral sex on her.[15] At trial, the appellant noted that he witnessed PO3 AD on her phone while he was performing oral sex on her, and thought it was "peculiar" and that "maybe [he was] doing something wrong."[16] However, the appellant testified that the first time he heard PO3 AD say "no" to what he was doing was when he stood up to have sex with her.[17] He stated that once she said no, he stopped all action and went to sleep. Notably, PO3 AD did not testify to receiving oral sex from the appellant and the appellant did not include this detail in his interview with Naval Criminal Investigative Service (NCIS) six weeks after the incident.[18] Rather, the first time the appellant indicated he performed oral sex on PO3 AD was at trial.

Early the next morning, PO3 AD awoke with the appellant **[*8]** asleep by her side in the bed. She quickly gathered her belongings and left the apartment. In addition to discussing the assault later that day with friends and family, she formally reported the sexual assault to her chain of command on Monday, 8 September 2014.

---

[5] Record at 396.

[6] *Id.* at 395.

[7] *Id.* at 397.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] PE 3 at 3.

[12] Record at 684.

[13] *Id.* at 685.

[14] *Id.* at 685-86.

[15] *Id.* at 688-89.

[16] *Id.* at 690.

[17] *Id.* at 691, 722.

[18] *See* PE 3; AE XXV.

II. DISCUSSION

A. Instructions, argument, and notice

The appellant was charged with one specification of violating Article 120(b)(1)(B), UCMJ—sexual assault by causing bodily harm—and two specifications of violating Article 120(d)—abusive sexual contact by causing bodily harm.[19] ***HN1***[] Article 120(b)(1)(B), UCMJ, states "any person . . .who . . . (1) commits a sexual act upon another person by . . . (B) causing bodily harm to that other person" is guilty of sexual assault.[20] Bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact."[21] Therefore, in order to convict the appellant of the offenses charged, the government was required to prove beyond a reasonable doubt that PO3 AD did not consent to the sexual act or sexual contacts.

With this charging scheme as a backdrop, the appellant contends that the "government violated [his] right to fair notice of **[*9]** what he was required to defend against" since the government charged violations alleging bodily harm—that PO3 AD did not consent—but argued "an uncharged violation" that she was incapable of consenting.[22] Likewise, the appellant argues that the military judge erred in instructing the members regarding incapacity due to intoxication using a standard established in *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016). Finally, the appellant argues that the TC committed prosecutorial misconduct by arguing to the members an uncharged theory of liability—that PO3 AD was incapable of consenting due to her impairment from alcohol.

In considering these related AOEs, we acknowledge a common theme advocated by the appellant—that the government charged him with one crime, but convicted him of another. We disagree.

1. Instructions

HN2[] "'Whether a panel was properly instructed is a question of law' we review *de novo." United States v. Mott*, 72 M.J. 319, 325 (C.A.A.F. 2013) (quoting *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013)). "When there is no objection to an instruction at trial, we review for plain error." *United States v. Payne*, 73 M.J. 19, 22-23 (C.A.A.F. 2014) (citing *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013) (additional citation omitted). Under plain error analysis, the appellant must demonstrate "that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* at 23-24 (citations **[*10]** and internal quotation marks omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006). Finally, the plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986) (citation and internal quotation marks omitted).

Moreover, ***HN3***[] "[t]he military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990)). In this regard, the military judge bears the primary responsibility for ensuring the members are properly instructed on the elements of the offenses raised by the evidence, "'as well as potential defenses and other questions of law.'" *Id.* (quoting *Westmoreland*, 31 M.J. at 164). Indeed, the military judge must tailor instructions in order to address only matters at issue in each trial and "provide 'lucid guideposts' to enable the court members to apply the law to the facts." *United States v. Newlan*, No. 201400409, 2016 CCA LEXIS 540, at *18 (N-M Ct. Crim. App. 13 Sep 2016) (quoting *United States v.*

---

[19] Charge Sheet.

[20] MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2012 ed.), Part IV, ¶ 45.a.(b). Throughout the opinion we refer to the appellant's conviction for sexual assault under Article 120(b)(1)(B), UCMJ. Our analysis of Article 120(b)(1)(B), however, applies equally to the appellant's convictions for abusive sexual contact under Article 120(d), UCMJ, which states: "Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct." Consequently, since the appellant's convictions for abusive sexual contact each alleged a "bodily harm" theory of liability, we incorporate the elements of Article 120(b)(1)(B), UCMJ: (1) that the appellant committed a sexual contact upon PO3 AD; and (2) that he did so by causing bodily harm to PO3 AD.

[21] MCM, Part IV, ¶ 45.a.(g)(3).

[22] Appellant's Brief of 25 Jan 2017 at 11.

Buchana, 19 C.M.A. 394, 41 C.M.R. 394, 396-97 (C.M.A. 1970)).

In a case involving a defense theory that the victim consented to the sexual acts or contacts, the instructions should be structured so as to clearly distinguish between the government's requirement to prove the victim *did not consent* and the potential for reasonable doubt based on **[*11]** evidence that the victim did consent. We therefore consider whether the instructions did this, or whether their structure allowed the members to convict the appellant "on the basis of a theory of liability not presented to the trier of fact"—that PO3 AD had a legal inability to consent because of her impairment from alcohol. *Ober*, 66 M.J. at 405 (citing *Chiarella v. United States*, 445 U.S. 222, 236-37, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)).

Turning now to the instructions at issue, the military judge instructed the members, prior to argument on findings, regarding consent:

> [T]he government also has the burden to prove beyond a reasonable doubt that [PO3 AD] did not consent to th[e] physical act[s].
>
> "Consent" is a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.
>
> Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are **[*12]** to be considered in determining whether a person gave consent or whether a person did not resist or ceased to resist only because of another person's actions. An incompetent person cannot consent to a sexual contact, and a person cannot consent to a sexual contact while under threat or in fear.[23]

Immediately following the standard instruction on consent, the military judge included the following instructions, based on our superior court's holding in *Pease*:

> A person is incapable of consenting if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.
>
> A totality of circumstances standard applies when assessing whether a person was incapable of consenting. In deciding whether a person was incapable of consenting, many factors should be considered and weighed, including but not limited to that person's decision-making ability, ability to foresee and understand consequences, awareness of the identity of the person with whom they are engaging in the conduct, level of consciousness, amount of alcohol ingested, tolerance to the ingestion of alcohol, and/or **[*13]** their ability to walk, talk, and engage in other purposeful physical movements.[24]

The government's overarching theme of the case was that PO3 AD did not consent to any sexual conduct with the appellant. Indeed, PO3 AD testified that after the appellant climbed into bed, "pressed up against [her]"[25] and started rubbing her back, she tried to move away until the appellant "rolled [her] over . . . and pinned [her] down with his arm . . . his leg on one of [her] legs, so [she] was unable to roll over."[26] PO3 AD further testified that she told the appellant "no" and "off" multiple times, but that he simply responded that she "was too tempting."[27] When asked specifically by government counsel, whether she had a consensual sexual encounter, PO3 AD responded, "I definitely did not."[28]

Moreover, PO3 AD was communicating via text message with her friend PO3 ZA, *during* the course of her encounter with the appellant. She texted PO3 ZA that "he won't take . . . No",[29] "Rape",[30] "Help",[31] "He

---

[23] Record at 756.

[24] *Id.* at 757.

[25] *Id.* at 396.

[26] *Id.* at 397.

[27] *Id.*

[28] *Id.* at 412.

[29] PE 3 at 2.

[30] *Id.*

[31] *Id.* at 3.

won't quit",[32] and "Being forced."[33] PO3 AD testified that in those texts she was referring to the appellant and texting PO3 ZA for help. On cross-examination, the civilian defense counsel questioned PO3 AD about her ability **[*14]** to send text messages and PO3 AD confirmed that she "knew what was going on" and that she knew she was "being assaulted."[34] PO3 AD stated she was able "to understand", "comprehend[,]" and "communicate" during the sexual encounter with the appellant.[35]

The issue in *Pease*—an Article 120(b)(3)(A), UCMJ, case—involved a victim who was incapable of consenting due to intoxication. The appellant argues, therefore, that inclusion of an instruction regarding capacity to consent—fashioned from *Pease*—"allowed members to find that [PO3 AD] was, at the same time, both capable of withholding consent and incapable of providing consent."[36] The appellant contends this standard was confusing and "chang[ed] the nature of the charged conduct."[37]

As a threshold matter, we do not accept the appellant's assertion that the instructions presented a confusing dichotomy where PO3 AD could simultaneously be capable of declining participation, but incapable of consenting. Indeed, ***HN4***[] a person incapable of providing *consent* may still, nonetheless, make or communicate their declination to participate in sexual conduct. In *Pease*, our definition of "incapable of consenting" identified three groups of individuals who are incapable of **[*15]** consenting: (1) those who do not possess the mental ability to appreciate the *nature of the conduct*; (2) those who do not possess the physical ability to make or communicate a decision regarding such conduct; and (3) those who do not possess the mental ability to make or communicate a decision regarding such conduct. *United States v. Pease*, 74 M.J. 763, 770 (N-M. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016). Therefore, a person that does not have the mental ability to appreciate the nature of any particular conduct may still be able to offer resistance to whatever bodily harm the person did appreciate at the time. Similarly, a person that does not possess the physical ability to make or communicate a decision, may nevertheless be able to articulate, in some fashion, a declination to participate in sexual conduct. And, finally, a person that does not possess the mental ability to make or communicate a decision may still manifest a physical unwillingness to engage in the sexual conduct. *See United States v. Long*, 73 M.J. 541, 546 (A. Ct. Crim. App. 2014) (explaining the distinction between having the physical and mental ability to consent to sexual conduct, with the physical and mental ability to manifest a lack of consent).

Having concluded the language of the military judge's *Pease* instruction was not **[*16]** confusing or contradictory, we next examine its inclusion here in a bodily harm case. While we agree with the appellant that there was insufficient evidence to find that PO3 AD was incapable of consenting in violation of Article 120(b)(3)(A), UCMJ, we also recognize that the appellant was not charged under that article. Rather, the evidence in this *bodily harm* case raised the issue of consent; the government was required to prove lack of consent beyond a reasonable doubt; the appellant presented evidence that PO3 AD did consent, and the members were required to decide whether or not she did. Therefore, the military judge was required to instruct the jury on the element of consent.

HN5[] The statutory definition of consent is "a freely given agreement to the conduct at issue by a *competent* person."[38] Therefore, "[a] full definition of consent includes [the] definition of competence to consent." *Long*, 73 M.J. at 545 (citations omitted).[39] Although the government was not required to prove that PO3 AD was competent—as discussed *supra*, incompetent people

---

[32] *Id.* at 4.

[33] *Id.* at 6.

[34] Record at 450.

[35] *Id.* at 452-53. We note the distinction between statements such as these which indicate that PO3 AD was able to "appreciate the nature of the conduct" and that she had "the mental and physical ability to make [or] to communicate a decision regarding that conduct," *Pease*, 75 M.J. at 185, and the testimony of PO3 AD indicating she was too intoxicated to get away, or "fight off" the appellant, Record at 395. The former establish competency to consent, while the latter simply reflect that PO3 AD did not have the wherewithal to fend off the appellant—a fact the government need not establish to prove the sexual conduct was nonconsensual.

[36] Appellant's Brief at 12.

[37] *Id.* at 21.

[38] MCM, Part IV, ¶ 45.a.(g)(8)(A).

[39] In *Long*, the military judged instructed the members that "[c]onsent means words or overt acts indicating a freely given agreement to the sexual conduct by a competent person." 73 M.J. at 543.

can decline to participate in sexual conduct—competence became relevant here after *the appellant* presented evidence that PO3 AD consented *and had the capacity to consent* ***[*17]*** . As a result, we find no plain error with the military judge's decision to instruct the members regarding what constitutes a "competent person" for purposes of defining consent.

HN6[] In *Pease*, our superior court (CAAF) adopted our definition of "competent person" as "a person who possesses the physical and mental ability to consent," 75 M.J. at 185, and noted that:

> This definition properly incorporates three statutory requirements: (1) the person must be "competent" to consent, Article 120(g)(8)(A), UCMJ; (2) the person cannot consent if she is asleep or unconscious, Article 120(g)(8)(B), UCMJ; and (3) the person is incapable of consenting if she is impaired by a drug, intoxicant, or other substance, or if she is suffering from a mental disease or defect or physical disability, Article 120(b)(3)(A), (B), UCMJ.

Id.

Recognizing that the CAAF found this court's definition of a "competent person" to have accurately incorporated the concept that a person incapable of consenting due to impairment by an intoxicant was not competent, we find no error, and certainly no plain error,[40] in the military judge's decision to use the *Pease* instruction to further explain to the members what constitutes a competent person. **[*18]** [41]

Importantly, the military judge's instructions neither transformed the charged specifications into Article 120(b)(3)(A) specifications, nor alleviated the government's affirmative responsibility to prove beyond a reasonable doubt that PO3 AD did not, in fact, consent. The military judge instructed the members *both before and after* issuing the *Pease* instruction that the government had "the burden to prove beyond a reasonable doubt that [PO3 AD] did not consent[.]"[42] ***HN7***[] "Absent evidence to the contrary,[we] may presume that members follow a military judge's instructions." *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000) (citing *United States v. Loving*, 41 M.J. 213, 235 (1994)) (additional citation omitted). "Because there is no evidence suggesting that the court members did not follow the instructions . . . given them by the military judge in this case, it must therefore be presumed . . . that the court members had reached a proper verdict in which the appellant was only found guilty of" the crimes for which he was charged. *United States v. Ricketts*, 23 C.M.A. 487, 1 M.J. 78, 50 C.M.R. 567, 570-71 (C.M.A. 1975).

2. Improper argument

Because we find no error in the military judge's instructions, we also find that government counsel did not commit prosecutorial misconduct by arguing, solely *in rebuttal*, that PO3 AD was incapable of consenting. The fact that **[*19]** government counsel's incapacity argument was confined to a single page out of 32 pages of transcribed rebuttal further demonstrates that the government proved the specifications as charged and that the members did not convict the appellant of an uncharged violation of Article 120(b)(3)(A).

3. Notice

Finally, we find no merit in the appellant's argument that he was not on notice. Simply put, the appellant was convicted of the offenses for which he was charged. As we noted *supra*, the government had no requirement to prove that PO3 AD was competent; only that she did not, in fact, consent. Clearly, evidence tending to show PO3 AD's level of impairment was relevant to establish a lack of consent. But it was the civilian defense counsel's cross-examination of PO3 AD that first introduced the issue of competence, and established that she was able to understand and appreciate what was occurring during her encounter with the appellant. As such, "[a]ny argument that [the appellant] was somehow not on notice of the relevance of competence to consent falls on deaf ears." *Long*, 73 M.J. at 547.

In reaching our decision, we are mindful of our superior

---

[40] *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (courts of appeals "cannot correct an error [under the plain error doctrine] unless the error is clear under current law"); *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001) (no plain error where no "binding precedent" at the time of trial or appeal established error).

[41] *See Newlan*, 2016 CCA LEXIS 540, at *19-20 (a person who is "incapable of consenting" is "incompetent" under Article 120, UCMJ).

[42] Record at 756. *See also id.* at 757 (". . . you must be convinced beyond a reasonable doubt that [PO3 AD] did not consent to the physical acts").

court's decision in *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016). In *Riggins*, the CAAF held that assault consummated **[*20]** by battery, in violation of Article 128, UCMJ, was not a lesser included offense of Article 120(b)(1)(A), UCMJ—sexual assault by threatening or placing another person in fear—because lack of consent was an element of assault consummated by battery, but not of the sexual assault offense as charged. The CAAF overturned Riggins' convictions, concluding that "the fact that the [g]overnment was required to prove a set of facts that resulted in [the victim's] *legal inability to consent*"—that she was placed in fear—"was not the equivalent of the [g]overnment bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." *Riggins*, 75 M.J. at 84 (emphasis in original) (footnote omitted). The CAAF further found prejudice since the appellant was not on notice that he needed to defend against the issue of *lack of consent. Id.* at 85 (emphasis added).

Applying an overly strict reading of *Riggins* might lead one to conclude that it controls here; that the military judge's instructions and TC's arguments permitted the members to convict the appellant of a crime of which he had no notice, simply because the government had proven a set of facts resulting in PO3 AD's *legal inability to consent*—that she was incapable of consenting. **[*21]** However, there are important distinctions between *Riggins* and the instant case. Riggins was convicted, under an erroneous lesser included offense theory, of a crime with which he was not charged. Here, the appellant was convicted as charged. The appellant was not convicted of a lesser included offense or by exceptions and substitutions that modified the charges in any way. Rather, the government charged, presented evidence, argued, and proved beyond a reasonable doubt that PO3 AD did not, in fact, consent to the sexual conduct. Therefore, the appellant was on notice; the charges he was convicted of were specifically listed on the charge sheet.

The appellant's contention is that the military judge's instructions and TC's arguments impermissibly imported Article 120(b)(3)(A) into the case and permitted the members to convict him of that offense—of which he had no notice—vice the one charged. In that regard, the CAAF's recent discussion of Riggins in *United States v. Oliver*, 76 M.J. 271 (C.A.A.F. 2017), is instructive and further demonstrates *Riggins*' inapplicability under the circumstances of this case. In *Oliver*, the appellant was convicted of wrongful sexual contact, a violation of Article 120(m), UCMJ (2006), as a lesser included offense of Article **[*22]** 120(h), UCMJ (2006)—abusive sexual contact by threatening or placing another in fear. Oliver argued that his case was like *Riggins*; the crime he was convicted of required lack of consent as an element, while the greater offense—abusive sexual contact by threatening or placing another person in fear—did not. However, because Oliver raised the affirmative defense of consent available at the time,[43] the government had to prove lack of consent beyond a reasonable doubt in order to obtain a conviction. The government addressed the issue of consent in trial and during closing arguments, and Oliver's trial defense strategy focused on the victim's consent. Consequently, the CAAF concluded, under a plain error analysis, that "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." *Oliver*, 76 M.J. at 275.

So too, here. The appellant's trial strategy focused on PO3 AD's consent, or alternatively, his mistake of fact as to consent. The civilian defense counsel cross-examined PO3 AD concerning her *capacity to consent*, in order to establish his theme that PO3 AD, although drunk, consented to the sexual conduct, and then, regretting her decision, **[*23]** later alleged the encounter was nonconsensual. As in *Oliver*, the appellant cannot now argue that he was not on notice that he had to defend against the victim's incapacity to consent, when he raised the issue of PO3 AD's competency and actually did defend against that theory. *See also Tunstall*, 72 M.J. at 197 (no prejudice where accused actually defended against both theories in the terminal element of Article 134, UCMJ).

4. Prejudice

Although we find error in neither the military judge's instructions nor the TC's rebuttal argument regarding PO3 AD's capacity to consent, we conclude that even if we did find any error, it would be harmless. ***HN8***[] "If instructional error is found when there are constitutional dimensions at play, the appellant's claims must be tested for prejudice under the standard of harmless

[43] Article 120(t)(16), UCMJ (as amended by the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. at 3263) required the defendant to first prove the affirmative defense beyond a preponderance of the evidence before then requiring the government to prove lack of consent beyond a reasonable doubt.

beyond a reasonable doubt."[44] *United States v. Hills*, 75 M.J. 350, 357-58 (C.A.A.F. 2016) (citations and internal quotation marks omitted). "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. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (citations and internal quotation marks omitted). In other words, to find that the error did not contribute to the conviction **[*24]** is to find the "error unimportant in relation to everything else the [members] considered on the issue in question, as revealed in the record." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (citation and internal quotation marks omitted).

We, therefore, conclude that the inclusion of the *Pease* instruction and the TC's brief comments during rebuttal were unimportant in relation to the government's affirmative responsibility to prove beyond a reasonable doubt that PO3 AD did not consent. Indeed, the evidence presented by the government regarding PO3 AD's lack of consent could not have been starker. She testified consistently regarding her encounter with the appellant, recounting for the members that she repeatedly told the appellant "no" and "off", tried to roll over away from him, but ultimately was too intoxicated to leave. The government presented PO3 AD's text messages to PO3 ZA, which provided a rare contemporaneous accounting of the attack, and a report from a Sexual Assault Nurse Examiner, conducted just days after the assault, in which PO3 AD relayed details consistent with her in-court testimony. Indeed, evidence of PO3 AD's level of intoxication, while not required to prove she was incapable of consenting, was certainly **[*25]** probative regarding her desire to engage in sexual relations with a man she hardly knew after she had just woken up in a strange bed.

In contrast, the appellant acknowledged during his testimony that he did not know PO3 AD, that he had only met her when she arrived at the party, and that he had little interaction with her throughout the night. The appellant testified to observing PO3 AD drinking and vomiting. Further, the appellant's testimony concerning his encounter with PO3 AD was also devoid of any of the hallmarks of consent: he does not mention what, if anything, PO3 AD said to him during the encounter and does not indicate that she responded to his advances by touching him in any way. During his testimony at trial, the appellant added details to the encounter that he did not include—but logically would have included—during his interview with NCIS. In short, PO3 AD's consistent, compelling testimony along with the corroborating evidence presented by the government stood in stark relief to the appellant's implausible, self-serving explanation of the night's events. Consequently, we are convinced beyond a reasonable doubt that any error related to the military judge's instructions **[*26]** or the TC's argument did not contribute to the verdict.

B. Prosecutorial misconduct

1. Legal error

The appellant alleges that the TC committed prosecutorial misconduct during closing arguments by (1) improperly introducing Navy sexual assault and bystander intervention training; (2) repeatedly calling the appellant a liar; (3) improper bolstering of the victim's testimony; (4) mischaracterizing evidence; (5) inserting TC's opinion; and (6) shifting the burden of proof by commenting on the defense.[45]

HN9[] "Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (citations and internal quotation marks omitted). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

HN10[] "Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). Prosecutorial misconduct in the form of improper argument is a question of law we review *de novo. United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011)). "The legal test for improper **[*27]** argument is [(1)] whether the argument was erroneous

[44] We assume, without deciding, that any error here is constitutional error.

[45] Appellant's Brief at 21.

and [(2)] whether it materially prejudiced the substantial rights of the accused." *Id.* (citation and internal quotation marks omitted). In application, "the argument by a trial counsel must be viewed within the context of the entire court-martial," and as a result, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *Young*, 470 U.S. at 16) (additional citation omitted). This inquiry, however, remains objective, "requiring no showing of malicious intent on behalf of the prosecutor" and unyielding to inexperience or ill preparation. *Hornback*, 73 M.J. at 160.

HN11[⬆] When a proper objection to a comment is made at trial, the issue is preserved and we review for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Art. 59, UCMJ). Until very recently, when the trial defense counsel failed to contemporaneously object, the issue was forfeited and we reviewed for plain error. *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)). To succeed under that plain error analysis, the appellant had to demonstrate that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Tunstall*, 72 M.J. at 193-94 (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

However, a recent decision by our superior court has **[*28]** called into question whether appellate courts may still conduct plain error review of improper argument when the issue is not preserved by an objection at trial. In *United States v. Ahern*, the CAAF analyzed the difference between "forfeiture" and "waiver" recognizing that courts "review[] forfeited issues for plain error" but cannot "review waived issues because a valid waiver leaves no error to correct on appeal." 76 M.J. 194, 197 (C.A.A.F. 2017) (citations and internal quotation marks omitted). "Forfeiture is the failure to make the timely assertion of right," while "waiver is the intentional relinquishment or abandonment of a known right[.]" *Id.* (citations omitted). The right at issue in *Ahern* was contained in MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 304, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) and specifically provided that failure to object constitutes waiver.[46] The CAAF held that the absence of any mention of "plain error review"—when those words appear elsewhere in the MANUAL FOR COURTS-MARTIAL[47]—indicates an unambiguous waiver, leaving the court nothing to review on appeal. *Id.*

The government avers that *Ahern* applies to RULE FOR COURTS-MARTIAL (R.C.M.) 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), which states, "[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection." ***HN12***[⬆] Analyzing R.C.M. 919(c), in light of *Ahern*, our sister court came to the same conclusion. Finding that the "plain language of the rule, and our superior court's decision in *Ahern*" compelled their result, the Army Court of Criminal Appeals held that the failure to object to government counsel's closing argument constituted waiver, leaving nothing to review on appeal. *United States v. Kelly*, No. 20150725, 76 M.J. 793, 2017 CCA LEXIS 453, at *9 (A. Ct. Crim. App. 5 Jul 2017). We agree. Like MIL. R. EVID. 304, R.C.M. 919(c) provides no provision for plain error review, and therefore, when a defense counsel fails to object to improper argument of government counsel, the defense waives the issue on appeal. We recognize that this conclusion differs from recent cases where CAAF has tested improper arguments for plain error. *See, e.g., Pabelona*, 76 M.J. at 11 ("Because defense counsel failed to object to the arguments at the time of trial, we review for plain error."). However, "[t]o the extent we are presented with contrary case law, we follow our superior court's most recent **[*30]** decision." *Kelly*, 76 M.J. 793, 2017 CCA LEXIS 453, at *9.

Here, applying *Ahern*, we find TC's comments, where preserved by objection, do not constitute prosecutorial

---

[46] *See* MIL. R. EVID. 304(f)(1) ("Motions to suppress or objections under this rule, or MIL. R. EVID. 302 or 305, to any statement or derivative evidence that has been disclosed must be made by the defense prior to submission of plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. *Failure to so move or object constitutes a waiver of the objection*.) (emphasis added).

[47] *See, e.g.*, RULE FOR COURTS-MARTIAL (R.C.M.) 920(F), MANUAL FOR COURT-SMARTIAL, UNITED STATES (2016 ed.) (providing for "waiver" but only "in the absence of plain error"); ***[*29]*** *see also Payne*, 73 M.J. at 23, n.3 (applying a plain error analysis to R.C.M. 920(f), which states that the failure to object constitutes "'waiver of the objection in the absence of plain error'").

misconduct.[48] Even assuming *arguendo* TC's actions amounted to prosecutorial misconduct, the errors did not materially prejudice a substantial right of the appellant and therefore do not warrant relief.

a. Introducing Navy training against military judge's instruction

HN13[↑] "An accused is supposed to be tried . . . [on] the legally and logically relevant evidence presented." *United States v. Schroder*, 65 M.J. 49, 57 (C.A.A.F. 2007). Thus, "[t]he prosecutor should make only those arguments that are consistent with the trier's duty to decide the case *on the evidence*, and should not seek to divert the trier from that duty." ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-6.8(c) (4th ed. 2015) (emphasis added). As a result, a court of appeals may find prosecutorial misconduct where TC "repeatedly and persistently" violates the RULES FOR COURTS-MARTIAL AND MILITARY RULES OF EVIDENCE contrary to instructions, sustained objections, or admonition from the military judge. *Hornback*, 73 M.J. at 160[49] .

Here, the appellant contends the TC "ma[de] inaccurate references to law"[50] when he "told the members that they were allowed to use their [Navy sexual **[*31]** assault and bystander] training in determining the case"[51] contrary to a preliminary instruction from the military judge to disregard such training.[52]

Throughout the course of the entire proceeding, the TC mentioned the Navy sexual assault and bystander training on three occasions—the first during cross examination of a character witness for the defense, Petty Officer First Class J.D.:

> Q: Now, OS2 Motsenbocker — did he receive any training regarding bystander awareness?
> A: Yes, we all have.
> Q: Can you summarize briefly what is that? What does that training entails (sic)?
> A: Bystander Intervention would be basically if you see something wrong happening. It's our duty to step in and stop it before it gets out of hand.
> Q: And that pertains specifically to sexual assaults, right?
> A: Yes.
> Q: When you see somebody drunk who's maybe in a compromised position we're supposed to protect them, right?
> A: Yes, sir.
> Q: We're not supposed to have sex with people in compromised positions, right?
> A: Yes, sir.[53]

Later, in closing argument, the TC argued that "[s]omething overcame his discipline, his self-control, *training* that he's undergone with the Navy" and stated that in addition to using common sense, the members were "allowed **[*32]** to use your *training*. . . . your knowledge and experience in determining this case."[54] However, immediately following this statement, the TC warned members that any sexual assault prevention and response (SAPR) training "is out the window" and to only apply the law as read and provided to them by the military judge.[55]

Concluding his closing argument, the TC arguably reintroduced bystander intervention training when he

---

[48] *See, e.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) (reversing the First Circuit's finding of prosecutorial misconduct because the "distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct . . . should continue to be observed.").

[49] *See, e.g., United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) (finding prosecutorial misconduct in repeated violation of Federal Rules of Evidence 404, 608, and 609, where such violations "continued even after the court instructed the prosecutor as to their impropriety").

[50] Appellant's Brief at 23.

[51] *Id.* at 26 (footnote omitted).

[52] Record at 146. ("As members, in the naval service, we have all received extensive training during recent years on the issue of sexual assault in the military. During that training, we are provided definitions and policies regarding sexual assault. Any definitions, explanations or policies provided during that training must be completely disregarded by you in this criminal trial.").

[53] *Id.* at 671-72.

[54] *Id.* at 766; 768.

[55] *Id.* at 768 ("Now, the judge just read you the instructions, that is, the law. That is what sexual assault is. That is what abusive sexual contact is. I'm sure that you all have preconceived notions about what consent means, what sexual assault means, what abusive sexual contact means. We've all been through different SAPR Trainings. You've heard people saying things like, one drink and you can consent. *All that stuff is out the window*. That piece of paper that you, have in front of you those pages, that's the law that you need to apply, here, today.") (emphasis added).

argued the appellant "was not looking out for a shipmate in need, at all."[56] He again emphasized the appellant's sexual desires "trumped all the *training* that everyone in the Navy gets about sexual assault" before asking the members to return a guilty verdict.[57]

The government avers the appellant waived this issue pursuant to *Ahern supra*, by failing to object prior to members' deliberations.[58] ***HN14***[] "Whether an appellant has waived an issue is a question of law reviewed de novo." *Ahern*, 76 M.J. at 197 (citation omitted). "The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case . . ." *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (citation and internal quotation marks omitted).

At trial, the civilian defense counsel objected **[*33]** to the line of questioning about training during cross-examination as argumentative and was overruled. He also objected after the entirety of TC's closing argument in a request for mistrial, on "the simple fact that the government stated that one drink and you can't consent" after repeatedly asserting that PO3 AD was drunk.[59] This request was similarly denied.[60] Neither objection specifically nor adequately preserved the issue of referencing Navy sexual assault training.[61] Moreover, the civilian defense counsel *approved* a member's question squarely raising appellant's decision to disregard his training on sexual assault.[62] "It is thus apparent, under the particular facts of this case, that counsel consciously and intentionally failed to save the point . . . ." *Elespuru*, 73 M.J. at 329 (citation and internal quotation marks omitted). Accordingly, we find that appellant exceeded passive forfeiture and alternately waived this issue.[63]

b. Calling the appellant a liar

As a threshold matter, we hold that the appellant did not waive this issue by failing to object at trial. The appellant's civilian defense counsel specifically moved for a mistrial prior to the members' deliberations on the grounds that the TC made **[*34]** disparaging comments about the appellant and called him a liar.[64] Therefore, we review for prejudicial error. *Fletcher*, 62 M.J. at 179.

HN15[] Our superior court has warned that "calling the accused a liar is a dangerous practice that should be avoided." *Fletcher*, 62 M.J. at 182 (citation and internal quotation marks omitted). This caution recognizes a prosecutor's goal "is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. Ultimately, disparaging comments "have the potential to mislead the members" and to "detrac[t] from the dignity and solemn purpose of the court-martial proceedings." *Fletcher*, 62 M.J. at 182.

However, describing a defendant as a liar does not equate to per se error.[65] Notably, TC is permitted to

---

[56] *Id.* at 794.

[57] *Id.* at 795 (emphasis added).

[58] Appellee's Brief of 25 May 2017 at 42.

[59] Record at 797.

[60] *Id.* at 798 ("[M]otion for mistrial is denied. The military judge's understanding . . . was that [TC] clarified the standard to which they are supposed to follow in accordance with Pease and the other more recent information regarding capacity to consent and defining a competent person who can consent.")

[61] *See, e.g., United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990) (only making the correct specific objection preserves issue for appeal).

[62] AE LV at 1 ("With all the GMT training you received on sexual assaults and bystander intervention training why did you decide to sleep on the bed vice going to the sofa in the common area[?]").

[63] Even conducting a plain error analysis for the benefit of the appellant, we conclude that appellant was not prejudiced by the discussion of Navy sexual assault and bystander training. Here, the appellant fails to demonstrate a "reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004) (citations and internal quotqation marks omitted). Although we do not condone a TC's use of Navy training during courts-martial, the military judge correctly issued the instruction for the members to disregard any training, and the TC reiterated that message during his closing argument in mitigation. Not only do we presume the members follow the instructions of the military judge, *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000), but the appellant's repeated failure to object also indicates "that either no error was perceived or any error committed was inconsequential." *United States v. Sittingbear*, 54 M.J. 737, 740 (N-M. Ct. Crim. App. 2001).

[64] *See* Record at 862; AE LXV.

[65] *See, e.g., Fletcher*, 62 M.J. at 182-83 (finding TC's comments that Fletcher's testimony "was the first lie," that he

"'forcefully assert reasonable inferences from the evidence.'" *United States v. Coble*, No. 201600130, 2017 CCA LEXIS 113, at *10, unpublished op. (N-M. Ct. Crim. App. 23 Feb 2017) (quoting *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008)). Therefore, the "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987) (citing *United States v. Williams*, 529 F. Supp. 1085, 1106-07 (E.D.N.Y. 1981) ("'Lie' is an ugly word, but it is appropriate when it fairly describes the ugly conduct it denotes."). In other words, it is appropriate for TC to "comment on . . . conflicting testimony" unless **[*35]** using "language that [i]s more of a personal attack on the defendant than a commentary on the evidence." *Fletcher*, 62 M.J. at 183.

Nevertheless, ***HN16***[↑] it is an "exceedingly fine line which distinguishes permissible advocacy from proper excess." *Id.* at 182 (citation and internal quotation marks omitted). One factor in determining if the TC has crossed this line is whether the TC ties the comment to evidence in the record. Where the TC has "explained why the jury should come to th[e] conclusion" that the appellant lacks credibility, the Court may find permissible advocacy. *Cristini*, 526 F.3d at 902. However, where the TC's statements are "unsupported by any rational justification other than an assumption that [the appellant] was guilty," and "not coupled with a more detailed analysis of the evidence adduced at trial[,]" the comments turn improper. *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). These untethered assertions "convey an impression to the jury that they should simply trust the [government's] judgment" that the accused is guilty because the TC "knows something [the jury] do[es] not." *Id.*

Despite the appellant's claim, the TC never called the appellant a "liar" at trial.[66] Likewise, the TC never referred to the appellant and an act of lying during his initial closing argument. However, the **[*36]** TC did use the words "lies" and "lying" with reference to the appellant approximately 15 times during his rebuttal argument.[67] All but one of these instances were connected to discrepancies between appellant's original statement to NCIS and his testimony at trial. First, the TC argued appellant expanded the time frame for the events that night to downplay PO3 AD's vomiting:

> You will notice that when OS2 Motsenbocker took the stand and told you a completely different story than he told NCIS and, ultimately, you might have gotten whiplash watching that story go back and forth; [']oh, no, it was before the police. Okay, I guess I did tell the NCIS, so I guess it did happen after the police got there[']. . . Why is he . . . elongating the night? . . . The reason why he's lying to you that way is because he wants to minimize the vomiting.[68]
>
> . . . .
>
> You heard him, "Oh, I laid her down and then I went and cleared everybody out. It took me an hour to clean up the house.["] Right? That's what he said. And then, when I presented him with text messages at 1227, so I may have been mistaken. He was mistaken. He was misleading. He was lying, and he's trying to get away with it.[69]

Second, the TC argued the **[*37]** appellant and defense mischaracterized statements made by police concerning whether PO3 AD was able to leave the appellant's house that night:

> [A]nother lie that he says [is] so obvious. This is what [the appellant] said in his original NCIS statement, "They could tell that she had been throw[ing] up and everything. So, they told me that she shouldn't leave, because at least not right away, because she's not in the condition to leave." That's his statement . . . and, for some reason, even defense counsel in their argument, keeps inserting "shouldn't leave" to "shouldn't drive." Listen to that statement very carefully. You would never hear [the appellant] ever say that to NCIS in October 2014.[70]

Finally, the TC argued the appellant added information during his testimony that PO3 AD was responding sexually to the appellant's conduct, which was not previously disclosed to NCIS:

> [T]he NCIS statement is a believable account. We would agree with that. Too bad it's drastically,

"had 'zero credibility' and that his testimony was 'utterly unbelievable'" were "not so obviously improper as to merit relief in the absence of an objection from counsel").

[66] Appellant's Brief at 29-30.

[67] Record at 824-56.

[68] *Id.* at 828-30.

[69] *Id.* at 835.

[70] *Id.* at 832.

> different from the one he had on the stand. So, here's what he gives you now. That new timeline we talked about . . . . What's the new information he provides us? "The moaning. The moisture. She's sexually turned on. She's spreading her legs. **[*38]** I gave oral sex to her. But, when I looked up, she was on the phone.". . . He changed his story, over and over again . . . He's lying. And he's lying because he committed a crime.[71]

We conclude, therefore, that the TC's arguments do not constitute error because he "avoided characterizing [the appellant] as a liar" and grounded all but one of his "comments instead to the plausibility of [the appellant's] story[.]" *Fletcher*, 62 M.J. at 183. This conclusion is supported by the fact that the TC only made such comments during rebuttal after the defense's closing argument, where the civilian defense counsel had asserted the appellant "went in [to NCIS] to be an open book, just like he was here with you"[72] and that "he volunteered the information; the entire story."[73] Here, just as in *Fletcher*, "the defense opened the door and it was appropriate for trial counsel to comment on [the appellant's] conflicting testimony during h[is] findings argument." 62 M.J. at 183.

c. Improper bolstering of the victim's testimony

HN17[] It is well-established that it is the "exclusive province of the court members to determine the credibility of witnesses." *United States v. Knapp*, 73 M.J. 33, 34 (C.A.A.F. 2014) (citation and internal quotation marks omitted). To protect the integrity of this province, the "TC should **[*39]** not imply special or secret knowledge of the truth or of witness credibility, because when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore that witness' views." *United States v. Andrews*, No. 201600208, 2017 CCA LEXIS 283, at *23, unpublished op. (N-M. Ct. Crim. App. 27 Apr 2017) (citations and internal quotation marks omitted). Thus, "improper vouching occurs when the trial counsel places the prestige of the government behind a witness through personal assurances of the witness's veracity." *Fletcher*, 62 M.J. at 179 (citation and internal quotation marks omitted). Such assurances may be evidenced by "the use of personal pronouns in connection with assertions that a witness was correct or to be believed" such as "I think it is clear," "I'm telling you," and "I have no doubt." *Id.* (citations and internal quotation marks omitted).

However, ***HN18***[] not all forms of vouching are improper. Closing arguments and rebuttal "may properly include reasonable comment on the evidence in the case, including references to be drawn therefrom, in support of a party's theory of the case." R.C.M. 919(b) (2016 ed.). Specifically, the TC may "comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported **[*40]** by evidence." R.C.M. 919(b), Discussion. "Thus, it is not improper vouching for TC to argue, while marshalling evidence, that a witness testified truthfully, particularly after the defense vigorously attacks this witness' testimony . . . ." *Andrews*, 2017 CCA LEXIS 283, at *24 (citation and internal quotation marks omitted). To illustrate, such permissible language includes "you are free to conclude," "you may perceive that," "it is submitted that," or "a conclusion on your part may be drawn." *Fletcher*, 62 M.J. at 180 (citation and internal quotation marks omitted).

During rebuttal,[74] the TC acknowledged that the civilian defense counsel had "honed in on two inconsistencies" in PO3 AD's testimony during his closing argument, declaring the fact that the cops left her at the appellant's house to be "a hole in [the government's] case." TC responded:

> The fact that she's using a different adjective for being pressed up against her, than she did her original statement, doesn't make her statement unreliable or different. . . . [PO3 AD has] told the

---

[71] *Id.* at 844-45.

[72] *Id.* at 801.

[73] *Id.* at 811.

[74] The appellant also alleges improper vouching during the TC's closing argument when he analogized PO3 AD "would have to be a diabolical super-genius; Lex Luther-level, Machiavellian" to have made up the charges. Record at 784. This is an issue of mischaracterizing the evidence, rather than improper vouching. *See Fletcher*, 62 M.J. at 183-84 (finding error where the TC referred to Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry and Robert Downey Jr. because the references "improperly invited comparison to other cases, the facts of which were not admitted into evidence and which bore no similarity" to the case at bar). Here, the TC's analogy, although not condoned, did not invite comparison to other cases, and therefore does not constitute severe misconduct. *See, e.g., United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (declining to find severity where "trial counsel's comparison of [a]ppellant to Hitler, bin Laden, and Hussein . . . were made in the context of a permissible theme").

> truth so many times. She's told it to [PO3 ZA], as it is happening to her. She told it to [PO3 ZA] the next morning; [TR] the next morning. She told her command the next business day. She told it to [MO]. She's been interviewed **[*41]** by NCIS, multiple times. She's testified in this court. And the best that they can come up with, defense, they are presenting to you as evidence that she is not a truthful person. Is that she uses the word pinned down? That's a hole in the government's case? That's strength. [PO3 AD's] consistency and the immediacy of her report is a strength, not a hole.[75]

The TC later commented, "she has been unbelievably consistent" and told the members that "you can convict him on the strength of her testimony alone."[76] Although the civilian defense counsel did not contemporaneously object to these comments, the defense's motion for appropriate relief and motion for mistrial complained that the TC had put the weight of the government behind their witness.[77]

Mindful that ***HN19***[] prosecutorial comments must be analyzed in the context of the full record, the TC's comments in this case were made following the civilian defense counsel's lengthy closing argument in which he repeatedly attacked PO3 AD's credibility, even focusing on the theme of "[r]egret after the fact."[78] It was the civilian defense counsel who first argued "[her] story makes no sense" and "[i]t's not believable."[79] He continued this attack, later stating **[*42]** again that "[i]t doesn't make any sense. It's not believable. Nothing in her story is believable."[80] In all, the civilian defense counsel called PO3 AD's story "not believable" nine times, said it "makes no sense" sixteen times, and claimed [PO3 AD] "wants you to believe" six times during the defense's closing argument.[81] As the Supreme Court has said, "it is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988). Here, the TC forcefully argued PO3 AD's consistency during rebuttal to meet the civilian defense counsel's attack on her credibility during the defense closing argument. Markedly, the appellant alleges error in statements identical to statements first made by his own counsel, substituting the subject person. We follow our superior court's principle that an "'[a]ppellant cannot create error and then take advantage of a situation of his own making.'" *United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999) (quoting *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996)).

d. Mischaracterizing evidence

HN20[] A prosecutor "may strike hard blows" against a defendant, but is "not at liberty to strike foul ones." *Berger*, 295 U.S. at 84, 88 (finding prosecutorial misconduct in part because the prosecutor "misstat[ed] the facts in his cross-examination of witnesses" by "putting into **[*43]** the mouths of such witnesses things which they had not said," and "assuming prejudicial facts not in evidence"). Indeed, "[i]t is a fundamental tenet of the law that attorney[s] may not make material misstatements of fact in summation."[82] *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994) (citation omitted). "At the same time, counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury." *Fletcher*, 62 M.J. at 183.

The appellant maintains the TC invented statements that did not exist "for the purpose of inflaming the passions of the jury" during his rebuttal when the TC provided commentary on why the police left PO3 AD at the appellant's house.[83] Specifically, the TC argued:

> The defense spent a lot of time talking about this idea that the police just left her there, as if that was stupid and crazy. You know why they left her there? Because she had a good-looking, strapping, young Petty Officer who was taking care of her. 'I got this. I'm getting her water. I'm giving her bread. It's cool cops, I got this.' That's why they left her there.[84]

The civilian defense counsel objected on the basis of mischaracterizing the evidence. The military judge

---

[75] Record at 826.

[76] *Id.* at 840-41.

[77] AE LXV at 4.

[78] Record at 800.

[79] *Id.* at 810, 811.

[80] *Id.* at 818.

[81] *Id.* at 800-821.

[82] *See also* ABA, at 3-6.8(a) ("The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record.").

[83] Appellant's Brief at 33.

[84] Record at 832-33.

overruled the objection, explaining that she "did not hear trial counsel attribute that **[*44]** statement to the accused."[85]

Here, we heed the Supreme Court's caution that ***HN21***[] "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). As the military judge determined and the record confirms, the TC never attributed the statements to the appellant, nor claimed to be quoting portions of the appellant's testimony. In context, the more likely and less damaging interpretation is that the TC intended to rebut the "[a]ppellant's contention that if [PO3 AD] was highly intoxicated, the police would not have left her in [the a]ppellant's care[,]" by offering another hypothetical explanation.[86] We refuse to infer otherwise, especially where to do so would contradict a military judge's firsthand observation and analysis at trial.[87] Regardless, we find that the statement did not prejudice the appellant.

e. Inserting trial counsel's opinion

In his motion for mistrial, the appellant argued that the TC interjected his personal beliefs and opinions, thereby materially prejudicing the appellant.[88] On appeal, the appellant argues that **[*45]** the TC undeniably "inserted [himself] into the proceedings by using the pronouns 'I' and 'we'." *Fletcher*, 62 M.J. at 181. All but one of the complained of uses occurred during his rebuttal argument, where the TC flatly stated, "If you disagree with me, that's fine."[89] He also argued:

> Defense said this over and over again. She didn't take responsibility for her actions. *I don't know*. Maybe she didn't. I don't know. And frankly *I don't care* and neither should you. And the reason is she's not on trial.[90]

HN22[] The Supreme Court has long-recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all[.]" *Berger*, 295 U.S. at 88. Certainly, it is a "breach [of] their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence." *Young*, 470 U.S. at 7. Thus, improper interjection of a prosecutor's views constitutes prosecutorial misconduct because "it may confuse the jurors and lead them to believe that the issue is whether or not the prosecutor is truthful instead of whether the evidence is to be believed." *Fletcher*, 62 M.J. at 181 (citation omitted).

However, improper **[*46]** interjection is not found by merely counting the number of pronouns, but rather must be examined for possible effect on the jurors.[91] Many of the TC's comments in the case at bar actually focused on possible theories *for* the defense. For example, the TC said, "I'll certainly admit the first blush, the text message thing, is a little weird . . . ."[92] Later, he stated, "I guess, and I'm only guessing, trying to connect the dots, here; cover up a notorious kissing, of [PO3 PC] by, falsely, accusing [the appellant,] I think that's what they're saying."[93] Many others simply did not offer an opinion on the "truth or falsity of any testimony or evidence." *United States v. Horn*, 9 M.J. 429, 430 (C.M.A. 1980) (finding improper argument where TC used the phrase "I think" when specifically "analyzing the evidence of record . . . and in suggesting what weight ought to be given by the court to various evidence"). Rather, the TC in this case often said, "I don't know what that means"[94] and "I guess."[95]

---

[85] *Id.* at 833.

[86] Appellee's Brief at 40 (TC "was arguing that it was reasonable to infer that the police left because it appeared to them that [a]ppellant was assisting" PO3 AD.).

[87] *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) ("While not required, where the military judge places on the record [her] analysis and application of the law to the facts, deference is clearly warranted.") (citation and internal quotation marks omitted).

[88] AE LXV at 4.

[89] Record at 848.

[90] *Id.* at 853 (emphasis added).

[91] *See Baer*, 53 M.J. at 238 (C.A.A.F. 2000) ("The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'") (quoting *Young*, 470 U.S. at 16).

[92] Record at 784.

[93] *Id.* at 848.

[94] *Id.* at 838.

[95] *Id.* at 851.

Therefore, we do not find the TC's statements, taken in context, to be "a form of unsworn, unchecked testimony," *id.*, resulting in any prejudice to the appellant.

f. Comments on the defense and shifting the burden of proof

HN23[↑] Mirroring the TC's duty to refrain **[*47]** from inserting personal opinions, "it is also improper for a [TC] to attempt to win favor with the members by maligning defense counsel." *Fletcher*, 62 M.J. at 181 (citation omitted). Thus, this court may declare prosecutorial misconduct where "one attorney makes personal attacks on another," creating "the potential for a trial to turn into a popularity contest." *Id.* In addition to "detract[ing] from the dignity of judicial proceedings[,]" personal attacks can "cause the jury to believe that the defense's characterization of the evidence should not be trusted, and, therefore, that a finding of not guilty would be in conflict with the true facts of the case." *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001). This squarely violates the core legal standard of criminal proceedings, that the government always bears the burden of proof to produce evidence on every element and persuade the members of guilt beyond a reasonable doubt. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995); R.C.M. 920(e)(5)(D).[96]

Here, the appellant asserts that the TC "crossed the line when attacking the defense's case."[97] Explicitly, the appellant alleges error in the TC's comments about the "defense's fanciful imagination world[,]"[98] the "[s]exual assault myths that defense, cravenly, runs full steam into"[99] and that the defense was "[g]rasping at straws."[100] Implicitly, the appellant **[*48]** maintains that the TC "insinuated that the defense had worked with their client in order to lie on the stand."[101] After discussing other discrepancies between the appellant's statements to NCIS and his testimony, the TC said:

> That's what he presents to NCIS. Now, obviously, that story is not going to work for defense. So, he's got to take the stand and give you something else, something more, something different.[102]

Using these statements as a premise, the appellant contends that the TC ultimately shifted the burden to the defense when he said, "So, if you're discussing this or you're entertaining the idea that he's not guilty that . . . we haven't met the burden because the defense's theory seems to be so persuasive."[103]

We disagree. Not only do these statements merely, and permissibly, address a theory of reasonable doubt offered by the defense by arguing the implausibility of the appellant's version of the facts, but the TC had already explicitly reminded the members that the defense did not have the burden:

> Defense doesn't have to put on a case. They don't have to cross-examine anybody. But, when they come in front of you and present you a theory, you can kick the tires on it.[104]

We conclude the **[*49]** TC's comments about the defense did not shift the burden of proof nor rise to the level of prosecutorial misconduct. ***HN24***[↑] For a TC to shift the burden to an accused is "an error of constitutional dimension" accompanied by a high threshold that is not met by the ambiguous statements here. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004).

To summarize our assessment of error, we do not find legal error in the TC's closing or rebuttal arguments where, as here, the TC zealously responded to the defense's theory of the case and assertions made during the defense's closing argument. ***HN25***[↑] "While a criminal trial is a serious effort to ascertain truth and an atmosphere of passion or prejudice should never displace evidence it is also a practical matter which can hardly be kept free of every human error." *United States v. Stockdale*, 13 C.M.R. 540, 543 (N.B.R. 1953). Here, it cannot be said that the TC's "argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Berger*, 295 U.S. at 85. Rather, the TC's "remarks were invited, and did no more than respond

---

[96] *See also United States v. Crosser*, No. 35590, 2005 CCA LEXIS 412, at *13, unpublished op. (A.F. Ct. Crim. App. 23 Dec 2005) ("[T]he burden of proof never shifts to the defense.").

[97] Appellant's Brief at 37.

[98] Record at 838.

[99] *Id.* at 841

[100] *Id.* at 842.

[101] Appellant's Brief at 38.

[102] Record at 843-44.

[103] *Id.* at 848.

[104] *Id.* at 840.

substantially in order to right the scale." *Young*, 470 U.S. at 12-13) (internal quotation marks omitted).

2. Prejudice to the appellant

While we find that the TC did not commit prosecutorial misconduct in either his argument or rebuttal, **[*50]** we conclude that even if we were to find error rising to the level of prosecutorial misconduct, there was no prejudice. In so concluding, we recognize that ***HN26***[] "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone[.]" *Young*, 470 U.S. at 11. Accordingly, "relief will be granted if the trial counsel's misconduct actually impacted on a substantial right of the accused (i.e., resulted in prejudice)." *Fletcher*, 62 M.J. at 184 (citation and internal quotation marks omitted). When analyzing the record for prejudice, the court must assess whether the misconduct is "not slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Id.* at 185. Reversal is necessary "when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone. *Id.* at 184.

HN27[] The Court employs a three factor balancing test to evaluate prejudicial impact on a verdict: (1) the severity of the misconduct, (2) any curative measures taken, and (3) the strength of the Government's case. *Id.* We discuss each factor in turn.

a. Severity **[*51]** of misconduct

> Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184 (citation omitted). In this case, even assuming as true the appellant's allegations of improper argument, we agree with the military judge's finding during trial that the severity of any misconduct was low.[105] First, the actual raw instances of alleged misconduct were minimal.[106] To illustrate, the TC referred to appellant's "lie(s)" or "lying" only approximately 15 times within the 32-page rebuttal. *Contra Andrews*, 2017 CCA LEXIS 283, at *14 (finding error where TC argued the lies of the appellant "some 25 times in total" within just 11 pages). Second, the alleged errors were almost entirely confined to that 32-page rebuttal, out of an 889-page record, and thus did not permeate the case as a whole. Third, the appellant's trial lasted five days with just one of those days encompassing the errors **[*52]** alleged now. Although the fourth factor weighs in favor of the appellant, as the members only deliberated for approximately one hour and fifteen minutes, it is not enough to overcome the first three factors in favor of the government. The fifth factor is neutral, as the military judge did not make a ruling for the TC to abide by before he completed rebuttal; the military judge denied the defense's request for a mistrial at the end of TC's closing argument[107] and overruled the objection for mischaracterizing the evidence.[108]

b. Curative measures taken

HN28[] "Generally, potential harm from improper comments can be cured through a proper curative instruction." *United States v. Boyer*, No. 201100523, 2012 CCA LEXIS 906, at *33, unpublished op. (N-M. Ct. Crim. App. 27 Dec 2012) (citation omitted). However, the extent of curative effect depends on how specifically the instruction targets the misconduct. Indeed, our superior court has repeatedly emphasized "[c]orrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher*, 62 M.J. at 185 (citation and internal quotation marks omitted). As a result, we would find a curative instruction insufficient where "[i]t is impossible to say that the evil influence

---

[105] *Id.* at 866. "So I'll note as towards the severity of the misconduct — I think that severity was low, and that it was in rebuttal argument."

[106] The appellant cited several of the TC's statements in more than one variation of prosecutorial misconduct. For example, the appellant asserted the TC's statement, "I don't know what defense's argument is, and you can probably make more sense of it than I can" for both interjecting his personal opinion and commenting on the defense to shift the burden. Appellant's Brief at 36-7.

[107] Record at 796-98.

[108] *Id.* at 832-33.

upon the [members] of these acts of misconduct was removed by **[*53]** such mild judicial action as was taken." *Berger*, 295 U.S. at 85.

Here, the military judge did not take any specific curative measures in response to the TC's rebuttal argument while delivered. In the military judge's own analysis of this factor on the record, she explained the comments were not "significant enough to cause the military judge to stop the argument or to excuse the members while it was happening in real-time."[109] We agree with the government that "[t]o the extent that she did not issue repeated curative instructions contemporaneously with the alleged error . . . this was [largely] the result of [the a]ppellant's failure to timely object." (citation omitted)[110]

However, the military judge did procure an overnight recess and reread instructions the following morning before deliberations.[111] Moreover, the military judge had issued a curative instruction before any closing arguments began:

> You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember **[*54]** it and apply the law as I instruct you.[112]

The military judge also reiterated minutes before deliberations that "[a]gain, argument by counsel is not evidence; counsel are not witnesses" and should "the facts as you remember them differ from the way counsel stated the fact [then] it is your memory that controls."[113] ***HN29***[⬆] Conclusively, "the members are presumed to follow the military judge's instructions." *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). We do not find evidence to the contrary. *Id.*

c. Strength of the government's case

HN30[⬆] Our superior court has found this third factor, the weight of the evidence supporting conviction, may be "strong enough to establish lack of prejudice in and of itself." *Pabelona*, 76 M.J. at 12. Relative to the defense case, the government's case here was strong. As we noted *supra*, PO3 AD and appellant had never met before the night in question and, except for a brief introduction, did not speak to each other until the assault. The members viewed and listened to the appellant's interview with NCIS, observed his real-time testimony under oath, and even questioned him. The members were thus given an opportunity to fully weigh the appellant's credibility against PO3 AD's testimony. The government also presented corroborating text messages sent during **[*55]** the sexual assault which flatly stated "[r]ape" and "help[.]"[114] Collectively, the strength of this evidence firmly supports the appellant's convictions.

With all three factors resolved in favor of the government, we conclude any misconduct by the TC did not materially prejudice the accused and we are thus "confident that the members convicted the appellant" beyond a reasonable doubt of the two specifications of abusive sexual contact and one specification of sexual assault "on the basis of the evidence alone." *Fletcher*, 62 M.J. at 180.

III. Conclusion

The findings and sentence, as approved by the CA, are affirmed.

Concur by: FULTON

Concur

FULTON, Judge (concurring in the result):

I agree with Parts I, IIB and III of the lead opinion and that the findings and sentence should be affirmed. I write separately because I think that as to Part IIA both the lead opinion and the dissent make this case harder than it needs to be.

The appellant was charged with committing a sexual act upon another person by causing bodily harm to that

---

[109] *Id.* at 866.

[110] Appellee's Brief at 49.

[111] Record at 860; 871-73.

[112] *Id.* at 752-53.

[113] *Id.* at 876-77.

[114] PE 3 at 2-3.

other person. The government presented ample evidence to support a conviction. The military judge properly instructed the members that the government had to prove that the appellant committed the bodily harm without the **[*56]** consent of the other person. This instruction defined consent as a freely given agreement to the conduct at issue by a competent person. None of these instructions are controversial.

At trial, the parties disputed the victim's competence—a necessary precondition to consent. The military judge elaborated on the subject of consent by telling the members that a person is incapable of consenting if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct. The appellant did not object to this instruction, and it does not represent, as the appellant now claims, an importation of a new theory of liability into the case.

The appellant was already on notice the government would have to prove lack of consent, and that consent means a freely given agreement to the conduct at issue by a competent person. The word *competent* is not defined by statute. But was the appellant prejudiced when the military judge instructed members that people without the mental ability to appreciate the nature of the conduct and people without the physical or mental ability to make **[*57]** or communicate a decision regarding such conduct cannot consent? Surely no one so described could be considered competent to give consent. I am therefore convinced that the assignments of error addressed in Part IIA of the lead opinion are withot merit and that following the military judge's instructions could have only led members to convict the appellant of the offenses properly before the court-martial.

Dissent by: CAMPBELL

Dissent

CAMPBELL, Senior Judge (dissenting):

Based on my reading of *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016) and *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017), affirming the appellant's convictions in this case does not give the requisite legal effect to both Articles 120(b)(1)(B) and 120(b)(3), Uniform Code of Military Justice (UCMJ), as separate criminal theories of liability. Therefore, I respectfully dissent.

Reversing our opinion in *Riggins*, the Court of Appeals for the Armed Forces (CAAF) explains, "the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." 75 M.J. at 84. (emphasis in original). The CAAF draws a clear distinction between factual consent and a legal inability **[*58]** to consent, and specifically notes that this court had *erroneously* held "that the Government could not prove sexual assault or abusive sexual contact 'by threatening or placing that other person in fear without necessarily proving assault consummated by a battery, because *one cannot prove a legal inability to consent without necessarily proving a lack of consent*.'" *Id.* at 82 (quoting United States v. *Riggins*, No. 201400046, 2014 CCA LEXIS 864, at *14 (N-M. Ct. Crim. App. 26 Nov 2014) (emphasis added).

In *Sager*, another more recent opinion reversing this court, the CAAF held that "asleep, unconscious, or otherwise unaware" creates three separate criminal liability theories under Article 120(b)(2)—noting the words "'asleep, unconscious, or otherwise unaware,' are separated by the disjunctive, 'or.'" 76 M.J. at 161. The court held, "Under the 'ordinary meaning' canon of construction, therefore, 'asleep,' 'unconscious,' or 'otherwise unaware' as set forth in Article 120(b)(2) reflect separate theories of liability." *Id.* at 162 (citation omitted). Applying another canon of construction, the CAAF further held that "to accept the view that the words 'asleep, unconscious, or otherwise unaware,' create only one theory of criminality would be to find that the words 'asleep,' **[*59]** 'unconscious,' and 'or' are mere surplusage. This we are unwilling to do." *Id.* (citation omitted)

Examining Article 120(b) in the context of *Sager*'s statutory interpretation of its component Article 120(b)(2) offenses, Article 120(b) on the whole more broadly codified separate and distinct theories of criminal liability by proscribing sexual acts upon another person under any of the four subparagraphs of subsection (b)(1), when the perpetrator knows or reasonably should know that the victim falls into one of the categories in subsection (b)(2), *or* when the perpetrator knows or reasonably should know that the victim is incapable of consenting due to any of the conditions in the two subparagraphs of subsection

(b)(3).

Consequently, giving effect to all of the legal inability to consent theories of criminal liability as separate offenses and ensuring that none of the Article 120(b) provisions are rendered mere surplusage by our interpretation of the statute requires us to limit application of Article 120(b)(1)(B) to allegations in which *only factual consent* is at issue.[1]

Factual consent is a "freely given agreement to the conduct" alleged under Article 120(b)(1)(B); there is no factual consent **[*60]** if there is "an expression of lack of consent through words or conduct[.]" Article 120(g)(8)(A).

Legal consent requires that a person have the competence to freely agree to the specific nature of the sexual conduct. Legal consent is at issue in alleged violations of Article 120(b)(1)(A), 120(b)(1)(C), 120(b)(1)(D), 120(b)(2), or 120(b)(3).

The lead opinion, in accordance with the distinctions drawn by the CAAF in *Riggins*, recognizes that both victims with the legal ability to consent and those having a legal inability to consent may express that they do not factually consent through their words or conduct. *See Riggins*, 75 M.J. at 84 n.6.

The government alleged only that the appellant engaged in sexual contacts and a sexual act with PO3 AD by bodily harm—in violation of only Article 120(b)(1)(B). Therefore, the government's theory that PO3 AD did not, in fact, consent to the sexual behavior, and the appellant's theory that she did, in fact, consent to the sexual behavior (or that there was at least a mistake of fact that she did, in fact, consent to the sexual behavior based on her physical responses to his gradual advances and escalating actions) was the only theory of liability at issue. During the government's **[*61]** initial closing arguments, the trial counsel specifically explained the only theory of criminal liability at issue:

> We're not saying she was passed out or that she's blacked out something like that. She just didn't want him to do this, and she said no. And that's a crime. There's a lot of different types of sexual assault, and that's the sexual assault that we're here today to talk about.[2]

The factfinder could properly consider all of the surrounding circumstances to determine whether PO3 AD, in fact, consented to the sexual behavior through her words or conduct with the appellant—including evidence of her recently vomiting, not having brushed her teeth, not having removed a feminine hygiene product, not engaging in verbal dialogue with the appellant, continuing to text on her phone during at least parts of the encounter, etc.

However, the military judge instructed on much more than the factual consent theory at issue in this case. In fact, most of the Article 120(b) theories of criminal liability were included in the instructions given before closing arguments and again the following day immediately before the members deliberated on findings:

> All the surrounding circumstances are to be **[*62]** considered in determining whether a person gave consent [Article 120(b)(1)(B)] or whether a person did not resist or ceased to resist only because of another person's actions. An incompetent person cannot consent to a sexual contact, and a person cannot consent to a sexual contact while under threat or in fear [Article 120(b)(1)(A)].
>
> A person is incapable of consenting [Article 120(b)(3)] if that person does not possess the

[1] Alternatively, we may properly view Article 120(b)(1)(B) as applicable to situations in which competence is presumed, and thus not at issue, as the appellant suggests. Either approach recognizes that how the statutory element "without consent" relates to the existence of various theories of liability for Article 120, UCMJ, offenses is different than a decade ago. Before 1 October 2007, rape was simply "an act of sexual intercourse, by force and without consent," and the MANUAL FOR COURTS-MARTIAL—not the UCMJ—provided different theories of rape liability by explaining, in part, that consent could not be inferred "if resistance would have been futile" or was "overcome by threats of death or great bodily harm, or where the victim [was] unable to resist because of the lack of mental or physical faculties." MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2005 ed.), Part IV, P 45.c.(1)(b). Regardless of which theory was presented at trial, the Article 120 statutory elements were the same, and there was but one sample "rape" specification. MCM, P 45.f.(1). But if the theory of liability *now codified* at Article 120(b)(3)(A) is implicated whenever an Article 120(b)(1)(B) offense is alleged, Article 120(b)(1)(B) is relegated to no more than a definitional status. Giving each Article 120(b) provision its proper status requires the "competent person" part of the statutory definition of consent to be applied to all of the sexual assault theories *except* for Article 120(b)(1)(B)—and the "freely given agreement to the conduct" part of the definition to be applied to just Article 120(b)(1)(B).

[2] Record at 790.

> mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct. . . .
> In deciding whether a person was incapable of consenting, many factors should be considered and weighted, including . . . awareness of the identity of the person with whom they are engaging in the conduct [Article 120(b)(1)(D)], level of consciousness [Article 120(b)(2)], amount of alcohol ingested, tolerance to the ingestion of alcohol [Article 120(b)(3)(A)], and/or their ability to walk, talk and engage in other purposeful physical movements [Article 120(b)(3)(B)].[3]

And in addition to arguing the legal theory actually at issue, lack of factual consent, the trial counsel also argued one of the legal **[*63]** inability to consent legal theories included in the military judge's instructions. Specifically, the trial counsel argued that even if PO3 AD provided her factual consent through her words or conduct in the bedroom with the appellant, the members should still convict the appellant of the alleged offenses under Article 120(b)(1)(B) only because, under those circumstances, PO3 AD had a legal inability to consent under Article 120(b)(3):

> *Not only did she not consent*. She could not consent. And the definition here is a person is incapable of consenting if that person does not possess the physical ability to make or communicate a decision regarding sexual conduct. So this is just a, potential, threat for defense's theory. So maybe she's not, actually, telling him no. And she's not, actually, telling him no, and maybe her words aren't coming out. But, they are certainly coming via text message. Then maybe there's a reasonable mistake of fact as to consent, but here's the thing, even if you believe the lies coming out of his mouth. Even if you believe every word of that and you believe that [PO3 AD], after drinking shot for shot which left a heavy, 200 pound Petty Officer [C] lying back down **[*64]** on the floor with his ID on his chest; and she's drinking shot for shot, and she's doing all of these things, she's vomiting in the toilet, vomiting in the bed, police observe her and say that she can't even leave; [if] you think that that person, in that state is then saying to Petty Officer Motsenbocker, "Hey, do it to me, big daddy." And then he does it to her. That's still a crime in that fact pattern and that kind of world defense may, or may not, be trying to present to you. Even if she's saying, I wanted to have sex----[4]

The government's slide presentation also substantively outlined both theories as the trial counsel argued them. Nine slides' titles included the words "Did Not Consent," and the seven slides that followed were titled "AD COULD Not Consent."[5] This portion of the trial counsel's rebuttal argument was apparently inconsistent with how both the civilian defense counsel and the military judge viewed the capable or incapable of consenting portion of the findings instructions. The civilian defense counsel interrupted:

> Objection, Your Honor: He's again misstating the law. He is not stating correctly from the instructions as far as from the . . . as far as incapable versus **[*65]** her consent. We request a correcting instruction to the jury of what the law actually is.[6]

The military judge immediately sustained the objection without further discussion, but the only curative measure was repeating the same instructions from which the trial counsel argued factual lack of consent did not matter because PO3 AD was legally incapable of consenting.5 And despite the motion for a mistrial, even if the appellant waived the improper argument related to bystander intervention training issue as the lead opinion suggests, the first members' question asked during the appellant's testimony in his own defense demonstrates the members may have been receptive to, if not focused on, a theory of liability requiring **[*66]** no lack of factual consent to convict. Under these circumstances, I am unable to conclude that the instructions and arguments regarding a theory of liability not at issue, based upon

---

[3] *Id.* at 756-57; 871-72.

[4] *Id.* at 853-54 (emphasis added).

[5] Appellate Exhibit LXIV, at 3-6; Record at 835-855.

[6] The next morning, the military judge informed the parties that she intended,

> to reread the three paragraphs under consent regarding lack of consent and incapable of consenting, and our language in accordance with *Pease*, to follow that with a reiteration of a majority of the mistake of fact portion, and . . . a reminder of the normal instruction that if there's any deviation between instructions I gave and what counsel for either side had said that they are to accept my statement as correct, and to remind them that argument from counsel is not evidence.

Id. at 868.

the way the government charged the appellant, did not impact the findings. I would set aside the findings and authorize a rehearing.

End of Document