IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Airman (E-2) CALEB A.C. SMITH, USAF Appellant.	)))))))))	BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. No. 40013 USCA Dkt. No. 22-0237 21 December 2022

BRIEF ON BEHALF OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES,	)	BRIEF ON BEHALF OF
Appellee,	)	THE UNITED STATES
	)	
v.	)	
	)	Crim. App. Dkt. No. 40013
Airman (E-2)	)	
CALEB A.C. SMITH	)	USCA Dkt. No. 22-0237
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING TEXT MESSAGES AND TESTIMONY AS AN EXCITED UTTERANCE RELATED TO THE ALLEGED VICTIM'S BELIEF THAT SHE WAS RAPED WHERE SHE HAD NO MEMORY OF THE EVENTS IN QUESTION.

II.

WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT BECAUSE THE ALLEGED VICTIM WAS CAPABLE OF CONSENTING AND WHERE, EVEN IF SHE WAS NOT CAPABLE OF CONSENTING, APPELLANT REASONABLY BELIEVED THAT SHE DID CONSENT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

At trial, a panel of officers convicted Appellant of one specification of sexual assault, in violation of Article 120, UCMJ, for penetrating the victim's vulva with his tongue while she was incapable of consenting due to impairment by alcohol. (JA at 477.) The offense occurred after the platonic pair attended a concert and drank heavily.

SrA HS invited a few friends to attend a concert with her in Charlotte, North Carolina, but only Appellant accepted the invitation. (JA at 46, 266.) After work, Appellant and SrA HS drove directly to the concert venue. (JA at 267.) Once there, they purchased drinks and found a spot near the stage to listen to the bands. (JA at 50.) Appellant drank about four to five double shots of liquor, and he remembered SrA HS drank four to five mixed drinks. (JA at 269, 283.) SrA HS only recalled drinking three vodka cranberry drinks. (JA at 51, 132.)

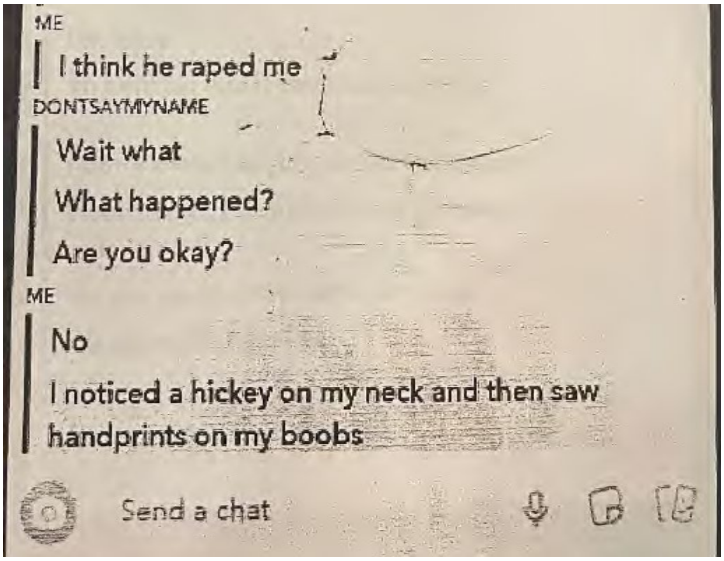
During the first of two interviews with OSI, Appellant explained SrA HS's speech became "slurred" after consuming the strong drinks. (JA at 271.) She started "falling over and couldn't stand back up." (JA at 270.) From Appellant's perspective, she was "too drunk." (JA at 270.) Appellant stated she was the most intoxicated he had ever seen her. (JA at 271.) Eventually, a security guard at the concert venue asked Appellant and the SrA HS "to leave." (JA at 272.) Appellant told OSI they were "kicked out because [SrA HS] couldn't stand up." (JA at 263).

Appellant detailed the remainder of the night to the OSI agents. Appellant said after getting kicked out of the concert, SrA HS could only walk with Appellant's assistance. (JA at 273.) He helped her sit down on a chair while he walked unassisted to get her car. (JA at 66.) She was "wobbling…with her head down." (JA at 284.) Appellant told OSI, eventually SrA HS "couldn't move." (JA at 285.) SrA HS could not unlock her own phone to get the address to their hotel where they were staying for the night. (JA at 273.) At this point, the security guard called them a taxi which arrived and took them to the hotel. (JA at 273.) Once there, Appellant walked to the front desk to check in while SrA HS remained in the taxi. (JA at 273, 274.) Appellant further recalled SrA HS was "stumbling to the door," and the taxi driver had to help them "all the way to the room," even though the room was on the first floor. (JA at 273, 274-275, 287.) The entire time, SrA HS was "leaning on [Appellant]." (JA at 275.)

As the interview with OSI continued, Appellant relayed what occurred in the hotel room. Once the taxi driver helped them open the hotel room, SrA HS sat down on one of the two beds. (JA at 275-276.) Appellant revealed to OSI when she sat down, she "peed herself." (JA at 275.) After urinating herself while fully clothed, she "stripped down because she pissed herself pretty much." (JA at 275.) Appellant explained she was not talking, but "mumbling, really." (JA at 288.) After taking off her urine-soaked clothes, Appellant "helped her wash up." (JA at 332.) SrA HS then crawled in her bed without Appellant. (JA at 289.)

SrA HS woke up the next morning in the hotel room, naked, in Appellant's bed, instead of her own. (JA at 56.) She asked him why they were in bed together. (JA at 65.) He said because she urinated in her original bed and so she moved to his. (Id.) SrA HS initially could not find her underwear, but she eventually found it "shoved underneath the covers in [her] bed." (JA at 57.) She noticed her underwear was "completely ripped." (JA at 58.) She asked Appellant why her underwear was ripped, and he replied, "I don't know." (JA at 65.) She then went to use the bathroom, and she noticed her "vaginal area was sore and bleeding." (JA at 57.) She "thought it was weird," but in the moment "just shrugged it off." (Id.) At the time, SrA HS thought being assaulted "was impossible" due to her friendship with Appellant. (JA at 67.)

SrA HS returned to the venue to find her car. (JA at 59.) After finding it, she and Appellant checked out of the hotel, ate breakfast, and stopped for gas. (JA at 64-65, 66.) At the gas station, she went inside to use the bathroom. (JA at 66.) When she was washing her hands in the bathroom, she noticed "a hickey or bruise of some sort on [her] neck and one on [her] collarbone." (Id.) She then pulled down her shirt to reveal "bruises all over [her] chest and on the tops of [her] arms, on the biceps." (JA at 66-67.) This was her first time seeing these marks. (JA at 145.) She felt the physical marks were "obvious proof" that she could not ignore. (JA at 67.) After seeing the bruises, she "freaked out." (Id.) She "panicked." (Id.) She "felt nauseated and started shaking again." (Id.) She felt sweaty and shaky for "a minute or two." (JA at 82.) As she was feeling these panicked symptoms, SrA HS sent a close friend the following text messages during the three minutes she was in the bathroom:



(JA at 67-68, 82, 480). When she left the bathroom to return to the car, she "was still nauseated," but the shaking and sweating had subsided. (JA at 82.)

SrA HS made a restricted report of sexual assault to the Sexual Assault Response Coordinator (SARC) the same day she noticed the bruising. (JA at 115.) She also went to the Emergency Room to have a Sexual Assault Forensic Exam (SAFE) performed. (JA at 112-115.) The SAFE report was admitted, without objection, as a prosecution exhibit at trial. (JA at 194; 484-498.) The report included the SrA HS's narrative description of the assault. (JA at 487.) During the exam, the nurse found an abrasion, bruising, and other injuries on the SrA HS's body. (JA at 211-212.) The nurse also collected vaginal, cervical, pubic mound, perineal, and anal swabs that were tested for Deoxyribonucleic Acid (DNA). (JA at 233-235.) Appellant's DNA was found on swabs taken from both pubic mound swabs and the inside crotch of the SrA HS's underwear. (JA at 401-403.) The DNA results could be "consistent with [Appellant] performing oral sex on the victim." (JA at 403.)

The Office of Special Investigations (OSI) interviewed Appellant twice. (JA at 253; 353.) On both occasions, Appellant waived his Article 31, UCMJ, rights after a rights advisement. (JA at 262; 355.) Both recorded interviews were introduced at trial and played for the members. (JA at 253; 353). During these two interviews, Appellant gave approximately six different versions of what

happened in the hotel room with SrA HS. (*See* JA at 29.) Appellant repeatedly denied any sexual activity with SrA HS to OSI, but eventually he admitted to "making out" with her even though they did not have a preexisting romantic interest in each other. (JA at 43; 324.) He then admitted to performing oral sex on her. (JA at 324.) During his interviews with OSI, Appellant wavered between claiming SrA HS was an active participant and acknowledging she was too drunk to engage in sexual activity. For instance, Appellant claimed that despite her stumbling and needing to be stabilized to stand upright, she was somehow coordinated enough to climb on top of him, support her own body weight, and grind on him. (JA at 327). Despite her slurred speech moments prior, Appellant claimed SrA HS clearly assured him, "No, I want to keep going," when he tried to stop her from grinding on him. (JA at 332-333.) Despite urinating through her clothes and being unable to clean herself up without Appellant's assistance, Appellant claimed he engaged in consensual sexual activity with SrA HS with "urine still in the bed." (JA at 309.)

During his second interview with OSI, Appellant also admitted to lying to OSI agents in his first interview. (JA at 325.) "I never had sex with her. I made sure I stopped before it got too far, but going that far was already too much." (JA at 327.) In addition to his recorded statements, Appellant provided a written statement to OSI. (JA at 499-501.) In the written statement, he expressed remorse

for lying to OSI, acknowledged he "should have stopped sooner," and reiterated he knew what he did was "wrong" because SrA HS was "drunk." (JA at 501.)

Based on Appellant's admitted false statements to law enforcement, the military judge provided the members with a false exculpatory statement instruction. (JA at 508-509.) The military judge also provided the members with the relevant instructions and definitions for sexual assault when the victim is incapable of consent due to impairment by alcohol. (JA at 502-504.) In addition, he provided the members with the mistake of fact as to consent instruction. (JA at 504-505.)

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion in admitting SrA HS's statement, "I think [Appellant] raped me," because the statement was an excited utterance. SrA HS was startled when she saw bruising on her neck, chest, and arms with no recollection of being injured, and she was under the stress of the startling event during the minutes in which she texted the message to her friend. In addition, Appellant did not suffer a material prejudice to a substantial right upon admission of the statement because the Government's case was strong in comparison to the lack of a defense case; the statement was not material to proving the Government's case; and the statement was of lower evidentiary quality than the inculpatory statements made by Appellant to OSI.

Viewing the evidence in the light most favorable to the prosecution, Appellant's conviction is legally sufficient because SrA HS did not have the physical or mental capacity to consent to sexual conduct due to intoxication by alcohol. Further, any alleged mistake of fact as to consent by Appellant was not honest and reasonable because the Government proved beyond a reasonable doubt Appellant knew or reasonably should have known SrA HS was incapable of consenting. In proving SrA HS's incapacity, the Government simultaneously disproved any mistake of fact as to consent defense.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING SRA HS'S STATEMENT TO HER FRIEND THAT SHE BELIEVED SHE WAS RAPED AS AN EXCITED UTTERANCE.

Additional Facts

SrA HS testified she began shaking, sweating, and was nauseous, as a result of seeing the bruises on her body, when she texted her friend from the gas station bathroom, "I think he raped me." (JA at 67.) Trial defense counsel did not object to her testimony. (JA at 67.) Then circuit trial counsel began laying the foundation for the accompanying text messages in Prosecution Exhibit 2. (JA at 69.) Trial defense counsel initially objected to the exhibit because SrA HS

appeared to be reading from it while she testified, and then trial defense counsel objected on relevance, cumulativeness, testifying on the ultimate issue, and eventually hearsay. (JA at 70, 72, 74.) Circuit trial counsel explained the messages were an excited utterance in which SrA HS documented her realization of what occurred the night before, in light of the injuries on her body. (JA at 69.)

During an Article 39(a), UCMJ, hearing, the military judge recognized he did not have enough detail about the timing of the messages for him to properly decide if an excited utterance exception applied. (JA at 77.) Circuit trial counsel offered to introduce additional testimony from SrA HS to provide the military judge with the timeline for the messages. (JA at 77.) The military judge then explained:

> I need to know from the witness what is and isn't an excited utterance. And once I know what is and isn't an excited utterance, then I'm going to turn to you, Trial Counsel, and see what if anything might go within another hearsay exception. For example, then existing mental, emotional, or physical condition.

(JA at 78.) Before allowing SrA HS to lay further foundation, the military judge articulated his first Mil. R. Evid. 403 balancing test on the record:

> All right. I tell you what, in regards to the objections that have been lodged by the defense, I have taken a look at MRE 403, and I do not believe this meets the standard of inadmissibility based on cumulativeness. That objection is overruled.

> I'm also overruling on the basis of a 403 objection simply because it conflicts with the injuries in the SANE report, that's not enough to cause it to be inadmissible under 403 as far as being unfairly prejudicial. Specifically, in the language of the rule, I do not believe that its probative value is substantially outweighed by the danger of unfair prejudice. Drawing ultimate conclusions, I'm overruling that objection as well.

(R. 485-486). After SrA HS provided additional testimony about which statements she texted while she was in the gas station bathroom, the military judge stated, "[W]e got a lot of information out there just now." (JA at 90). The military judge determined the Government "laid the appropriate foundation for an excited utterance exception to the hearsay rule." (JA at 90.) Then trial defense counsel reiterated the excited utterance failed because SrA HS did not remember the sexual assault which was the startling event, and if the startling event was discovering the bruising, then the statement, "I think he raped me" was not closely related to the event of discovering the bruising. (JA at 98-99). Trial defense counsel then argued the prejudice was the Government was using an excited utterance to "bolster a memory that never existed." (JA at 99.) The military judge then put a second Mil. R. Evid. 403 balancing test analysis on the record:

> And I have considered it under MRE 403, and I believe that the probative value is not substantially outweighed by the danger of unfair prejudice, so that objection is overruled.

(JA at 99). The military judge admitted Prosecution Exhibit 2. (JA at 98.). The text messages were published to the members. (JA at 102.)

Standard of Review

A military judge's decision to admit hearsay evidence is reviewed for an abuse of discretion. United States v. Hyder, 47 M.J. 46, 48 (C.A.A.F. 1997); United States v. Pollard, 38 M.J. 41, 491 (C.M.A. 1993). When the military judge performs the Mil. R. Evid. 403 balancing test on the record, his ruling will not be overturned unless there is a "clear abuse of discretion." United States v. Ruppel, 49 M.J. 247, 251 (C.A.A.F. 1998).

Law

A. Excited Utterance

"'Hearsay' means a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement." Mil. R. Evid. 801(c). A statement is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Mil. R. Evid. 801(a). Generally, hearsay is inadmissible unless an exception applies via federal statute or the Miliary Rules of Evidence. Mil. R. Evid. 802(a). An excited utterance is one such exception to the rule against hearsay. An excited utterance is "[a] statement relating to a startling

event or condition, made while the declarant was under the stress of excitement that it caused." Mil. R. Evid. 803(2).

The guarantee of trustworthiness for the excited utterance exception is based on the premise "that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." United States v. Jones, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotation marks omitted).

A statement is admissible as an excited utterance if it meets a three-pronged test: (1) the statement must be "spontaneous, excited or impulsive rather than the product of reflection and deliberation"; (2) the event must be "startling"; and (3) the declarant must be "under the stress of excitement caused by the event." United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987) (internal quotations marks omitted) (citations omitted).

Relevant to the second prong, "'the basis of the excited utterance exception rests with the spontaneity and impulsiveness of the statement; thus, the startling event does not have to be the actual crime itself, but rather may be a related occurrence that causes such a reaction.'" United States v. Lossiah, 129 F. App'x 434, 438 (10th Cir. 2005) (citing Esser v. Commonwealth, 38 Va. App. 520, 566 S.E.2d 876, 879 (Va. Ct. App. 2002)).

Relevant to the third prong of the inquiry are "the physical and mental condition of the declarant" and "the lapse of time between the startling event and the statement." United States v. Donaldson, 58 M.J. 477, 483 (C.A.A.F 2003) (internal quotation marks omitted) (citation omitted). However, "[i]t is the totality of the circumstances, not simply the length of time that has passed between the event and the statement, that determines whether a hearsay statement was an excited utterance." United States v. Belfast, 611 F.3d 783, 817 (11th Cir. 2010). Further, M.R.E. 803(2) does not require corroboration for the declarant's excited utterance. United States v. Henry, 81 M.J. 91, 96 (C.A.A.F. 2021); M.C.M., Appendix 22, Analysis of the Military Rules of Evidence (2016 ed.).

In determining whether a declarant was under the stress of a startling event at the time of her statement, courts have looked to a number of factors. These include: "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999); Morgan v. Foretich, 846 F.2d 941, 947 (4th Cir. 1988).

B. Abuse of Discretion

Under the abuse of discretion standard, "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it

has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993) (citation omitted). Further, the abuse of discretion standard recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range. United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004) (citing United States v. Wallace, 296 U.S. App. D.C. 93, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)). A military judge is afforded "considerable discretion" in admitting evidence. Donaldson, 58 M.J. at 488.

"An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citations and ellipsis omitted). The "'abuse of discretion' standard is a strict one." Id. "To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." Id. (citations and ellipsis omitted).

C. Prejudice

"[A] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial

rights of the accused." Article 59(a), UCMJ, 10 USC § 859(a). This Court evaluates the harmlessness of an evidentiary ruling by weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999). Overall, "an error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (citing United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)).

Analysis

Appellant argues SrA HS's statement, "I think [Appellant] raped me," was not an excited utterance for four reasons: (1) SrA HS's statement was the result of reflection and deliberation; (2) SrA HS was not under stress of the startling event – the sexual assault – when she made the statement; (3) SrA HS was not competent to testify on the ultimate issue because she lacked any memory of the sexual assault, and (4) the statement was prejudicial to Appellant. (App. Br. 18, 20, 21, 22.) Appellant's arguments fail for four reasons. First, SrA HS's statement was not the result of reflection and deliberation because it was made within three minutes of the startling event. And the startling event was the discovery of bruising on her neck, breasts, and biceps with no recollection of being injured, not

the actual sexual assault. Second, SrA HS was competent to testify about her personal observations and the actions she took once she believed a crime occurred. Third, the military judge's ruling did not rise to the level of an abuse of discretion because admission of the statement was within the range of available options for the admission of evidence. Fourth, the statement was not prejudicial to Appellant because Appellant's own inculpatory statements to OSI were more damaging than the excited utterance provided by SrA HS.

A. SrA HS's statement made immediately after the startling event without the opportunity for reflection or deliberation, and the startling event was the discovery of bruising on her body.

The military judge did not err when he admitted SrA HS's text messages as an excited utterance because SrA HS's statement passes the three-pronged Arnold test. An excited utterance is "[a] statement relating to a startling *event* or *condition*, made while the declarant was under the stress of excitement that it caused." Mil. R. Evid. 803(2)(emphasis added). The plain language of Mil. R. Evid. 803(2) does not require the declarant to be startled by the charged crime in the case, but rather a startling *event* relevant to the offense. Lossiah, 129 F. App'x at 437. "Rule 803(2) is taken from the Federal Rule verbatim." M.C.M., Appendix 22, Analysis of the Military Rules of Evidence (2016 ed.). "The statement need only 'relate' to the startling event or condition, thus affording a broader scope of subject matter coverage." Fed. R. Evid. R. 803(2), Advisory

Committee Notes; *See* Lossiah, 129 F. App'x at 437 (The prior sexual assault caused the child victim to be fearful when she saw appellant in the school hallway and seeing appellant in the hallway was a startling event which would support the admission of the hearsay statement.) Here, the startling event was not the sexual assault, of which SrA HS had no recollection due to her incapacitation; but rather, the startling event was SrA HS's discovery of bruising on her body.

Discovering significant, unexplained bruising on one's body certainly qualifies as a startling event. Upon seeing the bruises, SrA HS "freaked out" and "panicked." (JA at 67.) She began to shake, sweat, and became nauseous, physical manifestations of her stress from seeing the injuries. (Id.) In that moment, in the midst of her excitement from seeing injuries on her body, her synapses formed the opinion that she was sexually assaulted by a platonic, male friend, and she immediately texted another friend, "I think he raped me." (Id.) She was "under the stress of excitement caused by the event" of discovering bruising on her neck, chest, and biceps when she sent the text. Arnold, 25 M.J. at 132, (JA at 82.).

Appellant argues SrA HS's statement is not an excited utterance, but rather the result of reflection and deliberation due to the passage of time from waking up in the morning next to Appellant to her text message in the bathroom. (App. Br. at 20.) However, Appellant's interpretation of the excited utterance exception

requires the actual crime to trigger an excited utterance analysis, rather than a relevant startling event or condition. A crime could be a startling event, but a startling event is not necessarily criminal. Mil. R. Evid. 803(2) only requires a "startling event or condition" to trigger the excited utterance, but it does not go so far as to require the startling event be the criminal offense at issue in a court-martial. For example, a witness is startled when an assailant collides with him, and then runs past him holding a bloody knife. The declarant exclaims, "He has a knife!" However, the witness did not see how the knife was bloodied. Under Appellant's interpretation of the excited utterance exception, the declarant would be required to have seen the crime. This interpretation is too restrictive, and not supported by the plain language of the rule or case law. Though it is more common in case law for the startling event to occur upon witnessing a crime, the law does not require it. It is not an exception for the admission of eye-witness testimony; instead, the exception exists because of the guarantee of trustworthiness an excited utterance provides "because of a lack of opportunity to fabricate." Jones, 30 M.J. at 129.

In addition, Appellant's argument incorrectly assumes that the sexual assault itself was the startling event. When considering SrA HS's discovery of the bruising on her body as the startling event, her unprompted statement was "spontaneous, excited, or impulsive rather than the product of reflection and

deliberation." Arnold, 25 M.J. at 132. She only spent three minutes in the bathroom, and the messages admitted by the military judge as excited utterances were sent during that three-minute window. (JA at 79-82.) This Court has determined an excited utterance made within an hour while still under the stress of the event fit within the hearsay exception. United States v. Feltham, 58 M.J. 470, 473 (C.A.A.F. 2003) (The victim discussed the sexual assault with his roommate one hour after it occurred, but while he was under the stress of the event.) In this case, the discovery of the bruising was almost contemporaneous with SrA HS's statement to her friend, so she had no opportunity for reflection or deliberation.

SrA HS's statement, "I think [Appellant] raped me," was an excited utterance because it met all three prongs set out in Arnold. SrA HS was startled when she discovered unexplained bruises on her body, and while she was under the stress of the startling event, she made her "spontaneous, excited or impulsive" statement that was not the product of reflection and deliberation. Arnold, 25 M.J. at 132.

B. SrA HS was competent to testify about her personal observations and the actions she took once she believed a crime was committed.

Appellant argues the text message was improperly admitted because SrA HS was incompetent to testify about the ultimate issue of whether she was sexually assaulted due to her lack of memory. (App. Br. at 21-22.) However, SrA HS never testified about the ultimate issue. She testified to a brief memory of being

fully clothed and claiming a bed in the hotel room, and then the next thing she remembered was waking up, naked, with Appellant's arm draped over her. (JA at 55-56.) Appellant's OSI interviews filled in the timeline's gaps when he admitted to penetrating her vulva with his tongue. (JA at 327.)

"Every person is competent to be a witness unless [the Rules] provide otherwise." R.C.M. 601. A witness may testify to a matter if they have "personal knowledge of the matter" to which they are testifying. R.C.M. 602. SrA HS's testimony focused on her personal observations surrounding the night of the sexual assault, the morning after the sexual assault, and the details surrounding the excited utterance. She provided relevant and competent evidence to explain how the charges arose and the steps she took in reporting it to law enforcement. She explained who she talked to about the sexual assault; that she went to the emergency room for a SAFE, and that she ultimately reported it to law enforcement. (JA at 68, 104, 113, 115.) Though she does not recall the actual sexual assault, she was competent to testify to her personal observations she recalls and the actions she personally took after she thought a crime was committed.

C. The military judge did not err in admitting the evidence because admission of the statement was within the military judge's range of options.

A military judge's "challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." Travers, 25 M.J. at 62. The military judge's ruling is not clearly unreasonable or

clearly erroneous. It was a tenable decision that should not be overturned at the appellate level because the military judge ensured each foundational element of the excited utterance exception was met before deciding on the trial defense counsel's objection to Prosecution Exhibit 2. The military judge held a hearing outside the presence of the members to listen to SrA HS's testimony and gather additional facts about the excited utterance. During the hearing, the circuit trial counsel laid the foundation for the excited utterance. SrA HS testified (1) an event occurred – seeing the bruising on her body; (2) the event was startling, or at least stressful – she began sweating, shaking, and became nauseous; (3) she had personal knowledge of the event – she experienced it herself; (4) she made a statement about the event – she texted her friend, "I think he raped me"; and (5) she made the statement while she was in a state of excitement – she was shaking, sweating, and nauseous while she texted. (JA at 79-82.) *See* Military Evidentiary Foundations § 11-6 (2021). Only after hearing SrA HS's testimony did the military judge determine the foundational elements for an excited utterance were met. (JA at 90.)

The military judge had wide discretion in admitting or not admitting the hearsay statement into evidence. Because the foundation was laid for the excited utterance exception, choosing to admit the statement does not run afoul of a statute, court precedent, or the Manual. Different judges may have differing opinions on whether to admit the statement; however, "[t]o reverse for an abuse of discretion

involves far more than a difference in opinion." Travers, 25 M.J. at 62. Appellant argues the military judge should not be afforded additional deference because he did not articulate his findings of fact and conclusions of law on the record. However, the military judge stated he found the foundational elements were met for an excited utterance, and he articulated the Mil. R. Evid 403 balancing test twice on the record. The military judge's decision did not amount to any error requiring appellate intervention, and this Court should affirm the lower court's decision.

D. Even if this Court finds the military judge abused his discretion, SrA HS's excited utterance was not prejudicial to Appellant because the Government's case against Appellant was strong compared to defense's case; her statement was not material in resolving the ultimate issue; and the quality of her statement was low compared to the rest of the Government's case.

If this Court determines the military judge erred in admitting this statement as an exited utterance, Appellant's claim still fails because the evidentiary ruling was not materially prejudicial to a substantial right of the Appellant. Article 59(a), UCMJ. This Court evaluates the harmlessness of an evidentiary ruling by reviewing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." Kerr, 51 M.J. at 405.

First, the Government put forth a strong case against Appellant. Trial counsel entered Appellant's two OSI interviews into evidence during which he

admitted to performing oral sex on SrA HS after he explained in detail how intoxicated SrA HS appeared to be. (JA at 270, 327-328.) Then he admitted that he stopped the conduct, "but going that far was already too much." (JA at 327.) The Government also provided forensic evidence. Abrasions and bruising were documented on SrA HS's body during the SAFE, which was admitted without objection, corroborating SrA HS's testimony about her injuries. (JA at 194, 488-489, 495.) Then the DNA expert testified Appellant's DNA was found on SrA HS, which was consistent with Appellant performing oral sex on SrA HS. (JA at 403.) Appellant's inculpatory statements, his admission he lied to investigators, and forensic evidence solidified the Government's case against Appellant.

Second, the trial defense counsel did not put on any evidence in their case-in-chief. (R. at 993.) The trial defense counsel did not call a forensic psychologist to discuss blackout and the effects of alcohol on memory generally or as applied to this case. Instead, trial defense counsel attempted to elicit testimony about "blackout" during his cross examination of Dr. VF, the forensic nurse, but she stated such testimony was outside her expertise. (JA at 244-255.)

Third, the hearsay evidence was not particularly material to the panel's resolution of key issues in this case. This was not a case in which "the identity of the perpetrator was a central issue" and the excited utterance was "my husband did this," like in United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017). SrA HS's

realization in the gas station that she was sexually assaulted by a friend was peripheral to the main contested issue at trial: whether she was capable of consenting. Trial counsel referred to the statement in opening and closing as the moment of realization for SrA HS and an immediate reporting of the offense, but SrA HS's statement was not essential to the Government's case. (JA at 24, 417.)

Even if the hearsay statement in Prosecution Exhibit 2 had not been admitted as an excited utterance, SrA HS testified on direct examination, "And I messaged my friend Hopkins, and I told him that I thought that [Appellant] had raped me." (JA at 67.) Trial defense counsel did not object to SrA HS's testimony. (JA at 67.) Trial defense counsel only objected to the statement - "I think he raped me" - contained in the accompanying text messages of Prosecution Exhibit 2. (JA at 69.) In addition, the same information could have also been presented without eliciting hearsay. Trial counsel could have asked SrA HS, "When you saw the bruises, what did you think?" SrA HS would have responded, "I thought he raped me." In addition, she could have testified she did not delay in reporting the sexual assault, without discussing any out of court statements.

Moreover, the probative value of statement in the text messages was not related to the truth of the matter asserted. The members already knew SrA HS believed she was sexually assaulted because she took the stand and testified against Appellant in a court-martial charging him with doing so. The probative value of

the text messages lay instead in the timing of SrA HS's realization and the fact that she immediately reported her realization to a friend. These facts helped explain why later that day SrA HS made a restricted report of sexual assault and went to the emergency room to have a SAFE performed. Since the text message would have been admissible and more probative for purposes other than the truth of the matter asserted, Appellant suffered no prejudice from the statement's admission as an excited utterance.

Fourth, the quality of SrA HS's statement was low compared to the rest of the Government's evidence. The Government's strongest evidence came from Appellant's two interviews with OSI agents, in which he waived his rights and explained he penetrated SrA HS's vulva with his tongue even though he described her incapacitation in great detail. He explained SrA HS was unable to stand or walk unassisted, and she mumbled incoherently and urinated on her bed twice only moments before he penetrated her. Most damaging was Appellant's statement that he stopped the encounter because it had already gone too far because she was too intoxicated. (JA at 327.) In United States v. Abel, No. ACM 39362, 2018 CCA LEXIS 617, at *16 (A.F. Ct. Crim. App. Dec. 27, 2018) (unpub. op.), AFCCA recognized not all statements are created equal when they determined the victim's excited utterance to her friend the morning after an alleged sexual assault "added little to the Government's case." Specifically, the court in Abel pointed to more

persuasive evidence such as the victim's immediate reporting of the assault, her implied belief throughout her testimony that she was sexually assaulted, and her visit to the emergency room for a SAFE during her visit. Id. Like Abel, even if SrA HS's statement in this case that she thought she was raped was excluded, her belief that she was sexually assaulted and her observations about bruising on her body would still be before the members. Considering the four Kerr factors, Appellant failed to show any material prejudice to substantial right because of the admission of the excited utterance.

"An abuse of discretion exists where reasons or rulings of the military judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice." Travers, 25 M.J. at 62. Here the military judge's tenable decision was not prejudicial to a substantial right of the Appellant. This Court should affirm the lower court's decision.

II.

THE EVIDENCE WAS LEGALLY SUFFICIENT BECAUSE THE ALLEGED VICTIM WAS INCAPABLE OF CONSENTING AND ANY BELIEF BY APPELLANT THAT SHE DID CONSENT WAS UNREASONABLE.

Standard of Review

This Court reviews questions of legal sufficiency of the evidence *de novo*. United States v. Robinson, 77 M.J. 294, 297 (C.A.A.F. 2018) (citing United States v. Wilson, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable of the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). The test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether *any* rational factfinder could find that it did. United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001). Thus, legal sufficiency is a very low threshold. King, 78 M.J. at 221. The standard for legal sufficiency "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable

inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011).

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" United States v. Wilson, 182 F.3d 737, 742 (10th Cir. 1999) (quoting United States v. Parrish, 925 F.2d 1293, 1297 (10th Cir. 1991)). A legally sufficient verdict may be based on circumstantial as well as direct evidence, and even "[i]f the evidence rationally supports two conflicting hypotheses, the reviewing court will not disturb the conviction." United States v. McArthur, 573 F.3d 608, 614 (8th Cir. 2009) (citations omitted).

The elements of sexual assault involving incapacitation due to an intoxicant, as applicable to this case and as provided to the members by the military judge, are as follows:

> (1) That at or near Charlotte, North Carolina, on or about 16 November 2018, the accused committed a sexual act upon [SrA HS] by causing penetration, however slight, of [SrA HS's] vulva by the accused's tongue;
>
> (2) That the accused did so when [SrA HS] was incapable of consenting to the sexual act due to impairment by alcohol;
>
> (3) That the accused knew or reasonably should have known [SrA HS] was incapable of consenting to the sexual act due to impairment by alcohol; and

> (4) That the accused did so with intent to gratify his sexual desires,

M.C.M., Part IV b.(4)(f) (2016 ed.), (JA at 502.) Consent is "a freely given agreement to the conduct at issue by a competent person." M.C.M., Part IV a.(g)(8) (2016 ed.). A competent person is a one who possesses the physical and mental ability to consent. United States v. Pease, 75 M.J. 180, 185 (C.A.A.F. 2016). To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. Id.

The elements for mistake of fact as to consent for a general intent crime are as follows: (1) the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances; (2) if the circumstances were as the accused believed them, the accused would not be guilty of the offense; (3) the ignorance or mistake must have existed in the mind of the accused; and (4) the mistake must have been reasonable under all the circumstances. R.C.M. 916(j)(1). Though this Court has not ruled on the issue, the Service Courts have found and agree that:

> If the government proves that an accused had actual knowledge that a victim was incapable of consenting, then, by definition, such an accused could not simultaneously honestly have believed that the victim consented. Similarly, if the government proves that an accused should have reasonably known that a victim was incapable of consenting, the government has also proven

> any belief of the accused that the victim consented was unreasonable.

United States v. Teague, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016). *See also* United States v. Rich, 79 M.J. 572, 587 (A.F. Ct. Crim. App. 2019) (en banc) (citing Teague, 75 M.J. at 638) ("[B]y proving the elements of the charged offense, the Government necessarily disproved the existence of either asserted mistake of fact."), United States v. Bannister, No. 201600315, 2017 CCA LEXIS 361, at *10 (N-M Ct. Crim. App. May 31, 2017) (unpub. op.) (citing Teague, 75 M.J. at 638) ("Article 120(b)(3) already requires the government to disprove a mistake of fact defense, so "a mistake of fact defense is 'baked in' to the elements of the offenses themselves.")

Analysis

A. The Government provided sufficient evidence to show a rational trier of fact Appellant knew or reasonably should have known SrA HS was incapable of consenting due to alcohol intoxication beyond a reasonable doubt.

The trial evidence was legally sufficient to establish Appellant knew or reasonably should have known that SrA HS was incapable of consenting for three reasons. First, SrA HS consumed a large quantity of alcohol at the concert, four to five liquor-based drinks, and it was apparent to both the venue security guard and Appellant that SrA HS was intoxicated. Specifically, Appellant told OSI the venue security guard asked them to leave the concert because SrA HS was "too drunk." (JA at 270.) Appellant further explained SrA HS was stumbling, slurring her

speech, unable to sit up in a chair, and eventually she was unable to walk on her own. (JA at 271, 275, 284.) Appellant's explanation of SrA HS's behavior shows SrA HS's ability to control her body deteriorated as the night progressed. Her physical state only worsened as the night went on; therefore, making it less likely she would have had the physical and mental cognitive ability to consent. After hearing Appellant's explanation of the evening, both the inculpatory and exculpatory statements he made, the members likely determined Appellant's statements about SrA HS's alleged consensual behavior were unpersuasive, as demonstrated by their findings. "[F]actfinders may believe one part of a witness' testimony and disbelieve another," United States v. Harris, 8 M.J. 52, 59 (C.M.A. 1979), and here, the members could have believed parts of Appellant's admissions to OSI and disbelieved others.

Second, "[a] competent person is a person who possesses the physical and mental ability to consent," and SrA HS did not demonstrate control over her mental or physical faculties. Pease, 75 M.J. at 185. Appellant witnessed SrA HS stumble, slur, slump, and involuntarily urinate twice outside the bathroom, displaying a lack of control over her body before he penetrated her vulva with his tongue. In his statement to OSI, Appellant said SrA HS was "slurring" her words and "mumbling." (JA at 271, 288.) Her inability to speak shows she was unable to communicate a decision regarding Appellant's sexual conduct toward her. Then

Appellant explained he "got her cleaned up," then he engaged in oral sex with "urine in the bed." (JA at 309, 327.) If SrA HS was physically capable of consenting to sexual conduct, then she, as an adult, would have been able to clean herself up without assistance, and she would have understood she needed to urinate in the bathroom, not on the bed.

Third, Appellant admitted to OSI he "should have stopped sooner" and reiterated he knew what he did was "wrong" because SrA HS was "drunk." (JA at 501.) Further, he articulated concerns that SrA HS was too drunk to consent to vaginal sex, and he had likely gone too far by penetrating her with his tongue. Appellant's own statement demonstrates his actual subjective understanding that SrA HS was incapable of consenting. If she was not capable of consenting to vaginal sex, then she was not capable of consenting to oral sex. The law does not delineate a scale of consent based on the method of penetration.

The present case is similar to Robinson, 77 M.J. at 298, in which appellant saw the victim stumbling and slurring her words, almost hitting a stop sign with her car, and upon entering her room saw a trashcan and water bottle next to her bed, circumstantial evidence she was nauseous. In that case, the appellant testified the victim was "probably too intoxicated to consent." Robinson, 77 M.J. at 298. This Court determined the conviction was legally sufficient because enough evidence was provided at the trial level for a rational trier of fact to find beyond a

reasonable doubt the victim was incapable of consenting. Robinson, 77 M.J. at 298. In both Robinson and the present case, the victims demonstrated a lack of mental and physical ability to consent, and in both cases the evidence was and is legally sufficient to maintain the convictions.

Appellant also argues AFCCA wrongly equated blacking out to incapacity to consent. (App. Br. at 31.) For this argument, Appellant cites to one sentence in AFCCA's decision: "HS's testimony that she had no recollection shortly after getting to the hotel is persuasive evidence that she was so intoxicated she was incapable of consenting." (JA at 9.) However, AFCCA's analysis did not stop with a single sentence about SrA HS's lack of memory. AFCCA wrote in the next paragraph: "Additionally, Appellant's statements to AFOSI provided ample evidence to satisfy the legal standard that HS was incapable of consenting to the sexual act due to impairment by alcohol." (JA at 9.) Appellant's argument ignores AFCCA's continuing analysis in which details of SrA HS's conduct were evaluated to determine her ability to consent and asks this Court to improperly partake in a factual sufficiency analysis. AFCCA noted the amount of alcohol SrA HS drank, her inability to stand, SrA HS being kicked out of the venue, her slurred speech, and Appellant's statement it was the most intoxicated he had ever seen SrA HS. (JA at 9.) This additional analysis by the lower Court shows AFCCA did not equate blackout with an inability to consent because they did not simply stop at the

issue of memory; they considered the totality of the circumstances. The members, and AFCCA in their factual sufficiency review, were free to consider SrA HS's lack of memory along with other evidence of her intoxication like her slurring, slumping, staggering, and urinating when they were determining her ability to consent and the reasonableness of Appellant's mistake of fact defense.

Though it may be true that someone who is blacked out *may* be able to consent to sexual activity, Courts have not determined that is always the case. *See* Robinson, 77 M.J. at 301 (C.A.A.F. 2018) (A reasonable factfinder could find the victim was unable to consent due to impairment by alcohol even though she woke up to the penetration and blacked out immediately following.); *See also* United States v. Escobar, No. ACM 39638, 2020 CCA LEXIS 209, at *22 (A.F. Ct. Crim. App. June 18, 2020) (unpub. op.) (A reasonable factfinder could have found that the victim was incapable of consenting and not just blacked out.).

Viewing this evidence in the light most favorable to the prosecution, the Government presented sufficient evidence in this case for a rational trier of fact to determine Appellant knew or reasonably should have known SrA HS was incapable of consenting to the sexual act due to her impairment by alcohol.

B. Viewing the evidence in the light most favorable to the prosecution, evidence was presented to show Appellant's mistake of fact as to consent was unreasonable.

Proving the sexual assault due to incapacitation occurred and disproving a mistake of fact both turn on reasonableness. The third element of sexual assault due to incapacitation is "the accused knew or reasonably should have known of the impairment . . . of the other person." M.C.M., Part IV b.(4)(f) (2016 ed.) On the other side of the same coin is the fourth element of the mistake of fact defense which requires "the mistake must have been reasonable under all the circumstances." R.C.M. 916(j)(1). If the Government proves beyond a reasonable doubt the accused knew or reasonably should have known the victim was incapacitated, then it follows that the mistake of fact as to consent defense would be lost. If the factfinder determines beyond a reasonable doubt that the Appellant knew or reasonably should have known SrA HS was not physically or mentally capable of consenting, then the factfinder cannot logically find Appellant reasonably believed that SrA HS consented to the sexual act.

In Teague, Rich, and Bannister, the courts reviewed whether the mistake of fact defense instruction should have been given by the respective military judges. The courts determined the military judges did not err in omitting the instruction. Teague, 75 M.J. at 638, Rich, 79 M.J. at 587, Bannister, No. 201600315, 2017 CCA LEXIS 361, at *10. The service courts agreed, if the Government proved the

appellants knew or reasonably should have known the victims were incapable of consenting, then the Government simultaneously disproved the reasonableness of a mistake of fact as to consent defense. Id.

Even if AFCCA was incorrect in its assessment, the military judge still gave the mistake of fact as to consent instruction to the members for their consideration. The military judge determined the evidence presented the possibility of the defense and instructed the members on it. (JA at 504-505.) "The evidence has raised the issue of mistake of fact in relation to the offense alleged in the Specifications of the Charge." (JA at 504.) Though they were presented with the affirmative defense, the members were not convinced the defense applied as evidenced by their guilty verdict on one specification. (JA at 477.)

Appellant determined his own conduct was wrong, he thought his own conduct was unreasonable, so he claimed he stopped the sexual encounter. (JA at 327.) In addition, Appellant told OSI agents SrA HS was very drunk and unable to stand at the concert, they were told to leave the concert by a security guard, arguably a reasonable sober third party. SrA HS had to sit in a chair outside the venue while Appellant walked unassisted to grab the car. She was too drunk to unlock her own phone, and Appellant had to assist her to get the address to their hotel. Even though she made the reservation, SrA HS was too drunk to walk into the hotel to check-in, and Appellant had to check them into the hotel. The taxi

driver had to assist her and Appellant into the hotel room. Then once inside the room, she urinated herself twice on the bed, and she, an adult, required Appellant's assistance to clean herself up.

When assessing legal sufficiency, "[t]he evidence necessary to support a verdict 'need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.'" Wilson, 182 F.3d at 742. However, a rational trier of fact could determine, viewing these facts in the light most favorable to the prosecution, the Government proved Appellant knew or reasonably should have known of SrA HS's inability to consent and Appellant's mistaken belief as to consent was unreasonable. The conviction is legally sufficient, and this Court should affirm the decision of the lower court.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the lowers court's decision in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and transmitted by electronic means with the consent of the counsel being served via email to pristera@militaryattorney.com, meglo92@gmail.com, and heather.caine.1@us.af.mil on 20 December 2022.

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APPENDIX

Cited Unpublished Opinions

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1. *United States v. Abel, 2018 CCA LEXIS 617*

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Search Terms: United States v. Abel, No. ACM 39362, 2018 CCA LEXIS 617, at *16 (A.F. Ct. Crim. App. Dec. 27, 2018)

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United States v. Abel

United States Air Force Court of Criminal Appeals

December 27, 2018, Decided

No. ACM 39362

Reporter
2018 CCA LEXIS 617 *

UNITED STATES, Appellee v. William H. ABEL, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by *United States v. Abel, 79 M.J. 32, 2019 CAAF LEXIS 213 (C.A.A.F., Apr. 4, 2019)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jefferson B. Brown. Approved sentence: Dishonorable discharge, confinement for 30 days, forfeiture of all pay and allowances, and reduction to E-1. Sentence adjudged 29 July 2017 by GCM convened at Tinker Air Force Base, Oklahoma.

Core Terms

excited utterance, military, minutes, sexual assault, excitement, startling event, apartment, questions, hearsay, talk, defense counsel, declarant, stress, spoke, bed, rest of the group, admitting, responded, harmless, sentence, asleep

Case Summary

Overview
HOLDINGS: [1]-Appellant contended that being accused of sexual assault can qualify as a "startling" event for purposes of finding an excited utterance under Mil. R. Evid. 803(2). Manual Courts-Martial; the court agreed. Nevertheless, it did not find the military judge (MJ) abused his discretion in finding appellant's statements to SrA KL were not an excited utterance; [2]-The MJ reasonably determined appellant's exculpatory statements were not impulsive or spontaneous in immediate response to the allegation, but came after some opportunity to deliberate on what he would tell his housemates about the situation; [3]-A confused utterance is not necessarily an excited utterance for purposes of the exception to the hearsay rule. Nevertheless, assuming arguendo the MJ abused his discretion by admitting the victim's statements to PM, the error did not substantially influence the findings.

Outcome
The findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

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

HN1[] Evidence, Evidentiary Rulings

The court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact.

Evidence > ... > Exceptions > Spontaneous Statements > Excited Utterances

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Hearsay Rule & Exceptions

HN2[] Spontaneous Statements, Excited Utterances

Mil. R. Evid. 803(2), Manual Courts-Martial, provides that an "excited utterance," defined as a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," is an exception to the general prohibition on hearsay evidence; refer to Mil. R. Evid. 801, 802, Manual Courts-Martial. The excited utterance exception is based on the premise that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate. The guarantee of trustworthiness of an excited utterance is that the statement was made while the declarant was still in a state of nervous excitement caused by a startling event. To determine whether a hearsay statement qualifies as an excited utterance, the court applies a three-pronged test: (1) the statement must be spontaneous, excited or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling; and (3) the declarant must be under the stress of excitement caused by the event. Although the statement relating to the startling event need not always follow immediately after the event, a lapse of time between the event and the utterance creates a strong presumption against admissibility.

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

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

HN3[] Harmless & Invited Error, Harmless Error

Whether an error is harmless is a question of law reviewed de novo. For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings. The court evaluates the harmlessness of an evidentiary ruling by weighing: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.

Evidence > ... > Exceptions > Spontaneous Statements > Excited Utterances

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Hearsay Rule & Exceptions

HN4[] Spontaneous Statements, Excited Utterances

To establish an excited utterance, the proponent must demonstrate the statement was not the product of "reflection and deliberation."

Evidence > Burdens of Proof > Allocation

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Hearsay Rule & Exceptions

Evidence > ... > Exceptions > Spontaneous Statements > Excited Utterances

HN5 **Burdens of Proof, Allocation**

The proponent of a declaration bears the burden of demonstrating the statement was made under the "stress of excitement" in order to establish it was an excited utterance. Falling asleep or being drowsy are not typically indicative of an excited state. A confused utterance is not necessarily an excited utterance for purposes of the exception to the hearsay rule.

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

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

HN6 **Standards of Review, Harmless & Invited Error**

In assessing the harmlessness of a nonconstitutional error, the court considers the materiality and quality of the evidence in question.

Counsel: For Appellant: Major Meghan R. Glines-Barney, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Mary Ellen Payne, Esquire.

Judges: Before MAYBERRY, JOHNSON, and DENNIS, Appellate Military Judges. Senior Judge JOHNSON delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge DENNIS joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Senior Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of sexual assault by causing bodily harm in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*. The court members sentenced Appellant to a dishonorable discharge, confinement for 30 days, total forfeiture of pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant raises two issues on appeal: (1) whether the military judge **[*2]** erred by excluding evidence of out-of-court statements by Appellant offered by the Defense as an excited utterance; and (2) whether the military judge erred by admitting an out-of-court statement by the victim, SB, offered by the Government as an excited utterance. We find no prejudicial error and we affirm the findings and sentence.

I. Background

In early August 2016, Appellant was stationed at Tinker Air Force Base (AFB), Oklahoma. Appellant resided in an off-base apartment in Oklahoma City with two other male Airmen, Senior Airman (SrA) KL and SrA RW. At the time, SrA KL was in a romantic relationship with a civilian woman, PM. PM had two female roommates, NJ and the victim in this case, SB. SB's only social interaction with Appellant prior to 4 August 2016 had been one occasion when he visited the women's house as part of a group that played drinking games for approximately two or three hours.

On 4 August 2016, all six individuals planned to go out together for the evening. The group spent approximately 30 to 45 minutes talking and drinking alcohol at the Airmen's apartment before they walked to a nearby bar. They stayed at the bar for approximately two or three hours. At one point **[*3]** toward the end of the evening, SB and Appellant sat together away from the rest of the group and engaged in small talk for what SB later estimated to be 15 minutes. The conversation ended when PM approached and began speaking with SB, after which SB began dancing and then joined the rest of the group at another part of the bar.

In the course of the entire evening, SB drank approximately one and a half beers and at least six shots of whisky. She became significantly intoxicated. SB later testified her memory "fade[d]" toward the end of the evening. The last event SB remembered was writing the tip for her bar tab. PM later testified that SB became "wobbly in her chair," "tired," and "sleepy." When most of the group called a ride to return to the Airmen's apartment, SrA RW carried SB to the vehicle because SB was stumbling. Appellant decided to stay longer at the bar when the rest of the group returned to the apartment.

Inside the apartment, SB was placed on a futon in a common area, where she promptly vomited. PM and NJ cleaned up the mess. PM got a glass of water for SB, who appeared "very drowsy." After PM made sure SB was "okay," the rest of the group retired to different bedrooms, **[*4]** leaving SB lying on the futon. PM heard Appellant return to the apartment approximately 30 to 40 minutes after the rest of the group.

SB's next memory was awakening to find herself lying in Appellant's bed with Appellant "on top" of her. Appellant removed her shorts and underwear. SB later testified she did not say anything. She described herself as

> kind of going in and out of it like as if my body was trying to wake me up, but my mind just kept fading back and being dizzy. . . . I was so dizzy and I couldn't move and then by the time that he was taking off my pants I was just frozen and trying to get out of the state that I was in.

Appellant then penetrated her vagina with his penis for "[a]bout five minutes." SB testified at that point she "was able to start moving [and she] moved like up and out of it and then rolled over." SB continued to feel dizzy and felt she could not get out of the bed. After approximately five minutes she fell asleep.

The following morning, 5 August 2016, PM found SB and Appellant sleeping back-to-back on Appellant's bed with the covers pulled up. PM pulled the covers down to wake up SB and discovered SB was not wearing her shorts or underwear, although her shirt, **[*5]** bra, and sandals were still on. PM woke SB, helped SB find her underwear and shorts and get dressed, and took SB downstairs to the living room to talk. PM later testified:

> I was trying to calmly ask [SB] what had happened and she--it was really hard for her to like get the words out and I wasn't really understanding what she was saying. So I said, "Here, let's go outside and talk," so we got all her stuff, we got my purse, her purse, we moved down the stairs, walked out the front door and on the sidewalk I was able to talk to her more and I asked her if her and [Appellant] slept together and she said, "Yes." I said, "Did you want to?" And she said, "No."
>
> . . . .
>
> From there I asked her, "What would you like to do from here? This is completely your decision. Do you want to go to work? Do you want to go to the hospital? What would you like to do?" And she said she wanted to go to the hospital.

SB subsequently underwent a sexual assault forensic examination and was interviewed by civilian police on 5 August 2016. That afternoon, civilian police arrived at Appellant's apartment to speak with Appellant, who was home. As the police arrived, SrA KL and SrA RW drove up to the apartment, saw the **[*6]** police, and decided to keep driving. When they returned approximately five minutes later, the police were speaking with Appellant. SrA KL later testified that Appellant appeared "shaking and extremely distraught, freaking out" as he spoke with the police. SrA KL observed Appellant being questioned for approximately seven minutes. The police then took statements from SrA KL and SrA RW for approximately ten minutes, after which the police departed.

SrA KL testified that approximately two minutes after the police had gone Appellant spoke with SrA KL about what happened the night before. Appellant told SrA KL that he had laid down on his bed facing away from SB. Then, according to Appellant,

> [SB] grabbed [Appellant] and pulled him over. They started making out, proceeded to have sex. He after--it was like five minutes or so, he said he didn't last very long, he performed oral, got up[,] offered her sweatpants, and then they--she said, "No," and then they went back to bed.

II. Discussion

A. Law

HN1[] We review a military judge's decision to admit or exclude evidence for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017) (citation omitted). "An abuse of discretion occurs when a military judge either erroneously applies the **[*7]** law or clearly errs in making his or her findings of fact." United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003) (citing United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)).

HN2[] Military Rule of Evidence (Mil. R. Evid.) 803(2) provides that an "excited utterance," defined as a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," is an exception to the general prohibition on hearsay evidence. *See* Mil. R. Evid. 801, 802; Bowen, 76 M.J. at 87-88. The excited utterance exception is based on the premise "that a person who reacts to a startling event or condition while under the stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." United States v. Jones, 30 M.J. 127, 129 (C.M.A. 1990) (internal quotation marks omitted). "The guarantee of trustworthiness of an excited utterance is that the statement was made while the declarant was still in a state of nervous excitement caused by a startling event." United States v. Chandler, 39 M.J. 119, 123 (C.M.A. 1994) (citation omitted). To determine whether a hearsay statement qualifies as an excited utterance, we apply a three-pronged test: "(1) the statement must be 'spontaneous, excited or impulsive rather than the product of reflection and deliberation'; (2) the event prompting the utterance must be 'startling'; and (3) the declarant must be 'under the stress of excitement **[*8]** caused by the event.'" Bowen, 76 M.J. at 88 (quoting United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987)). Although the statement relating to the startling event "need not always follow immediately after the event, a lapse of time between the event and the utterance creates a strong presumption against admissibility." Jones, 30 M.J. at 129.

HN3[] Whether an error is harmless is a question of law we review de novo. Bowen, 76 M.J. at 87 (quoting United States v. McCollum, 58 M.J. 323, 342 (C.A.A.F. 2003)). "For nonconstitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings." *Id.* (quoting McCollum, 58 M.J. at 342) (internal quotation marks omitted). "We evaluate the harmlessness of an evidentiary ruling by weighing: '(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.'" Id. at 89 (quoting United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999)).

B. Appellant's Statements to SrA KL

1. Additional Background

The Government called SrA KL to testify at trial. On cross-examination the Defense attempted to elicit Appellant's statements to SrA KL after Appellant spoke with the police on the afternoon of 5 August 2016. Assistant trial counsel objected that this was inadmissible hearsay. Trial defense counsel responded that it was an excited utterance. In a ruling during an **[*9]** Article 39(a), UCMJ, session the military judge sustained the objection. The military judge explained:

> I find that this is not an excited utterance. There was sufficient time for reflection for [Appellant] between the police officers talking to him and then having the separate conversation with his roommates. Furthermore, what he was discussing, it occurred--at this point I think it was probably about a day and a half earlier and while I

> understand--the actual incident, the actual sexual assault incident or consensual sexual relationship had occurred approximately a day to a day and a half earlier, which provided a sufficient time--

At this point, trial defense counsel interrupted to clarify that Appellant's encounter with the police and statements to SrA KL occurred on the afternoon of 5 August 2016. After confirming this with the witness, SrA KL, the military judge continued: "I find that the approximate twelve hours was a sufficient intervening time and that that does not qualify as an excited utterance . . . ." Trial defense counsel then requested "clarification":

> DC [Defense Counsel]: Is the ruling based upon the amount of time between the alleged assault and when [Appellant] told **[*10]** the witness about it or are you counting, I guess, the startling event as the notification by the police that an allegation has been made?
> MJ [Military Judge]: . . . There is [sic] actually arguably two events; one is the amount of reflection that [Appellant] had after the incident occurred, and when I say "incident" now I am referring to the sexual contact that occurred. Certainly, defense, presumably your argument is that [Appellant] thought it was consensual the entire time, so the startling event was when the cops came and talked to him about this.
> DC: Correct, Your Honor.
> MJ: However, that may be an argument. I don't believe there is sufficient evidence or testimony that I've seen to suggest that that was necessarily the case. He had a sexual encounter, which at least the defense counsel and trial counsel agree with that, as to the alleged victim, there has been approximately twelve hours since that when he was approached and I find that is sufficient intervening time that he was not under duress that entire period of time and because of the amount of time that he had for reflection I will sustain the objection as to hearsay.

2. Analysis

Citing *United States v. Moolick, 53 M.J. 174, 177 (C.A.A.F. 2000)*, Appellant contends that being accused **[*11]** of sexual assault can qualify as a "startling" event for purposes of finding an excited utterance under Mil. R. Evid. 803(2). We agree. Nevertheless, we do not find the military judge abused his discretion in finding Appellant's statements to SrA KL were not an excited utterance under the circumstances of this case.

HN4[↑] To establish an excited utterance, the proponent must demonstrate the statement was not the product of "reflection and deliberation." *Arnold, 25 M.J. at 132* (citation omitted). Accepting that Appellant was "distraught" after he learned of SB's sexual assault allegation from the police, we find the military judge reasonably concluded Appellant had an opportunity to reflect on his circumstances before he spoke with SrA KL. In response to questions from the military judge, SrA KL testified that Appellant spoke with SrA KL approximately 25 minutes after the police first arrived; approximately 19 minutes after SrA KL first observed Appellant speaking with the police after he and SrA RW returned; and approximately two minutes after the police departed. The military judge reasonably determined Appellant's exculpatory statements were not impulsive or spontaneous in immediate response to the allegation, but came after some **[*12]** opportunity to reflect and deliberate on what he would tell his housemates about the situation.

Appellant's statements may be distinguished from the excited utterance the United States Court of Appeals for the Armed Forces (CAAF) found in *Moolick*. There, the alleged victim awoke to find the appellant on top of her. *Moolick, 53 M.J. at 175*. She immediately pushed the appellant off of her and ran to the room of another female Sailor, screaming and claiming the appellant had raped her. *Id.* The appellant arrived 30 seconds later. *Id.* When he heard the alleged victim accuse him of rape, the appellant appeared "shocked, [in] disbelief, upset." *Id.* (alteration in original). The appellant "responded to the accusation by saying, 'You grabbed me first.' Then he threw up his hands, said 'call the cops,' and walked out of the room." *Id.* Thus in *Moolick* the CAAF found the military judge erred in excluding the excited utterance because the appellant was "upset" *and* "responded immediately" to the accusation. *Id. at 176*. By contrast, in the instant case, even if Appellant remained upset from learning about the sexual assault allegation from the police, he had an interval of time to think about what he would say before he spoke to **[*13]** SrA KL. Under the circumstances, including the elapse of approximately 12 hours from the sexual act itself and the knowledge that he was under investigation by the police, we find this was enough time to

undermine the premise that Appellant lacked an opportunity to fabricate his version of events. *See* Jones, 30 M.J. at 129.

C. SB's Statement to PM

1. Additional Background

At trial, the Government elicited PM's testimony, described above, that on the morning after the assault she asked SB if SB had wanted to sleep with Appellant and SB responded "No." The Defense objected that the statement was hearsay. During an *Article 39(a)* session, PM described SB's condition when she took SB downstairs as "very shaky and she had just woken up still, so she wasn't able to really respond to me at that moment." The area defense counsel explained the Defense's objection: "The witness, [PM], testified about the witness's [sic] demeanor, that she was tired, that she was sluggish. Sir, when looking at the mental state required for excited utterance it requires some sort of emotion, it requires some sort of excitement from the actual language of the exception to hearsay."

The military judge overruled the objection:

> I will admit **[*14]** it in as an excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress or [sic] excitement that it caused, the testimony as it has been set forth by this witness was that she [SB] seemed to not really know what was going on, and that this appears to be one of the first opportunities that she had to actually relay what had occurred. I will overrule that objection and I will allow those questions and those responses.

2. Analysis

Appellant contends the military judge erred because SB's statement to PM was made hours after the startling event and SB was not in an excited state at the time. In addition, Appellant notes the statement was not spontaneous but rather made in response to specific questions from PM. *See* Jones, 30 M.J. at 129-30 (noting that statements being made "in response to a question" rather than "being the product of impulse or instinct" weighs against finding an excited utterance). The Government responds with several arguments. The Government contends that, because SB fell asleep after the sexual assault and slept until she was awoken by PM, she lacked an opportunity to reflect or fabricate regarding the incident. The Government also **[*15]** suggests that SB's discovery in the morning that she was "in a strange bed, halfway clothed, and unable to find her underwear" was itself a "startling realization" which might be the trigger for an excited utterance. The Government further argues the declarant need not be in an excited state so long as she remained under the "stress" of the startling event. In addition, the Government avers that although SB's statements were in response to questions, PM's questions were not leading, and questioning is only one non-dispositive factor in weighing whether a statement qualifies as an excited utterance. *See* Donaldson, 58 M.J. at 483.

Appellant makes valid points. ***HN5***[↑] The proponent of a declaration bears the burden of demonstrating the statement was made under the "stress of excitement" in order to establish it was an excited utterance. SB had testified she fell asleep five minutes after the sexual assault. PM testified SB was asleep when she found SB in Appellant's room, and PM had to wake her up. Falling asleep or being drowsy are not typically indicative of an excited state. Similarly, whereas SB "seemed to not really know what was going on," a confused utterance is not necessarily an excited utterance for purposes **[*16]** of the exception to the hearsay rule.

Nevertheless, assuming *arguendo* the military judge abused his discretion by admitting SB's statements to PM, we find the error did not substantially influence the findings. *See* Bowen, 76 M.J. at 87. ***HN6***[↑] In assessing the harmlessness of a nonconstitutional error, we consider the materiality and quality of the evidence in question. Kerr, 51 M.J. at 405. In this case, SB's statements to PM on the morning of 5 August 2016 added little to the Government's case. This was not a case where the report of sexual assault was delayed or was recanted at any

point. Even if SB's statements to PM had been excluded, SB's belief that she had been sexually assaulted would have been implicit in the testimony regarding her going to a hospital and submitting to a sexual assault forensic examination and police interview that day. More significantly, the sexual assault nurse examiner's report, prepared on the same day and admitted without objection as a prosecution exhibit, contained SB's narrative description of the assault which also indicated SB did not consent. Recognizing the Government bears the burden of demonstrating the error was harmless, we nevertheless note Appellant has not identified any prejudice **[*17]** from the alleged error. We conclude any error in admitting SB's statements to PM was harmless.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.

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1. *United States v. Bannister, 2017 CCA LEXIS 361*
   Client/Matter: -None-

United States v. Bannister

United States Navy-Marine Corps Court of Criminal Appeals

May 31, 2017, Decided

No. 201600315

Reporter
2017 CCA LEXIS 361 *

UNITED STATES OF AMERICA, Appellee v. JAMIE R. BANNISTER, Information Systems Technician First Class (E-6), 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.

Prior History: **[*1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Commander Arthur L. Gaston III, JAGC, USN. Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI. Staff Judge Advocate's Recommendation: Commander Monica V. Mallory, JAGC, USN.

Core Terms

specifications, sentence, consenting, charges, sexual, hotel, sexual contact, convinced, incapable, floor, penis, multiplication, impairment, falling, beyond a reasonable doubt, sexual assault, hotel room, convicted, military, offenses, wedding, vagina, guilt, talk, sex

Case Summary

Overview
HOLDINGS: [1]-Charges against a servicemember for attempted sexual assault and abusive sexual contact constituted an unreasonable multiplication of charges since the separate charges were both based on the same conduct of the servicemember in contacting the victim's vulva with the servicemember's penis; [2]-The evidence was sufficient to convict the servicemember of sexual misconduct since the testimony of witnesses and the servicemember's own statements established that the victim was substantially intoxicated and incapable of consenting to sexual activity, and any belief by the servicemember that the victim consented to the sexual activity was patently unreasonable.

Outcome
Findings set aside in part, and remaining findings and sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN1[] **Pretrial Proceedings, Charges & Specifications**

A military appellate court reviews five non-exclusive factors to determine whether there is an unreasonable multiplication of charges: (1) whether the servicemember objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresent or exaggerate the servicemember's criminality; (4) whether the number of charges and specifications unreasonably increase the servicemember's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. These non-exclusive factors are weighed together, and one or more factors may be sufficiently compelling.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

HN2 **Pretrial Proceedings, Charges & Specifications**

Within the context of unreasonable multiplication of charges, a military judge generally has wide discretion to dismiss offenses, merge offenses, or merge offenses only for purposes of sentencing. However, when the members return findings of guilt to two specifications based upon a single criminal act, the military judge must either consolidate the specifications or dismiss one of them, not simply merge them for sentencing purposes.

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

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

A conviction for either sexual assault or abusive sexual contact requires the government to prove that a servicemember committed the sexual act or contact upon the victim while the victim was incapable of consenting due to an impairment by an intoxicant and that condition was known or reasonably should have been known by the servicemember. In other words, Unif. Code Mil. Justice art. 120(b)(3), *10 U.S.C.S. § 920(b)(3)*, already requires the government to disprove a mistake of fact defense, so a mistake of fact defense is baked in to the elements of the offenses themselves. In short, if the government proves the servicemember's knew or reasonably should have known that the victim was incapable of consenting to the sexual act or sexual contact—required for both the sexual assault and abusive sexual contact offenses—then the government also, necessarily, proved that any belief by the servicemember that the victim consented was unreasonable.

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

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

HN4 **Judicial Review, Standards of Review**

A military appellate court reviews questions of legal and factual sufficiency of the evidence de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. In applying this test, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The test for factual sufficiency is whether after weighing all the evidence in the record of trial and recognizing that the military appellate court did not see or hear the witnesses as did the trial court, the appellate court is convinced of the servicemember's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make our own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Justice > Judicial Review

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

HN5[] **Military Justice, Judicial Review**

When setting aside specifications, a military appellate court will normally reassess the sentence in light of those changes.

Counsel: For Appellant: Lieutenant Commander Jeremy J. Wall, JAGC, USN.

For Appellee: Major Cory A. Carver, USMC; Lieutenant Megan P. Marinos, JAGC, USN.

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

Opinion by: HUTCHISON

Opinion

HUTCHISON, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of sexual assault and two specifications of abusive sexual contact in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012)*.[1] The convening authority (CA) approved the adjudged sentence of reduction to paygrade E-1 and a dishonorable discharge.

In his sole assignment of error, the appellant asserts that his convictions are legally and factually insufficient since the government failed to prove that the victim was incapable of consenting to sex due to intoxication and that the appellant did not have **[*2]** a reasonable mistake of fact as to consent. We disagree and find the appellant's convictions legally and factually sufficient but conclude that, although not raised by the parties, the two abusive sexual contact specifications represent an unreasonable multiplication of charges. Consequently, after careful consideration of the record of trial and the parties' pleadings, we set aside the appellant's conviction of Specification 2 of Charge I and dismiss that offense with prejudice. We conclude that the remaining findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c), UCMJ*.

I. Background

In September 2014, the appellant travelled to Virginia Beach, Virginia, to attend the wedding of MD and TD. The appellant was the best man at the wedding, and he first met the maid of honor, JCH, a few days before the ceremony. The appellant and JCH had little interaction until the wedding reception and after-party at the wedding-venue hotel's pool. There the appellant and JCH flirted with each other, played games, splashed and chased each other.

After the pool closed, the appellant, JCH, and another **[*3]** groomsman, JS, went to a nearby dance club. The group drank shots of alcohol and JCH and the appellant danced "really closely," "grinding."[2] When that club closed, they went to an after-hours nightclub in Norfolk, Virginia. JCH drank part of a wine cooler there, and once again,

[1] The members acquitted the appellant of forcible sodomy and one specification of attempted sexual assault.

[2] Record at 486.

she danced closely with the appellant. JCH testified that she and the appellant found a secluded area on the dance floor and "made out a lot . . . our bodies were facing each other where we could talk and make out some more, kiss."[3]

After leaving the Norfolk club, the appellant and JS drove JCH to her house. Then, she drove to TD's house while the appellant and JS followed her.[4] Once back at TD's house, the appellant, JS, and JCH unloaded wedding gifts from JCH's car and watched a movie. JCH sat next to the appellant on a loveseat until he got up and went into a bedroom. JCH followed him, and the appellant and JCH "started making out . . . again."[5] JCH testified that she told the appellant that they were not going to have sex but conceded that she straddled him and kissed his chest and abdomen while he kissed her bare breasts. JCH testified that this entire encounter was consensual. As the sun began to rise, JCH **[*4]** left and drove home.

After sleeping only three to four hours, JCH returned to TD's home to watch TD and MD open wedding gifts. While there, she and the appellant talked about the previous night. Although she again kissed the appellant, she testified that she told him she just wanted to be friends. That evening, JCH met the appellant and JS to play bingo before returning with them to the Virginia Beach hotel, where the wedding took place, so they could go out for the night with MD, TD, and other members of the wedding party. JCH had two cups of champagne at the hotel and then the group took a shuttle to a Virginia Beach bar. JCH testified that the appellant bought the group shots and she remembered drinking four—but recognized that it "could have been more[.]"[6] JCH further testified that she had not eaten since the wedding reception the day before. TD testified that the appellant "came up with the idea that [the group] would have shots every 15 minutes" and that JCH had six shots and two mixed drinks.[7]

After approximately two hours at the bar, the group returned to the hotel. While saying goodbye to other members of the group in the hotel parking garage, TD noticed that JCH was "being really **[*5]** loud, obnoxious, picking up a huge orange cone and talking to it and throwing it[.]"[8] JCH found an unlocked car, got in it and then placed the orange cone on top of the car. TD testified that the appellant and JS were trying to calm JCH down, and TD was worried the police were going to be called. The appellant, JS, TD, and MD helped JCH up to TD's and MD's hotel room, where TD gave JCH some "breakfast bread" because she knew JCH "hadn't eaten anything all day."[9] TD then described JCH falling backwards onto the floor of the hotel room, hitting her head. JCH started laughing after she fell and remained lying on the floor as the rest of the group were deciding what to do with her, since she was unable to drive home. TD testified that she initially thought about letting JCH sleep on the pull-out couch in her hotel room, but the appellant and JS "said that they could take her back to their hotel and let her sleep[.]"[10] The appellant and JS picked up JCH off the floor and helped carry her out.

After leaving TD's hotel room, the appellant and JS took JCH back to their nearby hotel. JCH testified that her memory was foggy, but she recalled undressing herself, showering and then falling after the **[*6]** appellant helped her to the bathroom. Her next memory was of the appellant asking if she wanted to have sex, but being unable to answer him coherently. TD then described going in and out of consciousness while the appellant attempted or

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[3] *Id.* at 487.

[4] According to JCH's testimony, she originally planned to return to her home, but realized that neither the appellant nor JS knew how to get back to TD's house in Virginia Beach, where they were staying.

[5] Record at 489.

[6] *Id.* at 500.

[7] *Id.* at 664-66.

[8] *Id.* at 668.

[9] *Id.* at 669.

[10] *Id.* at 669-70.

performed various sexual acts upon her. Specifically, she testified to the appellant digitally penetrating her vagina, placing his penis in her mouth, and attempting to put his penis in her anus while she was lying on the bathroom floor. Then the appellant attempted to penetrate her vagina with his penis while she was lying on the bed. She testified that she never consented to any of the activity and felt "helpless," like she "couldn't do anything."[11]

The following day, the appellant sent a series of text messages to JCH. At first he denied that anything occurred between them, stating:

> Sweetie [I] know you didn't [sic] remember much but [I] took care of you more than most [people] would[']ve. I stuck my own fingers down your throat to get [you] to throw up about 5 to 6 times. You were falling and hitting your head and falling into me . . . trust me [I] KNEW you were hammered and that means NO[. I] know the rules and [I] know [I] have ALOT [sic] LOT LOT **[*7]** to lose.[12]

After JCH told the appellant that she was going to the hospital to make sure she was ok, the appellant begged her not to. He admitted, "my penis was down near you touching you and [I] fingered you alot [sic] so [I] have no doubt there are traces of my [sic] on you and around your area[.]"[13] The appellant expressed concern that he would "go to jail[,] lose [his] family or [his] job over this[.]"[14] He wrote that if his command found out he would lose his "career[,] freedom and family[.]"[15] Finally, the appellant texted JCH, "[p]lease forgive me and please don[']t give them my name[. I] am at your mercy and begging for you not to give them my name. I am so sorry[. P]lease talk to me[.]"[16]

II. Discussion

A. Unreasonable multiplication of charges

The appellant was charged with attempted sexual assault under *Article 80, UCMJ*, and with abusive sexual contact under *Article 120, UCMJ*. The members convicted the appellant of abusive sexual contact as both a lesser-included-offense (LIO) of the *Article 80, UCMJ*, attempted sexual assault and, separately, under the *Article 120, UCMJ*, specification.[17] Both specifications alleged the appellant touched JCH's vulva with his penis while she was incapable of consenting **[*8]** due to her impairment by alcohol. During their deliberations, the members specifically

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[11] *Id.* at 514.

[12] Prosecution Exhibit (PE) 5 at 2.

[13] *Id.* at 6.

[14] *Id.*

[15] *Id.* at 13.

[16] *Id.* at 14.

[17] Although we have doubts regarding whether abusive sexual contact is, in fact, a lesser-included-offense of attempted sexual assault, given the requirement to prove specific intent for *sexual contact*, we need not resolve the issue since we conclude that the specifications represent an unreasonable multiplication of charges. *See United States v. Marbury, No. 20140023, 2016 CCA LEXIS 696, at *4*, unpublished op. (A. Ct. Crim. App. 29 Nov 2016) (holding that abusive sexual contact is not a lesser included offense of sexual assault because the "elements of abusive sexual contact include specific intent, which is not an element of the penetrative sexual assault as charged").

asked whether the two specifications were the same, and the military judge instructed them that they were.[18] After the announcement of findings, the military judge merged the specifications for sentencing.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). ***HN1***[↑] We review five nonexclusive factors from *United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001)* to determine whether there is an unreasonable multiplication of charges: (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality; (4) whether the number of charges and specifications unreasonably increase the appellant's punitive exposure; and, (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. These nonexclusive factors are weighed together, and "one or more factors may be sufficiently compelling[.]" *United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012)*.

Applying the *Quiroz* ***[*9]*** factors, we easily conclude that the appellant was convicted of two offenses for what amounts to a single criminal act. This unnecessarily exaggerates his criminality and unreasonably increases his punitive exposure. Thus, we find an unreasonable multiplication of charges.

HN2[↑] "Within the context of unreasonable multiplication of charges, the military judge generally has wide discretion to dismiss offenses, merge offenses, or merge offenses only for purposes of sentencing." *United States v. Thomas, 74 M.J. 563, 568* (N-M. Ct. Crim. App. 2014). However, when the members return findings of guilt to two specifications based upon a single criminal act, the military judge must either consolidate the specifications or dismiss one of them—not simply merge them for sentencing purposes. *See id.* (citing *United States v. Elespuru, 73 M.J. 326, 329-30 (C.A.A.F. 2014))*. Consequently, the military judge erred in not consolidating or dismissing one of these specifications. Therefore, we set aside the appellant's conviction for the abusive sexual contact LIO to Specification 2, Charge I, and dismiss it in our decretal paragraph.

B. Legal and factual sufficiency

The appellant contends the government failed to prove (1) that JCH was incapable of consenting to sex with him due to her impairment by alcohol, and **[*10]** (2) that he did not have a reasonable mistake of fact as to consent.

As a threshold matter, we note ***HN3***[↑] a conviction for either sexual assault or abusive sexual contact required the government to prove that the appellant committed the sexual act or contact upon JCH while she was "incapable of consenting . . . due to [an] impairment by . . . [an] intoxicant . . . and that condition [was] known or reasonably should [have been] known" by the appellant.[19] In other words, *Article 120(b)(3)* already requires the government to disprove a mistake of fact defense, so "a mistake of fact defense is 'baked in' to the elements of the offenses themselves." *United States v. Teague, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016)*, *rev. denied*, *75 M.J. 373 (C.A.A.F. 2016)*. In short, if the government proved the appellant knew or reasonably should have known JCH was incapable of consenting to the sexual act or sexual contact—required for both the sexual assault and abusive sexual contact offenses—then the government also, necessarily, proved that any *belief* by the appellant that JCH consented was unreasonable.

HN4[↑] Turning now to the dispositive issue for the assigned error, we review questions of legal and factual sufficiency *de novo*. *Art. 66(c), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*. The test for legal sufficiency is "whether, considering **[*11]** the evidence in the light most favorable to the prosecution, any

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[18] The members asked: "Is Spec[ification] #2 of Charge #2 the same as the lesser included offense of Charge I? The findings worksheet and descriptions in charges suggest to us they are. Please explain." Appellate Exhibit LV. The MJ responded: "Well, the short answer to that question is, yes, they're the same." Record at 939.

[19] *Article 120(b)(3)* and *(d), UCMJ*.

reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day, 66 M.J. 172, 173-74 (C.A.A.F. 2008)* (citing *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)*). In applying this test, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

The test for factual sufficiency is whether "after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt." *United States v. Rankin, 63 M.J. 552, 557* (N-M. Ct. Crim. App. 2006) (citing *Turner, 25 M.J. at 325* and Art. 66(c), UCMJ), *aff'd on other grounds*, *64 M.J. 348 (C.A.A.F. 2007)*. In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*.

Therefore, in order to find the appellant guilty, we must be convinced beyond reasonable doubt that he "knew, or reasonably should have known" that JCH was "incapable of consenting"—that she "'lack[ed] the cognitive ability to appreciate **[*12]** the sexual conduct in question or the physical or mental ability to make [or] communicate a decision about whether [she] agreed to the conduct.'" *United States v. Solis, 75 M.J. 759, 760* (N-M. Ct. Crim. App. 2016) (quoting *United States v. Pease, 74 M.J. 763, 770*, *aff'd*, *75 M.J. 180 (C.A.A.F. 2016)* (second alteration in original)), *aff'd on other grounds*, *76 M.J. 127, (C.A.A.F. 2017)* (summary disposition).

After carefully reviewing the record of trial and considering all of the evidence in a light most favorable to the prosecution, we are convinced that a rational factfinder could have found that JCH was incapable of consenting to sexual activity with the appellant, and that JCH's condition of impairment was known or reasonably should have been known by the appellant. Furthermore, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, we too are convinced beyond reasonable doubt of the appellant's guilt.

JCH's testimony was persuasive. She described her memory of the evening as "really foggy," with her vision "going in and out."[20] She testified that she was unable to talk, could not focus, and did not have control over her body. She remembers going into the bathroom, showering, falling onto the bathroom floor, then vomiting before the appellant began **[*13]** "touching [her] vagina" and "insert[ing] his fingers."[21] JCH next remembered lying on her stomach on the bed—unsure of how she got there—and the appellant trying to insert his penis in her vagina.

JCH's level of intoxication and impairment was substantially documented by TD, who described her as "wasted, probably the most drunk I've ever seen her."[22] TD explained how the appellant and JS picked up JCH off of TD's hotel room floor and carried her out. MD also testified that he observed JCH "acting like she was as little drunk," trying to get into a parked car in the hotel parking garage and then placing an orange traffic cone on top of the car, before lying on the ground and "throwing a fit."[23] Indeed, the appellant's text messages to JCH the morning after their encounter corroborate the sexual activity and JCH's level of impairment, conceding that they "messed around alot [sic] but when it was bad [I] stopped."[24] The appellant admitted to JCH that he knew she was "hammered,"[25] and that he digitally penetrated her and tried to put his penis in her vagina, before realizing "it wasn't working" because JCH was "falling and just really bad."[26] In another set of text messages with MD, the appellant was

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[20] Record at 510.

[21] *Id.* at 514.

[22] *Id.* at 672.

[23] *Id.* at 776-77.

[24] PE 5 at 11.

[25] *Id.* at 2.

frantic **[*14]** and distraught over the thought of JCH reporting him. He texted MD, "[I] don[']t want her to go the police or [h]ospital for a kit done cuz [sic] [I] don[']t need that report,"[27] and he further explained:

> "I trie[d] to get it in towards the beginning when [I] said we messed around but couldn[']t so yea my shit [w]as touc[]hing her shit. But then it was over[. I] knew sh[e] was hammered and done so [I] kept fingering h[e]r and she was jerking my dick."[28]

JCH's testimony, the testimony of TD and MD regarding JCH's level of intoxication, and the appellant's admissions to both JCH and to MD that his attempts to have sex with JCH were unsuccessful because she was "hammered," and that he continued digitally penetrating her after she was "done," leave us convinced beyond a reasonable doubt of the appellant's guilt. Moreover, despite the consensual encounter with JCH the previous night and the appellant's self-serving assertions that JCH was participating in the charged sexual activity, we are further convinced, in light of the testimony of JCH, TD, MD and the appellant's text messages, that any belief by the appellant that JCH consented to the sexual activity was patently unreasonable.

C. Reassessment of sentence

HN5[↑] When setting aside **[*15]** specifications, this court will normally reassess the sentence in light of those changes. In this case, however, the members were specifically instructed that "[t]he offenses charged in the lesser included offense of Specification 2 of Charge I and the offense of Specification 2 of Charge II are one offense for sentencing purposes. Therefore, in determining the appropriate sentence in this case, you must consider them as one offense."[29] As we are convinced that the unreasonably multiplied charges did not affect the sentencing decision, we see no need to reassess the sentence.

III. Conclusion

The finding of guilty of the lesser included offense to Specification 2 under Charge I is set aside and Specification 2 under Charge I is dismissed with prejudice. The remaining findings and sentence, as approved by the CA, are affirmed.

Senior Judge CAMPBELL and Judge FULTON concur.

For the Court

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[26] *Id.* at 10.

[27] PE 6 at 4.

[28] *Id.* at 6.

[29] Record at 1013.

User Name: Jocelyn WRIGHT
Date and Time: Friday, December 16, 2022 1:47:00PM MST
Job Number: 186256324

Document (1)

1. *United States v. Escobar, 2020 CCA LEXIS 209*
   Client/Matter: -None-

United States v. Escobar

United States Air Force Court of Criminal Appeals

June 18, 2020, Decided

No. ACM 39638

Reporter
2020 CCA LEXIS 209 *

UNITED STATES, Appellee v. Ross P. ESCOBAR Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Jefferson B. Brown (arraignment); Bradley A. Morris. Approved sentence: Dishonorable discharge, confinement for 2 years, reduction to E-1, and forfeiture of $800.00 pay per month for 2 years. Sentence adjudged 28 October 2018 by GCM convened at Minot Air Force Base, North Dakota.

Core Terms

military, sexual assault, sexual, alcohol, factfinder, consenting, drinking, penis, memory, sex, incapable, recalled, circumstances, intoxicated, convinced, questions, kissing, ignorance, argues, arm, reasonable doubt, communicate, consumed, forensic, remember, factors, guilt, beyond a reasonable doubt, lack of consent, mistake of fact

Case Summary

Overview

HOLDINGS: [1]-With respect to the finding that appellant was guilty of one specification of sexual assault in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, based on the evidence presented, a reasonable factfinder could have found that the victim was incapable of consenting; [2]-The military judge as the factfinder could rationally conclude that the Government proved beyond a reasonable doubt that appellant was not reasonably mistaken as to consent; [3]-For the purpose of Mil. R. Evid. 413, the military judge reasonably applied the applicable standard to the facts before him, and the military judge did not abuse his discretion in permitting testimony from a person that recalled an earlier sexual incident involving appellant.

Outcome
Findings and sentence affirmed.

LexisNexis® Headnotes

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

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

HN1[] Judicial Review, Standards of Review

Issues of legal and factual sufficiency are reviewed de novo. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. Assessment of legal and factual sufficiency is limited to the evidence produced at trial.

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

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

HN2[] Judicial Review, Standards of Review

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving questions of legal sufficiency, the appellate court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

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

HN3[] Evidence, Weight & Sufficiency of Evidence

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the accused's guilt beyond a reasonable doubt. In conducting this unique appellate role, the appellate court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt. The term reasonable doubt does not mean that the evidence must be free from conflict.

Military & Veterans Law > Military Justice > Defenses

Military & Veterans Law > Military Offenses > Indecent Assault

HN4[] Military Justice, Defenses

Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are 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. Manual Courts-Martial pt. IV, para. 45.a.(g)(8)(C).

Military & Veterans Law > Military Justice > Defenses

Military & Veterans Law > Military Offenses > Indecent Assault

HN5[] Military Justice, Defenses

A person who is substantially incapable of appraising the nature of the sexual conduct due to impairment or unconsciousness resulting from consumption of alcohol cannot consent. Consent requires a freely given agreement by a competent person. Further, a person is incapable of consenting when that person lacks the cognitive ability to appreciate the sexual conduct in question or lacks the physical or mental ability to make and to communicate a

decision about whether they agreed to the conduct. Additionally, a person can be awake and conscious and still be incapable of consenting.

Military & Veterans Law > Military Justice > Defenses > Ignorance & Mistake

HN6 **Defenses, Ignorance & Mistake**

For the defense of mistake of fact to exist, the ignorance or mistake of fact must have existed in the mind of the accused and must have been reasonable under all the circumstances.

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

HN7 **Evidence, Weight & Sufficiency of Evidence**

The determination of the accuracy and the weight of the testimony of any witness is for the fact-finder.

Military & Veterans Law > ... > Courts Martial > Evidence > Admissibility of Evidence

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

HN8 **Evidence, Admissibility of Evidence**

A military judge's decision to admit evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the reasoning of the military judge is clearly untenable and amounts to a denial of justice. In order for this court to reverse a military judge's decision based on an abuse of discretion, there must be far more than a difference of opinion. Instead, the appellate court must find that the military judge's decision or ruling was arbitrary, fanciful, or clearly unreasonable or erroneous.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN9 **Admissibility of Evidence, Sex Offenses**

Mil. R. Evid. 413(a) provides that in a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant. This includes using evidence of an uncharged sexual assault to prove the accused has a propensity to commit sexual assault.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN10 **Admissibility of Evidence, Sex Offenses**

The United States Court of Appeals for the Armed Forces (CAAF) has articulated three threshold findings that a military judge must make before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. If the findings are found in the affirmative, then the military judge applies a Mil. R. Evid. 403 balancing test.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN11 **Relevance, Confusion, Prejudice & Waste of Time**

In conducting the Mil. R. Evid. 403 balancing test, a military judge should consider factors such as the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN12 **Admissibility of Evidence, Sex Offenses**

Inherent in Mil. R. Evid. 413 is a general presumption in favor of admission.

Counsel: For Appellant: Captain M. Dedra Campbell, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Captain Kelsey B. Shust, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and RAMÍREZ, Appellate Military Judges. Judge RAMÍREZ delivered the opinion of the court, in which Chief Judge J. JOHNSON and Judge POSCH joined.

Opinion by: RAMÍREZ

Opinion

RAMÍREZ, Judge:

A general court-martial composed of a military judge sitting alone found Appellant guilty, contrary to his pleas, of one specification of sexual assault in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*.[1] He was found not guilty of two specifications of dereliction of duty in violation of *Article 92, UCMJ, 10 U.S.C. § 892*. The military judge sentenced Appellant to a dishonorable discharge, confinement for two years, reduction to the grade of E-1, and forfeiture of $800.00 pay per month **[*2]** for two years. The convening authority approved the adjudged sentence.

I. Background

A. Sexual Assault of Airman First Class PM

[1] All references in this opinion to the Uniform Code of Military Justice, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

Airman First Class (A1C)[2] PM enlisted in the Air Force in August 2015 when he was 19 years old. He arrived at his first duty station at Minot Air Force Base (AFB), North Dakota, where a flight chief introduced him to his supervisor, Appellant. On duty, A1C PM and Appellant would ride together in the same truck, going to and from jobs and would pick up tools or aircraft generation equipment. A1C PM described his initial impression of Appellant as a nice and helpful supervisor.

In June of 2016, while Appellant was assigned on temporary duty (TDY) to an installation in England, Appellant contacted A1C PM and invited him to Appellant's house once Appellant returned to Minot AFB. A1C PM agreed though he had never socialized with Appellant or been to Appellant's house. Appellant offered they could drink and get to know each other better, and A1C PM testified he was "excited" to receive Appellant's invitation.

A1C PM had been assigned to work mid-shift, from 2330 to 0800 hours, for about two to three weeks when Appellant returned **[*3]** from his TDY. On 28 June 2016, after completing his shift, A1C PM went to his dorm room, changed into civilian clothes, and drove to Appellant's house. He would later recall eating little more than a meal at midnight and a pastry at 0300 during his shift, which was the last time he ate before the incident in question. A1C PM was scheduled to return to work in the evening that same day.

A1C PM arrived at Appellant's house between 0930 and 1000 hours. Appellant met A1C PM in his garage and they drove together in Appellant's vehicle to a gas station to purchase alcohol. Because A1C PM was underage, Appellant purchased a 1.75 liter bottle of whiskey and some soda. On the drive back, Appellant told A1C PM that while he was in England, Appellant was lying in bed and woke up to one of Appellant's friends performing oral sex on him, and that Appellant was "okay" with it. Appellant also described an occasion when Appellant watched his friends having sex at a party. A1C PM testified the conversation made him very uncomfortable, but he "just smiled and shrugged it off" and did not tell Appellant that the conversation made him uncomfortable.

When they returned to Appellant's house, Appellant gave **[*4]** A1C PM a tour of his house, put on a movie, and prepared mixed drinks with the alcohol Appellant bought at the gas station. Throughout the day, Appellant told A1C PM more stories about his sexual encounters with friends in England while encouraging A1C PM to drink, and eventually they both finished the bottle of whiskey. A1C PM recalled drinking at least three strong mixed drinks that Appellant prepared, but he did not consider himself an experienced drinker and had never before consumed the types of drinks Appellant prepared, much less the amount of alcohol A1C PM consumed.

At one point, Appellant went to use the bathroom and invited A1C PM to join him. A1C PM stood up from Appellant's couch and was "[p]retty tipsy" and "sluggish," testifying he felt "[l]ike when you stand up and everything kind of moves a little bit." He explained he had consumed alcohol past the point where he felt he could drive home safely. As they urinated in the toilet together with their penises exposed, Appellant commented, "damn [A1C PM] . . . [n]ice dick" or words to that effect. A1C PM found this weird and "laughed it off" because Appellant's statement made him uncomfortable. A1C PM recalled drinking after **[*5]** the restroom incident but testified that he experienced gaps in his memory. He explained, "I know I was at point A. I know I was at point B," and yet "I can't remember the time in between" because "[m]y memory was very sporadic."

A1C PM recalled leaving the bathroom and returning to the living room couch. His next memory was sitting on the edge of a bed in Appellant's guest bedroom upstairs, still clothed, and with his feet off of the floor. A1C PM was sobbing and felt depressed. Although he could not recall at trial why he was so emotional, he did recall that Appellant was on his left side comforting him using a feminine voice that was not Appellant's normal tone of voice. On cross-examination, A1C PM explained he was "really upset and depressed," because he would "never be good enough" and "d[id]n't feel loved."

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[2] At the time of the incident in question, A1C PM held the rank of Airman (E-2). Appellant raises two issues on appeal: (1) whether the sexual assault conviction is legally and factually sufficient, and (2) whether the military judge abused his discretion by admitting evidence of an uncharged sexual assault to show propensity under Mil. R. Evid. 413 to prove the charged sexual assault. Finding no error, we affirm.

Toward the end of Appellant's consoling of A1C PM, A1C PM recalled using his left arm in a "subdued pushback" of Appellant to indicate he wanted Appellant to stop kissing him, "[b]ut it wasn't very powerful, so it didn't really stop anything." Though A1C PM cannot recall how the kissing started, on cross-examination A1C PM thought he kissed Appellant back, acknowledging he **[*6]** thought the two were "French kissing" and "making out" even though A1C PM "didn't want to" and "didn't really like it." He "remember[ed] kissing and then [he] blacked out."

As before, A1C PM could not recall how much time had elapsed but next recalled sitting on the side of the bed, still in Appellant's guest room. This time he was closer to the edge of the bed, his feet were touching the floor, and he was naked from the waist down. A1C PM testified that as his memory came to, his penis was in Appellant's mouth, and Appellant "was giving [him] oral." A1C PM explained, "I remember at some point putting up some kind of resistance but I don't know[,]" and "I wanted it to stop but I just couldn't make it stop." A1C PM's memory went out again, and he next recalled standing naked behind Appellant with his penis near Appellant's buttocks. Then his memory went out again.

A1C PM next recalled walking from the guest bedroom across the hall to Appellant's room, looking down at himself, realizing he was naked, feeling "so weird," and not knowing why he was walking. Then his memory went out again. A1C PM remembered waking up in Appellant's bed with Appellant next to him, but he had no memory of laying **[*7]** down. A1C PM explained that as he woke up, Appellant was playing "footsies" with him and using Appellant's foot to caress his own. A1C PM pulled his foot away and asked Appellant "why are you doing that?" Although A1C PM could not remember the dialogue, they began to talk, and then Appellant put his head in A1C PM's lap, which made A1C PM "super-uncomfortable." A1C PM asked Appellant, "why is your head in my lap?" and "why are you doing that?" which prompted Appellant to stop.

A1C PM testified he had never been as drunk as he was when he was at Appellant's house. Between 2230 to 2300 hours, A1C PM still felt drunk and wanted to leave because he "needed to get out" even though he was drowsy and "intoxicated." Both A1C PM and Appellant knew that A1C PM was scheduled to work and had to arrive at his unit before midnight. Appellant called the Aircraft Maintenance Unit and let them know that A1C PM would be late or would not be in at all. Although A1C PM did not feel sober enough to drive a vehicle, he drove his jeep from Appellant's house to Minot AFB because he "d[id]n't want to be [t]here anymore" and did not want to be late for work.

Unbeknownst to A1C PM, the Security Forces at Minot **[*8]** AFB had received a tip of a drunk driver in a vehicle matching the description of A1C PM's vehicle. Security Forces personnel were waiting for A1C PM at the gate where he was apprehended for suspicion of driving while intoxicated. A1C PM submitted to a breathalyzer test after being apprehended. At 0011 hours his blood alcohol content (BAC)[3] measured at 0.107 and five minutes later his BAC level was 0.118. A1C PM received nonjudicial punishment for this.

After the Government rested, the Defense called Dr. TL as an expert witness in the field of forensic toxicology, who was qualified as expert on the effects of alcohol on the human body. Dr. TL testified that the alcohol elimination rate is approximately 0.01 to 0.02 per hour. Dr. TL went on to clarify that it would take five or more hours for the average person to go from a BAC of 0.3 to a 0.2, and another five hours (or ten hours total) to get to a 0.1, and a full 15 hours to get to 0. Dr. TL also explained that for most people at a BAC of 0.3, they are unable to walk, incoherent, and a step right before unconsciousness.[4]

A1C PM did not initially report the incident that gave rise to the charges in this **[*9]** case. Instead, A1C PM spoke with Appellant about the incident, and Appellant assured him that it would not happen to anyone else. However,

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[3] Pursuant to Mil. R. Evid. 201(b)(2) we take judicial notice that BAC (Blood Alcohol Content) refers to the percent of alcohol in a person's blood stream. A BAC of 0.10 percent means that an individual's blood supply contains "one part alcohol for every 1,000 parts blood." Office of Alcohol and Policy Education, *The Buzz on the Buzz: What is BAC?*, Stanford Univ., https://alcohol.stanford.edu/alcohol-drug-info/buzz-buzz/what-bac (last visited May 21, 2020).

[4] The BAC of .3 is taken from the trial testimony and reflects a time/BAC computation starting with the A1C PM's known BAC (0.107) at a known time (0011 hours), along with the time A1C PM started drinking, and the amount A1C PM was drinking.

shortly before A1C PM reported what happened to him, he heard from another person in the squadron. In speaking with this person, A1C PM had reason to believe that a similar incident happened with another Airman after A1C PM's incident with Appellant, and A1C PM felt responsible. It was this concern that led A1C PM to report Appellant's conduct.

B. The Prior Sexual Assault under Mil. R. Evid. 413

BK enlisted in the Air Force in April of 2008. Although he and Appellant met during technical training in Texas, they were in different schools and had very little interaction. In September of 2011, while BK was stationed in Eng-land, he was informed through a mutual friend, Technical Sergeant (TSgt) AD, that Appellant was visiting. BK, TSgt AD, and Appellant decided to go out drinking at a nearby pub. BK was 23 years old at the time.

While they were drinking, Appellant asked BK sexual questions. Although BK could not recall verbatim the questions that Appellant was asking him, he did recall the nature of the conversation being sexual. BK testified Appellant asked "if I was **[*10]** gay or if I'd ever considered being with a male. If I'd ever thought about being bisexual." BK put Appellant on notice he was "straight as an arrow." TSgt AD was in the vicinity of Appellant and BK, but he was not at the table when Appellant was questioning BK about his sexual orientation. BK found Appellant's questions "were weird" and made him uncomfortable. Later that night, Appellant put his arm around BK, but it was not "a typical bro-type hug" and BK "kind of brushed it off." This stood out to BK because as he explained "[i]t followed some very probing questions about my lifestyle." Appellant put his arm around BK very soon after Appellant asked BK the sexually-charged questions. BK explained that it was at this point that he "was putting two and two together that this was a little awkward" for BK. BK was not comfortable with Appellant's arm being around him. While they were out, BK drank between seven and nine alcoholic drinks.

After the pub, the three Airmen took a cab to TSgt AD's house to sleep. TSgt AD went to his own room, which left a sectional couch for BK and Appellant to share. The couch had a long side and a short side. BK slept on the long side and Appellant slept **[*11]** on the short side. BK testified that when he laid down, he was still fully dressed in the clothes he wore that evening, including a pair of khaki pants and socks. Before falling asleep, BK recalled that Appellant was playing with BK's feet.

During the night, BK woke up to find that his penis was outside of his pants, and Appellant was near BK on his knees. BK was shocked and asked Appellant, "What the f**k are you doing?" Appellant then darted into the kitchen and possibly exited the residence using a back door because that was the last BK saw of Appellant. BK immediately called the Sexual Assault Response Coordinator, who instructed BK not to shower or change clothes and to be ready to be picked up. BK agreed to a sexual assault forensic examination (SAFE), which included swabs of his penis to gather evidence of any DNA foreign to his own that might be present on parts of BK's body. As a result of the incident, BK sought counseling, and sought advice from a chaplain, his parents, and TSgt AD before deciding to file a restricted report of sexual assault. BK separated from the Air Force in October 2014 without changing his restricted report to unrestricted.

Approximately five years after **[*12]** BK's incident with Appellant, TSgt AD contacted BK to share the allegations in A1C PM's case. While presumably the information TSgt AD provided to BK was hearsay and incomplete, TSgt AD asked BK if he would be willing to speak with an agent of the Air Force Office of Special Investigations about his experience with Appellant. As a result of this conversation, BK decided to disclose to military investigators the restricted report he made of the incident with Appellant that happened in September of 2011.

Prior to trial, the Government conducted forensic testing of the evidence collected during BK's SAFE. Doctor (Dr.) DW, a forensic biologist at the Defense Forensic Science Center, U.S. Army Criminal Investigation Laboratory, determined that Appellant's DNA had been present on BK's penis to a scientific certainty that was "one quintillion times more likely if it originated from [Appellant] then if it originated from an unknown" source. At trial, Appellant did not challenge that it was his DNA that was tested. However, Dr. DW did explain a concept called "secondary transfer." Dr. DW explained, "A secondary transfer would be if you came into contact with an individual and then you were to **[*13]** touch a second object. And then that second object is what's tested for DNA. So there's an

intermediary step between person one's DNA and finding that person on a different object." When Dr. DW was asked to provide an opinion as to whether transfer DNA occurred in this case — that is, BK had Appellant's DNA on his hand from earlier in the night, then BK touched his own penis — Dr. DW explained, "in this case the only DNA profile I detected in this sample was that of [Appellant]. I did not detect any of [BK's] own DNA which I would not expect in a secondary transfer event."

II. DISCUSSION

A. Legal and Factual Sufficiency

1. Law

HN1[↑] We review issues of legal and factual sufficiency de novo. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of legal and factual suffi-ciency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN2[↑] The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citation omitted); *see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every **[*14]** reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

HN3[↑] "The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the accused's guilt beyond a reasonable doubt." *United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000)* (citation and internal quotation marks omitted). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. "The term reasonable doubt . . . does not mean that the evidence must be free from conflict." *Id.* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986))*.

In Appellant's case, the elements of the specification of the charge of sexual assault in violation of *Article 120, UCMJ*, included the following: (1) that at or near Minot, North Dakota, on or about 28 June 2016, Appellant committed a sexual act upon A1C PM by causing A1C PM's penis to penetrate the mouth of the Appellant; (2) that A1C PM was **[*15]** incapable of consenting to the sexual act due to impairment by alcohol; and (3) that Appellant knew or reasonably should have known A1C PM was incapable of consenting. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(3)(f).

> The term "consent" means a freely given agreement to the con-duct 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.

MCM, pt. IV, ¶ 45.a.(g)(8)(A).

HN4[↑] "Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are 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." *MCM*, pt. IV, ¶ 45.a.(g)(8)(C).

HN5[] A "person who is substantially incapable of appraising the nature of the sexual **[*16]** conduct due to impairment or unconsciousness resulting from consumption of alcohol cannot consent." *United States v. Prather, 69 M.J. 338, 342-43 (C.A.A.F. 2011)* (citation omitted). "Consent requires a freely given agreement by a competent person." *Id. at 343*. Further, a person is "incapable of consenting" when that person lacks "the cognitive ability to appreciate the sexual conduct in question or [lacks] the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct." *United States v. Pease, 75 M.J. 180, 185 (C.A.A.F. 2016)* (internal quotation marks and citation omitted). Additionally, "a person can be awake and conscious and still be incapable of consenting." *United States v. Bailey, 77 M.J. 11, 14 (C.A.A.F. 2017)* (citing *Pease, 75 M.J. at 186*) .

Generally,

> it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring general intent or knowledge, the ignorance or mistake must **[*17]** have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Rule for Courts-Martial 916(j)(1).

Mistake of fact was an affirmative defense available in this case, which required Appellant to have an honest and reasonable mistake of fact as to A1C PM consenting to the oral sex. *See United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)*. HN6[] "For the defense of mistake of fact to exist, the ignorance or mistake of fact must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id.* (internal quotation marks and citation omitted).

2. Analysis

The Government, in Charge I and its Specification, alleged that Appellant, on or about 28 June 2016, committed a sexual act upon A1C PM by causing A1C PM's penis to penetrate the mouth of Appellant, when A1C PM was incapable of consenting to the sexual act due to impairment by alcohol, and that condition was known or reasonably should have been known by Appellant, in violation of *Article 120, UCMJ*.

In attacking the sufficiency of the evidence to support his conviction, Appellant takes the same two-pronged approach he did at trial. First, Appellant **[*18]** argues that A1C PM consented to the sexual activity because A1C PM was not so intoxicated that he was incapable of consenting. Second, and in the alternative, Appellant argues the evidence shows he labored under a mistaken belief as to consent. We disagree.

As explained in detail below, and after drawing every reasonable inference from the evidence in the record in favor of the Government, the court finds a reasonable factfinder could have found all the essential elements were met, and that the Government disproved the defense of mistake of fact as to consent beyond a reasonable doubt. Additionally, after taking a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make our own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt, and after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

a. Victim's Inability to Consent

Appellant argues that A1C PM, even if intoxicated, was capable of consenting and was in control of his mental **[*19]** and physical faculties. However, the evidence at trial was contrary to this position. A1C PM was 20

years old and, although he had previously consumed alcohol, he was not an experienced drinker. He had never had those particular mixed drinks before, and he had never felt as drunk as he did on the afternoon of the incident in question. Additionally, it was Appellant who prepared the drinks, and it was Appellant who encouraged A1C PM to drink and to continue drinking.

As to A1C PM's level of intoxication at the time of the oral sex, A1C PM testified that he started drinking at some point after 1000 hours, and a breathalyzer test administered to A1C PM shortly after midnight reported his BAC was at least .107. From the expert's testimony, a factfinder could reasonably conclude that even accounting for a faster alcohol elimination rate, A1C PM had a very high BAC at the time of the assault.

Here, A1C PM's effects from the alcohol began as him feeling "pretty tipsy" and "sluggish," to having everything move when he stood up. Then he experienced gaps in his memory. While A1C PM described his memory as not knowing what would happen "between point A and point B" and that his memory was "very **[*20]** sporadic throughout;" he found himself at one point sobbing and not knowing why; and recalled things like walking from one room to another and feeling "weird" and not knowing why he was walking; he was clear as to what he saw, felt, and experienced. From the testimony, a factfinder could reasonably conclude that A1C PM's lack of recall was due to the large amounts of alcohol he had consumed.

While Appellant argues that there is *no* evidence that A1C PM was passed out or unconscious while receiving oral sex, and in a similar vein contends that A1C PM was coherently communicating immediately before the oral sex and was actively participating in sexual activity, A1C PM's testimony directly contradicts this position. By the time A1C PM's memory comes back to him, Appellant already had A1C PM's penis in his mouth. As to whether A1C PM was communicating before the oral sex, there is nothing in the record that he communicated consent. Based on his testimony about his confusion as to what was happening and his inability to respond to prevent unwanted acts from occur-ring, a rational factfinder could conclude that the reason was because A1C PM was too intoxicated to effectuate consent.

Appellant **[*21]** cites *United States v. Nicely, No. ACM 36730, 2007 CCA LEXIS 322, at *4, *9-10* (A.F. Ct. Crim. App. 15 Aug. 2007) (unpub. op.) for the proposition that this court found the named victim capable of consenting even though she was intoxicated and did not remember having sexual intercourse with the accused. Appellant quotes this court in explaining that a "lack of memory does not always equate to a lack of consent." Appellant's reliance on *Nicely* is misplaced. While the quote is correct, in *Nicely*, there were observers to the sexual encounter who could speak to the objective actions of the named victim and the accused, which indicated the named victim was a "consenting and willing participant." *Id. at *2-3, *9-10*. Here, the only testimony before the court was A1C PM's recollections, which indicated he was confused and unwilling, and the scientific evidence as to his BAC levels.

The evidence in the record leads the court to conclude that A1C PM lacked "the cognitive ability to appreciate the sexual conduct in question or [lacked] the physical or mental ability to make and to communicate a decision about whether [A1C PM] agreed to the conduct." *Pease, 75 M.J. at 185* (internal quotation marks and citation omitted). Since A1C PM was "substantially incapable of appraising the nature of the **[*22]** sexual conduct due to impairment or unconsciousness resulting from consumption of alcohol," he could not consent to the oral sex. *See Prather, 69 M.J. at 342-43*. As such, the court finds that, considering the evidence in the light most favorable to the Prosecution, a reasonable factfinder could have found that the victim was incapable of consenting. Additionally, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the accused's guilt beyond a reasonable doubt.

b. Mistake of Fact

Over the Government's objection, and pursuant to trial defense counsel's request, the military judge considered the mistake of fact defense with regards to consent as to the sexual assault offense. Appellant claims that "there was no evidence that [Appellant] should have believed A1C PM was incapable of consenting." Appellant then suggests that there was no testimony that A1C PM was slurring, falling down, vomiting, talking incoherently, or passing out while Appellant was performing oral sex on him. As this is a similar argument to the one just discussed in this

opinion, the court will not reiterate the facts, but notes that these facts could **[*23]** easily lead a factfinder to conclude that it would not be reasonable to believe that a 20-year-old who was highly intoxicated and that had never had any social interaction with Appellant consented to oral sex.

Appellant gives seven reasons why the evidence shows he honestly believed A1C PM consented to the sexual conduct: (1) A1C PM never told Appellant to stop telling him sexually explicit stories, (2) it was A1C PM that exposed his penis to Appellant in the bathroom, (3) A1C PM did not "communicate any discomfort" when Appellant complimented A1C PM's penis, (4) it was A1C PM that told Appellant he did not feel loved, (5) A1C PM did not stop Appellant from kissing him, (6) A1C PM moved into a better position to receive oral sex, and (7) A1C PM had an erection. However, we final a rational factfinder would not be so convinced, and we ourselves are not convinced.

First, A1C PM did not have to tell Appellant to stop telling him sexually explicit stories in order to manifest lack of consent. Simply put, nervous silence in response to inappropriate sexual remarks by one's supervisor cannot reasonably be interpreted as indicating consent. Second, it was Appellant's suggestion to go to the **[*24]** bathroom at the same time, not A1C PM's suggestion. Third, Appellant's assertions are contradicted by A1C PM's testimony. A1C PM was clear that when he realized Appellant was kissing him, he used a subdued pushback with his left arm to try to stop the kissing. There is nothing before the court that would persuade us that Appellant had an honest and reasonable mistake of fact as to A1C PM consenting to the oral sex. It is up to the factfinder to determine which parts of A1C PM's testimony to believe. *See* United States v. Collier, 24 C.M.A. 183, 1 M.J. 358, 366, 51 C.M.R. 428 (C.M.A. 1976) (**HN7**[⬆] the determination of the accuracy and the weight of the testimony of any witness is for the fact-finder); United States v. Smith, 33 M.J. 527, 533 (A.F.C.M.R. 1991) (citations omitted), *aff'd*, 35 M.J. 138 (C.M.A. 1992) (the factfinder has the discretion to determine the appropriate weight to give the evidence). The military judge as the factfinder could rationally conclude that the Government proved beyond a reasonable doubt that Appellant was not reasonably mistaken as to consent.

Considering the evidence in the light most favorable to the Government, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of sexual assault as charged. Further-more, after weighing all the evidence in the record of trial **[*25]** and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

B. Admission of Prior Sexual Assault under Mil. R. Evid. 413.

1. Law

HN8[⬆] A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation omitted). An abuse of discretion occurs when the reasoning of the military judge is clearly untenable and amounts to a denial of justice. United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citation omitted). In order for this court to reverse a military judge's decision based on an abuse of discretion, we must have far more than a difference of opinion. *Id.* (citation omitted). Instead, this court must find that the military judge's decision or ruling was arbitrary, fanciful, or clearly unreasonable or erroneous. *Id.* (citation omitted).

HN9[⬆] Mil. R. Evid. 413(a) provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." This includes using evidence of an uncharged sexual assault to prove the accused has a propensity to commit **[*26]** sexual assault. *See* United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006).

HN10[⬆] The United States Court of Appeals for the Armed Forces (CAAF) has articulated three "threshold findings" that a military judge must make before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402. United States v. Wright, 53 M.J.

476, 482 (C.A.A.F. 2000). If the findings are found in the affirmative, then the military judge applies a Mil. R. Evid. 403 balancing test. *Id.*

The CAAF has further held that **HN11**[↑] in conducting the Mil. R. Evid. 403 balancing test, a military judge should consider factors such as

> the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties.

United States v. Berry, 61 M.J. 91, 95 (C.A.A.F. 2005) (citing *Wright, 53 M.J. at 482*).

2. Analysis

At issue on appeal is the military judge's admission under Mil. R. Evid. 413 of Appellant's uncharged sexual assault of BK in September of 2011. Specifically, although Appellant acknowledges that the military judge **[*27]** applied the correct legal test, he argues that the military judge abused his discretion applying the facts to the law. Recognizing that the abuse of discretion standard is a strict one, we find that the military judge reasonably applied the applicable standard to the facts before him, and the military judge did not abuse his discretion in permitting BK's testimony for the purpose of Mil. R. Evid. 413.

The military judge was the factfinder on the motion, as well as the fact-finder at trial. He issued a written ruling on the Defense's motion in limine to exclude evidence offered under Mil. R. Evid. 413. In the written ruling, the military judge made findings of fact, which we find were not clearly erroneous. Citing *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)*, the military judge articulated the correct burden of proof which was that as the proponent of the evidence, the Government had the burden to show the admissibility of the evidence by a preponderance of the evidence. The military judge set forth the correct tests for admissibility under Mil. R. Evid. 413 and Mil. R. Evid. 403. With the facts and the legal standard, the military judge then applied the *Wright* factors and the Mil. R. Evid. 403 balancing test.

The military judge found the uncharged act Appellant committed against BK in September 2011 was evidence **[*28]** under Mil. R. Evid. 413(d)(3) of contact, without consent, between any part of the Appellant's body and BK's genitals. The military judge found that the factfinder could find by a preponderance of the evidence that an offense occurred based on the evidence presented by BK and forensic evidence of DNA obtained from BK and Appellant. Further, the military judge found that the evidence would tend to support the contention that Appellant had demonstrated a propensity to commit sexual assault upon a non-consenting person.

Appellant claims that the military judge abused his discretion as to the second and third *Wright* factors as well as under the Mil. R. Evid. 403 balancing test. Specifically, Appellant first argues that the military judge erroneously concluded Appellant sexually assaulted BK by performing oral sex on him without his consent. Appellant then claims that the military judge erroneously concluded that evidence was relevant to show consent or lack of consent. In Appellant's argument with respect to the third *Wright* factor, he does not elaborate as to how the military judge abused his discretion but simply argues that the probative value of the uncharged misconduct was substantially outweighed by the danger of unfair **[*29]** prejudice pursuant to Mil. R. Evid. 403.

Appellant's arguments as to how the military judge abused his discretion, do not convince us that the military judge's finding was arbitrary, fanciful, or clearly unreasonable or erroneous. *See Travers, 25 M.J. at 62* (citation omitted). It is clear that Appellant has a difference of opinion with the military judge's findings and conclusions, but this is not sufficient to find that the military judge abused his discretion. Instead, we find the military judge did not abuse his discretion as explained below.

As to the second *Wright* factor, the military judge concluded that BK's testimony and the DNA evidence was sufficient to find that it was evidence under Mil. R. Evid. 413 of contact, without consent, between any part of Appellant's body and BK's genitals, and that a factfinder could find by a preponderance of the evidence that the incident occurred. We agree with the military judge. While there was no testimony of anyone seeing any part of Appellant's body on BK's penis, the evidence provided was strong.

While they were out drinking, Appellant first tested the sexual waters by asking BK if he had ever considered being with a male. After BK told him no in no uncertain terms, Appellant next pushed the **[*30]** issue by asking BK sexual questions, making BK feel uncomfortable. Later in the evening, Appellant put his arm around BK, but it was not "a typical bro-type hug." Then, at the end of the night while Appellant and BK had to sleep on the same couch, BK recalled that Appellant was playing with BK's socked feet. BK fell asleep with all his clothes on, but at some point in the night, BK woke up to find that his penis was outside of his pants, and Appellant was on his knees near him. While BK did not see Appellant sexually assault him, Appellant's DNA was found on BK's penis. This is convincing evidence that a part of Appellant's body was on BK's penis while BK was unable to consent because he was asleep or otherwise unconscious. We find that the military judge did not abuse his discretion as to this factor.

As to the third *Wright* factor, the military judge concluded that the evidence of Appellant sexually assaulting BK was relevant to A1C PM's case under Mil. R. Evid. 401 and 402. The military judge found that the evidence would tend to support the contention that Appellant has demonstrated a propensity to commit sexual assault upon nonconsenting males and that each incident occurred under similar circumstances. **[*31]** We find that the military judge did not abuse his discretion as to this factor.

Although *United States v. Hyppolite, 79 M.J. 161 (C.A.A.F 2019)*, was decided on the basis of Mil. R. Evid. 404(b), the CAAF also did a Mil. R. Evid 401 analysis, and we find it instructive as to the third *Wright* factor as it dealt with an accused charged with sexually assaulting more than one victim with common factors in the evidence. The CAAF held that the two military judges ad-dressing the same issue at Hyppolite's court-martial did not abuse their discretion in deciding that the accused had a common plan or scheme to take ad-vantage of sleeping victims who had been drinking, and that evidence of a common plan or scheme was admissible under the rubric of uncharged misconduct. *Id. at 167*. *Hyppolite* dealt with a common plan or scheme where the evidence of each victim shared factors such as the relationship of the victims to the accused, the circumstances surrounding the alleged commission of the offenses, alcohol, sleeping victims or victims falling asleep, and the nature of the misconduct. *Id. at 162-63*.

Similar to *Hyppolite*, here both incidents involved eight similar characteristics among the victims that relate to victim identity, basis of knowledge between Appellant and victim, alcohol, and memory issues. The **[*32]** similar characteristics between the incidents involving A1C PM and BK include the following: (1) a young male victim 20 to 23 years of age; (2) both victims knew Appellant only through the Air Force; (3) both victims were interacting with Appellant socially for the first time at the time of the wrongdoing; (4) Appellant had sexually-charged conversations with both victims; (5) both victims consumed a significant amount of alcohol; (6) neither victim recalled the beginning of the sexual assault; (7) both victims claimed that Appellant at some point played with their feet; and (8) Appellant performed sexual acts on each victim while the victim was incapable of consenting due to sleep or consumption of alcohol.

Therefore, all three *Wright* factors were met — Appellant was charged with an offense of sexual assault, the evidence proffered was evidence of his commission of another sexual assault; and the evidence was relevant. As to the Mil. R. Evid. 403 balancing test, the military judge took into account legislative intent that evidence of prior sexual offenses should be admissible. The military judge has support in appellate jurisprudence. The CAAF has stated that ***HN12***[⬆] "inherent in [Mil. R. Evid.] 413 is a general presumption **[*33]** in favor of admission." *Berry, 61 M.J. at 94-95* (citing *Wright, 53 M.J. at 482-83*). The military judge also took into account the inherent prejudicial effect that this evidence may have upon an accused. The military judge then found that the time between offenses was not too distant and concluded with a full Mil. R. Evid. 403 analysis.

We find the military judge did not abuse his discretion in admitting Appellant's conduct with BK under Mil. R. Evid 413. While such evidence carries a risk of unfair prejudice to an accused, that risk is minimized in a case tried by a military judge who is presumed to know the law and apply it correctly. *See* *United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (citation omitted). With no indication to the contrary, and applying this presumption, we are confident the military judge properly applied the evidence of Appellant sexually assaulting BK.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*.

Accordingly, the findings and the sentence are **AFFIRMED**.

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