IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	**BRIEF ON BEHALF OF APPELLEE**
v.	)	
Staff Sergeant (E-6) **ISAC D. MENDOZA,** United States Army, Appellant	)	Crim. App. Dkt. No. 20210647 USCA Dkt. No. 23-0210/AR

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

Granted Issue

WHETHER APPELLANT'S CONVICTION FOR SEXUAL ASSAULT WITHOUT CONSENT WAS LEGALLY SUFFICIENT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2018).

Statement of the Case

On December 8, 2021, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920

[UCMJ].[1] (JA 015). On the same day, the military judge sentenced appellant to a reduction to the grade of E-1, confinement for thirty months, and a dishonorable discharge. (JA 017). On January 6, 2022, the convening authority took no action on the findings and approved the sentence. (SA 01). The military judge entered judgment on January 12, 2022. (SA 02).

The Army Court affirmed the findings and sentence. (JA 009). This Court granted appellant's Petition for Review on the above stated issue on October 10, 2023. (JA 004).

Statement of Facts

1. Events prior to the sexual assault.

On the night of July 11, 2020, into the early morning of July 12, 2020, Ms. JW, then a Specialist (SPC) in the U.S. Army deployed to Camp Casey, Korea, consumed various alcoholic drinks off-post and then returned to her barracks building. (JA 36–38, 117–20). Upon returning to the barracks, she continued to drink and exhibited symptoms of alcohol intoxication, such as slurred speech, poor balance, and an inability to walk straight. (JA 77, 138). After observing Ms. JW act flirtatiously toward another male soldier, appellant told that soldier that Ms. JW was "too intoxicated" and that he was going to have her sent to her room. (JA 83,

[1] The military judge found appellant not guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ. (JA 016).

86–88; Pros. Ex. 1 at 11:27–12:47). Less than ten minutes later, appellant met Ms. JW in a hallway, and, pursuant to his invitation, they walked into his room in the same barracks building. (Pros Ex. 1 at 13:40– 14:18; Pros. Ex. 2 at 1:26:22–44). During the walk towards his room, appellant touched Ms. JW's groin.[2] (Pros. Ex. 1 at 14:06–14:10).

2. Appellant sexually assaulted Ms. JW without her consent.

Approximately one hour after they entered his room, closed circuit television (CCTV) footage showed appellant exiting his room with Ms. JW and walking—with Ms. JW's arms around his shoulders and her body and head slumped against him for support—to Ms. JW's room, where he dropped her off before returning to his room. (Pros. Ex. 1 at 14:19–16:30). Approximately one minute later, he left his room to retrieve a master key from the soldier working charge of quarters (CQ) duty and used it to open Ms. JW's room door and return her hat, which had been left in his room. (JA 67–68; Pros. Ex. 1 at 16:39–19:24; Pros. Ex. 2 at 1:33:30–55, 2:43:29–2:45:00). Appellant returned Ms. JW's shoes to her in her room later that morning. (JA 38–39, 68–69; Pros. Ex. 1 at 21:13–22:13).

Ms. JW testified that she had blacked out at some point on the night of July 11, 2020. (JA 38, 54). The next thing she remembered after drinking at her

[2] The military judge found appellant not guilty of touching Ms. JW's groin without her consent. *Supra* n.1.

barracks was waking up to appellant knocking on her door the next morning to return her shoes. (JA 38–39). After appellant came to her room again that morning to ask if she was okay, Ms. JW noticed that she was not wearing the bra or underwear she had been wearing the night before and that the tampon she had inserted the day before was pushed all the way inside her to the extent that she could not reach the string. (JA 39–40, 49, 60–61). At trial, Ms. JW testified that she never inserted a tampon to the point where the string was all the way inside her body. (JA 40, 50, 61). Ms. JW also stated that she would never have sex with her tampon in or when she was on her period. (JA 61–62, 65). Ms. JW, crying and confused, sought assistance from members of her unit, and the soldier on CQ duty arranged for her to receive a sexual assault forensic examination (SAFE). (JA 111, 127– 29, 139–41, 177).

After speaking to Ms. JW that morning, SPC RL, Ms. JW's friend, went to appellant's room and asked appellant if Ms. JW had been there the previous night, and appellant, whose voice was shaking and was visibly nervous, said Ms. JW fell asleep in his bed but did not disclose anything else at the time. (JA 115, 129– 30). Appellant followed SPC RL to the troop medical clinic (TMC) where Ms. JW received her SAFE. (JA 130–31, 177). Specialist RL called Ms. JW's phone while he was in appellant's presence, handed his phone to appellant during the call, and appellant said to Ms. JW—who was trying to figure out what had happened the

previous night—words to the effect that nothing had happened, but that she had locked herself in the bathroom at one point. (JA 42–45).

3. Appellant's admissions to CID.

At the TMC parking lot, appellant, who was not suspected of any crime at the time, told Criminal Investigation Division (CID) Special Agent (SA) DW while SA DW was conducting canvassing interviews that Ms. JW was in his room at some point but that he did not know why she was there. (JA 147–48).

After being informed of and waiving his Article 31, UCMJ rights at the CID office later on 12 July 2020, (Pros. Ex. 2 at 34:24–40:00; Pros. Ex. 5), appellant initially told SA DW that he did not remember events of the previous night after a certain point because he "blacked out quite a bit," but that the last thing he remembered was that Ms. JW was in his bathroom where she "started to fall all over the place," after which he "propped her upright," and picked her up and took her to her room. (Pros. Ex. 2 at 43:30–46:06). Appellant repeated to SA DW that he did not know how Ms. JW entered his room, (Pros. Ex. 2 at 1:18:13–26), but later stated that he invited Ms. JW to his room after she was hitting on him. (Pros. Ex. 2 at 1:24:10–1:26:44).

Appellant then described Ms. JW's intoxication by stating that she was stumbling, told him she was going to throw up, and that he had to walk Ms. JW to her room because she was "super drunk." (Pros. Ex. 2 at 1:28:40–1:31:00).

However, in describing how Ms. JW walked to her room, appellant stated that he "wasn't holding her up," that she had her arm around him for "comfort," and that she was "walking perfectly fine." (Pros. Ex. 2 at 1:39:19– 1:40:15). Appellant also stated that they "didn't have any sexual contact of any kind." (Pros. Ex. 2 at 1:28:20–37). Despite his claims of lack of memory, except for any sexual contact with Ms. JW or the sexual assault, appellant recounted the previous night during the first approximately two hours of the interview— including sequences of events and identities of people and their locations—in detail. (Pros. Ex. 2 at 50:19–2:43:22).

Later in the interview, SA DW showed appellant CCTV footage of him touching Ms. JW's groin while walking with her to his room. (Pros. Ex. 2 at 3:16:20–55). After being confronted with the CCTV footage, appellant admitted that Ms. JW was falling asleep on his bed with a drink in her hand, that he woke her up and had sexual intercourse with her during which he "was in control the whole time," that he knew Ms. JW could not consent because of her intoxication, and that he knew it was wrong to commit sexual acts upon Ms. JW when she could not consent. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellant also stated that he removed Ms. JW from his room because he "didn't want to incriminalize himself." (Pros. Ex. 2 at 2:17:24–30). In response to SA DW's question of what made him decide to have sex with Ms. JW, appellant said he

"made the conscious decision to just do it," and "didn't think about how [Ms. JW] was, didn't think about the consequences it." (Pros. Ex. 2 at 3:39:48–3:41:00). Appellant also acknowledged that he "didn't just make a mistake, [he] committed . . . a severe felony." (Pros. Ex. 2 at 3:43:17–24). Appellant wrote and swore to a statement containing these admissions, among other assertions, at the conclusion of the interview. (Pros. Ex. 2 at 4:07:40–5:08:52; Pros. Ex. 6). Although appellant also stated that, among other indicia of consent, Ms. JW kissed him and said "yes" in response to him asking "is this okay" during the sexual encounter, (Pros. Ex. 2 at 3:20:00–31), when SA DW asserted "she didn't say yes, and you know that," appellant said "yeah" and nodded in assent. (Pros. Ex. 2 at 3:27:29–36).

4. The trial.

Dr. RW, an expert in forensic psychology with an emphasis on effects of alcohol on behavior, (JA 192), testified that she estimated through backwards extrapolation based on Ms. JW's SAFE toxicology report that Ms. JW's blood alcohol concentration (BAC) was between .175 to .19 when appellant sexually assaulted her. (JA 195–96). Dr. RW further testified that such a BAC, when combined with Ms. JW's other symptoms of intoxication, comported with experiencing a blackout, impaired decision making, difficulty processing information, and diminished mental capacity. (JA 198).

During pretrial litigation, defense counsel motioned the court for a specific

instruction to remove the language "competent person" from the definition of consent, which the government opposed. (SA 03, 11–22). Although, the instructional issue was mooted based on the appellant's change in forum selection, the military judge noted that he would allow defense to "argue the matter in closing . . . . and then [the military judge] would take up the matter, as [he] would any other matter, when deliberating . . . ." (SA 03).

Summary of Argument

Ms. JW's testimony and state of intoxication, along with appellant's admissions, false exculpatory statements, and inconsistencies provided a sufficient basis for any rational factfinder to have found all essential elements of sexual assault without consent beyond a reasonable doubt. Although Ms. JW had no memory of the sexual assault, the government presented strong circumstantial evidence, in addition to the evidence of Ms. JW's intoxication, that she did not consent to any sexual acts with appellant. Even assuming the circumstantial evidence was insufficient to meet the "very low threshold" required for legal sufficiency, a plain reading of the statute makes clear: evidence that a victim could not consent, is also evidence that they did not consent.

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019).

Law

Findings of guilt are legally sufficient when "any rational fact-finder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When this court conducts a legal sufficiency review, it is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (cleaned up). Reasonable doubt "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *King*, 78 M.J. at 221. In analyzing both legal and factual sufficiency, this Court "has long recognized that the government is free to meet its burden of proof with circumstantial evidence," and "recognize[s] that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private." *Id.*

To convict appellant of sexual assault of Ms. JW without her consent as alleged in Specification 1 of The Charge ("Specification 1"), the government was required to prove that: (1) appellant committed a sexual act[3] upon Ms. JW; and (2)

[3] "Sexual act" means, in relevant part, "the penetration, however slight, of the

he did so without the consent of Ms. JW. Article 120(b)(2)(A), UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶ 60.b.(2)(d); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-44-2 (29 Feb. 2020) [Benchbook].

Consent is defined as "a freely given agreement to the conduct at issue by a competent person.[4] Article 120(g)(7)(A). The term "without" is "used as a function word to indicate the absence or lack of something or someone."[5] An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent." Article 120(g)(7)(A), UCMJ. Further, "[a] sleeping, unconscious, or incompetent person cannot consent," and "[a]ll the surrounding circumstances are to be considered in determining whether a person *gave* consent." Article 120(g)(7)(B), (C), UCMJ. The term "incapable of consenting" is defined as someone who is "incapable of appraising the nature of the conduct at issue; or physically incapable of declining

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penis into the vulva." Article 120(g)(1)(A), UCMJ. The first element was not at issue during trial or on appeal. (JA).

[4] Congress amended subsection (b) of section 920 of title 10, United States Code, by repealing the "bodily harm" language and adding "without the consent of the other person." National Defense Authorization Act for Fiscal Year 2017 Conference Report to Accompany S. 2943, 114 H. Rpt. 840. Although Congress amended the definition section of consent between 2016 and 2019, they did not amend the language at issue—"consent means a freely given agreement to the conduct at issue by a *competent* person." Article 120(g)(7)(A).

[5] *See Merriam-Webster Unabridged Online Dictionary*, http://unabridged.merriam-webster.com/unabridged/without (last visited Dec. 14, 2023).

participation in, or communicating [unwillingness] to engage in, the sexual act at issue." Article 120(g)(8).

Argument

In applying this test for legal sufficiency, reviewing courts must remember that "[f]indings may be based on direct or circumstantial evidence." R.C.M. 918(c); *see also King*, 78 M.J. 218, 221 (C.A.A.F. 2019) ("[T]he government is free to meet its burden of proof with circumstantial evidence."). As the Supreme Court has explained: "Circumstantial evidence . . . is intrinsically no different from testimonial evidence . . . . [With] both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, [an appellate court] can require no more." *Holland v. United States*, 348 U.S. 121, 140 (1954). Here, there was ample direct evidence that Ms. JW was incapable of consent and strong circumstantial evidence that Ms. JW did not consent.

In *King*, this Court recognized that the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private." 78 M.J. at 221 (finding circumstantial evidence that an appellant searched for and downloaded child pornography was legally sufficient for a factfinder to determine that he wrongfully viewed the images).

The service courts of criminal appeals (CCAA) agree[6] that the government may meet its burden of proving "without consent" by relying mainly on evidence of extreme intoxication.[7] For example, in *United States v. Roe*, the Army Court held that the government may "carry its burden of proving sexual assault without consent . . . by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act."[8] The facts here are nearly identical to the facts of *Roe*.[9] In *Roe*, the Army Court looked to this Court's holding in *United States v. Riggins*, 75 M.J. 78, n.6 (C.A.A.F. 2016), for the

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[6] While CCA opinions are not binding on this Court, their holdings on this issue are legally sound.

[7] *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, *10 (Army Ct. Crim. App. Apr. 27, 2022) *rev. denied Roe*, 2022 CAAF LEXIS 770 (C.A.A.F. Oct. 31, 2022); *see also United States v. Coe*, ARMY 20220052, 2023 CCA LEXIS 354 (Army Ct. Crim. App. Aug. 17, 2023); *United States v. Flores*, 82 M.J. 737, 743–44 (C.G. Ct. Crim. App. 2022) *rev. denied Flores*, 2023 CAAF LEXIS 390 (C.A.A.F., Jun. 7, 2023); *United States v. Williams*, No. ACM 39746, 2021 CCA LEXIS 109 (A.F. Ct. Crim. App. Mar. 12, 2021); *United States v. Gomez*, No. 201600331, 2018 CCA LEXIS 167 (N.M. Ct. Crim. App. Apr. 4, 2018) *rev denied Gomez*, 2018 CAAF LEXIS 557 (C.A.A.F., Aug. 22, 2018).

[8] Here, as the Army Court said in *Roe*, this Court need not decide "whether 'without consent' can be proved solely through showing an inability to consent because of intoxication . . . [because] the government's proof included both evidence of the victim's intoxication alongside other evidence including the appellant's own actions and words both before and after the sexual act.").

[9] Unlike *Roe*, this case was decided by a military judge. "Military judges are presumed to know the law and follow it, absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *see also United States v. Mann*, 54 M.J. 164, 167 (C.A.A.F. 2000) ("Because this was a bench trial, the potential for unfair prejudice was substantially less than it would be in a trial with members. We are satisfied that the military judge was able to sort through the evidence, weigh it, and give it appropriate weight.")

proposition that there was often evidentiary overlap between the "inability to consent" and "without consent." 2022 CCA LEXIS 248, *13. The Army Court properly held that a victim's high degree of intoxication is "one of many permissible ways for the government to attempt to prove 'without consent.'" *Id.* at *13–14. As discussed *infra*, this interpretation and the government's charging decision aligns with established law and the plain meaning of the statute.

A. Ms. JW's actions and testimony show she did not consent.

Analogous to *King* and *Roe*, appellant committed a crime in private against a person who had no memory of the crime. However, Ms. JW's actions following the assault and testimony at trial provided strong circumstantial evidence that she did not consent to any sexual act with appellant. First, Ms. JW had no prior relationship with appellant. (JA 38–39, 41); *see Flores*, 82 M.J. at 743 (finding that the victim's testimony that she "never, within her abilities of recall, had any desire or intent to engage in sexual activity with Appellant, nor had any physical attraction to him" to be "strong circumstantial evidence").

Second, although she testified she had no memory of the sexual assault, Ms. JW maintained that she would never engage in sexual acts on her period, and that she would never have pushed her tampon so far inside of herself. (JA 40, 61–62, 65). Lastly, Ms. JW's immediate report following her suspicion that she had been sexually assaulted along with her demeanor are consistent with sexual assault. (JA

41, 111, 127– 29, 139–41, 177). This evidence alone is sufficient to meet the very low threshold of legal sufficiency.

B. Appellant's admissions and false exculpatory statements.

"[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt." *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021). While acknowledging that this is a *de novo* review, this Court should find as the Army Court did when it held that appellant's changing narrative was evidence of false exculpatory statements which the court considered as substantive evidence of appellant's guilt. (JA 9). Specifically, that "after being confronted, appellant's narrative evolved from him having no idea what happened, to the victim just falling asleep in his bed, to the victim then locking herself in his bathroom, to her then taking a shower and putting her shirt on backwards." (JA 9).

Looking at each in turn, appellant's initial denial that any sexual acts occurred certainly is evidence of his consciousness of guilt, generally. (Pros. Ex. 2 at 1:28:20–37). However, appellant's admission that Ms. JW actually *did not* say "yes" in response to him asking "is this okay" during the sexual encounter, (Pros. Ex. 2 at 3:20:00–31), is strong evidence that Ms. JW never actually gave appellant verbal consent, regardless of whether she was capable of doing so.[10] (Pros. Ex. 2

[10] The government is not required to prove verbal or physical resistance to prove a

at 3:27:29–36) (SA DW asserting "she didn't say yes, and you know that," appellant said "yeah" and nodded in assent).

Importantly, appellant's admissions that "he was in control the whole time," Ms. JW was "falling asleep," and eventually locked herself in his bathroom show that Ms. JW did not consent to sexual acts. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2; JA 45). These facts directly contradicted the defense's theory of the case—that Ms. JW was a willing and active participant in the sexual acts. (JA 34).

Of course, someone who is falling asleep is certainly less likely to *give* consent to sexual acts then someone who is awake and alert. *See United States v. Weiser*, 80 M.J. 635, 642 (C.G. Ct. Crim. App. 2020) ("[T]he combination of [the victim's] consumption of alcohol, level of intoxication, and fatigue were not intended to prove incapacity, but were, instead, relevant 'surrounding circumstances' for the members to consider in deciding whether [she] actually consented."). This fact coupled with Ms. JW's lack of a prior relationship with appellant, her high level of intoxication, and her statements that she would never engage in sexual acts while on her period, all suggest that she did not freely give consent. Similarly, a reasonable inference was that Ms. JW "locked herself" in appellant's bathroom because she was trying to get away from appellant. (JA 45).

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lack of consent. Article 120(g)(7)(A); *United States v. Weiser*, 80 M.J. 635, 642 (C.G. Ct. Crim. App. 2020) ("Still, verbal or physical resistance is not required to show a lack of consent.").

The fact that she did not seek appellant's assistance while highly intoxicated, but rather sought to put a locked door between her and appellant is (at least) circumstantial evidence that she did not freely consent to what had just occurred.

Appellant's actions after the sexual assault also show that Ms. JW did not consent the night prior. Appellant's overwhelming feelings of guilt and need to probe Ms. JW for information do not align with his story that she was an active participant as he stated to CID. (SA 09). This Honorable Court is not obligated to take appellant's self-serving statements at face value, but rather is obligated to draw every reasonable inference in favor of the government.

Similarly, as this Court stated in *United States v. Smith*, the factfinder is "obligated to determine how much weight to give to the evidence . . . ." 83 M.J. 350, 360 (C.A.A.F. 2023). The military judge as the factfinder could have given greater weight to the circumstantial evidence that Ms. JW did not, in fact, consent, rather than the self-serving statements by appellant that Ms. JW was an active and willing participant *or* his incriminating statements that she was incapable of consent. *See id.* ("A reasonable panel could have given greater weight to evidence concerning the extent of [the victim's] intoxication than to Appellant's self-serving statements to [law enforcement] about her active, willing participation in the conduct at issue."). Appellant's admissions, contradictions, and evolving story are sufficient to affirm appellant's conviction.

C. Ms. JW's state of intoxication.

The evidence reasonably supports the inference that Ms. JW was in-and-out of consciousness throughout the sexual assault. (Pros. Ex. 2 at 3:28:00–3:38:47). It is also a reasonable inference that while Ms. JW was conscious she did not consent to sexual acts with appellant.[11] (JA 45, 61–62, 65). The law clearly supports that alcohol can impair an individual's ability to consent to sexual activities. *See supra*, n.6; Article 120(g)(7–8).[12] Ms. JW's high level of intoxication, and appellant's knowledge of her intoxication, was well-established at trial. (JA 38, 54, 83, 86–88, Pros. Ex. 1 and 2;). Whether Ms. JW was completely incapacitated by alcohol or whether she was merely intoxicated to a point that her resistance was significantly reduced was a question of fact properly before the military judge for consideration. Article 120(g)(8) ("All surrounding circumstances are to be considered in determining whether a person gave consent."); *see also United States v. Long*, 73 M.J. 541, 546 (Army Ct. Crim. App. 2014) ("Similarly, even if a panel were to find that a person was substantially

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[11] Dr. RW testified that she estimated Ms. JW's BAC was between .175 to .19 when appellant sexually assaulted her. (JA 195–96). Dr. RW further testified that such a BAC, when combined with Ms. JW's other symptoms of intoxication, comported with experiencing a blackout, impaired decision making, difficulty processing information, and diminished mental capacity. (JA 198).

[12] *See also Military Sexual Assault: A Framework for Congressional Oversight*, Kristy N. Kamarck & Barbara Salazar Torreon, September 12, 2017 (finding that alcohol may be used "to reduce a victim's resistance or to fully incapacitate a victim").

incapable of physically declining participation in sexual conduct, it may nevertheless find that the person could effectively articulate declination to participate in sexual conduct.”). Ultimately, the military judge heard, considered, and rejected appellant’s version of events where Ms. JW was an active and willing participant in the sexual acts.

2. The statute is unambiguous, did not render similar charges superfluous, and appellant was on notice.

Appellant’s case was legally sufficient because any rational factfinder could have found that the above referenced evidence met the very low threshold required to prove that appellant sexually assaulted Ms. JW without her consent. Appellant’s arguments regarding the statutes alleged ambiguity, the canons of statutory interpretation, and Due Process implications are unfounded for the following reasons: 1) the plain meaning of the statute is unambiguous, 2) overlapping theories of criminal liability does not render the alternative mere surplusage; 3) appellant has no right to a specific charging theory, and 4) the government adequately put appellant on notice that he was charged with sexual assault without consent and the evidence reasonably supported that charge.

A. Ambiguity.

Appellant argues “it is unclear if sexual assault ‘without consent means that the accused *did not* have the consent in fact” or “*could not* . . . because they were incapable of consenting.” (Appellant’s Br. 11). This argument ignores the plain

meaning of the words in the statute. "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'" *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (cleaned up)). Congress unambiguously criminalized sexual acts against another person without consent. "Without" or the "absence or lack of"[13] consent can be inferred from all surrounding circumstances. Article 120(g)(7)(C). The surrounding circumstances clearly would include evidence that a person is incapable of giving consent. Appellant's argument suggests that any case involving intoxication resulting in memory loss requires the government to charge under a theory of incapacitation (or not at all). (Appellant's Br. 6).

This argument fails to acknowledge that a factfinder may use evidence that a victim was incapable of consent to find that they did not, in fact, consent. Additionally, that this Honorable Court is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution" when determining if the evidence is legally sufficient to affirm. *Robinson*, 77 M.J. at 298.

However, even if this Court were to discount all of the circumstantial

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[13] *Merriam-Webster Unabridged Online Dictionary*, http://unabridged. merriam-webster.com/unabridged/without (last visited Dec. 14, 2023) (defining "without" as the "absence or lack of something").

evidence that Ms. JW did not consent,[14] the direct evidence of incapacitation through intoxication, on its own, is overwhelming evidence that Ms. JW did not consent. *Supra*, n.6; *see also Riggins*, 75 M.J. at 84 n.6 (noting that although not the legal equivalent "evidence regarding whether the alleged victim knowingly, willingly, and lawfully consented could certainly be relevant to the fact-finder's determination of whether the Government proved the placed-in-fear element beyond a reasonable doubt"). Appellant's narrow interpretation of Article 120(b)(2)(A) would require this Court, and the CCAs, to essentially parse through evidence to determine which charging theory is more appropriate, which evidence the factfinder likely considered as evidence that a victim *did not* consent, versus which evidence the factfinder likely considered that a victim was *incapable* of consenting. *See Smith*, 83 M.J. at 360 (holding that the factfinder is "obligated to determine how much weight to give to the evidence").

Importantly, neither the Army Court, nor appellant, could find any evidence in the legislative history that Congress "meant to somehow preempt the Article 120

[14] Appellant admits Ms. JW was falling asleep just prior to the sexual assault. (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellant admits that Ms. JW did not reply, "yes" to him asking her if "this was okay." (Pros. Ex. 2 at 3:27:29–36). Appellant admits that he "was in control the whole time." (Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellant tells Ms. JW that she locked herself in the bathroom after the sexual assault. (JA 45). Ms. JW testified that she had never spoken to appellant, never would have sexual intercourse on her period, and never would have had sex with her tampon in. (JA 39, 61–62, 65).

field for cases involving alcohol." *Roe*, 2022 CCA LEXIS 248, *15. Congress's intent is clear if we look to its' actions and inactions. In *United States v. Pease*, 75 M.J. 180, 185 (C.A.A.F. Mar. 17, 2016), this Court endorsed and adopted the CCA's meaning of a "competent person." Less than one year later, Congress codified that definition in Article 120(g)(8) as it related to a person who was incapacitated. National Defense Authorization Act [NDAA] for Fiscal Year 2017, 114 P.L. 328 (Dec. 23, 2016). In that same Act, Congress added the "without the consent" language and did *not* remove, amend, or further define the term consent to exclude the term "competent person" (despite making grammatical changes to that very subsection). *Id.*

Congress's actions and words are unambiguous—there is overlap regarding the elements of "without consent" and "incapable of consent." If someone is incapable of giving consent, clearly this is a factor in determining whether there was consent. Article 120(g)(7)(A). An "incompetent person cannot consent." Article 120(g)(7)(B). Such an overlap plainly does not offend the Constitution, it does not create ambiguity, nor does it create impermissible amount of prosecutorial discretion. As the Supreme Court stated in *United States v. Batchelder*, 442 U.S. 114, 123 (1979), "[a]lthough the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments."

Ultimately, where Congress has conveyed its purpose clearly, . . . [this Court should] decline to manufacture ambiguity where none exists." *Id.*

B. Surplusage.

Similarly, appellant relies on *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017) and *Yates v. United States*, 574 U.S. 528 (2015) for the proposition that the plain meaning of the terms "without consent" and "competent" would reduce Article 120(b)(3) to "mere surplusage." (Appellant's Br. 11–12, 14). This argument is incongruous with this Court's holding in *Sager* and the Supreme Court's holding in *Yates*. First, the term "without" is not controversial or ambiguous—it is the "absence or lack of something."[15] A "competent person" is also not an ambiguous term—this Court defined it in *Pease*, and Congress adopted that definition when describing a person who is "incapable of consenting." *Pease*, 75 M.J. at 185; Article 120(g)(8). As the Ninth Circuit held in *United States v. Burnett*, "[appellant's] principles of statutory construction are inapplicable to the instant case . . . [because] they would only be useful in resolving legitimate doubts about Congress' intent in passing overlapping statutes." 505 F.2d 815, 816 (9th Cir. 1974).

In *Sager*, this Court held that the CCA's interpretation of "asleep,

[15] *Merriam-Webster Unabridged Online Dictionary*, http://unabridged. merriam-webster.com/unabridged/without (last visited Dec. 14, 2023).

unconscious, or otherwise unaware" as a single theory of criminal liability was erroneous. *Id.* at 162. That is not what happened here. In *Sager*, this Court reasoned that where three separate and distinct words were used and separated by the disjunctive "or" Congress clearly did not intend a surplusage. *Id.* Here, only one word is at issue and it has the same definition as it applies to every offense under Article 120(b)—consent. Congress's enactment of a variety of charging theories for the government to choose from does not *per se* result in surplusage as appellant suggest.[16] The overlap in the two statutes does not suggest ambiguity but rather shows that Congress intended to ensure that all theories of culpability were captured by the statute.

The facts of *Yates* are completely dissimilar. 574 U.S. 528 (2015). In *Yates*, the appellant—a fishing boat captain—was charged and convicted for concealing evidence of his undersized fish under both a general obstruction statute (with a maximum five-year sentence) and a financial crime statute enacted to address the fallout from the collapse of the Enron Corporation (with a maximum twenty-year sentence). *Id.* at 531–32. Appellant contested the applicability of the conviction for the financial crime statute, specifically the government's interpretation of the

[16] Crimes with overlapping evidence and elements appear throughout the UCMJ. *Compare* Article 128, *with* Article 120. At times the exact same conduct can be charged a variety of ways using different theories of liability with the UCMJ. *E.g.*, extramarital sexual conduct.

term "tangible object" and its application to his case.[17]

The Court agreed with appellant that a contextual reading of the term "tangible object" was more appropriate than the government's "unrestrained reading," which necessarily equated the term to "all objects in the physical world." *Id.* at 536. Here, unlike *Yates*, the "specific context in which [the] language is used" supports the government's argument—"without consent" was intended to cover any sexual assault in which consent was not freely given by a *competent* person. *Id.* at 537; Article 120(g)(7–8). Additionally, this is not a case, as the Court referenced in *Yates*, where the statute used the same term differently within. *C.f. Yates*, 547 U.S. at 537–38. The consistent use of the term is clear considering Congress adopted this Court's definition of competency from *Pease*[18] while preserving the term "competent" and "incompetent" within the definition of consent. Article 120(g)(7)(A), (B) ("A sleeping, unconscious, or *incompetent* person cannot consent."). Ultimately, here, unlike *Yates*, the term "without consent" is not being "extend[ed] beyond the principal evil motivating [the statutes] passage." 574 U.S. at 536.

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[17] *Id.* at 532 ("Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . shall be . . . imprisoned not more than 20 years.").

[18] Compare Article 120(g)(8), with *Pease*, 75 M.J. at 185.

C. Specificity.

Appellant, relying on *Simpson v. United States*, 435 U.S. 6 (1978), argues that "where a general and a specific statute speak to the same concern, a prosecutor must charge the more specific statute even if the general provision was enacted later." (Appellant's Br. 15). This is incorrect. "[The Supreme] Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." [19]

Completely dissimilar to the case at hand, the issue in *Simpson* was whether the appellant could be given two consecutive punishments under two different statutes (one punishing for the robbery and the second punishing appellant for committing the robbery with a firearm) for a single criminal transaction. *Simpson*, 435 U.S. at 8. Of course, the government cannot, and has not in this case, sought to punish appellant twice for a single transaction.[20] However, neither the holding

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[19] *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *see also United States v. Burnett*, 505 F.2d 815, 816 (9th Cir. 1974) *(*"To assume [] that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it, is, in effect, to accomplish a partial repeal of the general statute. Repeals by implication are not favored; effect should be given to overlapping statutes if possible. In the present case the Government had the option of proceeding under either statute.") (citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

[20] In *Simpson*, *Batchelder*, and *Yates*, the Court was considering the dangers of unequal sentences, which is not at issue in this case.

in *Simpson*, nor the "specific statute" doctrine mentioned in dicta is relevant to this case.[21]

On the other hand, the Supreme Court in *Batchelder*, decidedly addressed a very similar issue that is far more applicable to the case at hand. 442 U.S. 114 (1979). Here, appellant seems to adopt an argument analogous to the one the Supreme Court overruled in *Batchelder*:

> The Court of Appeals acknowledged this 'settled rule' allowing prosecutorial choice. Nevertheless, relying on the dissenting opinion in *Berra v. United States*, 351 U.S. 131 (1956), the court distinguished overlapping statutes with identical standards of proof from provisions that vary in some particular way. In the court's view, when two statutes prohibit 'exactly the same conduct,' the prosecutor's 'selection of which of two penalties to apply' would be 'unfettered.' Because such prosecutorial discretion could produce 'unequal justice,' the court expressed doubt that this form of legislative redundancy was constitutional. *We find this analysis factually and legally unsound*.

Id. at 124 (emphasis added).

Analogous to the case at hand, applying the appellant's argument of specificity in this context would result in exactly what the Supreme Court found

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[21] *Simpson*, relying on *Preiser v. Rodriguez*, briefly mentions that the Court's result "is supported by the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later." *Id.* at 15 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973) (analyzing a prisoner's right to relief via *habeas corpus* under two entirely distinct Federal statutes). However, *Preiser* is also completely dissimilar from the case at hand. Although the single line cited by appellant sounds compelling, appellant failed to cite a single case in which it was applied as appellant suggests—precluding the government from charging a certain theory of criminal liability.

"factually and legally unsound." *Id.* "[A] defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution . . . ." *Id.* Ultimately, "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion, subject to constitutional restraints."[22] '

As discussed *supra*, the clear implication from this "long recognized" principle of prosecutorial discretion is that a statute enacted which criminalizes the same conduct as an existing statute does not render the existing statute mere surplusage. *Batchelder*, 442 U.S. at 123–24. Additionally, the Supreme Court expressly rejected the argument that "two overlapping statutes with identical standards of proof" creates a danger of "unfettered" prosecutorial discretion, nor does this "legislative redundancy" cause a constitutional concern for an appellant. *Id.* at 124.

D. Constitutional avoidance and Due Process.

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The

[22] *Id.* at 123–24; *see also United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused."); *Burnett*, 505 F.2d at 816 ([W]here a single act violates more than one statute, the government may elect to prosecute under either.") (citing *United States v. Gilliland*, 312 U.S. 86 (1941); *United States v. Chakmakis*, 449 F.2d 315 (5th Cir. 1971); *Ehrlich v. United States*, 238 F.2d 481 (5th Cir. 1956).).

Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged." *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (cleaned up). A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." *United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202, 206 (C.M.A. 1953). Appellant argues that the government's charged conduct deviated from the proof offered at trial. (Appellant's Br. 21). Not only is appellant's argument inconsistent with his defense strategy at trial, (SA 11), but it rests on the presumption that the words used in the statute do not have their ordinary meaning.[23] (Appellant's Br. 15).

As discussed *supra*, the terms "without," "consent," and "competent," properly noticed appellant of the theories of liability he had to defend against. *See Batchelder*, 442 U.S. at 126 ("The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction."). The evidence did not deviate from what the government charged. *See United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539, *17 (N.M. Ct. Crim. App. Aug. 10, 2017) ("[T]he government had no requirement to prove that [the victim] was competent; only that she did not, in fact, consent.

[23] Appellant does not expressly argue, nor is there any risk of double jeopardy. *See United States v. Felix*, 503 U.S. 378, 386 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation.")

Clearly, evidence tending to show [the victim's] level of impairment was relevant to establish a lack of consent."). Unlike *Riggins*,[24] this is not a case where the government charged appellant with one theory of liability and he was convicted of an unnoticed and unrecognized "lesser included offense." 75 M.J. at 83–84. Here, appellant was noticed of, presented a case defending against,[25] and was convicted of sexual assault without consent. *See Motsenbocker*, 2017 CCA LEXIS 539 at *20–21 (noting an "overly strict reading of *Riggins*" could lead to its misapplication and emphasizing the important distinction of an appellant who is convicted of charges "specifically listed on the charge sheet").

The existence of a similar theory of liability does not diminish appellant's notice of the plain language of the crime of which he was charged. Evidentiary overlap between criminal offenses is not uncommon, and simply does not deprive appellant of due process. *See Bobb v. United States AG*, 458 F.3d 213, 222 (6th Cir. 2006) ("It is not uncommon that federal criminal statutes partially overlap, permitting prosecutors to bring criminal charges under either one section or the

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[24] Another distinction is that *Riggins* approached the "inability to consent" versus "without consent" issue from the "placing a victim in fear" theory of liability. *Id.* This theory does not incorporate the "competent person" term that is at issue in this case, because of course a person who is under duress can still be competent.

[25] In opening argument, trial defense counsel lays out a theory of innocence based on Ms. JW's ability to consent as well as her alleged willing participation in sexual acts as described by appellant in his interview with CID. (JA 34). *See Motsenblocker*, 2017 CCA LEXIS 539 at *22–23 (finding that the defense's trial at strategy showed they were clearly on notice of the charged acts).

other. ").

The Army Court noted that "evidentiary overlap between [a legal inability to consent and without consent]" creates a foreseeable and appropriate means of the government to meet their burden. 2022 CCA LEXIS 248 at *13. The other service courts agree. *E.g.*, *United States v. Williams*, 2021 CCA LEXIS 109, *55 (A.F. Ct. Crim. App. Mar. 12, 2021) (recognizing "that there is a degree of logical evidentiary overlap in the Article 120, UCMJ, offenses"); *Flores*, 82 M.J. at 744–45 ("[A]lthough 'did not consent' theories of liability are distinct from 'could not consent' theories, there still may be overlap between them, and one set of circumstances may tend to prove either."). This finding is legally sound and also analogous to established Supreme Court precedent. *Felix*, 503 U.S. at 386 (analyzing the evidentiary overlap between conspiracy and the underlying crime through the lens of double jeopardy and holding that "mere overlap in proof between two prosecutions does not establish a double jeopardy violation"). In other words, whether evidence of incapacitation is viewed as circumstantial evidence that a victim did not consent, or whether it is direct evidence that the act occurred "without" consent, there is no Due Process claim for this Court to remedy.

In sum, "[t]hat this particular conduct may violate both [charges] does not detract from the notice afforded by each." *Batchelder*, 442 U.S. at 123.

Conclusion

WHEREFORE, the government respectfully requests this honorable court affirm the findings and sentence.

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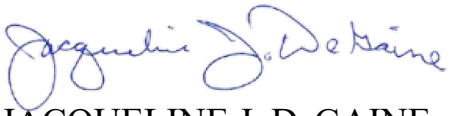

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b)(1) because this brief contains **7,724** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

ANTHONY J. SCARPATI
Captain, Judge Advocate
Attorney for Appellee
December 26, 2023

APPENDIX

United States v. Coe

United States Army Court of Criminal Appeals

August 17, 2023, Decided

ARMY 20220052

Reporter
2023 CCA LEXIS 354 *

UNITED STATES, Appellee v. Private E2 MATTHEW L. COE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, U.S. Army Maneuver Center of Excellence. Trevor I. Barna, Military Judge, Colonel Javier E. Rivera, Staff Judge Advocate.

Counsel: For Appellant: Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief); Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Bryan A. Osterhage, JA; Captain Andrew R. Britt, JA (on reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Pamela L. Jones, JA; Lieutenant Colonel Anthony 0. Pottinger, JA (on brief).

Judges: Before PENLAND, ARGUELLES,[1] and MORRIS Appellate Military Judges. Senior Judge PENLAND concurs. Judge MORRIS dissenting.

Opinion by: ARGUELLES

Opinion

SUMMARY DISPOSITION

ARGUELLES, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault in violation of *Article 120(b), Uniform Code of Military Justice, 10 U.S.C. § 920(b)* [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for twenty-four months, and reduction to the grade of E-1. The convening authority took no action on the sentence.

This case is before the court for review pursuant to *Article 66, UCMJ*. Appellant raises one assignment of error, which merits discussion but no relief. **[*2]** [2]

BACKGROUND

While in airborne training, the victim, appellant, and several other soldiers decided to spend an afternoon at the river. On the way to the river, they stopped to buy brandy. Almost immediately after arriving at the river, and before the heavy drinking started, appellant and the victim had consensual sex in a wooded area away from the group. Over the course of the afternoon the victim and a few (but not all) of the soldiers drank the brandy straight from the bottle, and the victim had sex with at least one of the other male soldiers and one of the female soldiers. When last

[1] Judge ARGUELLES decided this case while on active duty.

[2] We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find them to be without merit. We address appellant's factual sufficiency claim in greater detail below.

observed by the others at the end of the day, the victim, who appeared to be very intoxicated, was having sex with another soldier in the presence of appellant. Although there were no witnesses to the act, appellant admitted to having sex with the victim for a second and final time at the end of the day, which formed the basis for the charge in this case.

The next time witnesses observed the victim, appellant and another soldier were helping her put her bathing suit bottoms back on and cleaning her off in the river. Multiple witnesses testified that the victim had trouble walking and appeared to be very **[*3]** intoxicated at that point. Her friends flagged down two non-affiliated soldiers who were in a car by the river. These soldiers helped carry the victim back to their car, where she sat for a while in the air conditioning and drank water. While in the car, the victim borrowed a friend's phone and made several attempts to call a male soldier. Although multiple witnesses testified that the victim and the soldier she tried to call in the car were in a serious relationship, the victim claimed that they were just friends.

At some point, one of the male soldiers in the group (not appellant) directed the driver of the car to take the victim to a hotel. Concerned for her safety, the driver instead took the victim back to her barracks, where other soldiers say she showed up disheveled and intoxicated, with her clothes all dirty, scratches on her back and legs, and twigs and dirt in her hair. There was also evidence that while at the barracks, the victim attempted to string up a hair dryer cord for the purpose of hanging herself.

The victim testified at trial that after the drinking games started she became highly intoxicated and "blacked out . . . in and out of conscience." When asked the next **[*4]** thing she remembered, the victim testified:

V: Next thing I remember is looking up with my clothes off, looking at [appellant] saying "I do not want this," and then I blacked out again.

TC: Who was — what was happening at the time?

V: At the time, [another male soldier] was in front of me, sir, and then [appellant] was off to the side penetrating [another female soldier].

TC: What's the next thing you remember?

V: Next thing I remember is being in a vehicle.

As noted above, there is no dispute that appellant had sex with the victim after she stated "I do not want this" while looking at him.

A sexual assault forensic nurse also testified that the victim told her "that she remembers her clothes coming off, she doesn't remember who took them off, and she told them 'no stop,' and she looked into their eyes and they saw that she was scared and then she blacked out." Although the nurse did not clarify who the "them" was, this evidence tracks the victim's testimony about the statements she made to appellant and the other male soldier when she woke up with her clothes off, while appellant was having sex with another female.

The evidence at trial also revealed that appellant made several admissions: **[*5]** (1) he told the Army Criminal Investigation Command (CID) agent that he did not look at victim when he had sex with her the second time because "she was super drunk and it was wrong;" (2) when asked by the CID agent if he felt the victim "was coherent enough to give consent for sexual acts," appellant responded "No; " (3) another soldier testified that on the same night after the assault, appellant was "downhearted" and "emotionally drained" and that he told her he "f—d up" by not waiting to have sex with the victim "until they were sober;" and, (4) in a pretext text message stating that the victim was too drunk to consent, appellant replied "Yes she was. She

was wasted."

LAW AND DISCUSSION

Appellant, who was charged with one specification of violating *Article 120(b)(2)(A)*, sexual assault without the consent of the other person, now alleges that because the government's theory of the case, and the bulk of the evidence, pertained to the victim's level of intoxication, the government violated his due process rights. Specifically, appellant asserts that it was error for the government to charge him under one theory of liability for sexual assault (without consent), but to then convict him under a different **[*6]** non-charged theory of sexual assault, that is upon a person who is incapable of consenting due to impairment by intoxicant in violation of *Article 120(b)(3)(A)*.

Another panel of our colleagues recently addressed this very issue in ***United States v. Roe, ARMY 20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. 27 April 2022)***, pet. denied, *83 M.J. 83 (C.A.A.F. 2022)*. Although *Roe* was a nonbinding memorandum opinion, we agree with both the reasoning and holding of that case, and find it to be dispositive here. The court in *Roe* started its analysis by noting that the due process claim before it turned on the single question of whether the government may carry its burden of proving sexual assault "without consent" in violation of *Article 120(b)(2)(A)* by presenting "mainly, but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act?" *Id.* at *11. And in answering that question in the affirmative, the court explained:

> There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she did not consent. Our essential holding here is that this was one of the many permissible ways for the government to attempt to prove "without consent."

*Id. at *13-14*. The court in *Roe* also noted that because the **[*7]** government in any event presented additional evidence of "without consent" above and beyond the victim's intoxication, it was not required to "decide whether 'without consent' can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id.* at *17.

Applying the holding of ***Roe*** to this case: (1) it was permissible to prove lack of consent by introducing evidence of the victim's intoxication level; and (2) there is also additional evidence of lack of consent beyond intoxication level in this case. Among other things, the victim testified that she told appellant "I do not want this" before they had sex for the second time, she reported to the sexual assault nurse that she told "them" "no, stop." Likewise, although appellant's admissions to the CID agent and his statements to his fellow soldiers pertain to the victim's level of intoxication, they are nonetheless further evidence of his consciousness of guilt and the fact that he knew she was not a consenting partner. *Cf. United States v. Smith, M.J. , 2023 CAAF LEXIS 470 at *24 (C.A.A.F. 12 Jul. 2023)*. ("And although Appellant told AFOSI that SrA HS was an active, willing participant in the sexual activity, grinding on him and making out with him until he pulled away, he **[*8]** also admitted that he knew it was wrong to engage in sexual activity with her because she was drunk.").[3]

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[3] With respect to appellant's factual sufficiency claim, we note that even as amended, the most recent version of ***Article 66(d)*** still requires that in weighing the evidence we give "appropriate deference to the fact that the trial court saw and heard the witnesses and evidence." *See United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)*, *aff'd on other grounds* *76 M.J. 224 (C.A.A.F. 2017)* (holding that "the

As such, and like the court in *Roe*, we hold that because the military judge convicted appellant of the offense as charged, and not some other uncharged offense, appellant's due process claim is without merit.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge PENLAND concurs.

Dissent by: MORRIS

Dissent

Judge MORRIS dissenting:

I respectfully disagree with the majority opinion in this case for two reasons: (1) the government's charging decision violated appellant's due process right to fair notice; and (2) in any event, the evidence is factually insufficient. As such, appellant's conviction and sentence should be set aside.

FACTUAL SUFFICIENCY

Appellant asserts in his *Grostefon* matters that his conviction is factually insufficient. *Article 66(d)(1)(B)*, as amended by the *National Defense Authorization Act for Fiscal Year 2021* provides:

> (B) FACTUAL SUFFICIENCY REVIEW
> (i) In an appeal of a finding of guilty under *subsection (b)*, the Court [of Criminal Appeals] may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) **[*9]** After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> (2) appropriate deference to findings of fact entered into the record by the military judge.
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. The amendment to *Article 66(d)(1)(B)* applies only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

The question is whether we are clearly convinced the finding of guilty, which required the military judge to find beyond a reasonable doubt that that the sexual activity occurred

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degree to which we 'recognize' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue"); *United States v. Crews, ARMY 20130766, 2016 CCA LEXIS 127 at *11-12 (Army Ct. Crim. App. 29 Feb. 2019 (mem. op.)* ("The deference given to the trial court's ability to see and hear the witnesses and evidence — or "recogni[tion] as phrased in ***Article 66, UCMJ*** — reflects an appreciation that much is lost when the testimony of the live witnesses is converted into the plain text of a trial transcript . . . . [the factfinder] hears not only a witness's answer, but may also *observe* the witness as he or she responds.") (emphasis in original). While we recognize that there are certainly alternative interpretations of the evidence that could support a finding of not guilty, we emphasize that our factual sufficiency review is *not* a *de novo* review in which we substitute ourselves for the factfinder and decide what verdict we would have rendered. In sum, after reviewing the entire record, to include the evidence supporting the guilty verdict as set forth immediately above, and giving deference to the military judge who was able to see and hear each witness, including the victim, as they testified, we respectfully disagree with our dissenting colleague that the finding of guilt was "against the weight of the evidence."

without the consent of the victim, was against the weight of the evidence. I do not believe the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt and therefore, I am convinced that the finding of guilty was **[*10]** against the weight of the evidence.

The testimony from the victim and other soldiers who testified during appellant's court-martial established that a group of Airborne School students went down to the river to hang out and drink. Shortly after arriving at the river, appellant and the victim headed into the wood line and engaged in consensual sexual activity. Once they returned to their group of friends, appellant, the victim and one other soldier started playing drinking games and kissing. This kissing led to the victim and the other soldier engaging in consensual sexual activity, while appellant was nearby and continuing to kiss the victim's body. At some point two additional soldiers arrived, one male and one female, and the victim asked the female soldier to join, which she did. After she performed some sexual acts with the victim, the other female soldier began to have sexual intercourse with appellant. At some point, the victim who was at the time engaging in sexual acts with another soldier looked over to appellant and said, "I do not want this" and then the victim blacked out. When she woke up, she was crying and stated that she was disgusted with herself because she knew what **[*11]** happened. Others testified that she was yelling that she had cheated on her boyfriend. On cross-examination, the victim acknowledged that she could have said "yes to the group."

Other than the statements identified by the majority that appellant made to a CID agent in an interview where the agent used highly suggestive and manipulative interrogation techniques, the only direct evidence the government presented that the victim may not have been consenting was her statement that she looked at the appellant and said "I do not want this." Then, in the very next question when the assistant trial counsel asked her what was going on, she answered that the other soldier was in front of her and appellant was on her side having sex with the other female soldier. Just because the victim was looking at appellant does not mean that he saw or heard her. It is completely unclear if appellant ever heard the victim say "I do not want this" or had any idea at all that she was no longer consenting. Even worse, the military judge also confused this point. In response to the defense counsel's statement that the victim did not say "I do not want this," the military judge confirmed that "she did testify as **[*12]** such. That did come up when she made eye contact with Private Coe at some point." Only, that is not what the victim testified to. The victim said she looked at appellant, not that he made eye contact with her. She further testified that at the time appellant was having sexual intercourse with someone else, so it seems unlikely he would have made eye contact with the victim or been focusing on her at that moment. The military judge's mistaken characterization of the victim's testimony is particularly problematic because he was also the factfinder. Sometimes, as in this case, our ability to read the verbatim transcript affords us the opportunity to detect inconsistencies missed or misinterpreted by the factfinder.

Further conflicting evidence concerning consent came during the testimony of the sexual assault forensic nurse. Apparently, the victim told the nurse she did not remember who took her clothes off, but she told "them" "no, stop" and she looked into their eyes and they saw that she was scared and then she blacked out. It is not clear who "they" is in this statement. Adding to the confusion, this testimony from the nurse is also a different version of the "I do not want this" statement. **[*13]** And more confusing still is

the fact that there were people around who were not involved in the sexual acts, who could have intervened, but did not, because at least from their perspective, it appeared the victim was enjoying the exchange.

The best evidence against appellant are the statements he made to CID in which the CID agent used highly suggestive and manipulative tactics and refused to take a "no" or alternate version of the facts when appellant tried to deny the agent's suggestions. The agent essentially told appellant if appellant did not agree with the agent's version of events, then maybe this was not a "one time mistake" and appellant was someone "that takes advantage and preys on girls that are drunk." Worse still, most of the negative characterizations recounted by the trial counsel in argument and again by the majority here came from appellant's statements to the CID agent which initiated with the agent as he was pressuring appellant to agree. On these facts, it is not clear how the factfinder found appellant guilty of sexual assault. The victim was capable of consenting at the outset of the activities. From a mistake of fact as to consent perspective, it is unreasonable **[*14]** to assume that any of the soldiers involved on this day could have ascertained when the line of incapable of consenting was crossed. The statements appellant made to his friends and to the CID agents after the fact were as his defense counsel argued, in retrospect. As another colleague pointed out in his dissent on factual sufficiency grounds in *United States v. Moellering, ARMY 20130516, 2015 CCA LEXIS 270, at *29 (Army Ct. Crim. App. 29 June 2015) (Mem. Op.)* (Haight, J., dissenting) circumstances are fluid in the "heat of the moment." It is highly unlikely appellant was that enlightened in the "heat of the moment."

While the majority believes the comments appellant made to another female soldier and during a pretext text communication were evidence of his consciousness of guilt, it is just as likely he was acknowledging a sexual best practice—that because the victim had been drinking, he should have waited. Another reasonable conclusion is that his responses were a showing of compassion for the victim because he witnessed her expressing regret about the sexual activity. Instead of piling on and further damaging the victim's reputation, appellant was honest about his own regrets and acknowledging her intoxication. However unartfully expressed, even if appellant's statement about waiting was taken **[*15]** literally, it was not a matter of waiting for sexual activity as his comment suggested, sexual activity was ongoing, so this statement on which the majority places so much emphasis does not make sense in the context of what was occurring at the time.

Unlike the sleeping victim in *Roe*, where despite finding the evidence factually sufficient, the majority claimed the factual sufficiency was a close call, here the victim was actively participating in and initiating the sexual activity. *See* ***United States v. Roe, ARMY 20220144, 2022 CCA LEXIS 248, (Army Ct. Crim. App 27 April 2022)*** (mem. op.). Then, despite declaring that she blacked out during the approximately 15-minute period, she seemed to remember enough about the sexual activity to exclaim that "she knew what happened," had "cheated on her boyfriend," and could have said "yes to the group." These statements from the victim are strong indications of consent. While it is abundantly clear that the victim regretted the sexual activity, it is less than clear that she ever manifested a lack of consent. Appellant's expressions of regret over the sexual activity have been used as evidence of consciousness of guilt. But regret for making poor decisions concerning sexual activity is not the same as committing a sexual assault. In **[*16]** light of the amount of evidence contrary to a finding that the victim did not consent to the ongoing

sexual activity, I am clearly convinced that the finding of guilty was against the weight of the evidence.

UNITED STATES V. ROE

On its face, the charging decision made by the Government in this case is similar to the charging decision made by the Government in *Roe*. Specifically, in both cases, the Government elected to charge appellant with a specification of violating *Article 120(b)(2)(A)*, when the Government's theory of the case was instead that the victim did not consent because she was incapable of consenting. In *Roe*, the Government's theory was the victim was asleep, which is captured in *Article 120(b)(2)(B)*. In this case, the Government's theory was the victim was impaired by intoxication, which is captured in *Article 120(b)(3)(A)*. As my esteemed colleague highlighted in her dissent in *Roe*, "the statutory context, alone, dictates that *Article 120(b)(2)(A)*, *120(b)(2)(B)*, and *120(b)(3)(A), UCMJ*, are separate and distinct theories of liability for the offense of sexual assault." ***Id. at *24*** (Walker, J., dissenting). The elements the government is required to prove beyond a reasonable doubt in *Articles 120(b)(2)(A)* and *120(b)(3)(A)* are separate and distinct. While *Article 120(b)(2)(A)* simply requires lack of consent to the sexual act, when charged, **[*17]** *Article 120(b)(3)(A)* requires the government to prove beyond a reasonable doubt both that the victim is incapable of consenting to the sexual act due to impairment by an intoxicant and that the accused knew or reasonably should have known of that condition. *See* *10 U.S.C. § 920(b)(3)(A)*.

Allowing the Government to in effect merge all theories of liability into one gives the Government an even greater unfair advantage and the ability to shore up weak evidence as to any element without also having to prove the other required elements of that overall offense. The majority in *Roe* seems to suggest that *Article 120(b)(2)(A)* carries a "heavier burden" of affirmatively proving a lack of consent when intoxication is at issue. ***Roe at *15***. If that is the case, then the Government is arguably using proof of the lesser burden of incapable of consent to prove that heavier burden. Even worse, the Government is proving the victim is incapable of consent without also having to prove appellant knew or reasonably should have known of the victim's inability to consent. This unfair advantage gives the government more than just the "discretion to charge one of multiple offenses" as the majority suggests in *Roe*, but it allows the government to unfairly "cherry pick" which elements **[*18]** from a group of similar offenses it would like to prove up, without giving appellant fair notice of which elements he must defend against. *Id.* (citing *United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010)* (It is the Government's responsibility to determine what offense to bring against an accused.").

The facts of this case better illustrate the risk of allowing the government to convict on a theory other than the one charged. Unlike the victim in *Roe*, the victim in this case was engaging in ongoing sexual acts with a group of fellow soldiers. In fact, it is undisputed that on the day in question, she had participated in consensual sexual activity with appellant before consuming large amounts of alcohol. Then, while continuing to consume alcohol with the group, she invited another woman to engage in sexual activity with her and started having sexual intercourse with yet another man. When that woman became uncomfortable and attempted to break away from the group, the victim knee-crawled over to encourage her to continue participating.

On this evidence, either theory adjudicated separately and distinctly would likely have failed, and thus appellant was materially

prejudiced by the government's charging decision. Because the Government could **[*19]** not prove appellant's guilt beyond a reasonable doubt on either individual theory, it used elements from the uncharged theory to convict appellant of the charged theory. In other words, because the Government's evidence that the victim did not consent was weak, it used evidence that she was incapable of consenting to shore up the lack of consent element. In doing so, appellant's due process rights were violated by the government's election to charge him with sexual assault with a person unable to consent and then proving their case on a theory that the victim was too intoxicated to consent, which resulted in material prejudice to appellant.

In *Roe*, where material prejudice was not found, the facts supporting that victim's inability to consent were overwhelming. The victim in that case was sleeping and a team of fellow soldiers, including the accused, had set up a guard schedule to watch and care for her throughout the night. In this case, the facts concerning lack of consent or even inability to consent are weak at best and only shored up by the improperly merged theories. Thus, appellant was materially prejudiced by the Government's ability to merge theories of liability and elements **[*20]** of multiple offenses to prove lack of consent.

I would set aside appellant's finding of guilty and the sentence.

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United States v. Gomez

United States Navy-Marine Corps Court of Criminal Appeals

April 4, 2018, Decided

No. 201600331

Reporter
2018 CCA LEXIS 167 *; 2018 WL 1616633

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

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

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

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

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

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

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

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

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

Opinion by: PRICE

Opinion

PRICE, Judge:

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

The appellant raises seven assignments of error (AOEs): (1) the government violated his due process right to notice when it charged him with sexual assault under a bodily harm theory, but convicted him under an incapable of consenting due to impairment by alcohol theory; (2) the term *incompetent* as applied at trial was unconstitutionally vague; (3) the military judge abused his discretion by admitting evidence of the alleged victim's alcohol consumption; (4) the military judge abused his discretion by instructing the members on the alleged victim's competence and capacity to consent, after ruling that competence and capacity were not at issue, denying the appellant a fair trial; (5) the military judge erred by declining to provide a defense-requested instruction addressing the alleged victim's capacity to consent and the relevance of her intoxication; (6) the military judge improperly instructed the members on the alleged victim's competence and capacity to consent; and (7) the evidence is legally and factually insufficient to prove any violation of *Article 120*, UCMJ.

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

I. BACKGROUND

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

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

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

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

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

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

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

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

[4] PE 12.

[5] *Id.*

[6] Record at 194.

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

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

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

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

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[7] *Id.*

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

[9] *Id.* at 198.

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

[11] *Id.* at 203.

[12] PE 3.

his mouth on her vulva when she was incapable of consenting due to impairment by alcohol and by placing his mouth on her vulva, by causing bodily harm).[13]

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

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

Based on the TDC's concerns, the military judge substantially limited the TC's ability to argue that RMR did not have the **[*9]** capacity to consent. The military judge acknowledged that RMR's alcohol use was relevant to the issue of consent. But he reasoned that since the government would seek to prove that the appellant committed bodily harm in order to sexually assault RMR, and because the government had dismissed the specifications alleging that RMR was incapable of consenting due to alcohol, he "d[id] not find that competence and capacity [wa]s in issue" based upon the parties' proffers and the exhibits he had examined.

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

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[13] Charge Sheet.

[14] Record at 36.

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

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

[17] *Id.* at 38.

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

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

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

II. DISCUSSION

A. Due Process [*10] and notice

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

1. Law

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

2. Analysis

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

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

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

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

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

The sexual assault specifications alleged he penetrated RMR's vulva on two occasions with his penis and once with his finger "without her consent, by causing bodily harm to her, to wit: an offensive touching however slight."[21] The abusive sexual contact specification alleged he "plac[ed] his mouth on [RMR's] vulva, without her consent, by causing bodily harm to her, to wit: an offensive touching however slight."[22]

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

The statutory definition of consent as "a freely given agreement to the conduct at issue by a competent person" provides notice that when the "bodily harm" alleged is the sexual act or contact, as in this case, the victim's "competence" is at issue.[27] The plain language of the

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

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

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

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

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

[26] Record at 38.

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

statute provided the appellant fair notice of the offense and legal theory under which he was convicted. *See* *United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017)* ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first cannon [of statutory interpretation] is also the last: judicial inquiry is complete.") (citation and internal quotation marks omitted).

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

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

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

In closing, the TDC argued:

> Make no mistake members, [RMR is] not too drunk. That is not [an] issue before you. It's not — [an] issue. . . . it is not an element of the charges. . . . Don't be distracted by this red herring for one minute to think that the complaining witness lacked the capacity to participate in a sexual encounter that took place that night.[31]

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[28] Record at 511.

[29] *Id.* at 512.

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

[31] *Id.* at 516.

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

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

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

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

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

[33] PE 12.

[34] *Id.*

[35] Appellant's Brief at 22.

[36] *Id.*

[37] *See United States v. Riggins, 75 M.J. 78, 84 (C.A.A.F. 2016)* ("[l]ack of verbal or physical resistance or submission resulting from . . . placing another person in fear [necessary to prove violation of *Article 120(b)(1)(A)*] does not constitute consent. . . . the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove [the victim] *did not, in fact, consent*") (alteration in original) (citation, internal

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

The TDC was aware of the distinction among lack of consent, competence, and capacity. That he convinced the military judge to preclude the government from arguing capacity and competency with respect to the abusive sexual contact offense—an offense RMR could not even recall—further erodes his claim that he lacked notice. The TDC disclosed his awareness of these key distinctions in this colloquy while discussing instructions:

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

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

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

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quotation marks, and footnote omitted). *See also Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9, ¶ 3-45-14 at 577, Note 9 (10 Sep 2014) ("Evidence of consent. Generally, the elements of an *Article 120(b)* offense require the accused to have committed sexual conduct "by" a certain method . . . . Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element.").

[38] Record at 413.

B. Instructions

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

1. Defense-requested instruction

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

a. Law

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

b. Analysis

The TDC requested the military judge instruct the members that:

> [T]he question of [RMR's] capacity to consent is not before you. **[*20]** Put another way the government concedes that [RMR] had the capacity to consent despite her possible intoxication.
> Persons who have consumed an intoxicant, such as alcohol, often exercise free will and make conscious decisions for which they are legally responsible. This is true even if the person does not later recall making the decision or if they later regret the decision. . . .

> Evidence of intoxication in this case has been admitted merely on the question of whether the complainant consented, or the accused had a reasonable belief that she consented, and for its impact upon her memory. . . .[39]

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

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

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

2. Competence and capacity-to-consent instructions

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

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[39] Appellate Exhibit (AE) XX.

[40] Charge sheet.

[41] Record at 37.

[42] *Id.* at 418.

a. Law

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

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

b. Analysis

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

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

The military judge's ruling was limited to precluding **[*24]** the government from arguing competence and capacity and not a final ruling that competence and capacity were not at issue in this case.[44] We understand the military judge's ruling in the context in which it was

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

[44] Record at 36-39.

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

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

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

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

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

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

After the military judge **[*26]** declined to give the defense-requested instruction that RMR's capacity to consent was not an issue for the members to decide, the TDC acknowledged that he wanted the military judge to provide the "*Pease* definitions."[49] Because the TDC did not object to the draft instructions provided for his review by the military judge, or to the instructions ultimately given to the members, we review for plain error.[50]

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

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

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

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agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question, then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person.

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

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

[49] Record at 418-19.

[50] *Id.* at 491.

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

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

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

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

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

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

C. Vagueness

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

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

1. Law

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

2. Analysis

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

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

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

D. Legal and factual sufficiency

The appellant avers the evidence is both legally and factually insufficient to prove any of the charged sexual offenses or, alternatively, that the evidence is factually insufficient to overcome his reasonable mistake of fact as to consent. Specifically, he alleges there is no evidence that RMR communicated, through words or conduct, a lack of consent prior to

the sexual activity, nor are there words, conduct, or circumstances sufficient to show the appellant had reason to believe that RMR was not consenting to the sexual activity. We disagree.

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

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

1. Evidence of the sexual acts and sexual contact

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

RMR testified the appellant penetrated her vulva with his penis in the shower and then penetrated her vulva with his finger and penis on his bed. Her testimony was corroborated, in part, by the appellant and by forensic evidence. The appellant admitted penetrating RMR's vulva with his penis in the shower and on his bed, and performing oral sex on RMR during the NCIS-recorded phone **[*33]** conversation with RMR and apologized for having sex with RMR during that call and on other occasions. In addition, his DNA, including spermatozoa found on swabs taken from RMR's vagina, and his semen DNA, found in her underwear, corroborated penile penetration.

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

[53] PE 12.

convinced beyond a reasonable doubt that the appellant committed the charged sexual acts and sexual contact.

2. Evidence of bodily harm and lack of consent

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

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

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

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

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

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[54] Record at 198-200.

[55] *Id.* at 203.

said he was sorry at least five times and after additional prompting texted, "I'm sorry for having sex with you."[57]

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

We find the absence of any assertions or plausible evidence of consent in these last two recorded conversations significant as they followed RMR's representations that she was blacked out due to alcohol intoxication and could not remember details of what happened. We also find the appellant's repeated apologies evidence a consciousness of guilt. *See United States v. Quichocho, **No.** 201500297, 2016 **CCA LEXIS** 677*, unpublished op. (N-M. Ct. Crim. App. 29 Nov 2016).

3. Mistake of fact as to consent

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

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

Based on the record before us, and considering the evidence in the light most favorable to the government, a reasonable fact finder could have found all the essential elements of the charged offenses beyond a reasonable doubt. *Turner, 25 M.J. at 324*. After weighing all

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[56] PE 3 at 4-5.

[57] *Id.* at 6.

[58] PE 12.

[59] *Id.*

the evidence and recognizing that we did not see or hear the witnesses, we are also convinced that the appellant is guilty beyond a reasonable doubt. *Id. at 325*.

E. Erroneous admission of evidence

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

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

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

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

III. Conclusion

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

Senior Judge HUTCHISON and Judge FULTON concur.

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United States v. Motsenbocker

United States Navy-Marine Corps Court of Criminal Appeals

August 10, 2017, Decided

No. 201600285

Reporter
2017 CCA LEXIS 539 *

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

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

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

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

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

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

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

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

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

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

Opinion by: HUTCHISON

Opinion

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

HUTCHISON, Senior Judge:

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

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

I. BACKGROUND

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

At trial, the testimony of other party-goers and the appellant helped fill in events that occurred between PO3 AD's arrival and the sexual assault. PO3 AD spent the greater part

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[2] We have renumbered the AOEs.

[3] Record at 390-98.

of the evening with PO3 PC playing beer pong, drinking, and making out with him for a short period of time in the kitchen. There was little to no interaction between PO3 AD and the appellant—though the appellant testified to witnessing PO3 AD's interactions with PO3 PC—until the appellant was informed later that night that someone was sick in the bathroom.

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

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

Later that night, after all the other guests had departed, the appellant entered the bedroom where PO3 AD was sleeping. At trial, the appellant's and PO3 AD's recollections of what transpired next differed greatly. PO3 AD testified that as she was lying in the "fetal position" on the bed, the appellant removed his bow tie and shirt, climbed into bed with her, pressed the front side of his body against **[*5]** her back side—in a spooning-type fashion—and began to rub her back with his hands.[5] PO3 AD testified that she was "terrified" to find herself in such a "strange situation" and did not have the strength to get up and leave or to "fight off anyone"; she believed that "if [she] just laid there that maybe he would just leave."[6]

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

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

[5] Record at 396.

[6] *Id.* at 395.

[7] *Id.* at 397.

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

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

Conversely, the appellant testified that when he entered the room, PO3 AD was awake in the bed on her phone, and that she said "yes" when he explicitly asked if he could lie down in the bed with her.[12] He stated that after lying in bed for a short time, he began to "rub PO3 AD's back in a comforting manner."[13] After a few minutes, he began to rub her hip, caressing her from her waist down to her thigh. The appellant testified that PO3 AD was positively responding to everything he was doing, evidenced by the movement of her body so that the two were "kind of spooning."[14] The appellant then testified that PO3 AD rolled **[*7]** onto her back and the two began kissing for approximately ten minutes. Believing PO3 AD was consenting, the appellant began to rub PO3 AD's breasts with his hands. He testified that because of the manner in which she continued to respond—the noises she was making (though no verbal confirmations of affirmative consent) and her body movements—he proceeded to digitally penetrate PO3 AD's vagina, and then perform oral sex on her.[15] At trial, the appellant noted that he witnessed PO3 AD on her phone

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] PE 3 at 3.

[12] Record at 684.

[13] *Id.* at 685.

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

while he was performing oral sex on her, and thought it was "peculiar" and that "maybe [he was] doing something wrong."[16] However, the appellant testified that the first time he heard PO3 AD say "no" to what he was doing was when he stood up to have sex with her.[17] He stated that once she said no, he stopped all action and went to sleep. Notably, PO3 AD did not testify to receiving oral sex from the appellant and the appellant did not include this detail in his interview with Naval Criminal Investigative Service (NCIS) six weeks after the incident.[18] Rather, the first time the appellant indicated he performed oral sex on PO3 AD was at trial.

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

II. DISCUSSION

A. Instructions, argument, and notice

The appellant was charged with one specification of violating *Article 120(b)(1)(B)*, UCMJ—sexual assault by causing bodily harm—and two specifications of violating *Article 120(d)*—abusive sexual contact by causing bodily harm.[19] *Article 120(b)(1)(B)*, UCMJ, states "any person . . .who . . . (1) commits a sexual act upon another person by . . . (B) causing bodily harm to that other person" is guilty of sexual assault.[20] Bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact."[21] Therefore, in order to convict

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

[16] *Id.* at 690.

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

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

[19] Charge Sheet.

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

[21] MCM, Part IV, ¶ 45.a.(g)(3).

the appellant of the offenses charged, the government was required to prove beyond a reasonable doubt that PO3 AD did not consent to the sexual act or sexual contacts.

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

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

1. Instructions

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

Moreover, "[t]he military judge has an independent duty to determine and deliver appropriate instructions." *United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008)* (citing *United States v. Westmoreland, 31 M.J. 160, 163-64 (C.M.A. 1990))*. In this regard, the military judge bears the primary responsibility for ensuring the members are properly instructed on the elements of the offenses raised by the evidence, "'as well as potential defenses and other questions of law.'" *Id.* (quoting *Westmoreland, 31 M.J. at 164*). Indeed,

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

the military judge must tailor instructions in order to address only matters at issue in each trial and "provide 'lucid guideposts' to enable the court members to apply the law to the facts." *United States v. Newlan, No. 201400409, 2016 CCA LEXIS 540, at *18 (N-M Ct. Crim. App. 13 Sep 2016)* (quoting *United States v. Buchana, 19 C.M.A. 394, 41 C.M.R. 394, 396-97 (C.M.A. 1970))*.

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

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

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

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

> A person is incapable of consenting if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct.

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[23] Record at 756.

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

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

Moreover, PO3 AD was communicating via text message with her friend PO3 ZA, *during* the course of her encounter with the appellant. She texted PO3 ZA that "he won't take . . . No",[29] "Rape",[30] "Help",[31] "He won't quit",[32] and "Being forced."[33] PO3 AD testified that in those texts she was referring to the appellant and texting PO3 ZA for help. On cross-examination, the civilian defense counsel questioned PO3 AD about her ability **[*14]** to send text messages and PO3 AD confirmed that she "knew what was going on" and that she knew she was "being assaulted."[34] PO3 AD stated she was able "to understand", "comprehend[,]" and "communicate" during the sexual encounter with the appellant.[35]

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[24] *Id.* at 757.

[25] *Id.* at 396.

[26] *Id.* at 397.

[27] *Id.*

[28] *Id.* at 412.

[29] PE 3 at 2.

[30] *Id.*

[31] *Id.* at 3.

[32] *Id.* at 4.

[33] *Id.* at 6.

[34] Record at 450.

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

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

Having concluded the language of the military judge's *Pease* instruction was not **[*16]** confusing or contradictory, we next examine its inclusion here in a bodily harm case. While we agree with the appellant that there was insufficient evidence to find that PO3 AD was incapable of consenting in violation of Article *120(b)(3)(A)*, UCMJ, we also recognize that the appellant was not charged under that article. Rather, the evidence in this *bodily*

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

[36] Appellant's Brief at 12.

[37] *Id.* at 21.

harm case raised the issue of consent; the government was required to prove lack of consent beyond a reasonable doubt; the appellant presented evidence that PO3 AD did consent, and the members were required to decide whether or not she did. Therefore, the military judge was required to instruct the jury on the element of consent.

The statutory definition of consent is "a freely given agreement to the conduct at issue by a *competent* person."[38] Therefore, "[a] full definition of consent includes [the] definition of competence to consent." *Long, 73 M.J. at 545* (citations omitted).[39] Although the government was not required to prove that PO3 AD was competent—as discussed *supra*, incompetent people can decline to participate in sexual conduct—competence became relevant here after *the appellant* presented evidence that PO3 AD consented *and had the capacity to consent* ***[*17]*** . As a result, we find no plain error with the military judge's decision to instruct the members regarding what constitutes a "competent person" for purposes of defining consent.

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

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

Id.

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

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[38] MCM, Part IV, ¶ 45.a.(g)(8)(A).

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

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

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

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

2. Improper argument

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

3. Notice

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

In reaching our decision, we are mindful of our superior court's decision in *United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016)*. In *Riggins*, the CAAF held that assault

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

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

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

The appellant's contention is that the military judge's instructions and TC's arguments impermissibly imported *Article 120(b)(3)(A)* into the case and permitted the members to convict him of that offense—of which he had no notice—vice the one charged. In that regard, the CAAF's recent discussion of Riggins in *United States v. Oliver, 76 M.J. 271 (C.A.A.F. 2017)*, is instructive and further demonstrates *Riggins*' inapplicability under the circumstances of this case. In *Oliver*, the appellant was convicted of wrongful sexual contact, a violation of *Article 120(m)*, UCMJ (2006), as a lesser included offense of Article **[*22]** *120(h)*, UCMJ (2006)—abusive sexual contact by threatening or placing another in fear. Oliver argued that his case was like *Riggins*; the crime he was convicted of required lack of consent as an element, while the greater offense—abusive sexual contact by threatening or placing another person in fear—did not. However, because Oliver raised the affirmative defense of consent available at the time,[43] the government had to prove lack

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

of consent beyond a reasonable doubt in order to obtain a conviction. The government addressed the issue of consent in trial and during closing arguments, and Oliver's trial defense strategy focused on the victim's consent. Consequently, the CAAF concluded, under a plain error analysis, that "the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against." *Oliver, 76 M.J. at 275*.

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

4. Prejudice

Although we find error in neither the military judge's instructions nor the TC's rebuttal argument regarding PO3 AD's capacity to consent, we conclude that even if we did find any error, it would be harmless. "If instructional error is found when there are constitutional dimensions at play, the appellant's claims must be tested for prejudice under the standard of harmless beyond a reasonable doubt."[44] *United States v. Hills, 75 M.J. 350, 357-58 (C.A.A.F. 2016)* (citations and internal quotation marks omitted). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006)* (citations and internal quotation marks omitted). In other words, to find that the error did not contribute to the conviction **[*24]** is to find the "error unimportant in relation to everything else the [members] considered on the issue in question, as revealed in the record." *United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007)* (citation and internal quotation marks omitted).

We, therefore, conclude that the inclusion of the *Pease* instruction and the TC's brief comments during rebuttal were unimportant in relation to the government's affirmative responsibility to prove beyond a reasonable doubt that PO3 AD did not consent. Indeed, the evidence presented by the government regarding PO3 AD's lack of consent could not have been starker. She testified consistently regarding her encounter with the appellant, recounting for the members that she repeatedly told the appellant "no" and "off", tried to

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

roll over away from him, but ultimately was too intoxicated to leave. The government presented PO3 AD's text messages to PO3 ZA, which provided a rare contemporaneous accounting of the attack, and a report from a Sexual Assault Nurse Examiner, conducted just days after the assault, in which PO3 AD relayed details consistent with her in-court testimony. Indeed, evidence of PO3 AD's level of intoxication, while not required to prove she was incapable of consenting, was certainly **[*25]** probative regarding her desire to engage in sexual relations with a man she hardly knew after she had just woken up in a strange bed.

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

B. Prosecutorial misconduct

1. Legal error

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

"Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornback, 73 M.J. 155, 159-60 (C.A.A.F. 2014)* (citations and internal quotation marks omitted). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of

[45] Appellant's Brief at 21.

some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)* (citing *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935))*.

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017)* (citing *United States v. Young, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985))*. Prosecutorial misconduct in the form of improper argument is a question of law we review *de novo*. *United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)* (citing *United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011))*. "The legal test for improper **[*27]** argument is [(1)] whether the argument was erroneous and [(2)] whether it materially prejudiced the substantial rights of the accused." *Id.* (citation and internal quotation marks omitted). In application, "the argument by a trial counsel must be viewed within the context of the entire court-martial," and as a result, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000)* (quoting *Young, 470 U.S. at 16*) (additional citation omitted). This inquiry, however, remains objective, "requiring no showing of malicious intent on behalf of the prosecutor" and unyielding to inexperience or ill preparation. *Hornback, 73 M.J. at 160*.

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

However, a recent decision by our superior court has **[*28]** called into question whether appellate courts may still conduct plain error review of improper argument when the issue is not preserved by an objection at trial. In *United States v. Ahern*, the CAAF analyzed the difference between "forfeiture" and "waiver" recognizing that courts "review[] forfeited issues for plain error" but cannot "review waived issues because a valid waiver leaves no error to correct on appeal." *76 M.J. 194, 197 (C.A.A.F. 2017)* (citations and internal quotation marks omitted). "Forfeiture is the failure to make the timely assertion of right," while "waiver is the intentional relinquishment or abandonment of a known right[.]" *Id.* (citations omitted). The right at issue in *Ahern* was contained in MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 304, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.)

and specifically provided that failure to object constitutes waiver.[46] The CAAF held that the absence of any mention of "plain error review"—when those words appear elsewhere in the MANUAL FOR COURTS-MARTIAL[47]—indicates an unambiguous waiver, leaving the court nothing to review on appeal. *Id.*

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

Here, applying *Ahern*, we find TC's comments, where preserved by objection, do not constitute prosecutorial misconduct.[48] Even assuming *arguendo* TC's actions amounted to prosecutorial misconduct, the errors did not materially prejudice a substantial right of the appellant and therefore do not warrant relief.

a. Introducing Navy training against military judge's instruction

"An accused is supposed to be tried . . . [on] the legally and logically relevant evidence presented." *United States v. Schroder, 65 M.J. 49, 57 (C.A.A.F. 2007)*. Thus, "[t]he

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

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

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

prosecutor should make only those arguments that are consistent with the trier's duty to decide the case *on the evidence*, and should not seek to divert the trier from that duty." ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-6.8(c) (4th ed. 2015) (emphasis added). As a result, a court of appeals may find prosecutorial misconduct where TC "repeatedly and persistently" violates the RULES FOR COURTS-MARTIAL AND MILITARY RULES OF EVIDENCE contrary to instructions, sustained objections, or admonition from the military judge. *Hornback, 73 M.J. at 160*[49] .

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

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

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

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

[50] Appellant's Brief at 23.

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

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

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

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

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

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

At trial, the civilian defense counsel objected **[*33]** to the line of questioning about training during cross-examination as argumentative and was overruled. He also objected after the entirety of TC's closing argument in a request for mistrial, on "the simple fact that the government stated that one drink and you can't consent" after repeatedly asserting that PO3 AD was drunk.[59] This request was similarly denied.[60] Neither objection specifically

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

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

[56] *Id.* at 794.

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

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

[59] Record at 797.

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

nor adequately preserved the issue of referencing Navy sexual assault training.[61] Moreover, the civilian defense counsel *approved* a member's question squarely raising appellant's decision to disregard his training on sexual assault.[62] "It is thus apparent, under the particular facts of this case, that counsel consciously and intentionally failed to save the point . . . ." *Elespuru, 73 M.J. at 329* (citation and internal quotation marks omitted). Accordingly, we find that appellant exceeded passive forfeiture and alternately waived this issue.[63]

b. Calling the appellant a liar

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

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

However, describing a defendant as a liar does not equate to per se error.[65] Notably, TC is permitted to "'forcefully assert reasonable inferences from the evidence.'" *United States v. Coble, No. 201600130, 2017 CCA LEXIS 113, at *10, unpublished op. (N-M. Ct. Crim. App. 23 Feb 2017)* (quoting *Cristini v. McKee, 526 F.3d 888, 901 (6th Cir. 2008)*).

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

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

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

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

[65] *See, e.g.*, *Fletcher, 62 M.J. at 182-83* (finding TC's comments that Fletcher's testimony "was the first lie," that he "had 'zero credibility' and that his testimony was 'utterly unbelievable'" were "not so obviously improper as to merit relief in the absence of an objection from counsel").

Therefore, the "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." *United States v. Peterson, 808 F.2d 969, 977 (2d Cir. 1987)* (citing *United States v. Williams, 529 F. Supp. 1085, 1106-07 (E.D.N.Y. 1981)* ("'Lie' is an ugly word, but it is appropriate when it fairly describes the ugly conduct it denotes."). In other words, it is appropriate for TC to "comment on . . . conflicting testimony" unless **[*35]** using "language that [i]s more of a personal attack on the defendant than a commentary on the evidence." *Fletcher, 62 M.J. at 183*.

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

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

> You will notice that when OS2 ***Motsenbocker*** took the stand and told you a completely different story than he told NCIS and, ultimately, you might have gotten whiplash watching that story go back and forth; [']oh, no, it was before the police. Okay, I guess I did tell the NCIS, so I guess it did happen after the police got there[']. . . Why is he . . . elongating the night? . . . The reason why he's lying to you that way is because he wants to minimize the vomiting.[68]
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> . . . .

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

[67] Record at 824-56.

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

> You heard him, "Oh, I laid her down and then I went and cleared everybody out. It took me an hour to clean up the house.["] Right? That's what he said. And then, when I presented him with text messages at 1227, so I may have been mistaken. He was mistaken. He was misleading. He was lying, and he's trying to get away with it.[69]

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

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

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

> [T]he NCIS statement is a believable account. We would agree with that. Too bad it's drastically, different from the one he had on the stand. So, here's what he gives you now. That new timeline we talked about . . . . What's the new information he provides us? "The moaning. The moisture. She's sexually turned on. She's spreading her legs. **[*38]** I gave oral sex to her. But, when I looked up, she was on the phone.". . . He changed his story, over and over again . . . He's lying. And he's lying because he committed a crime.[71]

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

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[69] *Id.* at 835.

[70] *Id.* at 832.

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

[72] *Id.* at 801.

[73] *Id.* at 811.

Fletcher, "the defense opened the door and it was appropriate for trial counsel to comment on [the appellant's] conflicting testimony during h[is] findings argument." *62 M.J. at 183*.

c. Improper bolstering of the victim's testimony

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

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

During rebuttal,[74] the TC acknowledged that the civilian defense counsel had "honed in on two inconsistencies" in PO3 AD's testimony during his closing argument, declaring the

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

fact that the cops left her at the appellant's house to be "a hole in [the government's] case." TC responded:

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

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

Mindful that prosecutorial comments must be analyzed in the context of the full record, the TC's comments in this case were made following the civilian defense counsel's lengthy closing argument in which he repeatedly attacked PO3 AD's credibility, even focusing on the theme of "[r]egret after the fact."[78] It was the civilian defense counsel who first argued "[her] story makes no sense" and "[i]t's not believable."[79] He continued this attack, later stating **[*42]** again that "[i]t doesn't make any sense. It's not believable. Nothing in her story is believable."[80] In all, the civilian defense counsel called PO3 AD's story "not believable" nine times, said it "makes no sense" sixteen times, and claimed [PO3 AD] "wants you to believe" six times during the defense's closing argument.[81] As the Supreme Court has said, "it is important that both the defendant and prosecutor have the opportunity to meet fairly the evidence and arguments of one another." *United States v. Robinson, 485 U.S. 25, 33, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988)*. Here, the TC forcefully argued PO3

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[75] Record at 826.

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

[77] AE LXV at 4.

[78] Record at 800.

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

[80] *Id.* at 818.

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

AD's consistency during rebuttal to meet the civilian defense counsel's attack on her credibility during the defense closing argument. Markedly, the appellant alleges error in statements identical to statements first made by his own counsel, substituting the subject person. We follow our superior court's principle that an "'[a]ppellant cannot create error and then take advantage of a situation of his own making.'" *United States v. Eggen, 51 M.J. 159, 162 (C.A.A.F. 1999)* (quoting *United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996))*.

d. Mischaracterizing evidence

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

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

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

The civilian defense counsel objected on the basis of mischaracterizing the evidence. The military judge overruled the objection, explaining that she "did not hear trial counsel attribute that **[*44]** statement to the accused."[85]

Here, we heed the Supreme Court's caution that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less

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

[83] Appellant's Brief at 33.

[84] Record at 832-33.

[85] *Id.* at 833.

damaging interpretations." *Donnelly v. DeChristoforo, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*. As the military judge determined and the record confirms, the TC never attributed the statements to the appellant, nor claimed to be quoting portions of the appellant's testimony. In context, the more likely and less damaging interpretation is that the TC intended to rebut the "[a]ppellant's contention that if [PO3 AD] was highly intoxicated, the police would not have left her in [the a]ppellant's care[,]" by offering another hypothetical explanation.[86] We refuse to infer otherwise, especially where to do so would contradict a military judge's firsthand observation and analysis at trial.[87] Regardless, we find that the statement did not prejudice the appellant.

e. Inserting trial counsel's opinion

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

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

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

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

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

[88] AE LXV at 4.

[89] Record at 848.

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

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

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

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

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

[92] Record at 784.

[93] *Id.* at 848.

[94] *Id.* at 838.

[95] *Id.* at 851.

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

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

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

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

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

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

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

To summarize our assessment of error, we do not find legal error in the TC's closing or rebuttal arguments where, as here, the TC zealously responded to the defense's theory of

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[97] Appellant's Brief at 37.

[98] Record at 838.

[99] *Id.* at 841

[100] *Id.* at 842.

[101] Appellant's Brief at 38.

[102] Record at 843-44.

[103] *Id.* at 848.

[104] *Id.* at 840.

the case and assertions made during the defense's closing argument. "While a criminal trial is a serious effort to ascertain truth and an atmosphere of passion or prejudice should never displace evidence it is also a practical matter which can hardly be kept free of every human error." *United States v. Stockdale, 13 C.M.R. 540, 543 (N.B.R. 1953)*. Here, it cannot be said that the TC's "argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Berger, 295 U.S. at 85*. Rather, the TC's "remarks were invited, and did no more than respond substantially in order to right the scale." *Young, 470 U.S. at 12-13*) (internal quotation marks omitted).

2. Prejudice to the appellant

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

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

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

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

Fletcher, 62 M.J. at 184 (citation omitted). In this case, even assuming as true the appellant's allegations of improper argument, we agree with the military judge's finding

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

b. Curative measures taken

"Generally, potential harm from improper comments can be cured through a proper curative instruction." *United States v. Boyer, No. 201100523, 2012 CCA LEXIS 906, at *33, unpublished op. (N-M. Ct. Crim. App. 27 Dec 2012)* (citation omitted). However, the extent of curative effect depends on how specifically the instruction targets the misconduct. Indeed, our superior court has repeatedly emphasized "[c]orrective instructions at an early point might have dispelled the taint of the initial remarks." *Fletcher, 62 M.J. at 185* (citation and internal quotation marks omitted). As a result, we would find a curative instruction insufficient where "[i]t is impossible to say that the evil influence upon the [members] of these acts of misconduct was removed by **[*53]** such mild judicial action as was taken." *Berger, 295 U.S. at 85*.

Here, the military judge did not take any specific curative measures in response to the TC's rebuttal argument while delivered. In the military judge's own analysis of this factor on the record, she explained the comments were not "significant enough to cause the military judge to stop the argument or to excuse the members while it was happening in real-time."[109] We agree with the government that "[t]o the extent that she did not issue

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

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

[107] Record at 796-98.

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

[109] *Id.* at 866.

repeated curative instructions contemporaneously with the alleged error . . . this was [largely] the result of [the a]ppellant's failure to timely object." (citation omitted)[110]

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

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

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

c. Strength of the government's case

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

With all three factors resolved in favor of the government, we conclude any misconduct by the TC did not materially prejudice the accused and we are thus "confident that the

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[110] Appellee's Brief at 49.

[111] Record at 860; 871-73.

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

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

[114] PE 3 at 2-3.

members convicted the appellant" beyond a reasonable doubt of the two specifications of abusive sexual contact and one specification of sexual assault "on the basis of the evidence alone." *Fletcher, 62 M.J. at 180*.

III. CONCLUSION

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

Concur by: FULTON

Concur

FULTON, Judge (concurring in the result):

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

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

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

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

that following the military judge's instructions could have only led members to convict the appellant of the offenses properly before the court-martial.

Dissent by: CAMPBELL

Dissent

CAMPBELL, Senior Judge (dissenting):

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

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

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

Examining *Article 120(b)* in the context of *Sager*'s statutory interpretation of its component *Article 120(b)(2)* offenses, *Article 120(b)* on the whole more broadly codified separate and

distinct theories of criminal liability by proscribing sexual acts upon another person under any of the four subparagraphs of *subsection (b)(1)*, when the perpetrator knows or reasonably should know that the victim falls into one of the categories in *subsection (b)(2)*, *or* when the perpetrator knows or reasonably should know that the victim is incapable of consenting due to any of the conditions in the two subparagraphs of *subsection (b)(3)*.

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

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

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

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

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

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

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

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

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

> All the surrounding circumstances are to be **[*62]** considered in determining whether a person gave consent [*Article 120(b)(1)(B)*] or whether a person did not resist or ceased to resist only because of another person's actions. An incompetent person cannot consent to a sexual contact, and a person cannot consent to a sexual contact while under threat or in fear [*Article 120(b)(1)(A)*].
>
> A person is incapable of consenting [*Article 120(b)(3)*] if that person does not possess the mental ability to appreciate the nature of the conduct or does not possess the physical or mental ability to make or communicate a decision regarding such conduct. . . .
>
> In deciding whether a person was incapable of consenting, many factors should be considered and weighted, including . . . awareness of the identity of the person with whom they are engaging in the conduct [*Article 120(b)(1)(D)*], level of consciousness [*Article 120(b)(2)*], amount of alcohol ingested, tolerance to the ingestion of alcohol [*Article 120(b)(3)(A)*], and/or their ability to walk, talk and engage in other purposeful physical movements [*Article 120(b)(3)(B)*].[3]

And in addition to arguing the legal theory actually at issue, lack of factual consent, the trial counsel also argued one of the legal **[*63]** inability to consent legal theories included in the military judge's instructions. Specifically, the trial counsel argued that even if PO3 AD provided her factual consent through her words or conduct in the bedroom with the

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[2] Record at 790.

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

appellant, the members should still convict the appellant of the alleged offenses under *Article 120(b)(1)(B)* only because, under those circumstances, PO3 AD had a legal inability to consent under *Article 120(b)(3)*:

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

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

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

The military judge immediately sustained the objection without further discussion, but the only curative measure was repeating the same instructions from which the trial counsel

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

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

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

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

Id. at 868.

argued factual lack of consent did not matter because PO3 AD was legally incapable of consenting.5 And despite the motion for a mistrial, even if the appellant waived the improper argument related to bystander intervention training issue as the lead opinion suggests, the first members' question asked during the appellant's testimony in his own defense demonstrates the members may have been receptive to, if not focused on, a theory of liability requiring **[*66]** no lack of factual consent to convict. Under these circumstances, I am unable to conclude that the instructions and arguments regarding a theory of liability not at issue, based upon the way the government charged the appellant, did not impact the findings. I would set aside the findings and authorize a rehearing.

United States v. Roe

United States Army Court of Criminal Appeals

April 27, 2022, Decided

ARMY 20200144

Reporter
2022 CCA LEXIS 248 *; 2022 WL 1284392

UNITED STATES, Appellee v. Private First Class AUSTIN M. ROE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Roe, 2022 CAAF LEXIS 585, 2022 WL 4182553 (C.A.A.F., Aug. 15, 2022)*

Motion granted by *United States v. Roe, 2022 CAAF LEXIS 597, 2022 WL 4182400 (C.A.A.F., Aug. 16, 2022)*

Review denied by *United States v. Roe, 2022 CAAF LEXIS 770 (C.A.A.F., Oct. 31, 2022)*

Prior History: **[*1]** Headquarters, U.S. Combined Arms Center and Fort Leavenworth. S. Charles Neill, Military Judge. Colonel Alexander N. Pickands, Staff Judge Advocate.

Counsel: For Appellant: Captain Julia M. Farinas, JA (argued); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Major Christian E. DeLuke, JA; Captain Julia M. Farinas, JA (on brief); Colonel Michael C. Freiss, JA; Lieutenant Colonel Angela D. Swilley, JA; Captain Julia M. Farinas, JA (on reply brief).

For Appellee: Captain Melissa A. Eisenberg, JA (argued); Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Captain Samantha E. Katz, JA (on brief).

Judges: Before WALKER, EWING, and PARKER, Appellate Military Judges. Judge PARKER concurs. Senior Judge WALKER, dissenting.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

A panel with enlisted representation sitting as a general court-martial convicted appellant of sexual assault. In this court, appellant contends that: (1) the government violated his due process rights by charging him under one theory of liability for sexual assault but trying and convicting him under another theory; and (2) the government's evidence was legally and factually insufficient. **[*2]** We find appellant's claims to be without merit, and affirm.[1]

BACKGROUND

A. The Trial Evidence

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[1] Appellant elected to be sentenced by the military judge who sentenced appellant to a dishonorable discharge, confinement for twenty-eight months, and reduction to the grade of E-1. We have fully considered appellant's third assignment of error related to the requisite *mens rea* for sexual assault without consent and find it to be without merit. *See United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)* (holding that sexual assault without consent is a general intent crime).

On 17 March 2019, the victim in this case was a 19-year-old junior enlisted soldier who had arrived at Fort Leavenworth, Kansas—her first duty station—less than a month prior. After an evening of drinking alcohol, first at a St. Patrick's Day party at another soldier's home and later at a barracks gathering with appellant in attendance, the victim awoke in her barracks room nude, feeling "not normal" and "groggy." When she got out of bed to go to the restroom, she was startled to find appellant in her room, and told him to leave. In the restroom the victim was again surprised to discover semen when she wiped herself. She had no memory of sex, and a few minutes later asked a group of soldiers (including appellant) whether she had had had sex with someone. Appellant responded, "not me." Laboratory testing on evidence collected from the victim the following day revealed appellant's semen inside the victim's vagina and his DNA inside her rectum.[2] Appellant's charges and ultimate court-martial proceeding ensued.

Evidence related to the victim's intoxication played a prominent role at appellant's **[*3]** court-martial. The victim had arrived at the St. Patrick's Day party between 1700 and 1800 hours; between then and approximately 2000 she reported drinking four "strong" double vodka-Jell-O shots and a Guinness. Around 2000 the victim called a friend for a ride back to the barracks along with two other party-goers; the friend/driver described the three as acting "rowdy" in the car. Back at the barracks the victim changed clothes and joined a party in Private First Class (PFC) CB's room—only a few doors down from her room—with other male soldiers including Private (PV2) AC, PFC KP, and appellant. The room had a shared common area and separate internal rooms for PFC CB and his roommate PV2 AC.

Appellant handed the victim a Mike's Hard Lemonade when she walked into the barracks party; this was the victim's last memory before waking up nude in her room. Private First Class KP, the victim's "good friend," described her as "tipsy" when she arrived, and said that initially she seemed to be enjoying herself and was dancing with a few of the soldiers. Private AC, present but not drinking, described the victim as "kind of off balance" and "giggly" when she entered the party, and later described **[*4]** her as "dizzy" and "grasping on the walls" while walking. Private AC later saw the victim in the common area "progressively going down towards the ground while holding onto the wall" outside of PFC KP's door, ultimately ending up on the ground. Private AC described the victim's state later in the evening as "fatigued," "mumbling," and, finally, "unconscious."

While the victim lacked memory, barracks surveillance video provided a fair amount of detail about her movements. At 2154 hours, the video showed the victim walking somewhat unsteadily, but fully under her own power, from the party room to her room where she stayed for one minute before returning to the party room at 2155. At 2208, the video showed appellant carrying the victim on his back, accompanied by PFC CB, outside to smoke cigarettes. Appellant carried the victim back inside and back to the party room five minutes later at 2213, this time "cradling" style with her arms around appellant's neck and his arms under the back of her knees.

Back in the party room, appellant placed her in PFC KP's lap, because, appellant later explained, PFC KP was the victim's friend. Private First Class KP saw that the victim was unable to stand **[*5]** on her own and was having difficulty speaking, and told the other soldiers that they needed to get the victim

[2] The government's DNA analyst testified that the semen and DNA were "one quintillion times" more likely to have originated from appellant than an unknown contributor. A quintillion is a one with 18 zeros after it.

back to her room due to her condition. Two minutes later at 2215, video captured appellant carrying the victim down the hall to her room again using the "cradling" carry.[3] Private First Class KP, PV2 AC, and PFC CB also came to the victim's room. Private AC described the victim as "in and out" of consciousness and "mumbling stuff" as the soldiers placed her in bed. The group prepared the victim's military equipment for an early morning ruck march the following day, and discussed pulling a "fire guard" in her room to ensure that she did not "throw up in her sleep" or "choke." Appellant volunteered to take the first shift. At 2238, the video showed the other soldiers exiting the victim's room, leaving appellant and the victim alone for the next thirty-two minutes.

At 2255, video showed PV2 AC in the hallway stopping near the victim's door. At precisely the same time, appellant texted the other soldiers and said that the victim was taking off her clothes and asked for "help." Private AC noticed that while he had previously intentionally left the victim's door slightly open in case **[*6]** anyone needed to gain entry, the door was now closed and locked.

At 2310 PFC KP and PFC CB returned to the victim's room based on appellant's "help" text message. Appellant was still there, and the victim was in bed covered by a blanket. The victim looked "confused" and "horrified," and asked the group if she had had sex with anyone. Private First Class KP heard appellant reply, "not me." Private First Class KP stayed with the victim for a period of time, after which the victim called her fiancée and stayed on the phone with him for multiple hours before falling asleep. When asked at trial to elaborate on what she meant when she asked the group whether she had had sex with anyone, the victim said she meant "[d]id I consent or did somebody have sex with me." She further testified that she did not want to have sex with appellant at any point that evening, and that she would not have and did not consent to sex with him.

The victim reported a sexual assault to her chain of command the following morning, and underwent a sexual assault examination that resulted in the DNA evidence implicating appellant.[4]

Appellant made a videotaped statement to the Criminal Investigation Command (CID) the next **[*7]** day. Appellant provided a high degree of detail about the events both before and after the small window of time when the sexual act occurred. Appellant told CID that he consumed six to seven beers and seven to eight shots of liquor over the course of the evening. He confirmed that he carried the victim to and from the smoke pit outside because she was having difficulty maintaining her balance. He further recalled that the victim was in and out of consciousness and mumbling as he carried her back into the building and as the soldiers took her to her barracks room. Appellant claimed that while all of the soldiers were still in the room the victim started removing her clothing and "wanted sex," but that he and PFC KP told her to wait until the following day when she could "consent."[5] Once alone with the victim, appellant stated that she grabbed his face and kissed him and he kissed her back. He explained that he felt kissing the victim was wrong, so he moved across the room but then accepted the victim's invitation to join her in her bed. Appellant claimed that he then fell

[3] Private First Class KP testified that he carried the victim back to her room, but the barracks video appears to show that appellant did so.

[4] The nurse who conducted the sexual assault exam found a small tear below the victim's vaginal opening that she testified could have been caused by "lack or participation or cooperation between the two partners," or, in the alternative, from consensual sex.

[5] Private First Class KP did not testify about this exchange.

asleep in the victim's bed and awoke with his pants down, genitals exposed, and the victim on top of him wearing **[*8]** only her bra and underwear. When the victim got up and began removing her undergarments, appellant stated he then went into the common area of the barracks room and texted the other soldiers for help. Appellant claimed to have no memory of sexual intercourse with the victim.

B. The Charge and The Parties' Arguments

Appellant was charged with and convicted of a single specification of a violation of *Article 120(b)(2)(A)*, Uniform Code of Military Justice, *10 U.S.C. § 920* (2018) [UCMJ], sexual assault without consent, as follows:

> In that [appellant], U.S. Army, did, at or near Fort Leavenworth, on or about 17 March 2019, commit a sexual act upon [victim], by penetrating [victim's] vulva . . . with his penis, without the consent of [victim].

At trial, the government forthrightly argued that the victim's level of intoxication was relevant evidence, along with other evidence, on the question of whether the victim consented to the sexual act with appellant. In closing, the government argued:

> And the judge just instructed you about what consent means. He told you that 'consent' means a freely given agreement to the conduct at issue by a competent person. He went on to tell you that a sleeping or unconscious person cannot consent. **[*9]** [The victim] told you she had zero interest in having sex with the accused. She never told him she was interested. She did not want to have sex with him. She would not have had sex with him. She was emphatic she did not consent to sex with the accused, and more than that, she was in no state to freely consent to sex with anyone.

The government further contended that appellant's statement to CID was not believable and therefore affirmative evidence of his guilt, based on the level of detail he could recall both before and after the sexual act, and that his 2255 text to the other soldiers was likewise an attempt to cover for his actions and "explain why the victim was naked" after she awoke. The government argued that the accused "didn't fall asleep," but rather "knew what he did."

The defense likewise addressed the interplay between the victim's intoxication and consent by stressing in both its opening statement and closing argument that a "lack of memory does not mean lack of consent." The defense further focused on the portions of the video evidence that showed the victim walking unassisted in the hallways, using her keycard to enter her room, and similar evidence to argue that she **[*10]** was not so incapacitated as to not be able to provide consent.

LAW AND DISCUSSION

I. The Due Process Claim

A. Legal Principles and Standard of Review

Due process "does not permit convicting an accused of an offense with which he has not been charged." *United States v. Tunstall, 72 M.J. 191, 192 (C.A.A.F. 2013)* (cleaned up). A specification therefore must provide an accused both notice of the charge he is to defend against and shield him from double jeopardy. *United States v. Turner, 79 M.J. 401, 403 (C.A.A.F. 2020)*. This due process principle of fair notice "mandates that an accused has a right to know what offense and under what legal theory he will be tried and convicted." *United States v. Riggins, 75 M.J. 78, 83 (C.A.A.F. 2016)* (cleaned up).

Appellant asserts that the government violated his due process right to fair notice by charging him with sexual assault without consent, in violation of *Article 120(b)(2)(A), UCMJ*, but then effectively prosecuting and convicting him under either an *Article 120(b)(2)(B)* theory that he knew or reasonably should have known that the victim was asleep, unconscious, or otherwise unaware of the sexual act, and/or an *Article 120(b)(3)(A)* theory that the victim was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance. Appellant further contends that this alleged difference between the charged offense and the government's theory of **[*11]** the case at trial both prejudiced his ability to present a defense and created ambiguity regarding which theory the panel used to ultimately convict him. Because appellant did not present this claim to the military judge at his court-martial, we will review his claim for plain error. *See, e.g., United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013)* (applying plain-error review to a "fair notice" claim raised for the first time on appeal).[6] To satisfy the plain error test, appellant must show: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Id.* (cleaned up).

B. Discussion

Appellant's due process claim turns on a single question: may the Government attempt to carry its burden of proving sexual assault "without consent" in violation of *Article 120(b)(2)(A)* by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act? Because we answer that question "yes," we hold that the panel in this case convicted appellant the offense *as charged*, and not some other uncharged offense. Appellant was on notice of the charge on the charge sheet, and so his due process claim fails under any standard of review.

In so **[*12]** holding, we acknowledge the conceptual difference between affirmatively proving that a victim *did not consent*, and proving facts that show a victim's *legal incapacity to consent*. The Court of Appeals for the Armed Forces (CAAF) discussed this difference in *Riggins, 75* M.J. 78 (C.A.A.F. 2016). *Riggins* analyzed the question of whether Article 128, UCMJ, assault consummated by a battery, was a lesser-included offense of the 2012 version of two Article 120, UCMJ, offenses—sexual assault and abusive sexual contact—accomplished through placing the victim in fear. *Id. at 83*. The CAAF held that because the *Article 120* offenses "did not require the government to prove a lack of consent," but *Article 128* did, *Article 128* was not a lesser-included offense of *Article 120* and that Riggins had therefore not received "fair notice of what offense and under what legal theory he was tried and ultimately convicted" when the military judge there found him guilty of *Article 128* offenses on an erroneous lesser-included theory. *Id. at 80*. As relevant here, *Riggins* explained that "the fact that the Government was required to prove a set of facts that resulted in [the victim's] *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." *Id. at 84* (emphasis in original). **[*13]**

[6] The parties at appellant's court-martial discussed a similar issue in the context of appellant's pretrial motion to suppress evidence of underage drinking under Rule for Courts-Martial (R.C.M.) 404(b). In support of this motion, trial defense counsel argued that appellant's court-martial was a "consent case," and not an "alcohol case." While this raised the same general concept as appellant's current claim, appellant nonetheless did not present his current due process/fair notice claim to the military judge at trial, and is thus entitled only to plain error review. *See, e.g., United States v. Sweeney, 70 M.J. 296, 303 & n.16 (C.A.A.F. 2011)* (applying plain error review to claim not raised with the requisite specificity at trial).

Notably, *Riggins* was analyzing a lesser-included offense question, and therefore did not squarely address the issue here: namely, whether facts tending to show a legal inability to consent would be appropriate and relevant evidence on the issue of lack of consent. *Riggins* did explain in a footnote that despite the conceptual difference of "placing another in fear" and "without consent," that "evidence regarding whether the alleged victim . . . consented *could certainly be relevant to the fact-finder's determination* of whether the Government proved the placed-in-fear element beyond a reasonable doubt." *Riggins, 75 M.J. at 84* & n.6 (emphasis added). Thus, *Riggins* noted *both* the difference between proving facts showing an "inability to consent" and affirmatively proving "without consent," *and* the potential for evidentiary overlap between the two concepts.

So too here, on the flip-side of the *Riggins* footnote six coin. The DNA evidence made the sexual act here essentially undisputed. Thus, as charged, appellant's trial turned on the issue of consent. There is likewise no dispute that the government's theory of the case was that the victim's high degree of intoxication at the time of the sexual act was important evidence that she **[*14]** did not consent. Our essential holding here is that this was one of many permissible ways for the government to attempt to prove "without consent." By way of logic, if the government proves that a victim is asleep or unconscious and therefore legally incapable of consenting at the time of a sexual act, that is strong evidence that the victim did not, in fact, consent.

We further hold that there was fair notice here notwithstanding that the government likely could have charged this case differently. On this point, the other two relevant subsections of *Article 120(b)* prohibit committing a sexual act upon another person:

> [W]hen the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring[; and] . . .
>
> [W]hen the other person is incapable of consenting to the sexual act due to . . . impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by [the accused].

See *Articles 120(b)(2)(B)*, and *(b)(3)(A)*, respectively. These two charging theories facially address situations where the victim is intoxicated at the time of the sexual act. However, their presence in *Article 120* does not mean that the government **[*15]** is foreclosed from attempting to carry the arguably heavier burden of affirmatively proving a lack of consent when intoxication is at issue. Rather, this is simply one of many situations where the government exercised its discretion to charge one of multiple potential offenses. *See, e.g., United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010)* ("It is the Government's responsibility to determine what offense to bring against an accused.").[7] We find no evidence in the legislative history or otherwise that the drafters of *Articles 120(b)(2)(B)* and *120(b)(3)(A)* meant to somehow preempt the *Article 120* field for cases involving alcohol. In reaching this conclusion we acknowledge the force of the contrary statutory interpretation analysis of our dissenting colleague as it relates to the disjunctive "or" between the three charging theories at issue here. *See also United States v. Weiser, 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020)*. We simply disagree that this statutory language requires the government to charge a particular theory of liability where the victim's intoxication is at issue. The fact that

[7] Another option for the government here would have been to charge multiple *Article 120* offenses in the alternative based on exigencies of proof. *Morton, 69 M.J. at 16*.

there is evidentiary overlap between all three theories of liability at issue here is not unusual in the criminal law.

Our sister Air Force court concluded likewise last year in a similar case. In *United States v. Williams, No. ACM 39746, 2021 CCA LEXIS 109, at * 18 (A.F. Ct. Crim. App. 12 Mar. 2021)* (mem. op), the government charged Williams with the 2016 **[*16]** version of *Article 120*, sexual assault by bodily harm, under a "without consent" theory. Thus, as here, in *Williams* the government had an affirmative duty to show that the victim did not consent. *Id. at *18-19*. As here, the *Williams* victim was highly intoxicated and did not remember the sexual act, and the trial evidence focused on the victim's level of intoxication. *Id.* Like here, Williams contended that the government violated his due process right to fair notice, because, he claimed, he was "convicted under the theory that he engaged in sexual conduct with [the victim] when she was too intoxicated to consent," rather than the charged "without consent" theory. *Id. at *48*. The *Williams* court rejected this claim, explaining that it saw "no reason why" the government could not "use evidence of inability to consent" as "circumstantial evidence of the lack of actual consent." *Id. at *57*. The *Williams* court stated:

> Therefore, we conclude evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent, and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial.

*Id. at *57-58* **[*17]** (emphasis in original). We agree.[8] *Cf. United States v. Motsenbocker, No. 201600285, 2017 CCA LEXIS 539 (N.M. Ct. Crim. App. 10 Aug. 2017)*.

Finally, this is not a case where we have to decide whether "without consent" can be proved *solely* through showing an inability to consent because of intoxication or some other reason.[9] Rather, as detailed in the sufficiency analysis below, the government's proof included both evidence of the victim's intoxication alongside other evidence, including the appellant's own actions and words both before and after the sexual act.

A word on the panel instructions in this case. Consistent with the government's charging theory, the military judge instructed the panel that the government bore the affirmative burden of showing beyond a reasonable doubt that the sexual act was done "without the consent" of the victim. The military judge further defined "consent" as follows:

> 'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression or lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. A current or previous dating or social or sexual relationship by itself of the manner of dress of the person involved **[*18]** with the accused and the conduct at issue does not constitute consent. A sleeping or unconscious person cannot consent. All

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[8] Williams petitioned the CAAF to review the Air Force court's denial of his due process claim, but the CAAF granted review only on one of Williams' other assignments of error and ultimately affirmed Williams' conviction and sentence. ***United States v. Williams, 81 M.J. 338 (C.A.A.F. 2021)***; ***United States v. Williams, 81 M.J. 450 (C.A.A.F. 2021)***.

[9] This seems possible notwithstanding the *Riggins* conceptual difference. For example, if a victim in a medically-induced coma became pregnant due to a sexual assault from a hospital orderly the victim had never met, it would seem to be a "reasonable inference," *see, e.g., United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014)*, not only that the victim had the *legal inability* to consent because she was unconscious and in a coma, but also that she did, in fact, *not consent*. We are not called on to address this question here, because the government provided additional evidence of "without consent" above and beyond the victim's intoxication.

> the surrounding circumstances are to be considered in determining whether a person gave consent.

The military judge further instructed the panel that the evidence had raised the possibility of the affirmative defense of an honest and reasonable mistake of fact as to consent, and explained that the government retained the burden of disproving mistake of fact as to consent beyond a reasonable doubt.

At trial, the defense objected to the military judge's instruction that a "sleeping or unconscious person cannot consent," although the defense's main submission was that the evidence did not show that the victim was, in fact, asleep or unconscious during the applicable time-frame, rather than the "fair notice" claim he now presses. The military judge overruled this objection and provided the instruction, which was a verbatim quote from the UCMJ's definition of "consent" at *Article 120(g)(7)(B)* (with the omission of the words "or incompetent").

Appellant has not pressed a free-standing claim of error in this court as to any of the above instructions. Nor could he successfully do so, because **[*19]** the military judge's instructions were correct statements of the law. Moreover, when taken as a whole, the instructions imparted to the panel that the government retained the burden of *affirmatively proving a lack of consent* consistent with the charge in this case, and not some lesser burden. *Cf, e.g., United States v. McClour, 76 M.J. 23, 26 (C.A.A.F. 2017)* ("When taken as a whole, the instructions clearly stated the proper burden of proof and left it to the members to determine whether the Government's evidence met that burden."). This is particularly true in light of the fact that the military judge instructed the panel on the mistake of fact as to consent.[10]

II. Sufficiency

The above holding that the government's modality of proof was appropriate in light of the charged offense does not answer the separate question of whether that proof was *legally and factually sufficient* to prove sexual assault without consent. Appellant contends that it was not. While we find the sufficiency question close, we ultimately hold that the government's evidence was both legally and factually sufficient.

This court is obligated to review the legal and factual sufficiency of each court-martial conviction and only affirm those findings of guilty that are correct **[*20]** in law and fact. Article 66(c), UCMJ. We review questions of legal and factual sufficiency de novo. *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)*. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making

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[10] We find that appellant was on fair notice of the charge against him and therefore do not find error at all, much less "plain or obvious" error. *Warner, 73 M.J. at 3*. As such, we do not need to decide whether any arguendo error "materially prejudiced a substantial right of the accused." *Id.* Nevertheless, it bears mentioning that the relationship between the victim's intoxication and the question of consent was no secret at appellant's trial. The opening lines of trial defense counsel's opening statement to the panel was, "[l]ack of memory does not mean lack of consent. Consent does not require good judgment; and alcohol consumption does not mean inability to consent." The defense pressed this theme throughout the court-martial, thus evidencing its understanding of the importance of the intoxication issue to the question of consent. This cuts against any claim that the accused was prejudiced by a lack of notice of the government's theory of the case.

allowances for not having personally observed the witnesses, *the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt*." *Id.* (cleaned up). For factual sufficiency, this court applies "neither a presumption of innocence nor a presumption of guilt" but must "make [its] 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 (C.A.A.F. 2017)* (cleaned up). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)*. "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, **[*21]** recognizing that the trial court saw and heard the witnesses." Art. 66(d)(1), UCMJ. The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)*.

We find the sufficiency question close largely due to the victim's lack of memory. However, a constellation of factors, including but not limited to the victim's level of intoxication, ultimately shows that appellant's conviction was both legally and factually sufficient. First, as previously noted, the DNA evidence essentially takes the question of whether appellant performed a sexual act with the victim off the table, and narrows the question to one of consent. Second, it is uncontroverted that the victim was highly intoxicated at the time of the sexual act. Third, it was appellant who provided the victim alcohol at the barracks party. Fourth, it was appellant who volunteered to pull the first "watch" duty over the victim as she slept, thus putting himself in a position to be alone with her while she was vulnerable. Fifth, appellant's "help, she's taking off her clothes," text message—which it stands to reason he sent after the sexual act—is best **[*22]** read as a self-serving effort at "damage control" after the victim woke up. Sixth, appellant's "not me" statement when the victim was asking whether she had had sex with someone is demonstrably untrue based on the DNA evidence, and thus the most natural reading of that statement is that it was knowingly false. Seventh, having reviewed appellant's statement to CID the day after the event, we are struck by the level of detail he was able to provide about his actions both before and after the sexual act, with his memory failing only during the very tight time-frame of the sex itself. This appears to us to be a classic case of "selective memory loss." We are allowed to consider what we assess are appellant's false exculpatory statements—both in the middle of the night and the next day to CID—as substantive evidence of guilt on the *Article 120* offense, and we do so here. *See United States v. Quezada, M.J. , 82 M.J. 54, 2021 CAAF LEXIS 1098, at *15 (C.A.A.F. 20 Dec. 2021)* ("A false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt.") (citations omitted). When taken together, this evidence paints a picture of appellant knowingly taking advantage of the victim while she was highly vulnerable, and then lying about it. We therefore **[*23]** find both that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," and we ourselves are likewise "convinced of appellant's guilt beyond a reasonable doubt." *Rosario, 76 M.J. at 117*.

CONCLUSION

Upon consideration of the entire record, the finding of guilty and the sentence are AFFIRMED.

Judge PARKER concurs.

Dissent by: WALKER

Dissent

Senior Judge WALKER, dissenting:

While I find that the government violated appellant's due process right to fair notice, I find that the error did not materially prejudice appellant's substantial rights. Further, I find the charged offense of sexual assault without consent in violation of *Article 120(b)(2)(A), UCMJ*, factually insufficient and would set aside appellant's finding of guilty and sentence.

LAW AND DISCUSSION

A. The Government Violated Appellant's Due Process Right to Fair Notice

The charged offense in this case properly alleged every element of the offense of sexual assault and adequately placed appellant on notice that he was charged under the theory of liability that he committed a sexual assault without consent, in violation of *Article 120(b)(2)(A), UCMJ*. *Riggins, 75 M.J. at 83* (cleaned up). However, appellant alleges that he was tried and convicted of a distinct, and uncharged, theory of liability of sexual **[*24]** assault while a person is asleep, unconscious, or otherwise unaware that the sexual act is occurring, in violation of *Article 120(b)(2)(B), UCMJ*, or under a theory that the victim was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, in violation of *Article 120(b)(3)(A), UCMJ*. I agree that appellant was prosecuted under a theory of liability other than the one with which he was charged and denied his due process right to fair notice.

Determining whether the types of sexual assault outlined in *Article 120(b), UCMJ*, are differing theories of liability is essential to determining whether appellant was given fair notice in this case. The statutory context, alone, dictates that *Article 120(b)(2)(A)*, *120(b)(2)(B)*, and *120(b)(3)(A), UCMJ*, are separate and distinct theories of liability for the offense of sexual assault.[11] First, it is evident by the construct of statute that three distinct paragraphs within *Article 120(b), UCMJ*, for sexual assault are differing types or categories of sexual assault based upon the construction and the context of the statute. The first paragraph, *Article 120(b)(1)*, addresses sexual assault by inducement whether through threats, fear, fraudulent representation, or false pretenses. The second paragraph, *Article 120(b)(2)*, addresses both sexual assault by lack of consent or **[*25]** sexual assault when a person cannot consent based upon a condition of being asleep, unconscious, or otherwise unaware of the sexual act occurring. The third paragraph, *Article 120(b)(3)*, addresses sexual assault when a person is incapable of consenting due to physical impairment by a foreign substance or mental impairment. Each of these types of sexual assault are definitively different categories of sexual assault and thereby different theories of liability. *Sager, 76 M.J. at 161-62*; *see also United States v. Weiser, 80 M.J. 635, 641 (C.G. Ct. Crim. App. 2020)*.

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[11] Whether these three types of sexual assault are distinct theories of liability is a question of statutory interpretation reviewed de novo. *Sager, 76 M.J. at 161 (C.A.A.F. 2017)*. In reading these provisions, we must "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Pease, 75 M.J. 180 (C.A.A.F. 2016)* (cleaned up). Further, we must apply "the 'surplusage' canon—that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Sager, 76 M.J. at 161*.

Even more critical to appellant's assertion that he was denied his due process right to fair notice is whether the subparagraphs within *Article 120(b)(2)* are different theories of liability. In reviewing the language in *Article 120 (b)(2), UCMJ*, I note that the two subparagraphs are separated by the disjunctive, "or." As the CAAF noted in *Sager*, "'[i]n ordinary use the word 'or'. . . marks an alternative which generally corresponds to the word 'either.'" *Sager, 76 M.J. at 161* (cleaned up).[12] Statutory terms which are connected by a disjunctive should ordinarily be given separate meanings unless the overall statutory context dictates otherwise. *Id. at 161* (quoting *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*). As the majority opinion recognizes, the charged offense requires the government to affirmatively prove the victim *did not consent*, while the **[*26]** latter offenses require the government to prove the victim's *legal inability to consent. Riggins, 75 M.J. at 85*; *see also Weiser, 80 M.J. 635 at 641*. Our superior court has held that even the conditions of asleep, unconscious, *or* otherwise unaware are in and of themselves differing theories of liability. *Sager, 76 M.J. at 162*.

While I agree with the majority that there is evidentiary overlap between the three theories of liability at issue, I part ways with the majority in its characterization of the manner in which the government tried this case in relation to the charged offense. I find that the record as a whole demonstrates that the government's charged theory of liability, sexual assault without consent, was not the theory upon which the government prosecuted appellant at trial. Rather, the government tried appellant under the theory that the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. The tenor of the government's opening statement, presentation of evidence, and closing argument was that appellant took advantage of the victim while she was incapable of consenting as a result of her intoxication, and asked the panel members to infer she did not consent. Significantly, while the **[*27]** victim testified that she did not consent, she also admitted that she did not have any memory of sexual acts with appellant. The victim's complete lack of memory as to any sexual acts prevented her from providing any affirmative evidence as to whether or not she consented.

Given that the victim could not affirmatively tell the members she did not consent to the charged sexual acts, the trial nearly exclusively focused on the victim's apparent inability to consent. The government's opening statement and closing argument focused on the victim's condition by asserting the victim was "in and out of consciousness and falling over and mumbling her words," "passing out on the bed," "dead weight," "in her bed asleep or passed out," "[s]he's not awake," and "groggy." Testimony of soldiers who assisted the victim to her barracks room focused on her physical condition describing her as "passed out," "in and out of consciousness," "mumbling," "out of it," and "looked like she was asleep." The government began its closing argument with "[s]he was fucked up" in highlighting appellant's description to law enforcement of the victim's condition when assisting her to her barracks room. The government **[*28]** went on to argue that "[appellant] didn't care that she was passed out." To prove the victim's lack of consent, the government focused on: (1) witness testimony that the victim was "passed out," "unresponsive," and "mumbling;" (2) appellant's admissions to law enforcement that the victim was "passed out;" (3) the victim

[12] While there are structural differences in the Art 120, UCMJ, at issue in *Sager* and the Article 120, UCMJ, at issue in this case, the cannons of statutory interpretation for which the dissent cites *Sager* are not impacted by the statutory changes made to *Article 120* which went into effect in January 2019.

appearing as "dead weight" when being carried to her barracks room because "she's out;" (4) that after the barracks party the victim "was clearly incapacitated;" (5) that the victim could not have consented to sexual intercourse because "she is unresponsive, incoherent, unable to move herself from room to room and asleep in her bed while a bunch soldiers mess with her things;" and, (6) refers to the victim as "[t]he drunk, unconscious girl."

More significantly, I also part ways with the majority in its position that the government may support its affirmative burden to prove lack of consent by solely relying upon evidence of the victim's *legal inability* to consent. I concur with the majority that the government bears the responsibility of deciding the manner, and theory of sexual assault, with which it will charge an accused. However, once the government makes that decision, **[*29]** it is bound by that decision. I do not agree with the majority that the government satisfies its responsibility of fair notice in charging an accused with a sexual assault without consent and then solely relying upon evidence of the victim's inability to consent at trial. A sexual assault charged by lack of consent requires affirmative proof of lack of consent beyond any evidence of a legal inability to consent. To hold otherwise renders the other theories of liability outlined in *Article 120(b), UCMJ*, as merely superfluous, would eviscerate the need for any other theories of liability, and runs contrary to our superior court precedent. *See* *Sager, 76 M.J. 158*. Certainly, evidence of intoxication is relevant evidence to the issue of a victim's competence to consent and whether a victim is incapable of consenting due to impairment by an intoxicant. However, the government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent.

Given that the case turned on the issue of consent, as the majority accurately points out, evidence of the victim's consumption of alcohol was a relevant "surrounding circumstance" as to the issue of the victim's competence to consent.[13] However, **[*30]** all of the government's evidence and efforts at trial focused exclusively on the victim's legal *inability* to consent and not whether the victim did, in fact, consent. The manner in which the government focused on the victim's level of intoxication through witness testimony, video surveillance evidence, and argument rose to a level that was more than just using that evidence as a "surrounding circumstance" of whether the victim consented. It was obvious in the tenor of the government's presentation of evidence and arguments that it was prosecuting the case as one in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Therefore, I find that the government violated appellant's due process right to fair notice and that this error was plain and obvious given the manner in which the government prosecuted appellant.

B. Appellant Was Not Materially Prejudiced

While I find that the government violated appellant's due process right to fair notice, the inquiry does not end there. "An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *United State v. Oliver, 76 M.J. 271, 275 (C.A.A.F. 2017)* (quoting *United States v.*

[13] "'Consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also 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 does not constitute consent." Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 3A-44-2.d, note 5 (29 Feb. 2020) [Benchbook].

Wilkins, 71 M.J. 410, 413 (C.A.A.F. 2012). Appellant must demonstrate **[*31]** that "under the totality of the circumstances, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice." *Id.* (cleaned up).

Appellant argues he was prejudiced because the manner in which the government prosecuted him at trial denied him the opportunity to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance. Determining whether appellant was prejudiced requires a close review of appellant's trial strategy and specifically, "how the defense channeled its efforts and what trial defense counsel focused on or highlighted" at trial. *United States v. Treat, 73 M.J. 331, 336 (C.A.A.F. 2014)* (cleaned up).

The manner in which the case was contested diminishes appellant's argument that he was not on notice as to what he had to defend against in regards to the victim's inability to consent due to alcohol consumption. Prior to trial, defense counsel made a motion to preclude the government from presenting evidence that appellant and the victim were unlawfully consuming alcohol as minors in violation of a policy of possessing alcohol in the barracks. Trial defense counsel was also **[*32]** provided appellant's CID statement in which he refers to the victim as being "fucked up" and explains that he was intoxicated that night as well. At trial, the defense's strategy was to highlight the government's inability to prove lack of consent given that the victim had no memory of any sexual intercourse, presumably due to alcohol consumption. The defense theory at trial was that the victim's lack of memory did not mean she did not consent to sexual intercourse. The defense focused on the victim's competence to consent despite her alcohol consumption. At trial, the defense highlighted the victim's lack of substantial intoxication by eliciting evidence of: (1) the victim dancing with a few of the soldiers soon after arriving at the barracks party; (2) the victim's control of her motor skills in walking up and down the barracks hallway and swiping a key card to enter her barracks room in the moments just prior to the sexual intercourse; (3) the victim's ability to hold onto appellant while he carried her on his back (in and out of the building) and in his arms (on the way to her barracks room); and, (4) evidence that the victim coherently used her cell phone in the moments both before **[*33]** and after the short window of time in which the sexual intercourse occurred. The defense directly addressed the issue of the victim's consumption of alcohol that evening and how it impacted her mentally and physically. Given the defense's trial strategy of focusing on the victim's competence to consent despite her consumption of alcohol, I do not find that the appellant was unable to adequately prepare a defense against a sexual assault in which the victim was incapable of consenting to a sexual act due to impairment by a drug, intoxicant, or other similar substance. He was aware that the victim's alcohol consumption was a key surrounding circumstance and recognized that her competence was implicated by the relevant statutory definition. Therefore, while I find that appellant was denied fair notice of the offense with which he was prosecuted at trial, I do not find he suffered material prejudice.

C. Legal and Factual Sufficiency of Sexual Assault Conviction

Appellant also asserts that his conviction is both legally and factually insufficient. Since I find that appellant was not prejudiced by the government's lack of fair notice, it is necessary to evaluate whether appellant's conviction **[*34]** is legally and factually

sufficiency, as charged.

While I find that the evidence is legally sufficient as to the charged offense of sexual assault without consent, I find that it is factually insufficient. In viewing the evidence in the light most favorable to the government, I do find that a rational factfinder could have found all of the essential elements of the charged offense beyond a reasonable doubt. However, I disagree with the majority that the government satisfied its burden of proving the victim's lack of consent beyond a reasonable doubt. Specifically, I find there was no affirmative evidence of the victim's lack of consent to the sexual intercourse. The victim testified that she had absolutely no memory of any sexual intercourse with appellant. In fact, she has a lack of memory of several hours from the night of the charged offense. Despite the victim's testimony that she did not consent, such testimony is meaningless given the fact that she has no actual memory of any sexual act. The victim's testimony that she would not have consented to sexual intercourse is not evidence of lack of consent at the time of the sexual intercourse. The government is required to prove a lack **[*35]** of consent temporally linked to the sexual act. In this case, the victim cannot provide any affirmative evidence of her lack of consent at the moment of the sexual act. I acknowledge there is some circumstantial evidence that the victim may not have provided a freely given agreement to sexual intercourse with appellant given her level of intoxication and diminished consciousness in the moments leading up to the sexual act. However, I do not find such circumstantial evidence sufficient to satisfy the government's burden of proving lack of consent beyond a reasonable doubt, given the over thirty-minute period in which the victim was alone with appellant and given the victim's ability to engage in coherent text messages moments before the sexual act and mere moments after the conclusion of the sexual act. Further, unlike the majority, I do not find that appellant's false exculpatory statements, both when confronted by the victim immediately after the sexual act and in his statement to CID, to be affirmative circumstantial evidence of the victim's lack of consent. However, given the DNA evidence and the self-serving and bizarre story appellant provided to CID about what occurred while **[*36]** he was alone with the victim, I find his statements are clear indicators of consciousness of guilt. Unfortunately, I am bound by the government's decision to charge this case as a sexual assault without consent.[14] Based upon the evidence presented at trial, I am not convinced of appellant's guilt of the charged offense of sexual assault, without consent.

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[14] Had the government chosen to charge this case as a sexual assault while the victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance, in violation of *Article 120(b)(3)(A), UCMJ*, I would find the evidence is legally and factually sufficient for that theory of liability.

United States v. Williams

United States Air Force Court of Criminal Appeals

March 12, 2021, Decided

No. ACM 39746

Reporter
2021 CCA LEXIS 109 *; 2021 WL 955908

UNITED STATES, Appellee v. Derrick O. WILLIAMS, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Williams, 2021 CAAF LEXIS 425, 2021 WL 2414022 (C.A.A.F., May 6, 2021)*

Later proceeding at *United States v. Derrick, 2021 CAAF LEXIS 432, 2021 WL 2368266 (C.A.A.F., May 7, 2021)*

Review granted by, in part *United States v. Williams, 2021 CAAF LEXIS 595, 2021 WL 2810003 (C.A.A.F., June 25, 2021)*

Affirmed by *United States v. Williams, 2021 CAAF LEXIS 745 (C.A.A.F., Aug. 10, 2021)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Bradley A. Morris (arraignment and motions); John C. Degnan. Approved sentence: Dishonorable discharge, confinement for 45 days, hard labor without confinement for 3 months, and reduction to E-1. Sen-tence adjudged 22 March 2019 by GCM convened at Francis E. Warren Air Force Base, Wyoming.

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

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Dayle P. Percle, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, KEY, and ANNEXSTAD, Appellate Military Judges. Judge KEY delivered the opinion of the court, in which Senior Judge MINK and Judge ANNEXSTAD joined.

Opinion by: KEY

Opinion

KEY, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, 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 sentenced to a dishonorable discharge, confinement for 45 days, hard labor without confinement for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, **[*2]** Appellant raises six issues: (1) whether the military judge erred by excluding statements made by the victim; (2) whether the military judge erred by admitting evidence of Appellant's previous court-martial acquittal; (3) whether the military judge erred

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

by providing the court members an instruction on false exculpatory statements; (4) whether Appellant was denied due process by virtue of the Government pursuing a different theory of guilt than Appellant was charged with; (5) whether Appellant's sentence was rendered unlawfully severe when he was not correctly paid while he served his sentence; and (6) whether the military judge erred by not giving the Defense's requested instruction on consent. Appellant personally raises the fourth and sixth issues pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. We have carefully considered Appellant's sixth claim and have determined it warrants neither discussion nor relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. Although not raised by Appellant, we consider whether he is entitled to relief for facially unreasonable post-trial delay. Finding no error prejudicial to the substantial rights of Appellant, we affirm.

I. Background

Appellant, a noncommissioned officer, was convicted of sexually assaulting a junior Airman, **[*3]** AM, at a Halloween costume party Appellant hosted at an on-base club on 28 October 2017.

AM went to the Saturday-night party with a married couple, Ms. BW and Ms. JW, who were friends with Appellant.[2] AM said that before she went to the party, she consumed "five or six" shots of cognac despite not having eaten anything all day. The three women arrived at the club around 2100 hours to find approximately 30 others in the ballroom, which was physically separated from the club's bar. Ms. JW testified that at some point "early on" in the party, Appellant told her that AM "is fine." Trial counsel refreshed Ms. JW's recollection that she had originally told investigators that Appellant "was talking about how cute [AM] was" and said he "would f[**]k the sh[*]t out of her," but she did not recall when he said that. Appellant was married, but his wife did not attend the party due to an illness. He was dressed as a gladiator in a costume that primarily consisted of a knee-length tunic.

As time went on, partygoers began leaving the party, and those who remained, to include AM, Ms. BW, and Ms. JW, migrated to the bar area where a surveillance camera captured events there. Portions of recordings taken **[*4]** by this camera and another camera in a nearby hallway were admitted into evidence for the time period running from approximately 2300 hours to 0100 hours. Although Appellant, Ms. BW, and Ms. JW drank while at the party, AM was not served alcohol due to her being under the legal drinking age.

In the surveillance video footage from the bar area, AM, Ms. BW, and Ms. JW are standing at or near the bar from 2313 hours through approximately midnight. During this period, Appellant periodically walks into and out of the camera's view, eventually walking over to AM at 2327 hours and dancing up against her by placing his buttocks near her crotch area. This lasts for about ten seconds, and Appellant does it again shortly thereafter for about twenty seconds. Afterwards, Appellant and AM laugh and hug, and Appellant wanders out of view of the camera. During her testimony at Appellant's court-martial, Ms. JW described the dancing as "like a friendly dance." Other than this dancing with Appellant, AM is seen in the video talking to various party attendees, to include Ms. BW and Ms. JW. Ms. JW described AM as being "drunk at the party," but not loud, "just like more outgoing, like talkative" and slurring her **[*5]** words "just a

[2] Ms. JW was an active-duty co-worker of Appellant's at the time of the assault, but she separated from the military shortly before Appellant's court-martial. Her military grade at the time of the relevant events is not evident from the record.

little." Ms. BW said that at some point in the night AM's "eyes were like red, like bloodshot red," but her speech was unaffected "from what [Ms. BW] could tell."

No footage of the bar from midnight to 0030 hours was admitted at trial, but Ms. JW said she walked into the ballroom to get her purse so that she could close out her bar tab. In the ballroom, she saw Appellant and AM dancing alone together with Appellant "twerking" on AM by placing his buttocks in her crotch area. Ms. JW testified that this time, AM "was not really present," and that she "was leaning against the wall" with Appellant's buttocks "holding her up." Ms. JW took out her phone and took a short video in which Ms. JW can be heard saying, "kill it, kill it, kill it." The video carries a time stamp of 0031 hours. Ms. JW put her phone away and turned to go back to the bar, and as she was leaving, she turned back around and saw Appellant kiss AM. She did not see AM lean into the kiss and described it as "forced for sure." Ms. JW said she found the episode "weird," but she "wasn't worried."

The surveillance camera footage admitted at trial picks back up at 0033 hours and shows Ms. JW standing by herself at **[*6]** the bar while Ms. BW is at a nearby table with five other people. AM walks into the frame and speaks briefly to Ms. BW before walking over to the bar to talk to Ms. JW for about 30 seconds and then returning to talk to Ms. BW. Approximately 15 seconds later, Appellant walks up to AM and hugs her a couple of times. They separate and speak to other partygoers, then Appellant puts his arm around AM's shoulders, and they walk out of the view of the camera at 0035 hours, at which point the video stops.

At trial, Ms. BW testified she had a conversation with AM in the bar area after which AM "walked away." In her testimony, Ms. BW did not say AM left with Appellant, but she said that after this conversation, Ms. BW and Ms. JW went to the bathroom together where they stayed for about ten minutes. While in the bathroom, Ms. JW took a picture of the two of them which was admitted into evidence and bears a timestamp of 0044 hours. Realizing they had not seen AM "for ten or fifteen minutes," Ms. BW and Ms. JW left the bathroom to look for AM.

As the two women walked out of the bathroom, they spotted movement in a nearby closet—a closet which had no door. When they looked in to investigate, they **[*7]** saw Appellant on top of AM with Appellant's costume pulled up above his waist such that his buttocks were exposed. AM's pants were pulled down and her legs were up in the air in front of Appellant. Ms. BW testified Appellant's "hips were aligned with [AM's] vagina" and Appellant was "thrusting up and down." She said AM did not appear to be interacting with Appellant, and that she "was just lying there on the floor. . . . Her arms were sprawled out to the sides of her . . . [a]nd her eyes were closed." Ms. JW described the scene in substantially the same way, but neither Ms. JW nor Ms. BW saw Appellant's penis and neither could testify that Appellant's penis penetrated AM's vagina.

The second surveillance camera captured video of the hallway just outside of the closet, but the recording does not show the interior of the closet at all. The video shows Ms. BW and Ms. JW walking up to the closet at 0045 hours. About one minute later, three other partygoers walk by. According to Ms. BW, just after she and Ms. JW found AM and Appellant in the closet, three people came down the hallway looking for Appellant. Ms. BW diverted the group away from the closet because she "didn't want to embarrass **[*8]** [her] friend." Once the three people were gone, Ms. BW said she turned back around to find Appellant "still thrusting up and down." She testified AM "was still the same . . . her arms weren't

embracing him. They were out to her sides and [she] was still just lying there." Ms. BW then went into the closet, kicked Appellant in his side, and told him to get off AM. Appellant stood up and started adjusting his clothes, and AM's feet fell to the floor. Ms. BW said she helped AM get up "immediately," and AM "started adjusting herself." Ms. BW described AM as "just like discombobulated, like she didn't really have her balance," which Ms. BW ascribed to AM being "so drunk." Ms. BW told AM to meet her in the bathroom, and Ms. BW walked out of the closet. In the surveillance video, Ms. BW leaves the closet about a minute after the three people looking for Appellant walk by, and Appellant walks out about ten seconds later at 0048 hours.

Despite Ms. BW's directions, AM did not go to the bathroom. Instead, Ms. BW said she found AM near the bar area leaning against a wall for support and appearing "super drunk." Ms. BW said she noticed AM's jeans had been ripped at the knee, AM's eyes were red, and **[*9]** she was neither talking to anyone nor making any facial expressions. The surveillance video from the hallway camera, however, shows AM walking up to Ms. BW and Ms. JW near the closet entrance with a fourth woman at 0050 hours. Shortly thereafter, the group steps partially out of the camera's view, and AM is not visible for the next two minutes, but when she comes back into view, she is standing on her own and interacting with the other women until they all walk away at 0054 hours.

Meanwhile, footage from the bar shows Appellant seated at the bar at 0051 hours, about three minutes after he left the closet, talking to the bartender and the club manager, Technical Sergeant (TSgt) NB, as well as a few other partygoers. TSgt NB—who considered herself good friends with Appellant—noted Appellant had disappeared from the bar for "roughly ten to fifteen minutes" and when he returned to the bar, she asked where he had been. Appellant said he "didn't know" and appeared confused to TSgt NB. She testified that Appellant then said "something to the effect of was [he] being good or did [he] do something bad," and at some point volunteered that his wife keeps him out of trouble. TSgt NB agreed Appellant **[*10]** seemed extremely drunk and described him as "[t]he drunkest [she had] ever seen him." Around this same time, TSgt NB said she saw AM in the hallway "hunched over with [Ms. BW] kind of holding her or helping her." TSgt NB said AM appeared upset and that she was leaning against the wall.

The last bar video shows Ms. BW and Ms. JW walking into the bar just after 0054 hours and Appellant hugging each of them separately, with his mouth near their ears. Ms. JW, whom Appellant hugged first, testified Appellant asked her, "Did I just f[**]k your friend?" Ms. JW said she told him, "yes, you did," and he then turned to talk to Ms. BW who described Appellant as "talking in [her] ear" in "like a whisper." She testified Appellant said, "please don't tell me that I just had sex with your friend." With her arm around Appellant, Ms. BW told him he had, and Appellant "asked [her] not to say anything." Ms. JW testified she "maybe" hugged Appellant goodbye, but she did not tell him anything was wrong. In the video, AM walks into view at 0056 hours, and then she leaves again with Ms. BW and Ms. JW moments later.

AM, Ms. BW, and Ms. JW were driven by a designated driver to Ms. BW's and Ms. JW's house. In **[*11]** the car ride, Ms. BW said AM "wasn't saying anything" and did not seem to understand what was going on. Once at the house, AM vomited and fell asleep. The next morning, Ms. BW and Ms. JW told AM they saw Appellant having sex with her in the closet at the club. Ms. BW testified AM broke down in tears but did not want to report Appellant out of fear of getting in trouble for drinking underage.

Ms. BW, an Air Force civilian employee, told her supervisor about the events at the party the following Monday which, in turn, led to an investigation being initiated by the Air Force Office of Special Investigations (AFOSI).

At Appellant's trial, AM testified she remembered Appellant dancing in front of her at the bar. She said, "I found it funny that a grown man would be kind of bent over in front of me but I really didn't think anything of it." She remembered going to the bathroom at the club at some point, noting that she was drunk. Her next memory was being on the couch in Ms. BW's and Ms. JW's house, throwing up, and going back to sleep. She testified she woke up at 0600 hours and went to the bathroom and she noticed "a sensation on [her] vagina. . . . It was just sore, throbbing." She also **[*12]** noted her menstrual phase had begun and testified, "Whatever happened probably triggered it." AM said she went back to sleep and next woke up with Ms. BW and Ms. JW on the couch with her. Once they explained what they had seen, AW testified, "I was sad. I was shook. I was just confused. I was just lost, honestly." On cross-examination, trial defense counsel asked AM, "So you don't remember if you actually chose to engage in this intimate activity with [Appellant]?" AM replied, "No."

In the ensuing investigation, Appellant's house was searched by AFOSI agents who found the costume Appellant had been wearing at the party in the washing machine. The costume was the only article of clothing in the machine, and it was wet when the agents found it. One agent testified that it smelled like "a strong cleaner" had been used, because the machine "smelled essentially like a pool, like chlorine." AM also underwent a sexual assault forensic examination, the timing of which is unclear from the record, although one witness said the examination appeared to have been conducted "less than thirty-six hours" after the assault. The examination found no semen or male DNA in samples taken from AM's body, **[*13]** but evidence of the presence of Appellant's DNA was found on the inside of AM's underwear. In an interview with an AFOSI agent, AM said that after the assault, she felt "pain inside of her vagina."

II. Discussion

A. Evidence Excluded Under Mil. R. Evid. 412[3]

Just prior to Appellant's sexual conduct with AM in the closet at the club, AM had brief conversations with Ms. BW and Ms. JW in the bar area. At trial, Appellant sought to introduce the substance of those conversations, but the Government objected, arguing such evidence was prohibited under Mil. R. Evid. 412. The military judge ruled in the Government's favor, and Appellant asserts on appeal that the military judge's ruling excluding the evidence was erroneous. We disagree.

1. Additional Background

In her conversation with Ms. JW, AM essentially expressed an interest in potentially engaging in sexual conduct with another person.[4] Ms. JW told AM to go talk to Ms. BW about it, which AM briefly did. Ms. BW chalked the conversation up to AM "just drunk talking." Appellant and AM walked out of the bar area together moments later.

The Defense moved to admit the substance of AM's brief conversations with Ms. BW and Ms. JW under two primary theories: first, that the conversations **[*14]** demonstrated AM's

[3] This issue was filed under seal and the discussion, *supra*, only reveals that which is necessary to resolve the issue.

[4] This other person was not Appellant.

interest in sexual activity, and second, that they showed that AM had the ability to consent to sexual conduct in that she was having conversations about such shortly before being found in the closet with Appellant. The Government opposed, and the military judge denied the motion in a written ruling dated 10 December 2018 after a motions hearing, finding that an interest in sexual activity with persons other than Appellant was "neither relevant nor material to the Defense's case" as it did "not make a fact in issue in this case more or less probable. It has no bearing on whether AM consented to anything with [Appellant]." The military judge further concluded evidence of AM and Appellant dancing together and kissing "pertain[ed] to the issue of consent," and was being admitted, but he did not otherwise address whether the conversations demonstrated AM's ability to consent. Finally, the military judge found "the probative value of this evidence is outweighed by the danger of unfair prejudice and confusion of the issues" without comment as to how he arrived at that conclusion.

Between the hearing and Appellant's trial, a different military judge was detailed, and on 1 **[*15]** March 2019 the Defense sought reconsideration of the ruling. The Defense asserted that the Government's theory in the case was that AM could not consent to sexual conduct with Appellant due to her level of intoxication and, therefore, AM "contemplating sex right before the alleged assault" was evidence critical to rebutting that theory, as it demonstrated AM's mental capacity "to make important decisions." Trial defense counsel explained they were not trying to demonstrate AM had a general willingness to consent to sexual conduct.[5] The military judge denied the reconsideration motion without discussion at the beginning of Appellant's trial on the merits. He issued a written ruling two and a half months after the trial concluded in which he explained that the Defense had not identified any new evidence other than the surveillance videos, the substance of which had been previously documented in the report of investigation.[6] The military judge declined to revisit the prior military judge's ruling based upon a lack of new evidence or change in the law.

During the findings portion of Appellant's trial, while being questioned by the Government, Ms. BW testified about her conversation with AM, **[*16]** describing AM as "just babbling, just talking about random stuff." Ms. BW also noted AM was talking loudly, but her speech was not slurred. Neither party elicited any testimony from Ms. JW about her conversation with AM, and AM did not testify about either conversation.

2. Law

We review a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion. *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)* (citation omitted). A military judge abuses his or her discretion when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. White, 80 M.J. 322, 327 (C.A.A.F. 2020)* (quoting *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008))*. "The abuse of discretion standard is a

[5] Trial defense counsel raised other theories of admission at trial; however, Appellant has not asserted them on appeal and we do not address them in this opinion.

[6] Although the Government possessed the surveillance videos prior to the original motion hearing, agents had encountered difficulties transferring the videos to media that could be provided to the Defense. The Defense received the videos shortly before Appellant's trial on the merits began.

strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)* (quoting *United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010))*.

Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading **[*17]** cross-examination and evidence presentations common to sexual offense prosecutions." *United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)* (original alteration, internal quotation marks, and citations omitted). One exception to this rule is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(1)(C). It is the defense's burden to demonstrate the exception applies. *United States v. Banker, 60 M.J. 216, 223 (C.A.A.F. 2004)*. In order to show that the exclusion of evidence would violate an accused's constitutional rights, the defense must show that the evidence is relevant, material, and favorable to his defense, "and thus whether it is necessary." *Id. at 222* (quoting *United States v. Williams, 37 M.J. 352, 361 (C.M.A. 1993)* (internal quotation marks omitted)). The term "favorable" means the evidence is "vital." *United States v. Smith, 68 M.J. 445, 448 (C.A.A.F. 2010)*. Moreover, the probative value of the evidence must outweigh the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. *United States v. Gaddis, 70 M.J. 248, 256 (CA.A.F. 2011)*. Military judges have "wide discretion" in applying the Mil. R. Evid. 403 balancing test; however, military judges are afforded less deference when they do not explain their analysis on the record, and we give them no deference when they do not conduct the analysis at all. *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)*.

3. Analysis

On appeal, Appellant argues the military judge abused his discretion by excluding the substance of AM's conversations with Ms. BW and Ms. JW because the **[*18]** evidence was constitutionally required under Mil. R. Evid. 412(b)(1)(C), as it demonstrated that AM was capable of consenting to sexual activity. Appellant further argues that by not being able to present the substance of the conversations, the Government "capitalized" on the situation by portraying AM as "speaking incoherently moments before she was allegedly assaulted." Appellant asserts the initial military judge failed to consider how the evidence pertained to AM's capacity to consent, as he neither made any findings regarding AM's degree of intoxication nor addressed the capacity issue in his analysis. Because the evidence was excluded, Appellant argues his ability to cast doubt on Ms. BW's and Ms. JW's characterization of AM as being unresponsive in the closet was compromised. The Government responds that Appellant was charged under a theory of causing bodily harm to AM without her consent, not to assaulting her while she was incapable of consenting, and that there was "substantial other evidence" showing AM's competence, to include the surveillance video footage and witness testimony about AM's ability to walk, talk, and dance close in time to the assault.

As noted by the Government, Appellant was charged **[*19]** with sexually assaulting AM by causing her bodily harm, a charging decision which required AM's lack of consent to the sexual conduct to be proven beyond a reasonable doubt. The Government's case at trial did not involve any direct evidence AM did

not consent. Indeed, trial counsel never asked AM whether she consented or not, and trial defense counsel elicited AM's concession that she did not remember whether or not she chose to engage in the sexual conduct with Appellant. Without direct evidence proving AM's lack of consent, the Government elected to focus on circumstantial evidence, a large degree of which centered on AM's apparent lack of ability to consent.

The opening lines of trial counsel's closing argument illustrate the Government's theory of the case, as trial counsel described AM as being "vulnerable and drunk;" "unaware and unable to resist;" "passed out in a closet;" "dead to the world;" and "motionless." Trial counsel asked the members to infer AM did not consent "based on the surrounding circumstances," which trial counsel identified as AM's eyes being closed and her "lying there motionless on the floor." Trial counsel asked, "What actions or words or communication is **[*20]** she giving the accused to know that it is okay to put your penis inside of [her]? Nothing." At the conclusion of his argument, trial counsel told the members: "He found, had her isolated, passed out in a closet, and sexually assaulted her." In his rebuttal argument, trial counsel offered the clearest explanation of his theory on the issue of consent when he told the members, "It was sexual assault because she was unable to consent, she didn't consent, and he performed the sexual act on her." In other words, his argument was AM did not consent because she could not consent.

In light of this theory of Appellant's culpability, AM's ability—or lack thereof—to consent to the sexual conduct was directly at issue. Therefore, her capacity to carry on a conversation immediately before the alleged assault is plainly relevant to establishing her cognitive abilities at the time. Contrary to Appellant's argument, however, the subject matter of such conversation is far less relevant than the degree to which AM could communicate coherent thoughts and respond to inputs from the other conversation participants. The fact that AM had relayed an interest in potentially engaging in sexual conduct with someone **[*21]** may have shed some light on AM's sexual interests at the time, but those interests did not include Appellant—and there was no evidence Appellant had any knowledge of the conversations at all. As a result, AM's expressed sexual interests amount to the sort of sexual-behavior or sexual-predisposition evidence Mil. R. Evid. 412 is designed to exclude, as the evidence would do little more than paint AM as being generally open to engaging in sexual conduct. We agree with the military judge that the subject of AM's conversations with Ms. BW and Ms. JW was not material to the Defense's case, because AM's interest in sexual conduct with another has no bearing on whether or not AM consented to sexual conduct with Appellant. As such, this evidence cannot rise to the level where its exclusion would violate Appellant's constitutional rights, and the military judge's ruling excluding the evidence was not an abuse of discretion.

While the specific subject matter of AM's conversations with Ms. BW and Ms. JW sheds little light on AM's capacity to consent, her ability to have those conversations was far more pertinent to countering the Government's trial strategy. The first military judge's ruling, which contained only **[*22]** a single paragraph analyzing the admissibility of these conversations, did not differentiate between the subject matter of the conversations and the fact AM carried on conversations. However, nothing in the ruling indicates counsel were prohibited from introducing evidence about the surrounding circumstances of those conversations. The second military judge denied reconsideration of the motion simply

because trial defense counsel did not produce any new evidence, and his summary ruling did not go into any further detail. Yet trial defense counsel did not pursue a line of inquiry with witnesses with respect to AM's ability to cogently participate in the conversations or otherwise seek clarification from the military judge as to whether or not they could ask Ms. BW and Ms. JW about the surrounding circumstances of the conversations without delving into their substance. Government counsel, however, did elicit brief testimony from Ms. BW about her observations of AM's demeanor during their conversation shortly before the alleged assault, but trial defense counsel did not ask any questions on the subject, nor did they ask Ms. JW about her conversation with AM. While Appellant asserts on **[*23]** appeal the Government was able to portray AM as incoherent shortly before the assault—a characterization which somewhat overstates Ms. BW's actual testimony—trial defense counsel did not avail themselves at trial of opportunities to demonstrate AM carried on coherent conversations. The Defense's decision not to do so at trial does not warrant relief on appeal.

B. Evidence of Appellant's Previous Court-Martial

Nearly three years before his conviction in this court-martial, Appellant was acquitted of committing a sexual assault at a previous court-martial in July 2016 held at the same base. Over defense objection, the military judge permitted the Government to introduce evidence of the events supporting the earlier court-martial's charge. Appellant alleges the military judge erred. We disagree.

1. Additional Background

a. Appellant's First Court-Martial

In October 2014, AW—then a Senior Airman—went out to a bar with friends where she ran into another group which included Appellant. AW had three cocktails at the bar, and she and Appellant danced with each other in a style AW characterized as "grinding." The group went to a second bar where AW did not drink, but she and Appellant continued **[*24]** suggestively dancing with each other. Sergeant (Sgt) ML[7] —one of the designated drivers in the group—described AW as "flirting" with Appellant and dancing with him by placing "her rear end in his crotch region." After that bar closed, Appellant, AW, Sgt ML, and Staff Sergeant (SSgt) AS went to Appellant's apartment where Appellant and AW wound up sitting on a couch together while AW rubbed Appellant's head. At some point, SSgt AS went outside to smoke and Sgt ML went with her, leaving Appellant and AW in the apartment alone. Still on the couch, Appellant and AW began kissing each other, and SSgt AS saw them doing so when she opened the door to come back into the house. She told Sgt ML what she had seen, and she and Sgt ML decided to go to Sgt ML's house around the corner rather than interrupt Appellant and AW.

According to AW's testimony, she stopped kissing Appellant "after a little bit" when she "realized what [she] was doing," and she stood up from the couch. AW said she and Appellant then talked about AW's boyfriend until Appellant "lifted [her] up behind the knees" and started carrying her to the back of the house. AW was eventually able to pull free from Appellant's grasp and away **[*25]** from him, and she went outside to look for SSgt AS, only to find SSgt AS was not there and that Sgt

[7] Sgt ML was a noncommissioned officer at the time of these events, but he had separated by the time of Appellant's court-martial from which this appeal arises. His specific grade is unclear from the record, as he is only referred to as "Sergeant."

ML's car was gone. Due to the cold weather, AW went back into the apartment where Appellant and AW continued to converse. AW said Appellant told her that his wife was out of town and that they were "fighting anyway," and then he picked her up again and took her to a bedroom in the back of the apartment.

Once in the bedroom, Appellant set AW down such that she was standing in front of the bed, and Appellant proceeded to take off her pants and underwear. AW laid down on the bed, and Appellant laid on top of her, trying unsuccessfully to digitally penetrate her vagina. Appellant was then able to penetrate AW's vagina with his penis, and after some time passed, he pulled AW on top of him and continued to penetrate her vagina with his penis. AW testified she could not get off Appellant because "[h]is knees were up behind [her]" and he was holding one of her arms "on the bed or the wall." Eventually, Appellant got up and went to the bathroom, and AW dressed herself and went to the living room. When Appellant walked into the living room, AW told him she wanted to go home, and Appellant drove **[*26]** her there. The two conversed during the ride, and AW said Appellant told her, "I didn't know you liked me like that." Sgt ML testified that the following day he saw AW, and AW and he "were laughing and joking about that night, how she was dancing and what have you." During the subsequent investigation, Appellant admitted to having sexual intercourse with AW, but he maintained the act was consensual. AW, however, said she did not consent to the sexual activity. Appellant was charged with sexually assaulting AW; he was acquitted on 29 July 2016.

b. Appellant's Motion to Exclude Prior Acquittal

Prior to Appellant's trial in the instant case, trial defense counsel moved the military judge to exclude evidence of Appellant's alleged assault on AW under two theories: (1) the members could not find by a preponderance of evidence that Appellant committed the prior offense; and (2) the evidence failed the Mil. R. Evid. 403 balancing test by virtue of dissimilarities between the offense against AW and the offense against AM. The military judge denied the Defense's motion.

In the Government's opening statement, trial counsel told the members they would hear from AW during Appellant's trial explaining,

> [AW], too, was **[*27]** assaulted by [Appellant]. In fact, in October of 2014 [Appellant] used similar tactics and circumstances to isolate [AW] and force her to have sex with him. Now, in that 2014 case, when [Appellant] faced a general court-martial, the members of that panel were not able to find him guilty beyond a reasonable doubt. However, in this case, you will be given the opportunity to consider that event from 2014 in accordance with the instructions the [military] judge is going to give you later on.

Trial counsel did call AW to testify, and the Defense called Sgt ML, SSgt AS, and a special agent involved with the investigation into AW's allegations. Ultimately, the testimonial evidence in Appellant's trial underlying this appeal spanned 253 pages of the 776-page trial transcript, with 84 of those pages—or 33 percent—being devoted to the allegation pertaining to AW. Prior to closing arguments, the military judge provided the following instructions to the members:

> You heard evidence that [Appellant] may have committed a sexual offense against [AW]. [Appellant] is not charged with this other offense. This evidence may have no bearing on your deliberations, unless you

first determine, by a preponderance **[*28]** of the evidence that is more likely than not, this other offense occurred. In regard to your determination of whether or not this other offense occurred, you may consider the fact that [Appellant] was acquitted or found not guilty of the sexual offense involving [AW] at a prior court-martial in 2016.

If you determine, by a preponderance of the evidence, this other offense occurred, you may then consider the evidence of that other offense for its bearing on any matter to which it is relevant only in relation to the Charge and its Specification, or the lesser included offense of attempted sexual assault. You may consider the evidence of this other sexual offense for its tendency, if any, to show [Appellant]'s propensity or predisposition to engage in a sexual offense. You may not, however, convict [Appellant] solely because you believe he committed this other offense or solely because you believe [Appellant] has a propensity or predisposition to engage in a sexual offense. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist.

[Appellant] may be convicted of an alleged offense only if the prosecution has proven **[*29]** each element beyond a reasonable doubt. Each offense must stand on its own and you must keep the evidence of each offense separate. The prosecution's burden of proof to establish [Appellant]'s guilt beyond a reasonable doubt remains as to each and every element of the offense alleged in the Charge and its Specification, or the lesser included offense of attempted sexual assault.

Trial counsel highlighted AW's testimony in his closing argument, eventually telling the members,

> Now I do not want you to convict [Appellant] of this offense just because the other one happened and the military judge's instructions tell you just that. But you can consider it for anything you think is relevant. Anything. So if you want to know does this person have a propensity to commit sexual offenses? Does it tell you something about the way he views women? About his respect for another person's body. Does it give you insight into his thought process? That is for you to consider.

The Defense argued to the members that the sexual conduct between AW and Appellant was consensual and that the Government had introduced the conduct simply to "prop up their weak case." In rebuttal argument, trial counsel returned **[*30]** to the issue of AW and argued Sgt ML and SSgt AS had not undermined AW's testimony because they were not at the apartment at the time of the alleged assault.

2. Law

Under Mil. R. Evid. 413, evidence that an accused has committed another sexual offense may be admitted and "considered on any matter to which it is relevant." Mil. R. Evid. 413(a). The term "sexual offense" includes any conduct prohibited by Article 120, UCMJ, which includes the offense of sexual assault. Mil. R. Evid. 413(d)(1). Inherent in the rule is "a general presumption in favor of admission." *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (quoting *United States v. Berry, 61 M.J. 91, 94-95 (C.A.A.F. 2005)*). We review a military judge's decision to admit evidence under Mil. R. Evid. 413 for an abuse of discretion. *Id.* (citation omitted).

The three threshold requirements for admitting evidence under Mil. R. Evid. 413 include the accused being charged with a sexual offense,

the proffered evidence being evidence of the accused having committed another sexual offense, and the proffered evidence being relevant to the case being tried. *Berry, 61 M.J. at 95*. In order to conclude there is evidence of another offense, a court must determine that the members could find the other offense occurred by a preponderance of the evidence. *United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000)* (citing *Huddleston v. United States, 485 U.S. 681, 689-90, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)*). Once these requirements are met, "it is a constitutional requirement that evidence offered under [Mil. R. Evid.] 413 be **[*31]** subjected to a thorough balancing test under [Mil. R. Evid.] 403." *Id.* The employment of a careful balancing test is required due to "the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *United States v. James, 63 M.J. 217, 222 (C.A.A.F. 2006)*. An incorrect ruling risks injecting a court-martial with a "distracting mini-trial on a collateral matter of low probative value." *Solomon, 72 M.J. at 181*. The fact an accused was acquitted of committing the other sexual offense, standing alone, does not prevent its introduction under Mil. R. Evid. 413, but the military judge must give the acquittal "due weight," as it may serve to reduce the strength of the proof of the other offense. *Id. at 182*. Our superior court, the United States Court of Appeals for the Armed Forces (CAAF), has cautioned that "great sensitivity" is called for in determining whether or not to admit evidence of prior acts of which an accused was previously acquitted. *United States Griggs, 51 M.J. 418, 420 (C.A.A.F. 1999)* (analyzing admission of acquittal for purposes of demonstrating intent and absence of mistake under Mil. R. Evid. 404(b)).

3. Analysis

Because Appellant was charged with committing a sexual assault against AM—a sexual offense under Article 120, UCMJ—and because Appellant's conduct with AW would amount to the same type of offense, the first two threshold **[*32]** requirements of Mil. R. Evid. 413 were met. The third requirement is that the evidence was relevant under Mil. R. Evid. 401. Under that rule, evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. In his ruling, the military judge said nothing about how the alleged offense regarding AW was relevant to the offense relating to AM; he simply noted, "I find this evidence to be relevant" without elaboration. Notwithstanding the absence of analysis on this point by the military judge, we conclude evidence of Appellant committing a prior sexual assault has at least a marginal tendency to make it more probable he committed a later assault under the theory Appellant had demonstrated some degree of a propensity for committing such offenses.

After meeting the threshold requirements under Mil. R. Evid. 413, the military judge was required to subject the evidence to a thorough and careful balancing test under Mil. R. Evid. 403. Proper application of this rule results in the exclusion of evidence, even though relevant, if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion **[*33]** of the issues, or misleading the members." The CAAF has identified various non-exclusive factors to consider in conducting the Mil. R. Evid. 403 balancing test with respect to evidence offered for admission under Mil. R. Evid. 413:

> 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.

Berry, 61 M.J. at 95 (citing *Wright, 53 M.J. at 482*).

The military judge did consider these factors, although his analysis was fairly perfunctory in most respects. He found the strength of the proof of the offense against AW to be "high," as it was "more than gossip." He noted that Appellant's trial on the offense relating to AW "resulted in less than a conviction," but he was nevertheless "satisfied that the strength of proof is sufficient on this evidence" with no further discussion of how he arrived at this conclusion. He did not explain whether or how the fact Appellant's prior court-martial ended in acquittal factored into his analysis.

Nevertheless, the **[*34]** military judge found the probative value of the evidence "sufficient" due to similarities in the two offenses, to wit: (1) Appellant's wife was not present; (2) AM and AW were junior Airmen with whom Appellant did not have a notable prior relationship; (3) AM and AW were "extremely intoxicated;" (4) AM and AW "proceeded to dance/kiss with" Appellant; and (5) the assaults occurred in "a private location." The military judge determined "that the temporal proximity and frequency of the acts is sufficiently met" based upon the two incidents occurring "just over three years apart." He did not comment on the frequency of the acts, but he did note AM and AW did not know each other. Finally, the military judge found the evidence would not be a distraction to the members, because trial counsel only intended to call one witness, AW, to testify on the matter, although he did note it was "possible" that the Defense would "seek to admit more to counter AW's testimony." Based upon the foregoing, the military judge concluded the evidence regarding AW was not substantially outweighed by the danger of unfair prejudice, and he denied the Defense's motion.[8]

On appeal, Appellant argues the offense regarding **[*35]** AM was "vastly different" from that involving AW because AW was not so intoxicated that she was either unconscious or that her memory was even impaired. Appellant also argues the military judge erroneously concluded the members could find by a preponderance of the evidence Appellant had committed the offense on AW in light of the fact she had been seen flirting with, touching, and kissing Appellant prior to the alleged assault. Appellant also argues the military judge did not consider AW's motive to fabricate the assault allegation, as she purportedly only reported she had been assaulted once she learned rumors were circulating around her workplace about her sexual conduct with Appellant.

The military judge's ruling in this instance does give us pause, as it provides little indication of the careful and thorough Mil. R. Evid. 403 analysis required in analyzing evidence proffered for admission under Mil. R. Evid. 413, an analysis of a constitutional dimension. *See James, 63 M.J. at 222*; *Wright, 53 M.J. at 483*. Because the evidence the Government sought to admit resulted in acquittal, that fact required "great sensitivity" in determining whether the evidence should be allowed. *See Griggs, 51 M.J. at 420*. If the military judge did give this issue the required degree of consideration, **[*36]** such is not evident from his ruling, as the military judge provided only broad and conclusory statements, stating, for example, he was "satisfied that the strength of proof is sufficient on this evidence" without any further explanation. At least one of the military

[8] The Defense sought reconsideration of this ruling, but this was denied by the second military judge based upon the absence of either new evidence or a change in the law.

judge's findings of fact—that AW was "extremely intoxicated"—was not just unsupported by the record, but at odds with the evidence presented, thereby amounting to clear error. We are also unclear how the military judge concluded a closet without a door in an on-base club where a party was underway amounted to "a private location." As a result, we give the military judge's conclusions of law minimal deference. *See Berry, 61 M.J. at 96*.

Even though the military judge did not conduct his analysis with the constitutionally required rigor, and in spite of his erroneous findings of fact, we conclude the military judge ultimately did not err in admitting evidence of Appellant's prior conduct with AW. The evidence regarding that offense is not particularly strong as it hinges entirely upon the credibility a factfinder chooses to attach to the sole witness, AW. Yet, so long as a factfinder concludes AW is credible and that the offense more likely than **[*37]** not occurred without her consent in the manner she described, that factfinder could conclude Appellant committed the offense by a preponderance of the evidence, if not beyond a reasonable doubt. That AW may have acted flirtatiously towards Appellant does not disprove her stated lack of consent to sexual conduct with Appellant, conduct which occurred after Sgt ML and SSgt AS had left the apartment. Thus, we find the members could conclude, by a preponderance of the evidence, that Appellant sexually assaulted AW, even though an earlier court-martial did not conclude he did so beyond a reasonable doubt—a substantially higher burden of proof.

We further conclude that Mil. R. Evid. 403 would not operate to exclude evidence of Appellant's conduct with AW, although it is an admittedly close call. Both the conduct regarding AW and that regarding AM involve allegations of Appellant engaging in extramarital sexual intercourse with adult military women without their consent after evenings of drinking and socializing. The similarities largely stop there.[9] The probative value of the evidence regarding AW was that it indicated Appellant had some degree of propensity for engaging in sexual conduct with women without **[*38]** their consent, and the admission of such evidence was highly prejudicial to Appellant in that it portrayed him as a predatory serial offender. The evidence regarding AW *did* result in a mini-trial within Appellant's court-martial, largely re-litigating Appellant's first court-martial.[10] Nonetheless, we conclude the prejudice to Appellant's case regarding AM was not unfair to Appellant insofar as Appellant's acquittal was made known to the members at the outset of his trial, and the probative value of Appellant's predisposition was not *substantially* outweighed by the danger of confusing the issues. Trial counsel told the members in his opening statement the military judge would give them instructions on how to use the evidence, and the military judge later did so, correctly explaining what the evidence could be used for and what initial conclusions the members had to make before they could use it. Thus, the military judge's instructions served to minimize, if not eliminate, any potential confusion of the issues at trial. In light of the foregoing, we conclude the military judge did not abuse his discretion in admitting evidence of Appellant's prior offense against AW at the court-martial **[*39]** now before us.

C. Instruction on False Exculpatory Statements

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[9] Although both AW and AM were Airmen junior in grade to Appellant, there is no indication this grade differential was a factor in either case.

[10] The Defense's motion to exclude this evidence made it clear the matter would be contested at trial, stating: "Hours of trial time would be spent re-litigating something that was already adjudicated two years ago."

Appellant argues the military judge erred in instructing the members, over defense objection, on the doctrine of false exculpatory statements. We agree that the evidence was insufficient to warrant the military judge's instruction, but this error did not prejudice Appellant.

1. Additional Background

During a hearing outside the presence of the court members, trial counsel requested the military judge provide an instruction on false exculpatory statements based upon the comments Appellant made to Ms. JW and Ms. BW at the end of the party, wherein he asked Ms. JW, "Did I just f[**]k your friend?" and said to Ms. BW, "please don't tell me that I just had sex with your friend." He also asked Ms. BW to "not to say anything." Trial defense counsel objected to the instruction on the grounds that these comments were not capable of being either true or false. To the extent any assertion could be derived from the statements, trial defense counsel argued it would be that Appellant did not have a clear recollection of whether he had engaged in sexual conduct with AM, and there was no evidence indicating Appellant did have a clear recollection, **[*40]** so the assertions had not been shown to be false or otherwise contradicted by the evidence.

The military judge disagreed, saying,

> I think a legitimate other interpretation is that [Appellant] was caught in the middle of a crime and then fabricating an excuse. . . . I think the members can find that [Appellant] fabricated, and you can call it misleading, you can call it false, you can call it a lie. He made up some story to get himself out of trouble. That's one way of looking at it and I think that's supported by the evidence.

The military judge gave the following instruction to the members:

> There has been evidence that after the offense was allegedly committed [Appellant] may have provided a false explanation about the alleged offense to Ms. [BW] and Ms. [JW]. Conduct of an accused, including statements and acts done upon being informed that a crime may have been committed or upon being confronted with a criminal charge, may be considered by you in light of other evidence in the case in determining the guilt or innocence of the accused. If an accused voluntarily offers an explanation or makes some statement tending to establish his innocence, and such explanation or statement is later **[*41]** shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt.
>
> You may infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. The drawing of this inference is not required. Whether the statement was made, was voluntary, or was false, is for you to decide. You may also properly consider the circumstances under which the statements were given, such as whether they were given under oath, and the environment under which they were given.
>
> Whether evidence as to an accused's voluntary explanations or statement points to a consciousness of guilt, and the significance, if any, to be attached to any such evidence, are matters for determination by you, the court members.

In closing, trial counsel argued to the members,

> Did I just have sex with your friend? Did I just have sex with your friend? Don't tell

> anyone. He's whispering. He knows what happened. He knows that he just had sex with [AM]. And as the military judge instructed you earlier, and you'll have this during your deliberations, is that there are false exculpatory statements. That is **[*42]** an instruction you will have and you may consider whether this evidence points to a consciousness of guilt. You may infer than [sic] an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Again, that is not me telling you this. These are the instructions crafted by the military judge that you can consider.

In response, trial defense counsel sought to portray Appellant's comments as reflecting Appellant's concern that he—a married man—had been caught having sexual intercourse with another woman. Trial counsel did not return to the issue in rebuttal.

2. Law

Rule for Courts-Martial (R.C.M.) 920(a) requires the military judge to provide members appropriate findings instructions, and under R.C.M. 920(c), any party may request the military judge give particular instructions. "Appropriate instructions" under R.C.M. 920(a) are "those instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." *United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002)* (citations omitted). Although military judges have "wide discretion in choosing instructions to give," those instructions must "provide an accurate, complete, and intelligible statement of the law." *United States v. Behenna, 71 M.J. 228, 232 (C.A.A.F. 2012)*. In instructing the members, **[*43]** "the military judge should not give undue emphasis to any evidence favoring one party." *United States v. Damatta-Olivera, 37 M.J. 474, 479 (C.M.A. 1993)*.

We review the adequacy of a military judge's instructions de novo. *United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003)*. A military judge's determination whether to grant a request for a non-mandatory instruction is reviewed for an abuse of discretion. *United States v. Barnett, 71 M.J. 248, 249 (C.A.A.F. 2012)*. When a military judge commits an instructional error, we assess prejudice by viewing the military judge's instructions as a whole. *United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996)* (citing *United States v. Snow, 82 F.3d 935, 938-39 (10th Cir. 1996))*.

"[E]xculpatory statements by an accused which are successfully contradicted or otherwise shown to be false may be considered as evidence of a 'consciousness of guilt.'" *United States v. Opalka, 36 C.M.R. 938, 944 (A.F.B.R. 1966)* (quoting *United States v. Hurt, 22 C.M.R. 630 (A.B.R. 1956)* (additional citation omitted)). The United States Supreme Court has explained that false statements made by an accused may be considered by the jury as tending to show guilt, because "destruction, suppression or fabrication of evidence" suggests a consciousness of guilt—a matter "to be dealt with by the jury." *Wilson v. United States, 162 U.S. 613, 621, 16 S. Ct. 895, 40 L. Ed. 1090 (1896)*.

3. Analysis

The relevant force of a false exculpatory statement derives from the degree to which it demonstrates an accused's consciousness of guilt. As one of our sister courts has noted, "the fabrication of false and contradictory accounts by an accused criminal, for the sake **[*44]** of diverting inquiry or casting off suspicion is a circumstance always indicatory of guilt." *United States v. Elmore, 31 M.J. 678, 685 (N.M.C.M.R. 1990)* (quoting *Commonwealth v. Lettrich, 346 Pa. 497, 31 A.2d 155, 156 (Pa. 1943))*. Thus, false

exculpatory statements belong to a subset within the larger category of evidence tending to demonstrate a consciousness of guilt. Ordinarily, the false-exculpatory-statement instruction is given when an accused has attempted to mislead investigators with stories later proven to be fabrications[11] or falsely denied committing a particular offense in response to open-ended questioning,[12] which would fall in line with the military judge's instruction that, "an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence." While we conclude Appellant's statements do not amount to false exculpatory statements, we find they still amount to evidence of consciousness of guilt.

A false exculpatory statement has—by its terms—two fundamental requirements: first, the statement must be false, and, second, it must tend to be exculpatory. In order for a statement to be found to be false, there must ordinarily be some evidence of its falsity. *See, e.g.,* *Fox v. United States, 421 A.2d 9, 13 (D.C. 1980)* (noting **[*45]** the falsity of exculpatory statements providing an inference of consciousness of guilt is "typically is proven by independent direct evidence").[13] Here, we do not have statements by an appellant who sought to present a false alibi or to mislead investigators with false information. Instead, Appellant asked Ms. JW if he had just had sex with AM; he said to Ms. BW, "please don't tell me that I just had sex with your friend;" and he asked Ms. BW "not to say anything." None of these comments can be either true or false, because none of them asserts any fact subject to such inquiry. For example, the first of these is not a statement at all—it is a question, and questions do not typically assert anything. *See, e.g.,* *United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990)*. The third statement is a request that Ms. BW not reveal what she knew, and there is nothing factually asserted in that request subject to being disproven. The second statement is a combination of direction to Ms. BW to not tell Appellant he had just had sex with AM and a suggestion Appellant did not have a clear recollection of what had just transpired. Even giving this suggestion its greatest assertive value, no evidence was adduced at trial that Appellant had a clear recollection **[*46]** of the events, which means that whatever assertion can be derived from this statement about Appellant's awareness, it was not shown to be false.

In addition to these three comments not making any assertions which were shown to be false, they were not exculpatory. Even if we were to interpret Appellant's second statement

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[11] *See, e.g.,* *United States v. Cool, No. ACM 39714, 2020 CCA LEXIS 390, at *24-26 (A.F. Ct. Crim. App. 26 Oct. 2020)* (unpub. op.) (during interview with law enforcement, an appellant denied specific facts related to investigation and suggested certain evidence did not exist); *United States v. Baas, No. 201700318, 2019 CCA LEXIS 173, at *48-49 (N.M. Ct. Crim. App. 15 Apr. 2019)* (unpub. op.) (an appellant claimed, *inter alia*, he was conversing with a friend from high school, which was proven to be false); *United States v. Clough, 978 F.3d 810, 819-20 (1st Cir. 2020)* (an appellant told investigators about his typical prescription habits in an anti-kickback case, but investigators were able to prove his habits were not as claimed); *United States v. Ath, 951 F.3d 179, 187 (4th Cir. 2020)* (an appellant claimed another person picked up a particular package, but video evidence showed it was the appellant who picked it up); *State v. Hage, 532 N.W.2d 406, 411 (S.D. 1995)* (an appellant, *inter alia*, gave investigators a false name and address and falsely claimed to have arrived at the scene of the crime after leaving a nonexistent job).

[12] *See, e.g.,* *People v. Raymond, 81 A.D.3d 1076, 917 N.Y.S.2d 354 (N.Y. Ct. App. 2011)* (when an appellant was asked why he thought he was being arrested, he responded that he "would never molest [his] kids").

[13] *See also* *United States v. McDougald, 650 F.2d 532, 533 (4th Cir. 1982)* (citing *United States v. Bear Killer, 534 F.2d 1253, 1260 (8th Cir. 1976))* (exculpatory statements "contradicted by evidence at trial justifies the giving of this jury instruction").

as suggesting an incomplete or nonexistent recollection with respect to his conduct, such would not render the comment exculpatory, because voluntary intoxication—much less lack of memory—is no defense to the general intent offense of sexual assault charged here. *See, e.g.,* *United States v. Gonzales, 78 M.J. 480, 486 (C.A.A.F. 2019)*; *United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)*.

Since Appellant's statements were neither false nor exculpatory, the military judge's instruction was untethered to the evidence and unnecessary for the members to arrive at an intelligent decision, and it was error for him to overrule the Defense's objection to the instruction. In spite of this error, however, we are convinced Appellant suffered no prejudice, because evidence of an accused's guilty behavior demonstrating a consciousness of guilt extends well beyond providing false exculpatory statements and even reaches nontestimonial conduct. *See, e.g.,* *United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998)*; *United States v. Baldwin, 54 M.J. 551, 555-56 (A.F. Ct. Crim. App. 2000)*. Such evidence is admissible **[*47]** under Mil. R. Evid. 404(b) and includes situations in which an accused solicits false testimony[14] or—closer to Appellant's case—asks a witness not to testify.[15]

Appellant's comments to Ms. BW and Ms. JW could give rise to a host of inferences, some more indicative of a consciousness of guilt than others. For example, the members were free to conclude Appellant was trying to get a sense of what the women had witnessed and whether they would agree to not share that information. This evidence was properly admitted at trial, and trial counsel was free to argue Appellant had demonstrated a consciousness of guilt, which is to say the evidence and the argument was going to be in front of the members regardless of whether the military judge gave the instruction on false exculpatory statements.

Although it was not pertinent to Appellant's case, the military judge's instruction was a correct statement of law. More significantly, the military judge plainly explained to the members that it was up to them to determine whether or not Appellant had made any false statements in the first place after he told the members there was evidence Appellant "*may have* provided a false explanation about the alleged offense" (emphasis **[*48]** added). He reiterated this point when he told the members they were responsible for deciding whether such statements amounted to a consciousness of guilt, and "the significance, *if any*, to be attached to any such evidence" (emphasis added). Trial counsel only marginally sought to capitalize on the military judge's instruction, largely arguing inferences that would be permissible even in the absence of the instruction. But even in that argument, trial counsel told the members to reference the instruction—an instruction which vested the members with the absolute discretion to determine whether Appellant's statements were indicative of a consciousness of guilt. We conclude Appellant suffered no prejudice, and the military judge's employment of the instruction was therefore harmless.

D. Theory of Culpability

Appellant asks us to set aside his findings and sentence, arguing he was convicted under the theory that he engaged in sexual conduct with AM when she was too intoxicated to consent rather than by causing bodily harm to her, as he was charged. Appellant contends this

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[14] *United States v. Borland, 12 M.J. 855, 856-57 (A.F.C.M.R. 1981)*.

[15] *United States v. Dammerich, 9 C.M.A. 439, 26 C.M.R. 219, 222 (C.M.A. 1958)*.

denied him his due process rights to fair notice, a principle which "mandates that an accused has a right to know what **[*49]** offense and under what legal theory[ ] he will be convicted." *United States v. Tunstall, 72 M.J. 191, 192 (C.A.A.F. 2013)* (internal quotation marks and citations omitted).

Prior to trial, the Defense submitted a motion in limine asking the military judge to bar trial counsel from advancing any argument or theory that AM could not consent based upon either her being incapacitated due to her alcohol consumption or that she was asleep, unconscious, or otherwise unaware that she was participating in sexual conduct with Appellant. The military judge denied the motion, explaining the Government had to prove AM did not consent, and this would require "examination and consideration of all the facts and circumstances," including AM's level of intoxication, which the military judge concluded amounted to evidence of whether or not AM "effectively consented."

1. Law

The *Fifth Amendment's*[16] *due process clause* "does not permit convicting an accused of an offense with which he has not been charged." *Tunstall, 72 M.J. at 192* (quoting *United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011)*). A specification tried by court-martial will not pass constitutional scrutiny unless it both gives the accused notice of the charge he or she must defend against and shields him or her from being placed in double jeopardy. *United States v. Turner, 79 M.J. 401, 404 (C.A.A.F. 2020)* (citations omitted). The military is a notice-pleading jurisdiction. **[*50]** *United States v. Gallo, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000)*, *aff'd*, *55 M.J. 418 (C.A.A.F. 2001)*. A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." *Id.* (citations omitted).

Article 120, UCMJ, presents various alternative theories of liability for the offense of sexual assault. *Article 120(b)(1)(B)*, with which Appellant was charged, prohibits the commission of a sexual act by "causing bodily harm," while *Article 120(b)(2)* addresses sexual acts committed by a person who "knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring." *10 U.S.C. §§ 920(b)(1)(B)*, *920(b)(2)*. *Article 120(b)(3)(A)* further criminalizes sexual acts committed upon a person who is "incapable of consenting to the sexual act due to impairment by any drug, intoxicant or other similar substance" when that incapacitation is either known by, or reasonably should be known by, the perpetrator. *10 U.S.C. § 920(b)(3)(A)*.

In order to find Appellant guilty of sexual assault under *Article 120(b)(1)(B)* as charged here, the Government was required to prove beyond a reasonable doubt that: (1) Appellant committed a sexual act upon AM by causing penetration, however slight, of her vulva **[*51]** with his penis, (2) he did so by causing bodily harm to her, and (3) he did so without her consent. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(3)(b). "Bodily harm" is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." *MCM*, pt. IV, ¶ 45.a.(g)(3). In determining whether a person consented to the conduct at issue, "[a]ll the surrounding circumstances are to be considered," and "lack of consent may be inferred based on the circumstances of the offense." *MCM*, pt. IV, ¶ 45.a.(g)(8)(C). Trial counsel may "argue the evidence of record, as well as all reasonable inferences fairly derived

[16] U.S. Const. amend. V.

from such evidence." *United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)* (citation omitted).

2. Analysis

Based upon both a plain reading of and application of standard legal-construction principles to the three theories of liability under *Article 120, UCMJ*, discussed above, we conclude the theories are separate and distinct. *See, e.g., United States v. Weiser, 80 M.J. 635, 640 (C.G. Ct. Crim. App. 2020)*; *cf. United States v. Sager, 76 M.J. 158, 161-62 (C.A.A.F. 2017)* (finding "asleep," "unconscious," and "otherwise unaware" in *Article 120(b)(2)* to represent distinct theories of culpability). Of the three, *Article 120(b)(1)(B)* implicitly requires proof the sexual act **[*52]** in question was nonconsensual in order to meet the definition of "bodily harm" when the bodily harm alleged is the same as the sexual act itself, as is the case here. *See, e.g., United States v. Gomez, No. 201600331, 2018 CCA LEXIS 167, at *11 (N.M. Ct. Crim. App. 4 Apr. 2018)* (unpub. op.), *rev. denied*, *78 M.J. 108 (C.A.A.F. 2018)*. Moreover, this element of non-consent was expressly alleged in the text of the specification in Appellant's case.

At trial, the military judge gave the members instructions with respect to the requirement that the Government prove AM did not consent. In relevant part, he explained:

> "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal of [sic] 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 and the conduct at issue, shall not constitute consent.
>
> Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave **[*53]** consent or whether a person did not resist or ceased to resist only because of another person's action.
>
> The government has the burden to prove, beyond a reasonable doubt, that consent to the physical act did not exist. Therefore, to find [Appellant] guilty of the offense of sexual assault as alleged in the Charge and its Specification, you must be convinced, beyond a reasonable doubt, that [AM] did not consent to [Appellant] penetrating her vulva with his penis.
>
> Evidence concerning consent to the sexual conduct, if any, is relevant and must be considered in determining whether the government has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven every element of the offense.

The military judge was not asked to, and did not *sua sponte*, give any instructions on the concepts of capacity or competency to consent.

As detailed above, the tenor of trial counsel's presentation to the members was that Appellant took advantage of AM while she was unconscious—presumably **[*54]** as a result of her intoxication—and he asked the members in his closing argument to infer AM did not consent. Significantly, AM never testified she did not consent, and she said she had no recollection of whether she did or did not

consent. Likely as a result of being confronted with trying a case involving a victim who could not affirmatively tell the members she did not consent to the sexual conduct, trial nearly exclusively focused on AM's apparent inability to consent. Given the Defense's motion to preclude this precise trial strategy (and the military judge's ruling permitting trial counsel to employ the strategy), Appellant can hardly claim he was surprised at trial that the Government's case followed the route it did. The real questions are whether the military judge erred in his ruling and whether Appellant was convicted of an offense other than the one he was charged with. We answer both of those questions in the negative.

Because Appellant was charged with assaulting AM by causing her bodily harm, the Government was required to prove beyond a reasonable doubt—as the military judge instructed the members—that AM did not consent to the sexual conduct. Trial counsel sought to **[*55]** do so by presenting the improbability that an apparently non-responsive AM actually did consent by focusing on how others perceived her and then asking the members to infer from her non-responsiveness the absence of consent. Requesting members to draw inferences from such circumstantial evidence is a common aspect of court-martial practice. *See, e.g., United States v. Norman, 74 M.J. 144, 151 (C.A.A.F. 2015)*. *Article 120(g)(8)(C), UCMJ*, specifically notes "[l]ack of consent may be inferred based on the circumstances of the offense" and "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent," a concept we have previously endorsed. *10 U.S.C. § 920(g)(8)(C)*; *see United States v. Moore, 78 M.J. 868, 875 (A.F. Ct. Crim. App. 2019)*, *rev. denied*, *79 M.J. 203 (C.A.A.F. 2019)*. The military judge's instructions properly stated the Government's obligation in this regard, and trial counsel employed the entirely valid tactic of asking the members to draw a permissible inference from the circumstantial evidence which had been presented. Admittedly, direct evidence that AM did not consent to the sexual act is thin, but it was Appellant's burden to obtain AM's consent at the time of the sexual conduct, not AM's burden to manifest her lack of consent. *See McDonald, 78 M.J. at 381*.

The military judge correctly advised the members that consent "means **[*56]** a freely given agreement to the conduct at issue by a competent person."[17] The military judge did not give further instruction as to the definition of "competent," and trial counsel did not explicitly argue AM was not legally competent to consent, as he only used the word "competent" once in his argument when he repeated the military judge's definition of consent. Trial counsel argued that AM had not, in fact, consented to the sexual conduct, but he asked the members to reach this conclusion by focusing almost entirely on AM's external manifestations of her ability to consent. In doing so, trial counsel explicitly conflated the issue of AM's actual consent with her ability to consent, describing AM as "unaware and unable to resist;" "passed out in a closet;" "dead to the world;" and "unable to consent."[18]

We consider arguments by trial counsel in the context of the entire court-martial, and we do not "surgically carve out a portion of the argument with no regard to its context." *Baer, 53 M.J. at 238*. Reviewing his comments in this context, we conclude the overall weight of

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[17] The CAAF has recently endorsed this exact instruction. *United States v. McDonald, 78 M.J. 376, 381 (C.A.A.F. 2019)*.

[18] Although trial defense counsel did not object to these comments by trial counsel when they were made, we do not find the absence of objection operates to forfeit the issue in light of Appellant's unsuccessful pretrial motion to prevent trial counsel from making this very argument.

trial counsel's argument centered on the premise that AM had not actually consented to sexual conduct with Appellant. He arrived at this **[*57]** point by highlighting evidence of AM's apparent inability to consent, which he marshalled as circumstantial evidence that AM did not, in fact, consent. We see nothing infirm with the proposition that a person *did not* consent because that person *could not* consent by virtue of being incapable of consenting; therefore, inability to consent provides strong evidence of a person's lack of actual consent. Demonstrating a lack of ability to consent, however, does not relieve the Government of the burden to prove absence of consent when consent is an element of the charged offense, as is the case here. *Cf. United States v. Riggins, 75 M.J. 78, 84 (C.A.A.F. 2016)* (proof of victim's inability to consent by virtue of being placed in fear is not equivalent to proof of victim's non-consent).

We see no reason why the Government may not use evidence of inability to consent—ordinarily the focal point of a prosecution under *Article 120(b)(3)*, UCMJ—as circumstantial evidence of the lack of actual consent in a prosecution under *Article 120(b)(1)(B), UCMJ*. Therefore, we conclude evidence tending to show a person *could not* consent to the conduct at issue may be considered as part of the surrounding circumstances in assessing whether a person *did not* consent, **[*58]** and the military judge did not err in permitting trial counsel to employ this theory at Appellant's court-martial. Trial counsel's argument did not mislead the members or ask them to convict Appellant of any offense other than the one he was charged with committing.

Further, the military judge correctly instructed the members they were required to determine AM had not consented, and absent evidence to the contrary, we presume members follow a military judge's instructions. *United States v. Loving, 41 M.J. 213, 235 (C.A.A.F. 1994)* (citation omitted). Considering trial counsel's overarching argument that there was no evidence AM had consented, along with the military judge's accurate instructions and our recognition that there is a degree of logical evidentiary overlap in the *Article 120, UCMJ*, offenses, we are confident Appellant was convicted of the offense with which he was charged. We conclude Appellant was not denied due process, and we therefore decline to grant his requested relief.

E. Post-trial Punishment

We find ourselves faced with yet another case of an Airman who says his pay has been miscalculated as a result of military justice processes. Appellant's two-pronged complaint is that: (1) the Defense Finance and Accounting Service **[*59]** (DFAS) erroneously reduced his grade from E-5 to E-1 as of the last day of his court-martial (rather than 14 days later) and (2) he was later improperly placed in a no-pay status while he was still on active duty and serving his sentence. He argues this deprivation both unlawfully increased his sentence and subjected him to cruel and unusual punishment under the *Eighth Amendment*[19] and *Article 55, UCMJ, 10 U.S.C. § 855*, and he asks us to grant him "meaningful sentence relief." We conclude Appellant has not demonstrated any error of constitutional dimension with respect to his pay, and we decline to grant him relief.

1. Additional Background

Appellant's court-martial concluded on 22 March 2019, and we presume he immediately started serving his sentence to 45 days of confinement. According to a declaration he submitted to this court, Appellant asserts

[19] *U.S. Const. amend. VIII*.

DFAS reduced his grade to E-1 for pay purposes effective on 22 March 2019.[20] Because the convening authority did not earlier take action on the sentence, Appellant's reduction in grade should not have been effective until 5 April 2019, 14 days after his sentence was imposed, pursuant to *Article 57(a), UCMJ, 10 U.S.C. § 857(a)*. By operation of law, Appellant was required to automatically forfeit **[*60]** all pay and allowances starting the same day as this statutory reduction in grade, continuing for the remainder of the time he spent in confinement. *Article 58b, UCMJ, 10 U.S.C. § 858b*.[21] Appellant was released from confinement on a day in May 2019; we cannot determine the precise date from the record.[22] Once released, Appellant should have received his pay at the E-1 rate so long as he remained in a duty status—that is, until he started his appellate leave.

The convening authority took action on 15 July 2019, approximately two months after Appellant was released from confinement, and presumably Appellant began serving his sentence to three months of hard labor without confinement at some point thereafter.[23] Appellant's clemency request, submitted on 8 July 2019, made no mention of any concerns with his pay.

Appellant asserts that not only did DFAS erroneously demote him 14 days early for pay purposes, that service created an "advance debt" against his pay and began deducting partial payments from his pay, resulting in reduced pay.[24] For example, after deductions for his child-support payment and rent for his on-base house, Appellant's mid-month take-home pay in May 2019 was $11.34, and his end-of-month take-home **[*61]** pay was $254.85. Appellant's take-home pay for the months of April, June, July, and August 2019 ranged from approximately $940.00 in April 2019 to approximately $1,075.00 in August. Some of the variability in his pay was the result of Appellant's child support payments increasing, his change of residency to a state with no income tax, and changes he made to some of his discretionary deductions.

At some point in late August 2019, Appellant's enlistment apparently expired, resulting in Appellant being placed in a non-pay status in September and October 2019 despite the fact he remained on active duty in order to serve his court-martial sentence. Appellant received no take-home pay in his September mid-month and end-of-month pay or in his mid-October pay.[25]

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[20] Appellant submitted copies of his leave and earning statements to the court for the months of April through October 2019 in conjunction with his declaration. The April statement has an annotation which reads, "CHANGE GRADE 190322(101)." Appellant did not submit a leave and earning statement for March 2019, the month he entered confinement.

[21] Nothing in the record indicates Appellant asked the convening authority to waive these automatic forfeitures for the benefit of his dependents—his wife and daughter—during his time in confinement.

[22] If Appellant immediately entered confinement at the conclusion of his court-martial and remained confined the entire 45 days he was sentenced to, his release date would have been 6 May 2019. In one of the documents Appellant filed with this court, he noted he was released from confinement "in May 2019," but he does not further identify the specific date.

[23] Unlike confinement and forfeitures, a sentence to hard labor without confinement does not begin until the convening authority takes action. *Article 57(c), UCMJ, 10 U.S.C. § 857(c)*.

[24] The "advance debt" on Appellant's leave and earning statements was created as an entitlement (*i.e.*, added to his gross pay) in April 2019 in the amount of $1,396.86. Another advance debt was created in May 2019 for $88.27. Payments on this debt were then deducted from Appellant's monthly pay in varying amounts, ranging from $338.65 in April and $541.40 in May to $26.87 in September. According to his statements, Appellant paid $1,103.10 of this debt and still owed $382.03 as of the end of September 2019.

[25] Despite being in what Appellant refers to as a "no pay" status in September, DFAS did create an entitlement for his regular pay for that month but—after deducting various amounts, such as child support and taxes—placed the

In his declaration, Appellant asserts he repeatedly raised his concerns to his first sergeant beginning in the middle of May 2019. Appellant says he sought off-duty employment despite working 12-hour shifts seven days a week during his period of hard labor without confinement, resulting in stress and a lack of adequate sleep. Even with his second job, Appellant says he was unable to make his housing payments for his on-base house or **[*62]** pay child support for his daughter.[26] Exacerbating this situation, Appellant lost his military healthcare benefits, resulting in his wife and daughter being unable to obtain prescribed medications.

On 16 October 2019, Appellant filed a complaint under Article 138, UCMJ, *10 U.S.C. § 938*, and he received the back pay he was due in two payments which were issued on 24 and 31 October 2019. In this complaint, Appellant asserted he was still serving his hard labor without confinement at the time with "a couple weeks left" to serve. The record does not disclose when Appellant completed this punishment or when he was ultimately placed on appellate leave.

2. Law

We review de novo allegations of cruel and unusual punishment in violation of the *Eighth Amendment* and *Article 55, UCMJ*. *United States v. Wise, 64 M.J. 468, 473 (C.A.A.F. 2007)* (citing *United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001)*). In general, we apply "the Supreme Court's interpretation of the *Eighth Amendment* to claims raised under *Article 55*, except in circumstances where . . . legislative intent to provide greater protections under [*Article 55*]" is apparent. *United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000)* (citation omitted). "[T]he *Eighth Amendment* prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton **[*63]** infliction of pain.'" *United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)* (quoting *Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*).

Once released from confinement, a service member in duty status "may not be deprived of more than two thirds of his or her pay." *United States v. Stewart, 62 M.J. 291, 293 (C.A.A.F. 2006)*. *See also* R.C.M. 1107(d)(2), Discussion ("When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused."). Imposing total forfeitures on a service member in a duty status "raises issues" under both the *Eighth Amendment* and *Article 55, UCMJ*. *United States v. Warner, 25 M.J. 64, 66 (C.M.A. 1987)*.

Under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)* we have broad authority and the mandate to approve only so much of the sentence as we find appropriate in law and fact and may, therefore, grant sentence relief, without finding a violation of the *Eighth Amendment* or *Article 55, UCMJ*. *United States v. Gay, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*; *see United States v. Tardif, 57 M.J. 219, 223 (C.A.A.F. 2002)*. Unlike claims raised under *Article 55, UCMJ*, or the *Eighth Amendment*, we may not consider matters outside the record for a sentence-appropriateness review under *Article*

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remaining balance in a hold status.

[26] Appellant's reference to his unpaid rent relates to the months of September and October 2019, as rent is shown as being deducted from Appellant's leave and earning statements from April through August 2019. Appellant's child support payments were also deducted in all of those statements, as well as from his September 2019 pay.

66(c), UCMJ, unless those matters amplify information already raised in the record, such as that which is raised to the convening authority as part of a clemency request. *United States v. Jessie, 79 M.J. 437, 441-42 (C.A.A.F. 2020)*; *see also United States v. Matthews, No. ACM 39593, 2020 CCA LEXIS 193, at *13-15 (A.F. Ct. Crim. App. 2 Jun. 2020)* (unpub. **[*64]** op.).

3. Analysis

Appellant's complaint essentially points to two discrete pay-related events. First, he asserts DFAS demoted him 14 days early, resulting in him being paid at the E-1 rate instead of the E-5 rate for the period of 22 March 2019 through 5 April 2019. Second, he asserts his pay was improperly withheld in September and October 2019 due to being placed in a no-pay status.

With respect to the first allegation, we have carefully reviewed Appellant's complaint and the matters he submitted to this court, and we conclude Appellant has not adequately demonstrated a factual basis to support his claim such that we could either find error or assess what, if any, relief is warranted. Appellant's leave and earning statement includes the annotation "CHANGE GRADE 190322(101)," which tends to support Appellant's claim that his reduction to E-1 occurred—for pay purposes, at least—on 22 March 2019. Appellant, however, did not submit any documentation showing what, if any, impact this had on his March 2019 pay. Appellant's April and May 2019 leave and earnings statements establish advance debts totaling just under $1,500.00, but nothing in those statements or any of the other documentation **[*65]** submitted by Appellant explains what that debt was for. Although some amount of that debt was possibly attributed to recouping pay Appellant may have received at the E-5 rate between 22 March 2019 and 5 April 2019, we think it is more likely the advance debt reflects recoupment of the pay Appellant received from 5 April 2019 through his release from confinement—a period of time in which Appellant continued to receive pay and allowances, all of which was to be forfeited by operation of law.[27]

Appellant's base pay in his April statement is shown as $1,166.19, while each subsequent statement shows his base pay as $1,680.90—a difference of just over $500.00. It is possible that $500.00 difference reflects a recoupment of pay Appellant received at the E-5 grade in March 2019, but we simply cannot tell based upon the information Appellant has provided. We also note Appellant continued to receive his housing allowance of $841.00 while he was in confinement, and we detect no efforts by the Government to recoup that allowance, even though it was subject to forfeiture under the UCMJ. As a result of the foregoing, we are unable to determine whether Appellant was actually deprived of any pay by virtue **[*66]** of DFAS assigning him a date of rank of 22 March 2019, much less how much pay he was deprived of.

Importantly, Appellant concedes he was eventually paid his back pay in full, although not until late October 2019. We also note that rather than completely stop Appellant's pay while he was subject to automatic and total forfeitures for nearly all of April 2019, DFAS apparently created an advance debt which allowed Appellant to gradually pay off his forfeitures over a series of monthly installments. This, in turn, allowed him to meet

[27] The military judge advised the members that the monthly base pay for an E-1 at the time of Appellant's court-martial was $1,680.90. At that rate, Appellant would have forfeited approximately $1,400.00 in base pay for the period of 5 April through the end of the month, which is nearly exactly the amount of the advance debt Appellant was assigned for April: $1,396.86.

his child support, housing rental, and other financial obligations in April despite being subject to total forfeitures for nearly the entire month. Because we cannot determine what harm Appellant actually suffered, he has failed to demonstrate he was subjected to any punishment due to DFAS's annotation of the change in his date of rank. We therefore cannot conclude he suffered cruel and unusual punishment warranting relief.

Appellant's lack of pay in September and October 2019 is slightly more straightforward. His September 2019 leave and earning statement indicates he entered a "held pay" status on the first of that month. Appellant still received his base **[*67]** pay, his basic allowance for subsistence, and his housing allowance. His child support, taxes, and several other expenses were deducted from his pay and allowances, and the remainder was withheld based upon the "held pay" status, which meant Appellant received no take-home pay. The October 2019 statement Appellant submitted is a mid-month statement with no detail other than that his net mid-month pay was zero; because of this lack of detail, we cannot determine whether Appellant's child support payment was not paid as he alleges. In any event, Appellant received less pay than he was entitled to beginning with his mid-month pay in September through the end of October when his pay issues were apparently reconciled.

While the Government concedes we have jurisdiction regarding the 14-day grade-reduction issue, it objects to our consideration of Appellant's September and October pay problems under the theory they are collateral to Appellant's conviction. *See, e.g.,* United States v. Buford, 77 M.J. 562, 566 (A.F. Ct. Crim. App. 2017). In *Buford*, the appellant was released from confinement and elected to take his accrued leave and receive his pay and allowances during that leave then start his appellate leave afterwards. *Id. at 563-64*. The appellant there never received **[*68]** his pay and he complained to this court his non-payment improperly increased his sentence, a claim we concluded was unrelated to the legality or appropriateness of an approved court-martial sentence and therefore outside of our *Article 66(c), UCMJ*, authority to grant sentence relief. *Id. at 565*. In this case, however, Appellant asserts his deprivation of pay amounted to violations of the *Eighth Amendment* and *Article 55, UCMJ*, matters which we do exercise jurisdiction over. Appellant's pay issues also bear a more direct nexus to his sentence than was the case in *Buford*, as Appellant's term of enlistment was extended for the purpose of him serving out his sentence to hard labor without confinement, and Appellant was still on duty and serving his court-martial sentence when he was denied pay. In addition, Appellant was serving that punishment in September and October of 2019 due to the timing of the convening authority's action, which occurred three and a half months after Appellant's court-martial. Thus, we conclude we do have jurisdiction over Appellant's complaint.

Although we have jurisdiction, we do not find a violation of either the *Eighth Amendment* or *Article 55, UCMJ*. In the context of a prisoner in confinement, the Supreme **[*69]** Court has held an *Eighth Amendment* violation requires an objectively, sufficiently serious deprivation resulting in "the minimal civilized measures of life's necessities." *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* (quoting *Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)*. In addition, the prison official causing the deprivation must have a "sufficiently culpable state of mind." *Id.* (quoting *Wilson v. Seiter, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)*. Finally, we have required military prisoners to exhaust administrative grievance procedures as well as

seek relief under *Article 138, UCMJ*. *Lovett, 63 M.J. at 215*. Although Appellant was not in confinement when he was denied his pay, we still assess whether the person or persons inflicting the alleged harm had a culpable state of mind, which is to say the degree to which the harm was intended or recklessly permitted.

In this case, Appellant does not allege his pay was intentionally withheld in order to cause him to suffer. Rather, he argues the Government—specifically his unit leadership—displayed culpable indifference to his plight. The matters Appellant submitted to this court, however, somewhat undercut this claim, as they demonstrate more of a shortage of capability than of concern. From his submission, it is apparent Appellant's first sergeant and finance office personnel were engaged in trying to reconcile his pay **[*70]** issues, albeit ineffectually. Ultimately, the issue was resolved once Appellant made a complaint under Article 138, UCMJ, one indication of the wisdom of requiring complainants to first use that avenue before seeking judicial redress. Although we do not diminish the stressful challenge Appellant faced in maintaining his household without pay from the middle of September 2019 through the end of October 2019, we do not find that this amounts to punishment running afoul of societal decency or constituting unnecessary and wanton infliction of pain. We also note Appellant apparently received all the pay he was entitled to at the end of October 2019, and he has not alleged the denial of his pay for a month and a half has had any enduring impact on him—strong evidence Appellant was not denied "the minimal civilized measures of life's necessities." Based on the evidence before us, Appellant's pay troubles were rooted not in ill intent but in the unfortunate failure of finance and personnel officials to properly pay an Airman involved in the military justice system. This is insufficient to rise to the level of a violation of the prohibition of cruel and usual punishment under the *Eighth Amendment* and Article **[*71]** *55, UCMJ*.

Appellant's allegations regarding his pay issues were not referenced in his clemency submission to the convening authority and were only raised for the first time in his appeal to this court. For the reasons set out in *Matthews*, we cannot consider Appellant's submissions on the matter in our review of his sentence under *Article 66(c), UCMJ*. *See* unpub. op. at *15.

F. Post-Trial Delay

Appellant was sentenced on 22 March 2019. The convening authority took action on 15 July 2019, and the case was docketed with this court on 1 August 2019. Appellant filed his initial assignments of error 329 days later on 25 June 2020 after requesting and receiving eight enlargements of time over the Government's objection. The Government filed its answer one month later, on 24 July 2020, to which Appellant replied on 29 July 2020.

"We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)* (citing *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)*; *United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003))*. In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the Court of Criminal Appeals does not render a decision within 18 months of docketing. *63 M.J. at 142*. Where there is such a delay, we examine the four factors set forth **[*72]** in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Moreno, 63 M.J. at 135* (citing *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*; *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004))*. "No single

factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id. at 136* (citing *Barker, 407 U.S. at 533*).

This case exceeded the 18-month standard between docketing and appellate decision by just over one month. There are several factors explaining this delay. First, we note the record of trial is not insubstantial, including over 775 pages of transcript, 43 appellate exhibits, and several video recordings. Second, Appellant took nearly a year to file his assignments of error after requesting eight extensions. Third, Appellant asserted six errors, the careful consideration of which has resulted in a lengthy opinion from the court. In the face of these issues, we do not find egregious delay here, especially in light of the fact the bulk of the delay was at Appellant's behest.

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity **[*73]** of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. *63 M.J. at 138-39* (citations omitted). Appellant was released from confinement prior to the convening authority taking action on his case, so he has not suffered any oppressive incarceration as a result of appellate delay. Because our opinion does not result in a rehearing, Appellant's ability to prepare for such a hearing has not been impacted. *See id. at 140*. With respect to anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has not alleged any particularized anxiety or concern, and we do not discern such from our review of Appellant's case. Where, as here, there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious **[*74]** as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey, 63 M.J. at 362*. On the whole, we do not find the delay so egregious. *Id.*

Recognizing our authority under *Article 66(c), UCMJ*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif, 57 M.J. at 225*. After considering the factors enumerated in *Gay, 74 M.J. at 744*, we conclude it is not.

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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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 26, 2023.

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