IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private (E-2) **Matthew L. Coe** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20220052 USCA Dkt. No. _____/AR

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UNITED STATES, Appellee v. Private (E-2) **Matthew L. Coe** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20220052 USCA Dkt. No. _____/AR

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

Issue Presented

WHETHER APPELLANT'S CONVICTION IS LEGALLY SUFFICIENT BASED ON THE LOWER COURT'S STATUTORY INTERPRETATION OF ARTICLE 120(b)(2)(A).

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. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On February 1-3, 2022, a military judge sitting as a general court-martial found Appellant, Private (E-2) Matthew L. Coe, contrary to his plea, guilty of one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920. (R. at 114, 690; Charge Sheet). The military judge acquitted Appellant of one specification each of obstructing justice and false official statement. (R. at 690; Charge Sheet). The military judge sentenced Appellant to reduction to the grade of E-1, confinement for twenty-four months, and a dishonorable discharge. (R. at 742). On February 28, 2022, the convening authority elected to take no action on the findings or sentence. (Action). The military judge entered judgment on March 4, 2022. (Judgment). On August 17, 2024, the Army Court rendered a fractured 2-1 decision affirming the finding and sentence. (Appendix A). On September 12, 2023, Appellant requested reconsideration of the Army court's ruling *en banc* which the Court granted on December 6, 2023. On February 2, 2024, the Army Court again returned a fractured 6-3 decision affirming the finding and sentence on February 1, 2024. (Appendix B)

The Judge Advocate General of the Army designated the undersigned military counsel to represent Appellant, who hereby enter their appearance, and file a Supplement to the Petition for Grant of Review under Rule 21.

Reasons to Grant Review

This case raises the same question this Court recently considered in *United States v. Mendoza*, No. 23-0210/AR, 2023 CAAF LEXIS 699, at *1 (C.A.A.F. Oct. 10, 2023).[1] Again, this issue has caused a fractured opinion in the Army Court, this time acting *en banc*, as it did previously in *Mendoza* and in *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *14 (Army Ct. Crim. App. Apr. 27 2022) (mem. op.).

The majority opinion of the Army Court determined evidence of a high level of intoxication is simply circumstantial proof of sexual assault without consent, rather than proof of a separate statutory provision of sexual assault when the victim is incapacitated due to alcohol intoxication. That result renders every other statutory provision of Article 120(b) mere surplusage and allows for the government to avoid having to prove incapacitation to the standard set forth in *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016) and adopted by Congress in Article 120(b)(8)(A).

Moreover, the difference in opinion as to what is required to prove sexual assault without consent has caused judges on the Army Court to put dramatically different weight to different facts when conducting their legal and factual

[1] Following the oral argument in *Mendoza,* the Government cited the *en banc* opinion in this case as a supplemental citation to this Court.

sufficiency review. (Appendix A and B). This Court must sort this distinction out, or it will become a subjective result, where an appellant's case turns on which panel of the Army Court he draws.

Finally, this Court should take this case so that it can align military justice with Supreme Court case law. The United States Supreme Court recently made clear – an accused must be charged with the offense that is more specific to the crime he committed, the one that represents the "crux" of what made appellant's conduct criminal. Here, the crux of what made the conduct criminal was that the alleged victim was too drunk to consent, not that she did not consent in fact. *Dubin v. United States*, 599 U.S. 110 (2023)

Statement of Facts

For the Specification of Charge I, the government charged Appellant with a violation of Article 120, UCMJ:

> In that [appellant], did, at or near Fort Benning, Georgia, on or about 8 August 2021, commit a sexual act upon Private [RT], by penetrating Private [RT's] vulva with [appellant's] penis, without the consent of Private [RT].

(Charge Sheet).

In its opening, the government immediately emphasized the "severe[] intoxicat[ion]" of the alleged victim, Private First Class [PFC] RT, when Appellant penetrated her vagina with his penis. (R. at 115). Intoxication, and not a lack of

consent in fact, was the theme of the government's opening, with repeated references to PFC RT's intoxication, referencing her apparent "lifeless body" and state of being "too drunk to give consent" and "super drunk." (R. at 115-20).

During its case-in-chief, the government called witnesses to describe an incident on August 8, 2021 of multiple soldiers, to include Appellant and PFC RT, the alleged victim, engaging in a group orgy at the beachhead of the Chattahoochee River near Fort Benning. (R. at 196; 199-200). Before any group sex occurred, PFC RT and appellant engaged in consensual oral and vaginal sex within the woods near the beach. (R. at 264; 302; 508). Afterward, appellant, PFC RT, and PV2 Jacob Foster began consuming liquor on the beach. (R. at 201; 265; 300; 505). Appellant, PFC RT, and PV2 Foster and multiple other Soldiers then engaged in group sexual acts. During the orgy, when another female, also participating in the orgy broke off from the group, the alleged victim knee crawled over to her to encourage her to continue participating. (R. at 584).

However, at one point when she was having sex with a different member of the group, the alleged victim stated words to the effect of "I don't want this." (R. at 269). However, this it was not clear to anyone that it was about Appellant as Appellant was having sex with a different member of the orgy at the time. (R. at 269).

The alleged victim had no memory of the vaginal penetration by Appellant and said she was blacked out from consuming alcohol. (R. at 268-69). She also admitted that it was possible she indicated that she consented to sexual acts, however was unable to remember doing so because she was drunk. (R. at 336).

The government returned to and repeatedly emphasized its theme of intoxication in closing argument. The government quoted from Appellant's statement and repeatedly asserted that appellant believed PFC RT was "super drunk." (R. at 649-57). The government stated its theory of non-consent is that PFC RT could not consent "when she is in this state." (R. at 652).

The defense noted in its closing "too incapacitated to consent is a charge, but that's not what was charged here." (R. at 668). The defense focused its argument on the government's failure to prove actual non-consent and the inadequacy of proving incapable of consent for the charged offense. (R. at 673-75). The defense also raised the issue that convicting appellant for his charged offense under the government's intoxication theory lowers the government's burden and renders the incapable of consent section of the UCMJ a dead letter. (R. at 676-77).

WHETHER APPELLANT'S CONVICTION IS LEGALLY SUFFICIENT BASED ON THE LOWER COURT'S STATUTORY INTERPRETATION OF ARTICLE 120(b)(2)(A).

Not consenting and not being able to consent are two separate and distinct legal concepts. Sexual assault without consent criminalizes committing a sexual act upon another person "without the consent of the other person." Article 120(b)(2)(A), UCMJ. Sexual assault while incapable of consenting criminalizes a sexual act upon another person "when 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 person." Article 120(b)(3)(A), UCMJ.

In *Riggins*, this Court warned that the government's requirement to prove a set of facts that resulted in an alleged victim's legal inability to consent was *not* the equivalent of the government bearing the affirmative responsibility to prove the alleged victim did not, *in fact*, consent. *United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016).

To prove sexual assault without consent, the government was required to show 1) Appellant committed a sexual act upon PFC RT; and 2) Appellant did so without the consent of PFC RT. Manual for Courts-Martial, United States, pt. IV, para. 60.b.(2)(d) (2019 ed.) (MCM). The government did not charge, and therefore did not notify Appellant, of an offense of sexual assault while incapable of consent due to impairment by any intoxicant. This uncharged offense would require the government to prove: 1) Appellant committed a sexual act upon PFC RT; 2) PFC

RT was incapable of consenting to the sexual act due to impairment by any intoxicant; and 3) Appellant knew or reasonably should have known of that condition. MCM, pt. IV, para. 60.b.(2)(f).

In *Roe*, the Army Court concluded Roe's due process rights were not violated under similar circumstances as Appellant. *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *14 (Army Ct. Crim. App. 27 Apr. 2022) (mem. op.). The majority, over a strong dissent from Senior Judge Walker, found charging *without consent* does not preclude the government from introducing intoxication evidence as circumstantial evidence of the lack of actual consent. *Id*. at 16. However, the majority deferred on deciding whether *without consent* "can be proved *solely* through showing an inability to consent because of intoxication or some other reason." *Id*. at 17 (emphasis in original). Judge Walker again published a dissent in this case raising many of the same concerns as Roe, and this time joined by two other members of the Army Court. (Appendix B).

Senior Judge Walker found the government's presentation of its case and theory focused on intoxication and lack of memory of the victim, this rendered the other theories of liabilities outlined in Article 120(b), UCMJ, as merely superfluous, and eviscerated the need for any other theories of liability, and runs contrary to this Court's precedent. (Appendix B) citing *United States v. Sager*, 76 M.J. 158 (C.A.A.F. 2017)) (Walker, J., dissenting).

This court should find charging Appellant with sexual assault *without consent* but relying exclusively on evidence of an *inability to consent* violated Appellant's due process rights. As the defense argued at closing, the government's theory and evidence sought to convict Appellant based solely on PFC RT's level of intoxication.[2] Both the majority and dissent in *Roe* agree that it is the government's burden to affirmatively prove the victim did not consent for a charge of sexual assault *without consent*. Just like in *Roe* and *Mendoza,* the evidence of intoxication does not circumstantially support a finding of affirmative non-consent. Instead, the government proceeded throughout trial on the theory that PFC RT could not consent due to her intoxication, and therefore the charged sexual act was implicitly without consent. This tactic, in the context of Appellant's case, impermissibly resulted in Appellant's conviction without the government having to prove affirmative non-consent or the additional knowledge element for incapable of consent. Indeed, the purported victim admitted that she may have consented to sexual acts but was unable to remember doing so.

The government prosecuted Appellant on an uncharged theory where the alleged victim was incapable of consent when the government only notified

[2] While the government introduced some evidence concerning PFC RT expressing non-consent, such expressions were not in the context of sexual acts between appellant and PFC RT. (R. at 269; Pros. Ex. 22).

appellant of actual, affirmative non-consent. As a result, this violated Appellant's due process right to fair notice.

Further, allowing this overlapping charging scheme has caused appellate judges to read the record for factual sufficiency as if they were reading the facts in dramatically different cases.

Judge Morris found the conviction "against the weight of the evidence." (App. Ex A, at 5). Here, the alleged victim agreed to participate in a group orgy by the river. She had consensual sex with appellant before drinking heavily and before others became involved. (App. Ex. A, at 7). When another female, also participating in the orgy broke off from the group, the alleged victim knee crawled over to her to encourage her to continue participating. (App. Ex. A, 9). At one point, after the sex had ended, she appeared to express remorse that she had cheated on her boyfriend, and most importantly, she conceded that she "could have said yes to the group." (App. Ex. A, at 9)

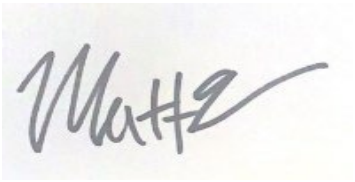
The only indicia of non-consent highlighted by the majority was the alleged victim making the statement "I don't want this," and then telling the forensic nurse that she told "them," "no, stop." (App. Ex. A, at 3). The majority takes these non-specific statements that were not about Appellant and spins it as some level of non-consent and when combined with the intoxication evidence gets to proof beyond a reasonable doubt.

The dissent, on the other hand, points out, the "I don't want this" statement was made while the alleged victim was having sex with someone else – not Appellant. (App. Ex. A, at 7). Those who observed the sex with Appellant did not intervene because, "at least from their perspective it appeared the victim was enjoying the exchange." (App. Ex. A, at 8).

The majority and dissent in the Army Court look at the facts differently because they have a different view of what is required to meet the elements of the offense. For the majority mere indicia of non-consent, even if it was not proof beyond a reasonable doubt, even if it was not specific to Appellant, despite evidence of enthusiastic participation, combined with intoxication evidence is enough. For the dissent, only proof of lack of consent beyond a reasonable doubt will suffice. This Court should take this case.

Conclusion

Based on the foregoing, appellant requests this Honorable Court grant his petition for review.



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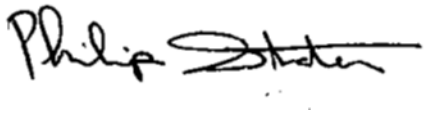

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Coe, Crim App. Dkt. No. 20220052, USCA Dkt. _____/AR was electronically with the Court and Government Appellate Division on March 26, 2024.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
PENLAND, ARGUELLES,[1] and MORRIS
Appellate Military Judges

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

ARMY 20220052

Headquarters, U.S. Army Maneuver Center of Excellence
Trevor I. Barna, Military Judge
Colonel Javier E. Rivera, Staff Judge Advocate

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 O. Pottinger, JA (on brief).

17 August 2023

SUMMARY DISPOSITION

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

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.

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

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]

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 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 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.

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[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.

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 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: (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 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 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 also

admitted that he knew it was wrong to engage in sexual activity with her because she was drunk.").[3]

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.

Judge MORRIS dissenting:

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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 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."

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) 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 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 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 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 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. 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 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 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 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, 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 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 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 of multiple offenses to prove lack of consent.

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

FOR THE COURT:

JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*[1]

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

ARMY 20220052

Headquarters, U.S. Army Maneuver Center of Excellence
Trevor I. Barna, Military Judge
Colonel Javier E. Rivera, Staff Judge Advocate

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

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

1 February 2024

OPINION OF THE COURT ON RECONSIDERATION

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)(2)(A), Uniform Code of Military Justice, 10 U.S.C. §§ 920(b) (2020) [UCMJ]. The military judge sentenced appellant to be dishonorably discharged, reduced to the grade of E-1, and confined for twenty-four months. The convening authority took no action on the sentence.

Appellant requests reconsideration of our decision affirming the findings and sentence. Upon reconsideration, we again affirm the findings and sentence, and additionally clarify three distinct points: (1) because appellant was both charged and

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

convicted of a violation of Article 120(b)(2)(A), sexual assault without the consent of the other person, there was no due process violation in the exercise of the government's charging discretion; (2) in considering whether appellant's due process rights were violated because the evidence was factually insufficient to support his conviction, we can consider evidence that the victim was incapable of consenting due to impairment by intoxication as *circumstantial* evidence that she did not actually consent; and (3) after reviewing the entire record, we find the evidence in this case was factually sufficient to support appellant's conviction.

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 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 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 several 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 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 thing she remembered, the victim testified:

> V: Next thing I remember is looking up with my clothes off, looking at the *defendant* 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 don't 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: (1) he told the Army Criminal Investigation Command (CID) agent that he did not look at the 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 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

A. No Due Process Violation in Government's Charging Decision

In *United States v. Tunstall*, the Court of Appeals for the Armed Forces (C.A.A.F.) reiterated that "[t]he 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." 72 M.J. 191, 196 (C.A.A.F. 2013), citing *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). Likewise, in *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011), the CAAF held "the Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged."

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's charging decision 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, non-charged theory of sexual assault (upon a person who is incapable of consenting due to impairment by intoxicant).

There is a difference, however, between: (1) alleging a due process violation based on being convicted of an offense different than what was charged; and (2) asserting a violation of due process because the evidence adduced at trial was factually insufficient to support the conviction. Applied in this case, given the military judge's finding that appellant was guilty of a violation of Article 120(b)(2)(A), the offense that was charged, appellant's contention that he was "convicted" under a different theory of sexual assault is simply without merit. Put another way, because appellant was informed of the sexual offense charged and the applicable legal theory – without consent – and then convicted of that offense, his due process challenge to the government's charging decision must fail. *Cf. United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975) ("[I]t 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.]").

B. Evidence of the Inability to Consent May be Considered as Circumstantial Evidence of Affirmative Lack of Consent

Given that the government elected to charge this case under Article 120(b)(2)(A), it was required to prove that appellant committed a sexual assault on the victim without her consent. In pertinent part, Article 120 defines "consent" as "a freely given agreement to the conduct at issue by a competent person," and expressly provides that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." *Manual for Courts-Martial*, pt. IV, ¶60.a(g)(7)(A)/(C) (2019).

We start by acknowledging that there is a conceptual difference between affirmatively proving that a victim did not consent, and proving facts that show her legal inability to consent. *See United States v. Weiser*, 80 M.J. 635, 640-41 (C.G.

Ct. Crim. App. 2020) (holding that the government's affirmative responsibility to prove that the victim did not, in fact, consent is distinct from the government's burden to prove a victim's legal inability to consent), *citing United States v. Riggins*, 75 M.J. 78, 84 (C.A.A.F. 2016). On the other hand, and as is the case with any disputed factual issue, the government may prove a victim's lack of consent with either direct or circumstantial evidence. *See, e.g. United States v. Flores*, 82 M.J. 737, 743 (C.G. Ct. Crim. App. 2022) (holding that Article 120(g)(7)(c) "expressly permits a trier of fact to conclude not only direct evidence of lack of consent – such as a putative victim's own account – but circumstantial evidence as well"); *United States v. Salamanca*, 2022 CCA LEXIS 635 at *22 (A.F. Ct. Crim. App. 4 Nov. 2022) ("The Government was permitted to use circumstantial evidence to prove KB's lack of consent, and a rational factfinder could conclude from this evidence that she did not."); *United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248 at *29 (Army Ct. Crim. App. 27 April 2022), (dissent) ("However, the government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent.").

As such, in light of Article 120(g)(7)(C)'s explicit prescription that we are to consider *all* the surrounding circumstances in determining whether a person gave consent, we also agree with our colleagues in *Roe* that "[b]y 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." *Id.* at *14. Not surprisingly, based on our research it appears that every other service-level appellate court to consider this issue has reached the same conclusion.

For example, in *Weiser,* the Coast Guard Court of Criminal Appeals held that "the 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 [the victim] actually consented." 80 M.J. at 642. Likewise, in *United States v. Williams*, the Air Force Court of Criminal Appeals squarely held that:

> 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.

2021 CCA LEXIS 109 at *57 (A.F. Ct. Crim. App. 12 Mar. 2021) (emphasis in original). Likewise, and again directly on point, in *United States v. Flores,* the Coast Guard Court of Appeal held:

> First, presenting evidence of the effects of alcohol on a putative victim is permissible in a "did not consent" case and does not, by itself, transform it into a "could not consent" case—as long as we can be satisfied that the Government prosecuted the case under a "did not consent" theory. In determining whether a putative victim actually consented, the trier of fact is entitled to consider "[*a*]*ll* the surrounding circumstances," including evidence of alcohol consumption.

82 M.J. 737, 744 (C.G. Ct. Crim. App. 2022). *See also United States v. Gomez*, 2018 CCA LEXIS 167 at *11-12 (N.M. Ct. Crim. App. 4 Apr 2018) (holding that military judge correctly applied the proscription of Article 120(g)(7)(C) in ruling that "evidence that [victim] was drinking is part of those surrounding circumstances and should be allowed in on the use of consent"); *United States v. Coovert*, 2021 CCA LEXIS 355 at *29-30 (A.F. Ct. Crim. App. 21 July 2021) (same); *United States v. Johnson*, 2023 CCA LEXIS 330 at *34-35 (A.F. Ct. Crim. App. 9 Aug. 2023) ("We see no reason why the Government may not use evidence that GH was asleep—ordinarily the focal point of a prosecution under the theory of while asleep—as circumstantial evidence of the lack of actual consent in a prosecution under a theory of without consent.").

Finally, and for all of the same reasons, just because the fact pattern involves an allegedly intoxicated victim, the government does not violate appellant's due process rights by exercising its discretion to charge him under an Article 120(b)(2)(A) lack of consent theory. Rather, and as noted above, if the government does in fact choose to charge such a case under Article 120(b)(2)(A), it is required to affirmatively prove, by direct and/or circumstantial evidence, that appellant committed a sexual assault on the victim without her consent.

C. The Evidence in this Case Was Factually Sufficient to Support the Conviction

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) 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.

With respect to this case, in addition to the victim's intoxication level, which as noted above we may consider as circumstantial evidence, there is a multitude of additional evidence, both direct and circumstantial, that the victim did not actually consent. Among other things, the victim testified that she told appellant, "I don't want this" before they had sex for the second time. She also told the sexual assault nurse that she told "them" "no, stop."

Likewise, although they pertain primarily to the victim's level of intoxication, appellant's multiple admissions nevertheless constitute circumstantial evidence that he knew the victim did not willingly consent to the charged sex act. Among other things: (1) he told the CID agent he did not look at the 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 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." *Cf. United States v. Smith*, 83 M.J. 350 (C.A.A.F. 2023) ("[A]lthough 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 also admitted that he knew it was wrong to engage in sexual activity with her because she was drunk.").

Moreover, 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 also 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 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 witness 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).

As such, we emphasize that our role in a factual sufficiency review is *not* to substitute ourselves for the factfinder and decide what verdict we would have rendered. To the contrary, Article 66(b)(ii) expressly cabins our discretion by requiring that we give deference to both: (1) the fact that the factfinder saw and heard the witnesses and other evidence; and (2) the military judge's findings of fact.

After reviewing the entire record, to include the evidence supporting the guilty verdict as set forth immediately above, and giving deference to both: (1) the military judge who was able to see and hear each witness, including the victim, as they testified; and (2) the military judge's implicit finding of fact that the victim did not affirmatively consent, we respectfully disagree with our dissenting colleagues that the finding of guilt was "against the weight of the evidence."

CONCLUSION

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

Chief Judge SMAWLEY, Senior Judge PENLAND, Senior Judge FLEMING, Judge HAYES, and Judge PARKER concur;

WALKER, Senior Judge, joined by MORRIS, Judge, and POND, Judge, dissenting, in part:

I agree with the majority that there was no due process violation in the government's charging decision and in the holding that evidence of an inability to consent may be considered as circumstantial evidence of a lack of consent. Where I part ways with the majority is in the holding that the evidence in this case was factually sufficient. I find the charged offense of sexual assault without consent in violation of Article 120(b)(2)(A), UCMJ, both legally and factually insufficient and would set aside appellant's finding of guilty and sentence.

This court is obligated to review both the legal and factual sufficiency of each court-martial conviction and only affirm those findings of guilty that are correct in law and fact. Article 66(d)(1)(A), UCMJ. "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." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (cleaned up). As the majority properly recognized, the test for factual sufficiency, upon appellant's specific showing of deficiency in proof, is whether "the Court is clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii). 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). Citing *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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).

The charged offense requires the government to affirmatively prove the victim *did not consent,* and the government failed to satisfy its burden on this essential element. I do not find that a rational trier of fact, even in the light most favorable to the government, could have found all the essential elements of the charged offense beyond a reasonable doubt based upon the evidence the government presented at trial. There was no dispute at trial that sexual intercourse occurred between the victim and appellant on the date charged. Appellant admitted that he engaged in sexual intercourse with the victim by penetrating her vulva with his penis late in the evening after she had consumed alcohol and exhibited signs of intoxication. Thus, the issue of contention at trial was whether the sexual intercourse occurred without consent.[2] During his statement to law enforcement, appellant explained that the victim never verbally or physically manifested a lack of consent to the sexual intercourse. He also stated that the victim never made any statements during the

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[2] "'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 issues 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].

sexual intercourse with another soldier immediately preceding his sexual intercourse with the victim. Rather, appellant admitted that she exhibited signs of intoxication, and he knew she was incapable of consenting based upon her level of intoxication. The victim testified that she had no memory of the sexual intercourse with appellant and was thus unable to provide any affirmative evidence of a lack of consent.

The government cannot rely exclusively on the victim's lack of memory due to intoxication as a proxy for satisfying its burden to prove a lack of consent, which is what occurred in this case. I concur with the majority, and sister service court opinions, that evidence of consumption of alcohol and a victim's level of intoxication may be considered by the fact-finder as part of the relevant "surrounding circumstances" in determining whether a victim actually consented. Where I part ways with the majority is on the viewpoint that evidence of an inability to consent is *strong evidence* that the victim did not, in fact, consent. *See United States v. Roe*, ARMY 20200144, 2022 CCA LEXIS 248 at *29 (Army Ct. Crim. App. 27 April 2022).

While the majority cites several sister service court cases in support of its holding that evidence of intoxication is *strong* circumstantial evidence of a lack of consent, each of those cases involved evidence of the victim's lack of consent in addition to the victim's alcohol consumption, which is absent from this case. *See Weiser*, 80 M.J. 635, 640-41 (C.G. Ct. Crim. App. 2020) (the victim testified at trial that she was intoxicated at the time of the sexual assault but recalled the sexual assault acts and testified as to her lack of consent to the sexual acts), *United States v. Flores*, 82 M.J. 737, 743 (C.G. Ct. Crim. App. 2022) (while the victim did not recall events immediately preceding the sexual assault, the victim recalled appellant performing oral sex on her and immediately removing herself from the room, and testified she was convinced she did not consent to sexual acts with appellant). In *United States v. Williams*, the government argued that appellant took advantage of the victim while she was unconscious, likely due to her alcohol consumption, and therefore she could not consent. I find that factual scenario distinguishable from a victim who is conscious and the government leverages the victim's level of intoxication and lapse in memory as the sole evidence of a lack of consent. 2021 CCA LEXIS 109 at *53-56 (A.F. Ct. Crim. App. 12 Mar. 2021).

The government bears the burden of providing affirmative evidence, either direct or circumstantial, of the victim's lack of consent. While all the surrounding circumstances must be considered by the factfinder in determining whether the government proved the essential element of the victim's lack of consent, the surrounding circumstances in this case do not support a lack of consent, but rather an *inability to consent,* which is a distinct sexual assault offense with separate and distinct elements. *United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (holding that assault consummated by a battery was not a lesser included offense of sexual assault and abusive sexual contact by placing in fear); *see also United States v.*

Weiser, 80 M.J. 635, 640-41 (C.G. Ct. Crim. App. 2021) (holding sexual assault by bodily harm requires proof "the victim did not, in fact, consent" and is distinct from the victim's "legal inability to consent"). The evidence before the factfinder was that the victim was coherent and actively participating in sexual acts with a female and then initiating sexual acts with a male openly where observers could witness the acts. Witnesses observed the victim exhibiting signs of intoxication at this point. But, those same witnesses testified the victim was actively participating in, and even initiating, sex acts and providing a freely given agreement to those sex acts through words and actions.

The victim testified that she recalled consuming alcohol and then could not recall most of the remainder of the evening. She did recall, however, a point in which she was naked and another soldier was on top of her and looking over at appellant, who was engaged in sexual intercourse with another female, and stating "I do not want this." There was no evidence of any other witness hearing or acknowledging this statement, including appellant. The next memory the victim possessed was being in a vehicle. The victim did not recall engaging in sexual intercourse with appellant after her expression of lack of consent of another Soldier engaging in sexual acts with her. The victim's lack of memory is not evidence of a lack of consent. At best, the victim's lack of memory, due to intoxication by alcohol, is circumstantial evidence of an *inability to consent*. I do not find that a victim's affirmative lack of consent to sexual intercourse with one individual supports any inference that the victim then subsequently did not consent to sexual intercourse with appellant. Just as a factfinder is not authorized to infer that consensual sexual intercourse with an individual earlier in the evening permits an inference that a victim must have consented to subsequent sexual intercourse with that same individual or even another individual. Each sexual act is separate and distinct and stands alone as to the issue of consent.

Law enforcement's interrogations of appellant focused mainly on the victim's level of intoxication and inability to consent. When questioned about whether the victim manifested any lack of consent, appellant denied the victim verbally or physically exhibited a lack of consent. At the same time, appellant also admitted the victim did not verbally or physically exhibit affirmative consent. Given the evidence elicited at trial, I do not find that a rational trier of fact could find the government met its burden of proving the element of lack of consent beyond a reasonable doubt in this case.

Further, I also find that the charged offense is factually insufficient. Even after carefully reviewing the evidence and taking into consideration that the military judge personally observed the witnesses, I am clearly convinced that the finding of guilty for sexual assault without consent was against the weight of the evidence presented in this case. 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 neither sufficient direct nor circumstantial evidence of the victim's lack of consent to the sexual intercourse. The victim testified she had absolutely no memory of any sexual intercourse with appellant subsequent to the sexual act in which she indicated she "did not want this."

In fact, the victim has a lack of memory of several hours from the night of the charged offense. The victim testified she recalled going to the location with friends, having consensual sexual intercourse with appellant, and then consuming alcohol. The victims' only other memory from that night was a moment in time when she indicated a lack of consent to a sex act, with someone other than appellant, while appellant was engaged in sexual intercourse with another female. Even more concerning is the military judge's confusion about this point. In response to a defense statement concerning the victim's testimony, the military judge replied the victim "did testify as such. That did come up when she made eye contact with Private Coe at some point." However, the victim did not testify she made a statement directly to appellant. The victim testified only that she looked at appellant when she stated "I do not want this" but never testified she made eye contact with appellant at that moment or that he acknowledged her statement. 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.

The victim testified her next memory was being in a vehicle and being taken back to her barracks room. Despite declaring that she blacked out during the approximately 15-minute period of sexual acts with appellant and two other individuals, the victim testified "she knew what happened," had "cheated on her boyfriend," and wanted to contact a male for whom she had feelings and dated briefly. On cross-examination, the victim acknowledged that she could have said "yes to the group." The government is required to prove a lack of consent temporally linked to the sexual act. In this case, the victim cannot provide any evidence of her lack of consent at the time of the sexual act. While there was evidence the victim exhibited some signs of intoxication prior to sexual intercourse with appellant, I do not find such circumstantial evidence sufficient to satisfy the government's burden of proving lack of consent beyond a reasonable doubt. Further, the victim engaged in consensual sexual acts up to the point of indicating she did not want sexual intercourse with a particular male that was not appellant. At that point, the victim was conscious, coherent, and able to verbally express a lack of consent. There is no evidence the victim continued to consume alcohol after that point, just that she cannot recall what occurred from that point until she was placed into a vehicle. Sometime in that period, appellant engaged in sexual intercourse with the victim. He admitted to law enforcement that the victim was exhibiting signs of intoxication and that he knew she was drunk but did not provide any information that the victim expressed any verbal or physical lack of consent. While verbal or

physical resistance is not required for the government to prove a lack of consent, it is evidence that can be relevant in a case in which a victim has no recollection of the sexual intercourse.

The majority places a lot of emphasis on appellant's statements to law enforcement during a prolonged and highly suggestive interrogation. Many of the statements relied upon by the majority were words initiated by the CID agent as he pressured appellant to agree with his version of events. The CID agent used highly suggestive and manipulative tactics and refused to accept appellant's denials or alternate version of the facts when appellant attempted to provide his viewpoint on what transpired. Further, the agent told appellant if he 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." The majority also relied upon appellant's statements to another soldier that he should have waited to have sex with the victim and from a pretext communication about the victim's level of intoxication as evidence of his consciousness of guilt. While these statements may be relevant, they are not necessarily evidence of consciousness of guilt, but rather "[statements] from someone who knows they have acted inappropriately, but not criminally." *United States v. Prasad*, 80 M.J. 23 (C.A.A.F. 2020) (citation and internal quotations omitted). Further, it would have been difficult to ascertain when the line crossed into illegal sexual activity under these circumstances and certainly not enough to meet the government's burden of proving lack of consent beyond a reasonable doubt.

The government solely focused its case on the victim's *inability* to consent as opposed to her lack of consent from start to finish. In its opening statement, the government started by describing appellant penetrating the victim "as she lay there severely intoxicated on the banks of the Chattahoochee River." The focus of the testimony elicited from each witness who was at the river that day was about the victim's outward manifestations of intoxication and her *inability* to consent. The government's first piece of evidence was eliciting opinion testimony about alcohol poisoning from a Private who served as an EMT for a year prior to joining the Army. The government then presented testimony from no less than four additional witnesses who observed the victim that day and whose testimony focused on the victim's level of intoxication involving intermittent consciousness, slurred speech, vomiting, falling while attempting to walk, and emotional state. In closing argument, the government began by focusing on appellant's statements to law enforcement about his awareness of the victim's level of intoxication when he engaged in sexual intercourse with her and then proceeded to argue the testimony of witnesses who testified about their observations of the victim's outward manifestation of intoxication. The government did not use the victim's intoxication as merely a "surrounding circumstance" for the factfinder to consider as to the element of lack of consent, the government used it as the *only* circumstance of lack of consent. The government fails to satisfy its burden in doing so, and the finding of

guilty of sexual assault without consent is against the weight of the evidence the government presented in this case.

This court is bound by the government's decision to charge this case as a sexual assault without consent. I am convinced the finding of guilty for the theory of sexual assault, without consent, is against the weight of the evidence presented. 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 both legally and factually sufficient under that theory of liability.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court