

UNITED STATES AIR FORCE JUDICIARY

UNITED STATES)
)
v.) **DEFENSE MOTION TO DISMISS –**
) **SPECIFICATION 2, CHARGE IV**
Amn) **(INDECENT CONDUCT) AS FACIALLY**
) **UNCONSTITUTIONAL AND FAILING**
) **TO STATE AN OFFENSE**
)
)
) Dated: 18 April 2013

COMES NOW, Amn J , by and through his undersigned counsel, and requests that this Court dismiss Specification 2 of Charge IV on grounds that Article 120(k) is unconstitutionally vague and overbroad on its face, and because it fails to state an offense. The authority for this motion is Rules for Courts-Martial (R.C.M.) 907(b)(1)(B), and the First, Fifth, and Sixth Amendments to the Constitution.

FACTS

1. Specification 2 of Charge IV alleges Amn committed an indecent act in violation of Article 120, UCMJ, 10 U.S.C. § 920 by penetrating the vulva of A1C [REDACTED] with his penis while in the same bed as A1C [REDACTED] and in close proximity to seven other Airmen.

SUMMARY OF ARGUMENT

2. There are two parts to this motion: 1) facial constitutionality, and 2) failure to state an offense, which involves an as applied challenge to the specification in this case. Understanding the constitutionality argument is necessary to fully understanding the reasons why this specification fails to state an offense. Accordingly, the facial challenge will be addressed first and then the as applied challenge.

3. *Constitutionality.* In 2007, Indecent Acts with Another was modified and moved from Article 134 to Article 120. In making that change, the Joint Service Committee intended to make Indecent Acts more specific, noting that “military personnel reviewing MCM, Pt IV, ¶90 [Indecent Acts with another], would be unable to discern what conduct constituted ‘indecent’ conduct without researching the caselaw.”¹ The problem is that Congress rejected specificity and significantly changed the nature of the offense by stripping out critical elements; namely, Congress removed the “wrongful” element, removed any requirement that the act be “with” another and, most importantly, removed the terminal element thereby leaving the Government to prove only that some act was done and that the act was indecent. Crimes are defined by elements. By removing three elements, the offense is now substantially different and case law built on those missing elements is no longer applicable; to hold otherwise is to say elements do

¹ *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice (Subcmte Rpt)* at 199. The full report can be downloaded at http://www.dod.gov/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc.

not matter. If *Fosler* and *Jones* teach us anything, it is that elements are critically (or fatally) important. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). In changing the nature of the offense, the Article 120 version of Indecent Acts is facially unconstitutionally vague, overbroad, and fails to provide sufficient notice of what is objectively criminal in violation of due process. Further, Indecent Acts is no longer in the MCM; Congress removed it from Article 120 and the President has not yet considered whether to put it back into Article 134. Consequently, Indecent Acts was barely constitutional before, it was unconstitutional as of 2007, and it does not even exist today.

4. *Failure to State an Offense.* Putting aside the facial challenge, Specification 2 of Charge IV fails to state an offense as applied to this case because 1) there is no objective standard expressly in the specification, without which it is unconstitutionally vague; and 2) the specification fails to articulate what fact brings this consensual conduct outside the due process liberty interests recognized by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court of Appeals for the Armed Forces (CAAF) has taken up related issues this term in *United States v. Castellano*, No. 12-0684/MC (argued 23 January 2013), and *United States v. Goings*, No. 11-0547/AR (argued 12 November 2012). *Castellano* focuses on whether the liberty interests recognized in *Lawrence v. Texas* (and applied to the military by *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2006)) are matters of law to be determined by the military judge or questions of fact that must be submitted to the jury. Pursuant to Supreme Court case law, and based on the tenor of argument, the liberty interests are mixed questions of fact and law. That is, the military judge must always assess whether the evidence is legally sufficient to sustain a conviction but they are ultimately questions of fact to be determined by the finder of fact. In *Goings*, CAAF is assessing whether the liberty interests are included in indecent conduct, specifically in a case involving three people having sex in a hotel room, i.e., what has traditionally been accepted as “open and notorious” conduct. The tenor of that argument combined with the trend in case law and Supreme Court guidance indicates that for conduct to be indecent it must overcome the constitutional liberty interests of adults to engage in consensual sexual behavior without government interference or penalization. Further, established case law provides that any fact necessary to an offense must be pled. The absence of such critical information in this specification renders it fatally flawed.

LAW & ANALYSIS

5. *Standard of Review.* The constitutionality of a statute is reviewed *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). Whether a specification states an offense is a question of law, reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

6. There are three principles at issue in this motion:

- A. *void-for-vagueness* – grounded in the Fifth Amendment
- B. *overbroad* – grounded in the First Amendment
- C. *failure to state an offense* – grounded in the Fifth and Sixth Amendments

7. “No person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “It is a basic principle of due process, than an enactment is void for

vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A statute is void-for-vagueness when it fails to either: 1) provide sufficient notice of what conduct is forbidden; or 2) provide explicit standards for law enforcement officials, thus allowing discriminatory and arbitrary enforcement. *Parker v. Levy*, 417 U.S. 733, 774-75 (1974).

8. The Supreme Court explained the rationale for these prohibitions in *Grayned*, 408 U.S. at 108-09 (internal citations omitted)(alterations in original):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.

9. A statute is unconstitutionally overbroad if it proscribes both protected and criminal conduct. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). “The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others.” *Id.* at 122 n.8 (citing *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989)).

10. “A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.” *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); R.C.M. 307(c)(3).

11. Due process “requires that a person have fair notice that an act is criminal before being prosecuted for it.” *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). There are several potential sources of “fair notice” including: federal law, state law, military case law, military custom and usage, and military regulations. *Id.* at 31-32.

12. “[W]hat is general is made specific through the language of a given specification. The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.” *Fosler*, 70 M.J. at 229 (internal citations omitted).

13. “[T]he terminal element of Article 134, UCMJ, like any element of any criminal offense, must be separately charged and proven.” *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012) (emphasis added). An element is “each component of the actus reus, causation, the mens rea, any grading factors, and the negative of any defense.” Black’s Law Dictionary 360 (6th ed. 1998).

14. The difference between the Fifth and Sixth Amendments as well as between the principles of fair notice and failure to state an offense were succinctly described in *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011):

The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law,” U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall “be informed of the nature and cause of the accusation,” U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948); *see also United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). But 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. *See United States v. Marshall*, 67 M.J. 418, 421 n. 3 (C.A.A.F.2009) (noting the government's dual due process obligations of fair notice and “proof beyond a reasonable doubt of the *offense alleged*” (emphasis added by CAAF)). As the Supreme Court explained in *Patterson v. New York*, “the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.” 432 U.S. 197, 210 (1977) (emphasis added by CAAF); *see also United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F.2008) (“To satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the *charged offense*.” (emphasis added by CAAF)). Thus, when “all of the elements [are not] included in the definition of the offense of which the defendant is charged,” then the defendant's due process rights have in fact been compromised. *See Patterson*, 432 U.S. at 210

15. Prior to 2007, indecent conduct was prohibited under Article 134, UCMJ. When Congress made its sweeping overhaul to Article 120, UCMJ in 2007, however, indecent conduct was moved to Article 120, UCMJ.² This motion is a direct result of that change. The legislative history, therefore, is informative to this motion.

I. Legislative History

16. In 2004, Congress tasked the Secretary of Defense to review the UCMJ and MCM “with the objective of determining what changes are required to improve the ability of the military

² The Joint Services Committee (JSC) recommended putting indecent acts back into Article 134 as part of the FY2011 National Defense Authorization Act (NDAA). Congress, however, removed those changes before enacting the NDAA. JSC has once again recommend indecent acts be moved back into Article 134 as part of the FY2012 NDAA. See JAJM on Flite at page 18 (https://aflsa.jag.af.mil/AF/JUSTICE/LYNX/articles120_125.pdf).

justice system to address issues relating to sexual assault” and conform the UCMJ and MCM “more closely to other Federal laws and regulations that address such issues.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571, 118 Stat. 1811, 1920-21 (2004). The Joint Service Committee on Military Justice (JSC) designated a subcommittee to review sexual offenses under the UCMJ and MCM and propose potential alternatives to the current offenses. *Subcmte Rpt*, p. 1. This subcommittee report is the primary reference for the legislative history related to the change at issue here.³ The subcommittee evaluated six proposals and determined that no changes were necessary, that the “rationale for significant change was outweighed by the confusion and disruption such change would cause.” *Id.* The subcommittee explained, however, that if higher authorities directed a change to substantially conform the UCMJ to Title 18, the subcommittee recommended Option 5. *Id.* “Option 5” is, with few changes, what has become Article 120, UCMJ.

17. One of the principal attractions for Option 5 was to establish “much more specific notice of the conduct that is unlawful, and explain when age, consent, marriage, and mistake of fact are applicable affirmative defenses.” *Id.* at 4. Additionally, Option 5 eliminated the “lack of consent element,” specifically prohibited indecent acts that are commonly prosecuted, and moved some sexual offenses that are *per se* criminal out of Article 134, UCMJ, to eliminate the need to prove the conduct is prejudicial to good order and discipline or service discrediting. *Id.* at 5.

18. With indecent acts in particular, the subcommittee specifically noted that “*military personnel reviewing MCM, Pt IV, ¶90, would be unable to discern what conduct constituted ‘indecent’ conduct without researching the caselaw.*” *Id.* at 199 (emphasis added). The subcommittee reviewed all of the relevant case law involving indecent acts and recognized the most commonly charged act involves sexual intercourse “when someone in addition to the sexual partner is present.” *Id.* at 200. The subcommittee recommended these types of indecent acts, commonly known as “open and notorious” conduct, be specifically prohibited in the amended Article 120 to improve notice and conform the UCMJ with the specificity commonly found in most state statutes. *Id.* at 200-01 n.705.

19. Nevertheless, Congress did not adopt the specificity proposed by the subcommittee. More importantly, although the subcommittee expressed intent to prohibit the same conduct commonly prosecuted in case law, the resulting statute substantially changed the elements of proof. The value of prior case law and constitutionality of Article 120(k) have, therefore, been called into question by the new statute.⁴

³ The congressional committee reports related to this change provide no substantive commentary on the amendments proposed by the Secretary of Defense and the Congressional Record is otherwise void of any meaningful discussion of congressional intent.

⁴ Under prior case law, indecent acts were largely characterized by one of two behaviors: those which were open and notorious, and those which involved force, a lack of consent, or children who were not legally capable of consenting to sexual acts. *See, e.g., United States v. Blake*, 33 M.J. 923, 926 (A.C.M.R. 1991) (noting the single most common circumstance relied upon by military courts for indecent act offenses is the public nature of the act); *United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993) (appellant hugged and ran his fingers through the hair of another male without consent); *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (appellant handcuffed and videotaped victim without her consent); *United States v. Daye*, 37 M.J. 714 (C.M.A. 1993) (appellant videotaped consensual intercourse but without consent of victim); *Rollins*, 61 M.J. 338 (appellant gave minor, who is legally unable to

II. Pre-2007 Indecent Acts v. 2007-2012 Indecent Conduct

20. Prior to 2007, indecent conduct was prohibited under Article 134, UCMJ, with the following elements:

- (1) That the accused committed a certain wrongful act with a certain person;
- (2) That the act was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (MCM), A27-4 (2008 ed.)

21. When Congress made its sweeping overhaul to Article 120, UCMJ in 2007, however, indecent conduct was moved to Article 120, UCMJ, the following elements were removed:

- (1) That the act was wrongful;
- (2) That the act was “with” another; and
- (3) That, under the circumstances, the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Article 120(k), UCMJ; 10 U.S.C. § 920(k).

22. To begin with, there is no reference to “wrongful” whatsoever in Article 120(k). Further, the President has not listed “wrongful” as an element. *MCM*, ¶45.b.(11). The model specification suggests using “wrongful” in the pleadings and the Benchbook therefore includes a definition of “wrongful” in the jury instructions. Department of the Army Pamphlet (D.A.Pam) 27-9, *Military Judge’s Benchbook*, ¶3-45-9. The Benchbook, however, is not an authority for what is an element, it is not actually listed as a separate element, and it is only defined generically. More importantly, Congress specifically excluded “wrongful” when it established indecent acts as an enumerated offense under Article 120. The legislative history behind Article 120 also suggests “wrongful” was intentionally omitted from Article 120(k) in order to establish *per se* criminal liability.

23. Under the old Article 134 scheme, indecent acts also required the conduct occur with another. This was not an insignificant requirement. According to *Miller*, “with” required the

consent, pornographic magazines and asked her to masturbate). Although lack of consent and open and notorious behavior may also be considerations of what constitutes indecency, these factors are most logically indicative of whether or not the conduct was wrongful in the first instance. By removing “wrongful,” Congress established a strict liability offense in Article 120(k) dependent only upon proof of indecency.

government prove the acts were done “in conjunction or participating with another person.” *Miller*, 67 M.J. at 91 (quoting *United States v. Thomas*, 25 M.J. 75, 76 (C.M.A. 1987)). “With” required proof of some “affirmative interaction” between the accused and the victim. *Id.* (citing *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994)). It was insufficient for the victim to be an inadvertent or passive observer. *Id.* (citing *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)).

24. Lastly, under the old Article 134 offense, the government had to prove the alleged conduct was service discrediting or prejudicial to good order and discipline. In essence, the government had to demonstrate a tangible effect on the military environment, mission, or reputation as a result of the alleged conduct. This is perhaps the most critically important issue for both the facial and as applied challenges.

**III. Article 120(k) is unconstitutionally vague:
It fails to provide sufficient notice of what conduct is forbidden and
it fails to prevent discriminatory and arbitrary enforcement.**

25. First of all, as recognized by the Joint Services Committee, the primary means of notice for what constitutes indecent conduct comes from case law. *Subcmte Rpt* at 199 (noting that “military personnel reviewing MCM, Pt IV, ¶90, would be unable to discern what conduct constituted ‘indecent’ conduct without researching the caselaw.”) (emphasis added). Indecent acts under Article 120, UCMJ, however, is fundamentally different than what existed under Article 134, UCMJ. As described in the section above, Article 120(k) no longer requires three elements: wrongfulness, active participation “with” another, or prejudice to good order and discipline or service discrediting nature. These are substantial changes that render prior case law meaningless in deciphering the boundaries addressed by Article 120(k). In other words, the very source of information that the subcommittee believed could *potentially* inform a military member of which conduct was prohibited has now been rendered meaningless and inapplicable.

26. To begin with, a “wrongful” element is not inconsequential. “Wrongful” adds a knowledge component. See *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007) (interpreting “wrongful” to impose a mens rea requirement in a wrongful introduction case). The mens rea requirement for an offense is critically important. In this case, Congress intended to make indecent acts a strict liability offense, thereby stripping it of any mens rea. Regardless of whether the Government can add (or has added) this element through pleadings, the statute is substantially broader and more vague than its predecessor because it does not require a mens rea as it did previously. Further, the confusion created by the draft specification, which includes “wrongful” language not found in the elements or the statute, only adds to the confusion about what conduct is proscribed and what the elements are for that offense. If wrongfulness is required, then it should be a listed element, not a term in a draft specification. Under the Due Process clause, servicemembers have a constitutional right to clear notice. The lack of clear notice here, however, renders this provision unconstitutional vague.

27. Further, under the old Article 134 offense, the government had to prove the alleged conduct was service discrediting or prejudicial to good order and discipline. This is a particularly important element as it creates a military nexus to criminalize conduct that may otherwise be

lawful or constitutionally protected in the civilian world. *See, e.g., Wilcox*, 66 at 448-49 (requiring proof of direct and palpable service discrediting connection before offensive speech may be proscribed, otherwise “the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive.”); *Marcum*, 60 M.J. 198 (requiring a military nexus to overcome conduct falling within the liberty interests identified in *Lawrence v. Texas*, 539 U.S. 558). “It is a promise of the constitution that there is a realm of personal liberty which the government may not enter.” *Lawrence*, 539 U.S. at 578 (citations omitted). Military men and women “may not be stripped of basic rights simply because they have doffed their civilian clothes.” *Marcum*, 60 M.J. at 205 (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). As a strict liability offense, however, Article 120(k) prohibits otherwise lawful sexual conduct or communication between consenting adults.

28. Lastly, indecent acts under Article 120(k) is now a simple question of indecency. It no longer requires wrongfulness or active involvement by a victim, and it does not care about the impact of the alleged conduct on the specialized society that is the military. The only guidance Congress provided for in the vague Article 120(k) was an equally vague definition of the term “indecent conduct”:

that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

MCM, ¶45.a.(t)(12); 10 U.S.C. §920(t)(12).

29. What sex-based conduct doesn’t fall under Article 120(k) now? How is one to determine when conduct or speech crosses from permissible bounds into forbidden grounds? If a married couple engages in sexual intercourse in something other than the missionary position, have they committed indecent conduct? Indecency is so vague under Article 120(k) that it unlawfully sanctions a “standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). Because Article 120(k) is virtually without limitation and only ambiguously defined, servicemembers cannot know the contours of what is proscribed. Consequently, it is unconstitutionally vague.

30. The arguments advanced in this brief have been raised in a more rudimentary form in two cases on appeal, *United States v. Walton*, Misc. Dkt. 2009-11 (25 Jan 2010)(unpub.)⁵ and *United States v. Rheel*, 2011 WL 6372779 (N.M. Ct. Crim. App. 2011). *Walton* was an Article 62, 10 U.S.C. § 862, government appeal.

⁵ *Walton*, does not appear on Westlaw but can be found on the Court’s website. (http://afcca.law.af.mil/content/afcca_opinions/cp/walton - 2009 11 - order - appeal under article 62 ucmj 25 jan 10.pdf)

31. *Walton*.

A. The appellant was charged with committing indecent conduct in violation of Article 120(k) by sending a picture of his genitalia by cell phone to a civilian female, Ms. BH. The central issue in the charge was that Ms. BH had requested a picture of the appellant but she apparently did not desire *that type* of picture of the appellant. The military judge, Colonel Donald M. Christensen, questioned the constitutionality of Article 120(k) specifically because of its application to conduct protected by the First Amendment and because of questions about the applicability of consent as a defense under Article 120(r). Consequently, he dismissed the charge and the Government appealed. Although the constitutionality of Article 120(k) was raised, in the context of an Article 62 appeal, the Air Force Court of Criminal Appeals (AFCCA), did not address this issue. The Court instead concluded indecency was about the totality of the circumstances and identified consent as a factor, rather than a defense.

B. Before an appeal could be filed with CAAF, trial defense counsel proceeded to trial on the case. The appellant elected to be tried by military judge alone and he was acquitted of the alleged indecent act. The constitutionality question was thus moot and never reached CAAF for decision in a contested case.

C. Notably, even under AFCCA's opinion, Article 120(k) is problematic. A statute is unconstitutionally vague if ordinary individuals would not know what clearly is prohibited such that they can tailor their behavior to avoid committing an offense. If indecent conduct is, as described by AFCCA, dependent upon the totality of the circumstances, how is there a measuring stick by which an ordinary person knows what is and is not criminal, especially when the offense in Article 120(k) is missing three elements from its predecessor? The JSC warned about this back in 2006. They specifically noted that the old Article 134 was impermissibly vague and overbroad but for case law. That case law, however, doesn't apply to the 2007 version of indecent acts, which is fundamentally different in that it has three less elements and is even more vague than the version JSC reviewed.

32. *Rheel*.

A. The appellant in *Rheel* pled guilty to committing an indecent act with "a child who had not attained the age of 12 years." *Rheel*, unpub. op. at 1, n.1. On appeal, he challenged the constitutionality of Article 120(k). NMCCA, in an unpublished opinion, held that it was constitutional as applied to appellant. This case is distinguishable from *Amn* challenge for several reasons.

B. First, *Amn* is not pleading guilty. This is a major factor on appeal. By way of example, any contested case where the specification failed to allege a terminal element is essentially being overturned due to *Fosler*. By comparison, if the specification failed to allege the terminal element and the appellant pled to the offense, per *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012), the cases are being affirmed. Pleading makes a huge difference on appeal.

C. Secondly, the appellant in *Rheel* did not contest the issue at trial. Fundamentally, the concepts at play are issues of constitutional notice. When an accused pleads and fails to raise the

issue prior to pleas, the necessary implication is that he was actually on notice and suffered no prejudice. Further, the standard of review is different as demonstrated in *Fosler* and *Ballan*. The plain error standard puts the burden on appellant to prove prejudice. When the issue is raised at trial, however, the burden is completely different; the Government bears the burden to prove beyond a reasonable doubt that the error was harmless. Consequently, the Government loses far more often when the issue is raised at trial is one of constitutional dimension.

D. Third, the NMCCA did not do a facial analysis. Its analysis of the case is based entirely on the actual specification, which is an “as applied” analysis rather than a facial analysis. We are challenging the pleading as applied but that is where failure to state an offense comes into play. The concepts are different and NMCCA did not address it.

E. Fourth, NMCCA did not publish the opinion which means it is the limited view of the panel for that particular case and does not represent the opinion of the NMCCA. At best it is persuasive authority but given the above critical distinctions, it is not very persuasive either.

F. Fifth, *Rheel* involved a child under 12. Sexual conduct with a child under 12 is in an entirely different category than consensual adult sexual behavior. It is far more difficult to argue lack of constitutional notice for conduct with people who cannot legally consent than it is for conduct with people who can consent.

G. Sixth, the specification in *Rheel* specifically included language that the alleged conduct involved a child under the age of 12. Through pleadings, general offenses are made more specific. By conducting an as applied analysis, rather than a facial analysis, NMCCA was able to save the guilty plea primarily because the Government added this critical information into the pleading.

H. Finally, *Rheel* was not reviewed by CAAF. Presumably this had a lot to do with the fact that *Rheel* was a guilty plea and he did not raise the issue at trial. Nevertheless, CAAF has not affirmed *Rheel* or even addressed the issue presented in this motion.

IV. Article 120(k) is unconstitutionally overbroad.

33. Closely related to the issue of vagueness, Article 120(k) is also unconstitutionally overbroad in violation of the First Amendment. The Supreme Court noted in *Parker v. Levy*, that “the military is, by necessity, a specialized society.” 417 U.S. at 743. The right of free speech is not unlimited in the military and authorities “may curtail a servicemember’s communication and association with other individuals... *provided the authorities act with a valid military purpose and issue a clear, specific, narrowly drawn mandate.*” *United States v. Moore*, 58 M.J. 466, 468 (C.A.A.F. 2003) (emphasis added). Article 120(k), however, casts a broad net for restricting communications; it is certainly not narrowly drawn or defined now that it has fewer requirements and less specificity than was provided by its predecessor. The subcommittee report specifically noted how vague indecent acts with another was, especially compared with the specificity common to most comparable state statutes. *Subcmte Rpt* at 199-201, 279. In warning of the dangers of overbroad statutes, the Supreme Court noted:

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to courts to step inside and say who could be rightfully detained, and would should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender, 461 U.S. at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

34. When Congress affirmatively removed the military nexus (e.g., prejudice to good order and discipline or service discrediting nature) from indecent acts, they removed the pre-existing discernable legal standard. Servicemembers can now be convicted and punished for *anything* that the Government or any particular juror deems “indecent.” That is, indecent acts under Article 120(k) criminalizes without restriction any conduct deemed indecent. But the general prohibition of Article 134 survived precisely because its reach was restricted to conduct that was service discrediting or prejudicial to good order and discipline. Without similar tailoring, Article 120(k), UCMJ is unconstitutionally overbroad. Presumably, these same concerns are why Congress has removed Article 120(k) from the UCMJ and why the JSC has pushed for indecent acts to be put back into Article 134, UCMJ through executive order.

35. Additionally, the case of *Wilcox*, *supra*, is instructive on this point. *Wilcox* involved alleged racial speech associated with the appellant’s participation in Klu Klux Klan activities. *Wilcox*, 66 M.J. at 443-46. Although we are not dealing with speech in this case, the principle at play is instructive. In setting aside the specification for legal insufficiency, CAAF emphasized the importance of the terminal element of Article 134, UCMJ:

If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public or even many members of the public, would find offensive. *And to use this standard to impose criminal sanctions under Article 134, UCMJ, would surely be both vague and overbroad.*

Id. at 448-49 (emphasis added). Such is the case now with Article 120(k). By removing the military nexus, servicemembers are now completely at the mercy of what specific prosecutors and juries consider offensive. What is to preclude, for example, prosecution of a military member who had phone sex with another consenting adult? Or prosecution of someone who writes about sex acts that some find offensive or taboo? Is it indecent conduct for an Airman to engage in consensual S&M behavior with another adult given that some people find that morally offensive or demeaning? In the realm of sexual behavior, case law demands more than prosecutorial restraint. The law must be narrowly tailored and defined. Article 120(k), however, criminalizes a substantial portion of otherwise lawful behavior or speech and is, therefore, unconstitutionally overbroad.

36. There are two cases where this issue has been raised before on appeal. Those cases, and the applicability of those decisions, are addressed in the preceding section. That analysis is equally applicable here.

V. Specification 2 of Charge IV Fails to State an Offense

37. If a fact is required in order for an act to be criminal, then it must be in the pleadings. This is the lesson originating in the Supreme Court's recent jurisprudence in *Apprendi*, *supra* and *Jones v. United States*, 526 U.S. 227 (1999), and carried into action by CAAF through LIO jurisprudence (*Jones*, 68 M.J. 465) and *Fosler*, *supra*. Recent activity at CAAF, namely *Castellano* and *Goings*, which will be discussed momentarily, suggests this principle will continue to be expanded and clarified in military jurisprudence.

38. In 2003, the Supreme Court of the United States decided *Lawrence v. Texas*, *supra*. A hallmark of that decision is that "it is a promise of the constitution that there is a realm of personal liberty which the government may not enter." *Lawrence*, 539 U.S. at 578 (internal citations omitted). Although military members do not always enjoy the same level of constitutional rights as civilians, in *Marcum*, CAAF concluded the liberty interests recognized in *Lawrence* apply to military members.

39. On 23 January 2013, CAAF heard argument in *Castellano*.⁶ In the context of an Article 125, UCMJ, offense, CAAF is assessing who determines whether the constitutionally protected liberty interests have been overcome: the military judge or the finder of fact? Consistent with *Apprendi*, both *Jones* cases, *Fosler*, and the trend in military case law, CAAF appears poised to find that it is a fact to be determined by the jury. Indeed, during the argument, Judge Ryan is heard asking (as she has in related cases), but for some fact that overcomes the liberty interest, is there even an offense? The answer is, of course, no. If the Government has not overcome the constitutional liberty interests of adults to engage in consensual sexual activity, then there is no offense. There must be, therefore, some fact that takes the sexual activity outside of protected conduct. *See, e.g., United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011) (setting aside a guilty plea to sodomy for failure to sufficiently address the difference between prohibited and protected conduct); *United States v. Anderson*, 2012 WL 1077463 (A.F. Ct. Crim. App. 2012) (finding a plea to consensual sodomy improvident for failing to address the distinction between prohibited and protected conduct). Under the Fifth and Sixth amendments, that fact must be alleged to give an accused notice of what he is defending against, and it must be presented to a jury and be proven beyond a reasonable doubt. It is possible CAAF will decide *Castellano* on other grounds, such as whether the issue was waived by failure to preserve it at trial. Nevertheless, it is instructive on the principles already found in the Supreme Court and CAAF jurisprudence.

40. On 12 November 2012, CAAF heard oral argument in *Goings*.⁷ *Goings* involves an indecent conduct offense. The appellant was engaged in a threesome in Germany. There is a

⁶ The granted issue in *Castellano* was:

IN MILLER v. CALIFORNIA, THE SUPREME COURT HELD THAT THE TRIER OF FACT MUST DETERMINE WHETHER JUDICIALLY-CREATED FACTORS THAT DISTINGUISH BETWEEN CONSTITUTIONALLY-PROTECTED AND CRIMINAL CONDUCT ARE SATISFIED. THE FACTORS IDENTIFIED IN UNITED STATES v. MARCUM ARE AN EXAMPLE OF SUCH FACTORS BUT THE LOWER COURT HELD THAT THE MILITARY JUDGE MUST DETERMINE WHETHER THE MARCUM FACTORS ARE SATISFIED. WHO DETERMINES WHETHER THEY HAVE BEEN SATISFIED?

⁷ The relevant granted issue in *Goings* was:

male civilian holding a video recorder showing the appellant having intercourse with a civilian female. At some point during the encounter, the person behind the camera changes positions and the appellant takes hold of the camera while that other civilian male engages in sexual intercourse with the same female. The question on appeal is whether this threesome is constitutionally protected behavior. The clear tenor of the questioning by CAAF judges is that it is protected behavior absent some fact that takes it outside of the liberty interests recognized in *Lawrence v. Texas*. The simple fact that there is a third party is insufficient to make it an offense or to make it what has historically been referred to as “open and notorious” conduct. Whatever fact supposedly overcomes the liberty interests, however, was not pled and creates an additional problem of whether the specification stated an offense.

41. Applying these principles to our case, there are two fatal infirmities with Specification 2 of Charge IV: 1) there is no objective standard expressly in the specification, without which it is unconstitutionally vague; and 2) the specification fails to articulate what fact brings this consensual conduct outside the due process liberty interests recognized by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003).

42. *No Objective Standard.*

A. As discussed above, our Constitution requires a criminal offense be described with sufficient particularity to allow ordinary citizens to shape their behavior to avoid committing the offense, and to provide law enforcement with an objective standard for determining when the offense has been committed. There is no objective standard expressly in the specification at issue, nor is it implied in the specification. Under the old case law, when indecent acts was in Article 134, UCMJ, the terminal element satisfied this problem. Without the terminal element, however, there is no true objective standard in the specification to allow ordinary Airman to tailor their behavior accordingly, or for law enforcement to objectively assess when an offense has been committed. Under Article 120(k), the standard is simply that you have done something offensive. What could be more broad than that? It is not a reasonable person standard or a prudent person standard, and it does not even define the category or community whose standards are to be applied. The terminal element is the critical reason why Article 134, UCMJ survived a constitutional challenge at the Supreme Court of the United States in *Parker v. Levy*, *supra*. To be clear, the terminal element made it that an act may not be prohibited unless the Government proves it is objectively offensive to the public (i.e., service discrediting) or objectively offensive to the military (i.e., prejudicial to good order and discipline). Absent the terminal element, the charge casts a broad net that allows subjective morality to dictate what is or is not an offense without any true objective measure.

B. Additionally, a specification that includes a subjective standard alone is unconstitutional. An individual cannot be held accountable for the excessive differences that exist in individual sensitivities; it is completely contradictory to due process and fair notice law. For this reason, most offenses (and defenses for that matter) require both a subjective and objective test – that it was offensive to someone in fact, and that it was reasonable for that person to be offended. Without this standard, Specification 2 of Charge IV is fatally defective.

43. *No Fact Alleged to Overcome Liberty Interests.*

A. First and foremost, it is important to note that Specification 2 of Charge IV does not allege the sexual act involved was nonconsensual. The question here, therefore, is when does consensual sexual acts between adults become criminal? The Supreme Court has concluded that it becomes criminal when liberty interests have been overcome. Historically, this involves facts such as: nonconsensual sex, sex involving minors, sexual acts involving non-consenting members of the public, or sex involving significant rank disparity where consent may not be easily refused. None of these categories are clearly charged in this case. We are not on sufficient notice of what we are defending against that takes this conduct outside of the constitutionally protected liberty interests.

B. *Goings* is remarkably on point with this case. It does not matter much that Amn may have been engaging in a threesome. That behavior is constitutionally protected absent some other fact that overcomes his constitutional liberty interests. Any fact of consequence to an offense must be pled. Without clear notice of what exactly overcomes Amn constitutional rights, Specification 2 of Charge IV is fatally defective.

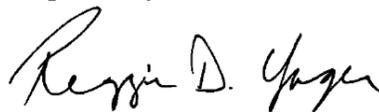
C. By comparison, *Rheel* provided notice. The specification in *Rheel* expressly asserted the indecent conduct was with a child under 12. By adding this language, the specification expressly provided a fact that took the sexual conduct outside of the constitution's protections; sexual conduct with children is outside of the constitution's liberty interests. There is no such fact in the specification of this case that takes this consensual behavior outside of Amn liberty interests.

D. On a final note, this Court should consider CAAF's opinion in *United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011). The failure to allege the sexually explicit images were of *actual* minors was significant enough to change the offense from a federally recognizable 10 year offense to a military simple disorder authorizing a maximum of four months confinement. Elements matter and facts matter, especially when proscribing behavior that otherwise enjoys constitutional protection. Accordingly, Specification 2 of Charge IV must be dismissed.

REQUEST FOR RELIEF

44. WHEREFORE, the Defense requests that this Honorable Court dismiss Specification 2 of Charge IV. Pursuant to R.C.M. 905(h) and *United States v. Savard*, 69 M.J. 211 (C.A.A.F. 2010), we request an Article 39(a) session for argument.

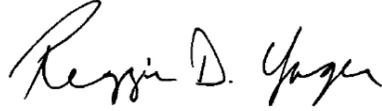
Respectfully Submitted,



REGGIE D. YAGER, Major, USAF
Senior Defense Counsel

CERTIFICATE OF SERVICE

I certify the above Defense Motion to Dismiss – Specification 2, Charge IV (Indecent Conduct) as Facially Unconstitutional and Failing to State an Offense was served on this Honorable Court and Trial Counsel on 18 April 2013 via e-mail.

A handwritten signature in black ink that reads "Reggie D. Yager". The signature is written in a cursive, flowing style.

REGGIE D. YAGER, Major, USAF
Senior Defense Counsel

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	ASSIGNMENTS OF ERRORS
<i>Appellee,</i>)	
)	
v.)	Before Panel No. 2
)	Case No. ACM 38500
Senior Airman (E-4))	
COURTNEY D. WADDELL,)	Tried at Tinker Air Force Base, OK
United States Air Force,)	between 15-17 October 2013 by a general
)	court-martial convened by the Commander,
<i>Appellant.</i>)	AFMC

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

Issues Presented

I.

**WHETHER THE FINDINGS OF GUILTY ARE LEGALLY AND
FACTUALLY SUFFICIENT.**

II.

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION
WHEN HE OVERRULED THE DEFENSE OBJECTION FOR LACK OF
FOUNDATION.**

III.

**WHETHER THE MILITARY JUDGE ERRED WHEN HE FAILED TO
GIVE THE DEFENSE REQUESTED INSTRUCTION.**

Summary of Proceedings

Between 15-17 October 2013, Appellant was tried by general court-martial composed of officer members at Tinker AFB, OK. Contrary to his pleas, Appellant was found guilty of one charge and one specification of sexual assault, in violation of Article 120, Uniform Code of Military Justice (UCMJ). R. 393.

Appellant was sentenced to a reprimand, reduction to E-1, forfeiture \$200 pay per month

for five months, restriction to Tinker AFB for two months, and a bad-conduct discharge. R. 431. On 10 December 2013, the convening authority approved the sentence, except for restriction to base, and except for the bad-conduct discharge ordered it executed.

Statement of Facts

i. Testimony of [REDACTED]

During the findings portion of Appellant's court-martial, the government called [REDACTED] to the stand. R. 113. Appellant and [REDACTED] were in a relationship prior to her entering the Air Force. R. 114-15. They had sexual intercourse approximately 8-9 times prior to the alleged assault. R. 116. They would have sexual intercourse after hanging out with their friends and drinking. R. 116, R. 139. The last time they had sexual intercourse was in January 2013. [REDACTED] and Appellant were still friends after their relationship. R. 162.

On 22 February 2013, Appellant, [REDACTED] and their friends planned to go out to celebrate [REDACTED] 21st birthday. R. 120. According to the testimony of [REDACTED], she had a frozen margarita with dinner, at approximately 2030. R. 121. She left dinner and went to Appellant's house. *Id.* [REDACTED] testified she had approximately five or six shots at Appellant's house, while drinking with her friends. R. 122. In addition, she said she "sipped" on one mixed drink. *Id.* After those drinks, [REDACTED] said she was "buzzed." R. 123. She left Appellant's place around 2330 and headed to a bar called "Cowboys." *Id.* While at "Cowboys," [REDACTED] danced and kissed [REDACTED]. R. 126. She testified she had around five shots while at "Cowboys." R. 124. She testified she felt drunk at that point. *Id.* She left "Cowboys" around 0230 and headed back to Appellant's place.

[REDACTED] said she threw up at Appellant house when she returned. R. 126. She testified she does not remember anything else until she woke up with "him" inside of her. R. 127. She testified she did not know who was having sex with her until Appellant turned on the lights. R.

128. Before Appellant turned on the lights, [REDACTED] thought she was having sex with [REDACTED].

R. 129. The following morning [REDACTED] told [REDACTED] that [REDACTED] had sex with Appellant and she woke up she thought it was [REDACTED]. [REDACTED] said when she woke up with Appellant inside of her she was not intoxicated, but felt intoxicated. R. 158.

[REDACTED] texted Appellant the next day and asked him how he could have sex with her, since he knew she was so drunk. R. 130. Appellant apologized and told her he should not have let it happen. *Id.* That night, [REDACTED] went back to “Cowboys” with Appellant and a group of friends. R. 155. When Appellant asked her, via text message, if he could dance with her, [REDACTED] responded with “maybe.” Pros. Ex. 2.

[REDACTED] told the members Appellant was a clingy person who had apologized to her prior to the alleged event approximately seven times in a two day period. R. 162

On cross-examination, [REDACTED] was asked if she remembered talking to her sister on the phone the night of the alleged incident. R. 146. She replied she did not. *Id.* She confirmed that she stated at the Article 32 hearing that she woke up, put on some clothes, and walked around the house; however, at the court-martial, she testified she did not remember putting on clothes. R. 148. Next, she relayed she spoke with the government expert, Dr. Younggren, and realized she did not remember putting on clothes and walking around, rather it was what other people told her she did. R. 149. Further, [REDACTED] testified that, after talking with Dr. Younggren, a forensic psychologist (Pros. Ex. 4), she understood her memories may have been from people telling her what happened, not what she actually remembered. R. 151. She confirmed she said at the Article 32, after going to Appellant’s bed before the alleged incident, “I still felt a little drunk at this point, however, I was not heavily intoxicated.” R. 152. However, at the court-martial she

only remembered waking up in Appellant's bed. *Id.* She specifically denied telling anyone about opening a bathroom door with a knife. R. 153.

On redirect █████ confirmed she told Dr. Younggren she was confused about what she actually remembered, before Dr. Younggren said anything to her. R. 161. Dr. Younggren later said there are two types of errors in memory: commission and omission. R. 255. Omission is when one can no longer remember something, but commission is where you "incorporate incorrect data into our data . . ." *Id.* In addition, Dr. Younggren educated the members about alcohol blackouts. R. 259. According to Dr. Younggren, during a blackout there is no memory storage and that one can do complex activities and not remember doing them. *Id.* Dr. Younggren testified someone can have sexual intercourse while blacked out and can consent to sexual intercourse. R. 270. Dr. Younggren was asked by one of the court members, "Is it possible for someone to give consent during a fragmented period of blackout?" R. 278. He responded "Yes." *Id.*

█████ testified she did not want to report the alleged incident. R. 159. █████ sister, █████ reported the incident. *Id.* █████ testified that she spoke with █████ on 22 February 2013 and █████ sounded drunk. R. 176. In addition, she said Appellant told her █████ was drunk. R. 177. S█████ testified █████ told her she woke up "bawling with someone on top of her having sex with her and she had no idea where she was or who was on top of her and made him turn on the lights." R. 181. █████ testified she did not want █████ to sleep in Appellant's bed because she did not want █████ to regret it the next morning. R. 186. █████ clarified she thought █████ would regret "the drama" █████ sleeping in Appellant's bed would cause. R. 194. █████ testified she told OSI about the alleged event because her boyfriend, Appellant's roommate, could not get out of his lease

with Appellant. R. 189. She clarified and said getting out of the lease was not the only reason, it was also “eating [her] up inside.” R. 190.

ii. Testimony of [REDACTED]

Ms. [REDACTED], a prior security forces member, testified she knew [REDACTED] and had been around her over a dozen times when [REDACTED] was drinking. R. 214-15, 217, 219. In addition, she had seen [REDACTED] vomit due to alcohol at least three times. R. 219-20. Appellant’s trial defense counsel (TDC) asked Ms. [REDACTED] how [REDACTED] acts when she is drunk. R. 228. Ms. [REDACTED] said “rude, belligerent, sloppy.” *Id.* The TDC clarified if [REDACTED] was acting that way when Ms. [REDACTED] spoke with her and Ms. [REDACTED] said “no.” *Id.* Ms. [REDACTED] spoke with [REDACTED] around 0330 on the morning of the alleged incident. R. 221. Ms. [REDACTED] tried to get [REDACTED] out of Appellant’s bed, but [REDACTED] told her to stop touching her. *Id.* Ms. [REDACTED] asked [REDACTED] if she realized she was in Appellant’s bed and [REDACTED] said yes. R. 222.

Ms. [REDACTED] was with [REDACTED] and Appellant at “Cowboys.” R. 220. While there, [REDACTED] told Ms. [REDACTED], in relation to [REDACTED], the following: “[I]sn’t he cute? [REDACTED] said he was my birthday present. I am going to fuck him tonight.” R. 230. Later in the morning on 23 February 2013, [REDACTED] told Ms. [REDACTED] she had got up earlier and got someone out of the bathroom with a kitchen knife. R. 234. The Appellant was not present for that conversation. *Id.*

iii. Testimony of Senior Airman [REDACTED]

Senior Airman (SrA) [REDACTED] was called by the defense. R. 282. He testified he knew [REDACTED] and was present the evening and morning of the alleged incident. R. 283. He confirmed [REDACTED] told him and Ms. [REDACTED] that [REDACTED] had gotten someone out of the bathroom with a knife and that Appellant was not present for the conversation. R. 284.

Ms. [REDACTED] was called by the defense. R. 286. She testified she knew [REDACTED] and was present the evening and morning of the alleged incident. R. 286. Ms. [REDACTED] testified [REDACTED] told her that she and Appellant “messed around” on the morning of 23 February 2013 at around 1100. Ms. [REDACTED] was asked by a court member if [REDACTED] seemed drunk at the time of the conversation. R. 295. Ms. [REDACTED] replied, “no.” *Id.*

iv. Testimony of SrA [REDACTED]

During the government’s case in chief, it planned to call SrA [REDACTED] to testify about a conversation he heard between [REDACTED] and [REDACTED]. Appellant’s TDC objected prior to SrA [REDACTED] testimony based upon foundation. R. 204. The military judge told trial counsel they will have to lay the foundation to ask SrA [REDACTED] how [REDACTED] sounded on the phone. R. 206. SrA [REDACTED] testified he had met [REDACTED] two times prior to 22 February 2013. R. 209. During one of those occasions [REDACTED] was drinking. R. 210. SrA [REDACTED] was around [REDACTED] for a couple of hours during both occasions. *Id.* On 22 February 2013, SrA [REDACTED] overheard the phone conversation between [REDACTED] and her sister [REDACTED]. R. 210. Trial counsel asked SrA [REDACTED] how [REDACTED] “sound[ed]” on the phone. R. 211. TDC objected to hearsay and foundation. *Id.* The military judge said, “I believe the question was, ‘How did she sound?’ Your objection is hearsay?” *Id.* TDC responded, “Yes, Your Honor, and foundation.” *Id.* The military judge responded, “With regard to hearsay, he’s not asking him what anyone said. He’s just asking how she sounded. I’m going to overrule the objection at this point.” *Id.* He did not rule on the foundation objection. SrA [REDACTED] testified [REDACTED] “sounded drunk; slurred speech, had kind of a baby, you know, people get a baby voice when they’re drunk.” *Id.* SrA [REDACTED] testified he was going to “the sand dunes” with [REDACTED] boyfriend after he got off work that day. R. 212.

The military judge, later in the trial, ruled on the foundation issue. R. 243. He ruled:

Based on how the testimony came out regarding that he indicated she was slurring speech and it was typical, in his experience, to how she sounded when she was drunk. I'm going to overrule the objection ex post facto, but I'm going to overrule the objection regarding foundation as well.

Id.

v. Recall of [REDACTED]

[REDACTED] was recalled by the court members. R. 303. During questioning she was asked how she felt when she told Ms. [REDACTED] she was "messaging around" with the Appellant.

Id. [REDACTED] replied she was "still confused about all of it happening . . ." *Id.* She was asked what she was confused about by one of the court-members. R. 305. She replied:

"[R]eally not what had taken place. I mean, not what had taken place, but like I knew that when I woke up he was inside of me and all of that, but just like how it had all come about. *I didn't know how it had happened.*" *Id.* (emphasis added).

vi. Military Judge's findings instructions.

The military judge told both parties he did not intend to instruct on mistake of fact. R. 320. TDC requested a mistake of fact instruction. *Id.* The following commenced:

DC: Your Honor, we would request that instruction. We believe that the evidence has reasonably been raised that based upon their prior consensual sexual relationship the modus operandi of that dating relationship when they would pregame at the house, go out to the bars, come back and have sex, and often times it was drunk sex; based upon that as well as the events of that night, it is reasonable for the members to infer that Airman Waddell may have had a mistake of fact as to whether or not [REDACTED] consented.

MJ: So it is the defense's position that he may have thought she consented by the mere fact that they--

DC: For two reasons, Your Honor.

MJ: --went to the pregame, and then went to a bar, and then came back; is that the defense's position?

DC: That as well as the testimony by [REDACTED] that she thought that it was possibly

Airman [REDACTED] that she was having sex with. Based upon the testimony of Felicia Hodges and others that night that [REDACTED] wanted to have sex with Airman [REDACTED].

MJ: Walk me through, defense counsel. The elements in this case with regard to knowledge is that--first of all the element within the sexual act is that the accused did so when [REDACTED] was incapable of consenting. There is no knowledge requirement on behalf of the accused on that part. That is just a straight up was she capable or was she not capable of consenting. Does the defense agree to that?

DC: Whether or not [REDACTED] was capable or not capable of consent?

MJ: Correct.

DC: Yes, Your Honor.

MJ: All right. The second part though is, "and that condition was known or reasonably should have been known by the accused." There is gets to his knowledge where *I guess he could have a mistake of fact.* (emphasis added).

...

MJ: So the mistake of fact--again, I'm still just stuck on because if you get into what his knowledge is--because, again, the government has to prove beyond a reasonable doubt that he knew or should have known that she was incapable of consenting. Again, the language out of *U.S. v. Prather*, 69 M.J. 338, CAAF, 2011, is, "If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault, that the victim was substantially incapacitated. In an area of law with many nuances, one principle remains constant--an affirmative defense may not shift the burden of disproving any element of the offense to the defense." In other words, if I give you what you want I believe it's an impermissible burden shift. I think it's an unconstitutional burden shift, even if you are asking for it, I think it is an unconstitutional burden shift to the accused to create the impression with the panel that he has to prove that she consented when the burden is on the government to prove that she was incapable of consenting. With regard to his knowledge, again, the burden is on the government to prove beyond a reasonable doubt that he knew she was incapable of consenting. They have to prove that, despite the past history and beyond anything else, he knew or should have known that she was incapable of consenting. Even under your second argument I think you're still asking this court to impermissibly and unconstitutionally shift the burden to the accused which this court is not inclined to do unless you have some case law or something else that indicates that the accused can request a burden shift.

DC: No, Your Honor. We do not have that.

MJ: Again, for the record, should this case result in an appeal of some sort, you've noted your objection for the record and your requests.

R. 320-24.

Other facts necessary to the resolution of the issues are set forth in the argument, below.

Argument

I.

THE FINDINGS OF GUILTY ARE NOT LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

This Honorable Court reviews convictions for factual and legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

In determining whether sufficient factual evidence exists to support a conviction, this Court must determine “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the accused’s guilt beyond a reasonable doubt.” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This review “involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition in Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.” *Washington*, 57 M.J. at 399. A reviewing court “applies neither a presumption of innocence nor a presumption of guilt” and instead “must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.” *Id.* This Court may affirm a conviction only if it concludes that the evidence presented by the government at trial proves Appellant’s guilt beyond a reasonable doubt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002).

In determining whether Appellant's conviction is legally sufficient, this Court must determine "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The evidence is not factually sufficient. ■■■ said she threw up at Appellant's house, yet no one else testified to seeing her vomit. ■■■ told the members she had at least 10 shots of alcohol, yet no one testified to seeing this. ■■■ said at trial she did not remember getting up, putting on clothes and walking around Appellant's house, yet she remembered this at the Article 32. ■■■ testified at trial "I still felt a little drunk at this point, however, I was not heavily intoxicated," but her testimony at trial was she remembers nothing after vomiting until she wakes up with someone inside of her. R. 152. Even though there were three witnesses who explained to the members about her opening the bathroom door with a knife, she does not remember it. She said she did not remember talking to her sister on the phone. ■■■ testified when she spoke with ■■■ she said ■■■ said she woke up "bawling" with someone having sex with her, yet ■■■ did not mention that during her testimony at all. R. 181. Perhaps most curious is she remembered doing all of that, until she spoke with the government expert Dr. Younggren, who testified ■■■ lack of memory was normal.

This Court, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [cannot be] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. ■■■ herself stated she was not intoxicated. Multiple people testified she was not acting drunk. Multiple people testified she was interacting with everyone just fine, in fact she was able to open a locked bathroom door. ■■■ told ■■■

█ she “messed around” with Appellant, not that Appellant had sex with her without her consent.

Likewise, the evidence is not legally sufficient. When reviewing this case, “considering the evidence in the light most favorable to the prosecution,” this Court cannot say “a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *Turner*, 25 M.J. at 324 (citations omitted). The only permissible testimony concerning █ alleged substantial incapacitation came from her and her sister █ and █ was not present that evening or morning. On the contrary, █ said that █ spoke with her in the morning and █ did not seem drunk. Likewise, Ms. █ told the members she had been around █ multiple times when █ had drunk alcohol and was drunk and █ was not drunk on the night of the alleged incident. Rather, Ms. █ told the members she talked with █ and █ told Ms. █ she knew she was in Appellant’s bed. Perhaps most important, █ testified when she woke up with Appellant inside of her she was not intoxicated, but felt intoxicated. R. 158. If she is not intoxicated, by her own admission, she cannot be substantially incapacitated.

WHEREFORE, Appellant respectfully requests that this Court set aside the finding of guilty and the sentence and dismiss the charge.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE OVERRULED THE DEFENSE OBJECTION FOR LACK OF FOUNDATION.

Standard of Review

“A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion.” *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F.2010)).

Law and Analysis

“[Military Rule of Evidence], M.R.E. 701(a) requires that lay witness opinions or inferences be limited to those that are ‘rationally based on the perception of the witness.’” *United States v. Eslinger*, 70 M.J. 193, 199 (C.A.A.F. 2011)(citing M.R.E 701(a)). M.R.E. 701(b) says the testimony must be “helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” *Id.* M.R.E. 602, Lack of personal knowledge, says “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”

The military judge overruled TDC’s hearsay objection to SrA [REDACTED] testimony. R. 211. The military judge never overruled TDC’s foundation objection explicitly. The military judge abused his discretion by overruling the objection to foundation. SrA [REDACTED] did not meet the requirements of M.R.E. 701 and M.R.E. 602. M.R.E. 602 was not met. SrA [REDACTED] met [REDACTED] two times and one time she was not drinking. Rather, SrA [REDACTED] gave a lay opinion that [REDACTED] sounded drunk *on the phone*.

Next, this Court must determine if the testimony prejudiced Appellant. Because the error was non-constitutional, this Court tests for harmlessness by weighing four factors. *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008). These factors are “(1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). In this case, the government’s case was not that strong. The case centers on Appellant’s texts to [REDACTED] apologizing when he knew she was drunk. However, this is offset by multiple people testifying how she was not acting drunk. Conversely, the defense case was fairly strong; especially in light of the military judge’s error in failing to give the mistake of fact instruction.

See Issue III, *infra*. Appellant had multiple witnesses testify that [REDACTED] was not acting drunk, that she got up and helped open a bathroom door with a knife, and that she told someone the next day that her and Appellant “messed around.” R. 293-94. The evidence was material. This case resolves around whether or not [REDACTED] was substantially incapable of consenting to sexual intercourse with Appellant. The objectionable testimony of SrA [REDACTED] was material to the government convicting Appellant. Likewise, the testimony went to the heart of the issue. It was someone who was not at the party or related to [REDACTED]. Therefore, the military judge’s abuse of his discretion prejudiced Appellant.

WHEREFORE, Appellant respectfully requests that this Court set aside the findings of guilty and the sentence.

III.

THE MILITARY JUDGE ERRED WHEN HE FAILED TO GIVE THE DEFENSE REQUESTED INSTRUCTION.

Standard of Review

Whether a jury was properly instructed is a question of law reviewed *de novo*. *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (citing *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007))

Law and Analysis

Under military law, a three-part test determines whether a military judge erred by failing to give a defense-requested instruction: (1) is the instruction correct?; (2) is the instruction substantially covered by the other instructions given to the members?; and (3) is the instruction “on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation?” *United States v. Damatta-Olivera*, 37 M.J. 474,

478 (C.M.A. 1993) (quoting *United States v. Winborn*, 14 U.S.C.M.A. 277, 282, 34 C.M.R. 57, 62 (1963)); see also *United States v. Eby*, 44 M.J. 425, 428 (C.A.A.F. 1996) (“The defense is not entitled to a requested instruction unless it is correct, necessary, and critical.”).

1. The defense’s requested instruction was correct.

Rule for Courts-Martial (R.C.M.) 906(j) says:

It is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense . . . If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonably under all the circumstances.

Id.

Appellant’s TDC requested a mistake of fact as to consent instruction. R. 320. It was the correct instruction and the military judge actually acknowledged it was correct when he said, “I guess he could have a mistake of fact.” R. 321. Despite this acknowledgement, the military judge failed to give a mistake of fact defense. R. 340-46.

2. The instruction was not substantially covered by another instruction.

The members were never instructed about mistake of fact as to consent. Rather, the exact opposite was instructed by the military judge. He told the members, “The 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.” R. 341. The military judge then gave a contradictory instruction that still fell below the required mistake of fact instruction.

Evidence has been introduced indicating that ██████ has engaged in past acts of sexual intercourse with the accused. The evidence may be considered by you on the issue of whether ██████ consented to the sexual act with which the accused is charged. You may also consider it and give it whatever weight you deem appropriate in determining whether the accused knew or should have known that

██████ was incapable of consenting to the sexual act due to impairment by an intoxicant.

R. 344.

Neither instruction substantially covered the requested instruction. Rather, the members were never instructed about mistake of fact as to consent, which was critical to Appellant's defense.

3. The instruction was "on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation?" *Damatta-Olivera*, 37 M.J. at 478.

"A military judge is required to instruct the panel on affirmative defenses, such as mistake of fact, 'if the record contains some evidence to which the military jury may attach credit if it so desires.'" *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) (citing *United States v. Hibbard*, 58 M.J. 71, 72 (C.A.A.F. 2003)).

The record contained more than "some evidence." Appellant and ██████ had a history of getting drunk and having sexual intercourse. R. 116, 139. The military judge was required to give the instruction. The military judge's failure deprived Appellant of the mistake of fact defense, which was crucial to Appellant's defense.

WHEREFORE, Appellant respectfully requests that this Court set aside the findings of guilty and the sentence.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 16 July 2014.

A handwritten signature in black ink, appearing to read "Christopher D. James". The signature is fluid and cursive, with a long horizontal stroke at the end.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	ANSWER TO ASSIGNMENTS
<i>Appellee</i>)	OF ERROR
)	
v.)	Panel No. 2
)	
Senior Airman (E-4))	
COURTNEY D. WADDELL, USAF,)	ACM 38500
<i>Appellant.</i>)	

**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

ISSUES PRESENTED

I.

**WHETHER THE FINDINGS OF GUILTY ARE LEGALLY
AND FACTUALLY SUFFICIENT.**

II.

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION WHEN HE OVERRULED THE DEFENSE
OBJECTION FOR LACK OF FOUNDATION.**

III.

**WHETHER THE MILITARY JUDGE ERRED WHEN HE
FAILED TO GIVE THE DEFENSE REQUESTED
INSTRUCTION.**

STATEMENT OF THE CASE

The United States accepts Appellant's "Summary of Proceedings."

STATEMENT OF FACTS

The facts necessary to the disposition of this matter are set forth in the Argument section below.

ARGUMENT

I.

**APPELLANT SEXUALLY ASSAULTED AN ASPIRING
AIRMAN AND THE EVIDENCE SUPPORTS THE PANEL'S
FINDING OF GUILT.**

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

On 23 February 2013, at Midwest City, Oklahoma, Appellant sexually assaulted Airman First Class (A1C) [REDACTED] while A1C [REDACTED] was incapable of consenting based on her level of intoxication. (R. at 340-41; 393.)

After choosing to be tried by officer members (R. at 5), having the opportunity to confront his victim (R. at 137), having the right to call any witness he wanted at government expense (R. at 279), and having the constitutional right to testify himself, Appellant now complains because the officer members that he chose convicted him of sexually assaulting an aspiring Airman. (App. Br. at 9-11.)

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v.

Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court must "draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

On the other hand, the test for factual sufficiency is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, this Court is convinced of Appellant's guilt beyond a reasonable doubt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). While this Court must find that the evidence was sufficient beyond a reasonable doubt, it does not mean that the evidence must be free of conflict. United States v. Rankin, 63 M.J. 552, 557 (N.M. Ct. Crim. App. 2006), aff'd, 64 M.J. 348 (C.A.A.F. 2007).

A1C ██████ first met Appellant before she joined the Air Force. (R. at 114.) They began hanging out, then dating exclusively. (R. at 115.) While they hung out with groups, they did not ever go out on dates as a couple. (R. at 115.) During the time they were dating exclusively, they had sex about eight or nine times. (R. at 116.) However, A1C ██████ (still before joining the Air Force) felt that Appellant was texting her and sending her messages too much. (R. at 116.) A1C ██████ would not leave for basic training until March 2014. (R. at 116.)

A1C ██████ told Appellant it was getting to be too much and she told him to stop texting her. (R. at 116.) Then A1C ██████ sister told Appellant to stop texting A1C ██████. (R. at 116.) Other people also told Appellant to stop texting A1C ██████ (R. at 116.) Appellant refused to stop. (R. at 116-17.) A1C ██████ still saw Appellant on occasion as they had the same friends. (R. at 119.) A1C ██████ sister was dating Appellant's roommate. (R. at 119.)

On 22 February 2014, A1C ██████ and a group of friends were going to go out for her 21st birthday. (R. at 120.) The original plan was to go to her friend, ██████ house. (R. at 120.) However, because of unforeseen issue with the house, the group decided they would go to Appellant's house. (R. at 120.) Before going to Appellant's house, the group (not including Appellant) went to Chili's restaurant for an hour where A1C ██████ had one margarita. (R. at 121.) From there, the group went to Appellant's house. (R. at 121.)

While at Appellant's house, one of the group members suggested that A1C ██████ do 21 shots to commemorate her 21st birthday. (R. at 122.) She accepted that as a goal. (R. at 122.) While at Appellant's house, A1C ██████ consumed vodka and tequila shots. (R. at 122.) A1C ██████ took approximately five or six vodka shots and an additional five or six tequila shots. (R. at 122.) A1C ██████ also had a mixed drink that she was

sipping. (R. at 122-23.) At this point she was drunk, but not "super" drunk. (R. at 123.)

A1C ██████ and the group spent approximately two hours at Appellant's house. (R. at 123.) From there, A1C ██████ and her friends went to a bar called "Cowboys." (R. at 123.) While at Cowboys, A1C ██████ continued to drink shots. (R. at 124.) A1C ██████ was drinking "Rattlesnake" shots and "Malibu" shots. (R. at 124.) She had approximately five shots of alcohol at Cowboys. (R. at 124.)

With this amount of alcohol, A1C ██████ felt drunk and sick. (R. at 124.) While she was dancing, she "was feeling pretty drunk." (R. at 125.) She was so drunk that she was "doing the hold on and shuffle thing." (R. at 125.) A1C ██████ took one last shot at "last call" and stayed at Cowboys until it closed - either at 2:00 am or 2:30 am. (R. at 125.) (R. at 125.) They all went to Appellant's house afterwards. (R. at 126.)

Upon arriving at Appellant's house, A1C ██████ went to the bathroom to vomit. (R. at 126.) Appellant was in the bathroom with A1C ██████ while she was vomiting from all the alcohol consumption. (R. at 126.)

A1C ██████ last memory for the night is that Appellant was with her in bathroom while she was vomiting from the alcohol; she has no more memory until she "wak[es] up in a dark

room with [Appellant] inside of [her]." (R. at 127.) At that point she could not see Appellant, but she felt his penis inside her vagina. (R. at 127.) She did not know where she was when she woke up. (R. at 127.) A1C ██████ was lying on her back with Appellant sexually assaulting her on top of her. (R. at 127.) The sex did not last long before Appellant ejaculated on her stomach. (R. at 127.)

A1C ██████ confronted Appellant the next day. (R. at 130.) A1C ██████ asked Appellant, "How could you have sex with me when you knew I was so drunk?" (R. at 130.) Appellant apologized and said, "***I'm sorry. I shouldn't have let it happen.***" (R. at 130.)

Two days after sexually assaulting A1C ██████, Appellant contacted her. (R. at 130.) A1C ██████ again confronted him. (R. at 130.) A1C ██████ told Appellant, "***I was passed out drunk and I woke up with you inside of me. I didn't know where I was or who I was with.***" (R. at 130.) Appellant responded by saying, "***I know. I'm sorry. I knew you were drunk.***" (R. at 130.)

There was also text message evidence presented to the members demonstrating Appellant's guilt:

A1C ██████: The other night. Courtney [Appellant] I was passed out. . .I had no idea what was going on and I woke up to you having sex with me. I didn't even know who I was with or where I was until you turned the light on.

Appellant: Ok. Well I understand then. All I'm going to say is I'm sorry **yea I knew u were drunk** and so was I but I wasn't hammered and shouldn't of let that happen and I'm sorry honestly it was a mistake that and I wish I would of stopped and thought things through. But I understand completely and I will leave u alone. But honestly from the bottom of my heart I'm sorry. It was a mistake that I wish I could take back. I'm sorry [A1C ██████]. I wish u the best w everything coming up. And I'm truly sorry this is how your going to remember me and how things had to end b4 u left. But I understand and I feel like shit for it. I'm sorry [A1C ██████] good luck w basic [training] and everything.

(Pros. Ex. 2.)

Here, both elements of the crime were met beyond a reasonable doubt. Appellant clearly admitted that he had sex with A1C ██████ and that she was drunk. Appellant knew A1C ██████ was too drunk to consent. There was zero evidence that Appellant had a mistake of fact as to A1C ██████ level of intoxication therefore, he could not have been mistaken as to consent.

After weighing the evidence in the record and making allowances for not having personally observed the witnesses, this Court should be convinced of Appellant's guilt beyond a reasonable doubt. Especially when considering the evidence in the light most favorable to the prosecution, as it must, this Court should also conclude that any reasonable fact finder, as did the fact finder in Appellant's case, could find all elements proven beyond a reasonable doubt. This issue has no merit.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY OVERRULING THE DEFENSE OBJECTION TO LACK OF FOUNDATION.

Standard of Review

Appellate courts test a military judge's admission or exclusion of evidence for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Law and Analysis

"[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995). Appellate courts accord a military judge "considerable discretion" in admitting evidence. United States v. Donaldson, 58 M.J. 477, 488 (C.A.A.F. 2003) (citations omitted).

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

Military judges are presumed to know the law and apply it correctly. United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009). Unless there is clear evidence to the contrary, this presumption holds true. United States v. Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008).

The prosecution called SrA [REDACTED] as a witness. (R. at 208.) SrA [REDACTED] testified that he had previously had conversations with A1C [REDACTED] while she was sober as well as when she had been drinking. (R. at 210.) During the early morning hours of 23 February (the night Appellant sexually assaulted A1C [REDACTED]), SrA [REDACTED] was working with A1C [REDACTED] sister. (R. at 210.) SrA [REDACTED] overheard a conversation between A1C [REDACTED] and her sister as they were on speaker phone. (R. at 210-11.) Once that foundation was laid, trial counsel asked the witness, "How did [A1C [REDACTED]] sound on the phone?" (R. at 211.) Trial defense counsel objected to hearsay and foundation. (R. at 211.) As trial counsel did not ask for a witness's statement, this was not hearsay and the military judge overruled the objection. (R. at 211.) As to the foundation objection, the military judge also overruled that objection. (R. at 243.) SrA [REDACTED] testified that A1C [REDACTED] sounded drunk. (R. at 211.) This was based on talking to her previously while she was sober and while she was drunk. (R. at 210.)

Military Rule of Evidence 701 allows for opinion testimony by lay witnesses. As it applies to this case, SrA ██████ should have been allowed to testify as to A1C ██████ sounding drunk as long as his opinion was (a) rationally based on his perception, (b) helpful to a clear understanding of his testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Military Rule of Evidence 702. M.R.E. 701.

Here, SrA ██████ established that his opinion of whether A1C ██████ sounded drunk was based on his perception of hearing her that night compared to hearing her drunk and hearing her sober on previous occasions. (R. at 210.) Second, Appellant attempted to argue that A1C ██████ was not drunk, therefore, SrA ██████ opinion was helpful to the determination as to whether she was drunk. (App. Br. at 9-11.) Finally, SrA ██████ testimony was based on his personal perception, not a scientific, technical, or other specialized knowledge within the scope of M.R.E. 702. (R. at 211.) Therefore, it was proper to overrule this objection.

Appellant's "prejudice" argument is not relevant as there was no error in the first place. This issue has no merit.

III.

THE MILITARY JUDGE DID NOT COMMIT ERROR OR ABUSE HIS SUBSTANTIAL DISCRETIONARY POWER IN REFUSING TO PROVIDE A DEFENSE REQUESTED

**INSTRUCTION AS THERE WAS NOT SUFFICIENT
EVIDENCE TO PROVIDE THE INSTRUCTION.**

Standard of Review

Appellate courts review challenges of instructional error by using an abuse of discretion standard. United States v. Anderson, 51 M.J. 145, 153 (C.A.A.F. 1999). "A military judge has substantial discretionary power in deciding on the instructions to give." Id.

Law and Analysis

Appellant argues that the military judge should have given the mistake of fact instruction in his case. (App. Br. at 13-15.) The military judge allowed trial defense counsel to establish a record as to why the instruction was appropriate, but ultimately denied the instruction. (R. at 320-24.)

Appellant cites a three-part test to determine whether an instruction should have been given. (App. Br. at 13-14.) However, Appellant cannot get past the first prong of the test (whether the instruction was correct).

"[O]ur superior court has stated that 'some evidence' entitling an accused to an instruction, has not been presented until there exists evidence sufficient for a reasonable jury to find in the accused's favor." United States v. Gurney, 73 M.J. 587, 598-99 (A.F. Ct. Crim. App. 2014) (citations omitted.)

Here, Appellant does not cite to "some evidence" sufficient to establish the foundation needed for the instruction. Evidence was not presented sufficient for a reasonable jury to find in the Appellant's favor. The only mistake of fact that would have been applicable would have been as to his state of mind. Appellant did not testify nor did he point to any evidence that would support a mistake of fact.

Appellant clearly admitted that he had sex with A1C [REDACTED] and that he knew she was drunk. Appellant's own statement defeated any need or propriety for his recognized instruction. There was zero evidence that Appellant had a mistake of fact as the A1C [REDACTED] level of intoxication therefore, he could not have been mistaken as to consent.

The military judge properly concluded that an instruction should not have been given. This issue has no merit.

CONCLUSION

Because Appellant's allegations are meritless, this Court should deny his claims and affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 August 2014 via electronic filing.



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	APPELLANT’S REPLY BRIEF
<i>Appellee,</i>)	
)	
v.)	Before Panel No. 2
)	Case No. ACM 38500
Senior Airman (E-4))	
COURTNEY D. WADDELL,)	Tried at Tinker Air Force Base, OK
United States Air Force,)	between 15-17 October 2013 by a general
)	court-martial convened by the Commander,
<i>Appellant.</i>)	AFMC

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

COMES NOW Appellant, by and through his undersigned counsel, and pursuant to Rule 15(b) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure replies to the government’s answer.

A. The government asks this Court to ignore Military Rule of Evidence (M.R.E.) 602.

In Appellant’s original brief at 14, he posited that the military judge abused his discretion because Senior Airman (SrA) [REDACTED] testimony did not meet the requirement of M.R.E. 602. The government fails to address M.R.E 602. Instead, they focus solely on M.R.E. 701. Gov. Br. at 10. SrA [REDACTED] did not meet the foundational requirements of M.R.E 701, because he failed the test required under M.R.E. 602, that he actually have personal knowledge. SrA [REDACTED] saw A1C [REDACTED] twice before hearing her on speakerphone, one time when she was drinking and one time when she was not. R. 209-10. SrA [REDACTED] did not testify how much A1C [REDACTED] was drinking on the only occasion he had been around her when she was drinking. In addition, he contradicted himself when questioned by trial counsel about how A1C [REDACTED] sounded on the phone. R. 211. SrA [REDACTED] said A1C [REDACTED]. sounded different from the two prior occasions he heard A1C [REDACTED]

speak. R. 211. Trial counsel highlighted this fact by asking SrA [REDACTED] if A1C [REDACTED] voice was “distinct from the other times you’ve heard her?” *Id.* SrA [REDACTED] replied, “yes sir.” If it is distinct from the other two times, then how does that meet the requirement of M.R.E. 602?

Moving to the issue of prejudice, Appellant would ask this Court to review the argument presented in his original brief, contrary to the government’s assertion that “Appellant’s ‘prejudice’ argument is not relevant as there was no error in the first place. This issue has no merit.” Gov. Br. at 10.

B. The military judge erred by not giving the required mistake of fact instruction.

The government wants this Court to apply the wrong standard of review. Gov. Br. 11. The government attempts to lower the standard of review to abuse of discretion, however that is not the standard. *Id.* The government cited to *United States v. Gurney*, 73 M.J. 587 (A.F. Ct. Crim. App. 2014) *review denied*, 14-0515/AF, 2014 WL 3862034 (C.A.A.F. July 1, 2014) in their brief, which gives the correct standard of review: *de novo*. *Id.* at 598. In addition, contrary to the government’s assertions that “Appellant does not cite to ‘some evidence’ sufficient to establish the foundation needed for the instruction,” Appellant would direct the Court’s attention to page 17 and 18 of Appellant’s original assignment of errors. Gov. Br. 12.

Next, the government states, “Appellant did not testify nor did he point to any evidence that would support a mistake of fact.” *Id.* Appellant does not have an obligation to testify in order to receive the required instruction. Additionally, Appellant did point to evidence that would support a mistake of fact instruction, starting with the military judge’s own admission that “I guess he could have a mistake of fact.” App. Br. 16-17, R. at 321. In addition, Appellant highlighted all of the testimony how A1C [REDACTED] acted during the time she is allegedly passed out. Finally, the government declares that “[t]here was zero evidence that Appellant had a

mistake of fact as the A1C [REDACTED] level of intoxication therefore, he could not have been mistaken as to consent.” Gov. Br. 12. That is not the standard. The government appears to be arguing that drunk people cannot consent to sexual intercourse. And perhaps more importantly that an accused could not view a complaining witnesses actions as consent, where a complaining witness drank alcohol. Appellant admitted he knew A1C [REDACTED] was drunk, he never admitted she was so drunk she could not consent. Appellant respectfully request this Honorable Court find the military judge abused his discretion by not giving the requested instructions and set aside the findings and sentence.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 August 2014.



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12 May 2014

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee,

v.

Staff Sergeant (E-5)

GLENN J. LITTLE,

United States Air Force

Appellant.

) ASSIGNMENT OF ERRORS

)

) Before Panel No. ____

)

) Case No. ACM 38338

)

) Tried at RAF Mildenhall, UK on 5 Nov 12

) and 10-14 Dec 12 by general court-martial

) convened by 3 AF/CC (USAFE)

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS:**

Issues Presented

I.

**WHETHER THE EVIDENCE WAS FACTUALLY SUFFICIENT TO
CONVICT APPELLANT OF SPECIFICATION 1 OF CHARGE I.**

II.

**WHETHER THE EVIDENCE WAS FACTUALLY SUFFICIENT TO
CONVICT APPELLANT OF SPECIFICATION 3 OF CHARGE I AND
ADDITIONAL CHARGE IV AND ITS SPECIFICATION.**

III.

**WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE
PANEL MEMBERS THEY COULD CONSIDER SPECIFICATIONS 1
AND 3 OF CHARGE I AND SPECIFICATIONS 2 AND 3 OF
ADDITIONAL CHARGE III AS EVIDENCE OF APPELLANT'S
PROPENSITY TO COMMIT SEXUAL ASSAULT BECAUSE IT
EVISCERATED THE SPILLOVER INSTRUCTION WITH REGARD TO
ADDITIONAL CHARGE IV AND ITS SPECIFICATION.**

IV.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL MEMBERS ON THE DEFENSE OF VOLUNTARY INTOXICATION WITH REGARD TO SPECIFICATIONS 1 AND 3 OF CHARGE I.

Summary of Proceedings

On 5 November and 10-14 December 2012, Appellant was tried at a general court-martial by officer and enlisted members at Royal Air Force Mildenhall, United Kingdom. The Charges and Specifications he was arraigned on, his pleas, and the findings of the court-martial are as follows:

Chg	Art	Spc	Summary of Findings	P	F
I	120			NG	G
		1	Did, a/o/n Newmarket, UK, o/a 3 Mar 12, cause A1C ■■■ to engage in a sexual act, to wit: penetrating her vaginal opening with his fingers, by causing bodily harm upon her, to wit: offensive touching of the vulva and vaginal opening.	NG	G
		2	Did, a/o/n RAF Mildenhall, UK, o/a 3 Mar 12, wrongfully commit indecent conduct, to wit: licking the areola and surrounding area of the breast of SrA ■■■.	NG	NG
		3	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 30 Apr 12, engage in sexual contact with A1C ■■■, to wit: grabbing the buttocks of A1C ■■■, and such sexual contact was w/o legal justification or lawful authorization and w/o the permission of A1C ■■■.	NG	NG, but G of attempted wrongful sexual contact in violation of Article 80, by excepting the word "engage" and substituting therefor the words "attempt to engage."
II	134			NG	G

		1	Did, a/o/n RAF Mildenhall, UK, o/a 31 Mar 12, unlawfully enter the dorm room of A1C ■■■, which conduct was prejudicial to good order and discipline in the armed forces.	NG	G
		2	A married man, did, a/o/n RAF Mildenhall, UK, b/o/a 4 Dec 11 and o/a 3 May 12, wrongfully have sexual intercourse w/ SrA ■■■, a woman not his wife, which conduct was prejudicial to good order and discipline in the armed forces.	NG	NG
Add'l Charge I	92			NG	G
			Who knew or should have known of his duties, b/o/a 1 Jan 12 and o/a 31 Mar 12, was derelict in the performance of those duties in that he negligently failed to maintain professional relationships w/ junior enlisted members, as it was his duty to do; by repeatedly visiting the dorm rooms of junior enlisted members, providing alcohol and other gifts for junior enlisted members, and partying w/ junior enlisted members in the dorms and clubs.	NG	G
Add'l Charge II	93			NG	NG
			a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 1 Mar 12, did maltreat A1C ■■■, a person subject to his orders, by making divers unwanted sexual comments and sexual advances.	NG	NG
Add'l Charge III	120			NG	NG
		1	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Feb 12 and o/a 30 Apr 12, wrongfully commit indecent conduct, to wit: fondling his groin area and penis in the presence of A1C ■■■.	NG	NG

		2	Did, a/o/n Newmarket, UK, o/a 3 Mar 12, engage in sexual contact, to wit: touching the genitalia, groin, or inner thigh, w/ A1C ■ by causing bodily harm to her, to wit: offensive touching of the genitalia, groin, or inner thigh.	NG	NG
		3	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 1 Mar 12, engage in sexual contact w/ A1C ■, to wit: touching the breast of A1C ■, and such sexual contact was w/o legal justification or lawful authorization and w/o the permission of A1C ■.	NG	NG
Add'l Charge IV					
	128			NG	G
			Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Feb 12 and o/a 30 Apr 12, unlawfully push A1C ■ by the chest or shoulders onto her bed and hold her down.	NG	G, except the words "chest or shoulders" and substituting therefor the words "shoulders."

Appellant was sentenced to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. R. at 941-942. On 11 April 2013, the convening authority approved the findings and sentence as adjudged. Record of Trial, Vol. 1, Action. Pursuant to Article 57, UCMJ, the convening authority deferred both Appellant's reduction in grade and mandatory forfeitures until Action. *Id.* Additionally, pursuant to Article 58, the convening authority waived mandatory forfeitures for a period of sixth months. *Id.*

Summary of Facts

Facts necessary to the disposition of Appellant's case are contained in the respective argument sections below.

Argument

I.

THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO CONVICT APPELLANT OF SPECIFICATION 1 OF CHARGE I.

Statement of Facts

A. Incident with A1C ■

On Saturday, 3 March 2012, A1C ■ went to Club Innocence in Newmarket, UK, with several female friends. R. 171-72. At the club, A1C ■ engaged in a dance with several different partners, including Appellant, known as twerking. R. 178, 188. She testified that twerking is a dance where you “shake your butt” as fast as you can while you are facing away from your dance partner. R. 178-79, 204. *See* Pros. Ex. 3. She further testified that when she is twerking, it is common to have physical contact between her butt and her partner’s crotch and the front of his legs. R. 180. Sometimes her partners will put their hands on her hips when she is twerking. *Id.* She denied that twerking is a sexually suggestive dance. R. 200-01.

A1C ■ had four alcoholic drinks of Ciroc vodka and cranberry juice in six- to eight-inch tall glasses while at the club. R. 181-82. She testified that she was tipsy but not stumbling or slurring her speech. R. 182-83.

A1C ■ testified that while she was on the stage she began twerking with someone for several minutes, and he put his hands on her hips while they danced. R. 184-86. While dancing on the stage, A1C ■ had her hands on the wall, which was made up of a wall length mirror about waist high on the stage. R. 184-85; Pros. Ex. 11. It was very loud in the club and difficult to hear. R. 204. Then, in a “split second” and while she was bent over and shaking her hips and

butt, he put his right hand up underneath her shirt and down her pants and put his both his index and middle fingers two knuckles deep into her vagina. R. 186, 188-89, 209-211. A1C ■ testified that she did not feel anything, including movement of her pants and underwear, until Appellant's fingers penetrated her vagina. R. 211-12. She even testified that she did not feel Appellant's hand touch her pubic region or "the lips of [her] vagina." R. 212. It was at this point that she pushed his hand away, turned around, and realized she had been twerking with Appellant. R. 188. She testified that Appellant did not touch her genital area at all before putting his fingers in her vagina. *Id.* She claimed that Appellant then "put both his fingers in his mouth and sucked them and then smirked." *Id.* She then left the stage, found her friends, and left the club. R. 189. A1C ■ had not met Appellant prior to that night. R. 171.

A1C ■ testified that she was wearing a green button down shirt and form-fitting leggings—kind of like spandex pants. R. 187. Her pants were tight and had an elastic waistband. R. 200-01. She also had on thong underwear. *Id.* She was not wearing a belt. *Id.* See Pros. Exs. 3 and 13, which show what A1C ■ was wearing that night. A1C ■ testified it "is possible for someone to put their hands into [her pants] without stretching them." R. 187. A1C ■ initially told her friends that Appellant "tried to finger her." R. 190, 198, 199. This was corroborated by A1C ■, SrA ■, and A1C ■ who all testified that A1C ■ said that Appellant "tried to finger her." R. 286-87, 319, 360, 580, 586.

On the car ride home from the club, A1C ■ called her boyfriend in Georgia and told him what happened. R. 190-91. She denied being worried about telling her boyfriend that she had been twerking with Appellant. R. 192-93. A1C ■ testified that she does not remember giving Appellant a hug at the club that night but it is possible that she did hug him. R. 193. During

cross-examination, she maintained that she did not black out that evening but does not remember hugging Appellant. R. 205. However, she admitted that Prosecution Exhibit 13 showed her hugging Appellant at the club. *Id.*

A1C ■ sent Appellant an email on Monday, 5 March 2012, accusing him of fingering her. R. 194-95. *See* Pros. Ex. 14. Appellant consistently maintained to A1C ■ her friends, and investigators that he did not remember fingering A1C ■ but apologized to her too. R. 195-96, 215, 233-235, 349, 437, 439, 440, 441, 453, 467. During a pretext phone call, Appellant maintained he did not remember the incident but said, “I know you wouldn’t accuse me of doing that if I didn’t do it.” R. 234. That same week while talking with her boyfriend via Skype, A1C ■ called Appellant on her cell phone and had Appellant talk to her boyfriend. R. 196. A1C ■ boyfriend confronted Appellant about the incident. *Id.* A1C ■ eventually reported the incident to the Sexual Assault Response Coordinator (SARC) in April—a month later. R. 235. She broke up with her boyfriend in September 2012. R. 191.

Standard of Review

Questions of factual sufficiency are reviewed *de novo*. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). “The test for factual sufficiency ‘is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,’ the court is ‘convinced of the accused’s guilt beyond a reasonable doubt.’” *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Law and Analysis

No other witness testified to seeing Appellant digitally penetrate A1C ■. Thus, A1C ■ credibility is extremely important in determining whether Appellant is guilty. However, she

is not credible because the sexual assault was not physically possible, her testimony is riddled with inconsistencies, and she had a motive to fabricate the allegation.

During closing argument, senior trial defense counsel made the point that Appellant must have “magic fingers” to have pulled off the sexual assault as described by A1C ■ R. 825, 829. If A1C ■ is to be believed, then Appellant reached up under her untucked shirt and down her tight spandex pants inside her underwear and into her vagina without her noticing or touching any other part of her body, including the outside of her vulva, all while A1C ■ was twerking and shaking her hips and butt as fast as she could. Despite this, A1C ■ testified that it “is possible for someone to put their hands into [her pants] without stretching them.” R. 187.

A1C ■ is also not credible because she claimed she was only tipsy and did not black out that evening. She also maintained she does not remember hugging Appellant even though Prosecution Exhibit 13 clearly shows her hugging him. R. 182-83. Her selective memory is further evidence of her lack of credibility. Moreover, she also denied that twerking is a sexually suggestive dance, but Prosecution Exhibit 3 and common sense clearly show otherwise. R. 200-01. She also claimed that she did not know she was dancing with Appellant until she turned around even though she was dancing in front of a large mirror. R. 184-85, 188.

A1C ■ also waited a month to report the incident to the SARC, but she called her boyfriend in Georgia on the ride home from the club and told him. R. 190-91, 235. Apparently, she was more interested in making sure her boyfriend knew she had been sexually assaulted than reporting the incident to the authorities. Perhaps she was more worried that her boyfriend might find out that she had been hugging Appellant, twerking with him, and letting him digitally penetrate her, so she fabricated a sexual assault allegation against Appellant. It is also plausible

that A1C ■ fabricated a sexual assault allegation in an attempt to re-ignite her long-distance relationship with her boyfriend in Georgia. Interestingly, there was no testimony that her friends or her boyfriend attempted to persuade her to report the incident. Perhaps they too did not believe her.

Appellant consistently maintained that he does not remember digitally penetrating A1C ■; however, he frequently followed his denials with an apology to A1C ■. Trial counsel argued that “innocent people do not apologize for sexual assaults they didn't commit.” R. 773-74. However, Appellant was steadfast and consistent even when he was repeatedly confronted by A1C ■ her friends, her boyfriend, and for hours by AFOSI agents. It is just as likely that Appellant apologized because he did not know what else to say to A1C ■ and was trying to be nice in the middle of an awkward conversation.

A1C ■ was the only witness against Appellant for this specification. However, because the digital penetration she alleges occurred was physically impossible, she is not a credible witness, and she had a motive to fabricate the allegation there is not enough evidence to prove beyond a reasonable doubt that Appellant is guilty of this offense.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the finding of guilt with regard to Specification 1 of Charge I and remand the case for a sentencing rehearing.

II.

THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO CONVICT APPELLANT OF SPECIFICATION 3 OF CHARGE I AND ADDITIONAL CHARGE IV AND ITS SPECIFICATION.

Statement of Facts

A1C █████ testified that around 0200 in the morning in March 2012 Appellant knocked on her dorm room door. R. 599, 602. She heard him say her last name when he knocked, and she instantly recognized his voice. R. 598, 619. She then invited him into her room. R. 602. Appellant appeared intoxicated to her, and she testified that the way Appellant said her name led her to believe he was drunk. R. 603.

While conversing with Appellant next to her bed, A1C █████ claimed he asked her if she had ever been with a black man before. R. 605. A1C █████ said, “no.” *Id.* Then, Appellant asked if she wanted to be with a black man, and, again, she said, “no.” *Id.* Then, he allegedly grabbed her by the shoulders and pushed her onto the bed. R. 606. She landed on her back on the bed with her knees pulled up to her chest like she was in the fetal position. *Id.* Then, she alleged Appellant put his left arm across her collar bone and chest area while he used his right arm to try and pull her legs out from between them. R. 607. She also tried to use her legs to push him off of her, but she was unable because Appellant’s body weight was on top of her. R. 608.

Appellant testified that during this alleged 30-45 second interaction Appellant did not grab her butt; he just came into contact with her “lower butt, upper thigh.” R. 609. According to her, Appellant was laughing the entire time, and his laughter caused A1C █████ to go “from being scared and uncomfortable to being angry because he was making it seem like a game *and it was no longer a game to me.*” R. 609-10 (emphasis added). Trial counsel immediately asked A1C █████ if it had ever been a game to her, and she said, “no.” R. 610. Then, A1C █████ hit Appellant in the temple with her left closed fist. *Id.* He immediately got off of her, backed away, and just stood there in silence. R. 611. A1C █████ testified she went back to her computer, and her

“intention was to logon to Facebook and see if [she] could get in contact with anybody to see if they could help [her] get him out of [her] room.” *Id.* A1C █████ did not make contact with anyone on Facebook. R. 614. Then, Appellant walked over to her bed and lay down. R. 612. A1C █████ testified she never directly looked at him while he was lying on her bed even though she was allegedly scared. R. 613, 630. She could only see Appellant out of the corner of her eye, and it appeared that he was falling asleep. R. 631. Eventually Appellant just got up and left her dorm room. R. 614.

A1C █████ never attempted to leave her room even though she admitted she had the opportunity. R. 627. She also never screamed or tried to use a phone to call for help. R. 611, 627. Though she testified that she frequently can hear other people’s music and it is hard to tell if someone is knocking on her door or someone else’s. R. 605, 615, 621.

A1C █████ said she told Appellant a few days later while at work to never talk with her again unless it was work related. R. 615-16. She claims that Appellant apologized to her and said that the incident happened because he was drunk. R. 616. A1C █████ testified that Appellant never acted inappropriately toward her before or after the incident. R. 616, 619-20. A1C █████ claims she later told a co-worker, A1C █████, that she had an “unpleasant encounter” with Appellant, but she never provided her with details or told anyone else about the incident. R. 617. She did not report the incident to investigators until she was contacted sometime after 15 June 2012 by AFOSI while she was deployed to Ali Al Salem Air Base in Kuwait. R. 616-17.

Standard of Review

The standard of review for this issue is the same as the standard of review for Issue I.

Law and Analysis

There is no evidence beyond a reasonable doubt that supports Appellant's conviction for attempting to grab the buttocks of A1C [REDACTED] with the intent to abuse, humiliate, or degrade A1C [REDACTED] or to arouse or gratify his or her sexual desires.¹ A1C [REDACTED] specifically denied Appellant ever grabbed her buttocks. R. 609, 639. She consistently testified that he tried to pull her leg out from between them. R. 607-08, 626, 637, 639. One can reasonably deduce that had Appellant intended to grab her buttocks, he would have just done so instead of pulling on her leg.²

According to A1C [REDACTED] own version of these events, she was lying on the bed with her knees at her chest in the fetal position, and Appellant was on top of her. R. 606-08. This would have exposed a very large portion of her buttocks to Appellant, making it very easy for him to grab it, but he did not. He grabbed her leg instead. R. 607-08, 626, 637, 639.

A1C [REDACTED]'s credibility also casts reasonable doubt about whether Appellant grabbed her by the shoulders and pushed her onto the bed without her consent.³ A1C [REDACTED] admitted that at some point while she and Appellant were wrestling on the bed that it was no longer a game to her. R. 609-10. This means that at some point it was just a game to her. Immediately noticing how damaging this testimony was, trial counsel followed up by asking her if it was ever a game to her, and she of course said, "no." R. 610.

¹ The military judge instructed that the first element of wrongful sexual contact was that the Appellant "engaged in sexual contact." R. 739. The military judge also defined "sexual contact" as "intentional touching . . . of the . . . buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." *Id.*

² Because we do not know whether this incident or the incident with A1C [REDACTED] as described in Issue I occurred first in time, we have no way of knowing whether Appellant's purported deftness with his magic fingers dramatically improved or diminished between these incidents.

³ The military judge instructed that the "act must be done without legal justification or excuse and without the lawful consent of the victim." R. 755, 59.

It is more likely that this was a consensual and playful encounter between Appellant and A1C ■■■. She testified that she instantly recognized his voice outside her dorm room, and she invited this married man in, even though he appeared drunk, she was alone, and it was 0200. R. 599, 602-03. She never cried out for help, never even attempted to leave the room, and never attempted to call anyone on her phone even though she admitted she could have done these things. R. 611, 627. Instead, she opened her laptop, logged back onto the Internet, and logged into Facebook while Appellant lay on her bed. R. 627-28. Even though moments earlier Appellant was supposedly willing to resort to force to get what he wanted, he was now content to almost fall asleep on her bed before simply getting up and walking out the door. R. 612, 614, 631.

She purports that she confronted Appellant at work, but she cannot remember if it was the next day or several days later—a fact that a true victim would not likely forget. R. 615. She claims he approached her at work and apologized, and then, even though no one else was around and she had no idea how he would respond, she decided to confront him. R. 616. It is also telling that she did not report the alleged incident even after she learned that Appellant may have done something to A1C ■■■. She and A1C ■■■ conveniently did not even discuss the details of what had happened to them. R. 617. However, when AFOSI contacted her, she only had two choices, admit that she had been fooling around with a married man or concoct a sexual assault allegation.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specification 3 of Charge I and Additional Charge IV and its Specification and remand the case for a sentencing rehearing.

III.

THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL MEMBERS THEY COULD CONSIDER SPECIFICATIONS 1 AND 3 OF CHARGE I AND SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE III AS EVIDENCE OF APPELLANT'S PROPENSITY TO COMMIT SEXUAL ASSAULT BECAUSE THIS EVISCERATED THE SPILLOVER INSTRUCTION WITH REGARD TO ADDITIONAL CHARGE IV AND ITS SPECIFICATION.

Statement of Facts

On 15 October 2012, trial counsel submitted a written motion requesting a Military Rule of Evidence (MRE) 413 instruction with regard to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. App. Ex. X. Trial defense counsel submitted a written response on 6 December 2012 opposing a MRE 413 instruction. App. Ex. XII. The military judge heard oral argument from the parties before ruling on the motion. R. 703-15. Trial defense counsel opposed the MRE 413 instruction because it would “essentially eviscerate the spillover instruction.” R. 708-09. The military judge ultimately granted trial counsel’s motion and instructed the panel members they could consider Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III as evidence of Appellant’s propensity to commit sexual assault. R. 766-67. The military judge also instructed the panel that “potential propensity use only applies to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. It does not apply to any other charged offenses.” R. 767. Specification 3 of Charge I (i.e. grabbing the buttocks of A1C [REDACTED]) includes the same continuing course of misconduct alleged in Additional Charge IV and its Specification (i.e. pushing A1C [REDACTED] by the shoulders onto her bed and holding her down). R. 9.1, 9.6. *See* Issue II. Appellant was

convicted of violating both Additional Charge IV and its Specification and Specification 3 of Charge I. R. 881-82.

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed *de novo*.” *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). “The military judge has an independent duty to determine and deliver appropriate instructions.” *Ober*, 66 M.J. at 405. “Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.” *United States v. Westmoreland*, 31 M.J. 160, 164 (C.M.A. 1990) (citations omitted).

Law and Analysis

By instructing the panel members that they could consider Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III as evidence of Appellant’s propensity to commit sexual assault, the military judge eviscerated the spillover instruction with regard to Additional Charge IV and its Specification. It did not matter that the military judge gave a spillover instruction and instructed that the propensity evidence only applied to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. By permitting the use of propensity evidence with regard to whether Appellant grabbed A1C ██████ buttocks, the military judge inadvertently implicated the use of propensity evidence with regard to whether Appellant held A1C ██████ down on her bed while he attempted to grab her buttocks. Thus, there was an inherent contradiction in the military judge’s instructions that resulted in an

evisceration of the spillover instruction with regard to Additional Charge IV and its Specification—a non-sexual assault offense. The military judge could have avoided this error by not including Specification 3 of Charge I in his propensity instruction or declining to give a propensity instruction at all.

This error prejudiced Appellant because the panel members were not only allowed to consider sexual assault propensity evidence with regard to Specification 3 of Charge I but also with regard to Additional Charge IV and its Specification. The Government cannot show that this error was harmless or that the panel members did not use propensity evidence to convict Appellant of both Specification 3 of Charge I and Additional Charge IV and its Specification. Thus, Appellant’s convictions for Specification 3 of Charge I and Additional Charge IV and its Specification must be overturned.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specification 3 of Charge I and Additional Charge IV and its Specification and remand the case for a sentencing rehearing.

IV.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL MEMBERS ON THE DEFENSE OF VOLUNTARY INTOXICATION WITH REGARD TO SPECIFICATIONS 1 AND 3 OF CHARGE I.

Statement of Facts

The military judge never instructed the members on the defense of voluntary intoxication. In other words, the military judge never instructed the members that voluntary intoxication could be considered for its effect on Appellant’s ability to form the specific intent necessary to commit

Specifications 1 and 3 of Charge I. The only instruction the military judge gave to the members regarding voluntary intoxication was how it was not relevant to the defense of mistake of fact as to consent. The military judge instructed the members with regard to Specification 1 of Charge I (aggravated sexual assault in violation of Article 120, UCMJ) as follows:

There is evidence in this case that indicates that, at the time of the alleged aggravated sexual assault, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that [A1C ■■■] consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

R. 733-34. The military judge did not provide the same instruction for Specification 3 of Charge I (wrongful sexual contact in violation of Article 120, UCMJ). Although there was evidence that Appellant was under the influence of alcohol at the time of the alleged wrongful sexual contact, the military judge did not give a voluntary intoxication defense instruction. R. 603. He simply stated that "the defense of mistake of fact as to consent does not apply" if Appellant's "belief was not a reasonable belief for a sober person under all of the facts and circumstances." R. 741.

The military judge also instructed the panel members on the lesser included offense of attempt for both Specification 1 and 3 of Charge I. R. 735, 741. Appellant was ultimately convicted of attempt with regard to Specification 3 of Charge I. R. 881-82.

During voir dire, trial counsel told the panel members that "[v]oluntary intoxication is not a defense to sexual assault." R. 61. Trial counsel reiterated this during findings argument. R. 796-97. Senior Defense Counsel conceded that voluntary intoxication was not relevant to a mistake of fact as to consent defense. R. 830.

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed *de novo*.” *Garner*, 71 M.J. at 432. “The military judge has an independent duty to determine and deliver appropriate instructions.” *Ober*, 66 M.J. at 405. “Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.” *Westmoreland*, 31 M.J. at 164.

Law and Analysis

To be guilty of aggravated sexual assault, Appellant must have engaged in a sexual act. A sexual act is defined as “the penetration, however slight, of the genital opening of another by a hand or finger or by any object, *with an intent* to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” R. 731 (emphasis added). To be guilty of wrongful sexual contact, Appellant must have engaged in sexual contact. Sexual contact is defined as “*the intentional touching*, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, *with an intent to* abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.” R. 739 (emphasis added). Thus, because aggravated sexual assault and wrongful sexual contact require a specific intent, a voluntary intoxication defense instruction should have been given by the military judge. A voluntary intoxication defense instruction was also appropriate and should have been given each time the military judge instructed on the lesser included offense of attempt, which he did for both Specifications 1 and 3 of Charge I.

The only instruction regarding voluntary intoxication given by the military judge was that it was irrelevant to the defense of mistake of fact as to consent. R. 733-34. Additionally, trial counsel pointed out in both voir dire and findings argument that “[v]oluntary intoxication is not a defense to sexual assault.” R. 61, 796-97. This only exacerbated the military judge’s failure to give a voluntary intoxication defense instruction. Thus, the panel members were not able to consider whether Appellant’s voluntary intoxication affected his ability to form the specific intent necessary to complete the crimes of aggravated sexual assault and attempted wrongful sexual contact of which Appellant was ultimately convicted.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specifications 1 and 3 of Charge I and remand for a sentencing rehearing.

Respectfully,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 May 2014.



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12 May 2014

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee,

v.

Staff Sergeant (E-5)

GLENN J. LITTLE,

United States Air Force

Appellant.

) ASSIGNMENT OF ERRORS

)

) Before Panel No. ____

)

) Case No. ACM 38338

)

) Tried at RAF Mildenhall, UK on 5 Nov 12

) and 10-14 Dec 12 by general court-martial

) convened by 3 AF/CC (USAFE)

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS:**

Issues Presented

I.

**WHETHER THE EVIDENCE WAS FACTUALLY SUFFICIENT TO
CONVICT APPELLANT OF SPECIFICATION 1 OF CHARGE I.**

II.

**WHETHER THE EVIDENCE WAS FACTUALLY SUFFICIENT TO
CONVICT APPELLANT OF SPECIFICATION 3 OF CHARGE I AND
ADDITIONAL CHARGE IV AND ITS SPECIFICATION.**

III.

**WHETHER THE MILITARY JUDGE ERRED BY INSTRUCTING THE
PANEL MEMBERS THEY COULD CONSIDER SPECIFICATIONS 1
AND 3 OF CHARGE I AND SPECIFICATIONS 2 AND 3 OF
ADDITIONAL CHARGE III AS EVIDENCE OF APPELLANT'S
PROPENSITY TO COMMIT SEXUAL ASSAULT BECAUSE IT
EVISCERATED THE SPILLOVER INSTRUCTION WITH REGARD TO
ADDITIONAL CHARGE IV AND ITS SPECIFICATION.**

IV.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL MEMBERS ON THE DEFENSE OF VOLUNTARY INTOXICATION WITH REGARD TO SPECIFICATIONS 1 AND 3 OF CHARGE I.

Summary of Proceedings

On 5 November and 10-14 December 2012, Appellant was tried at a general court-martial by officer and enlisted members at Royal Air Force Mildenhall, United Kingdom. The Charges and Specifications he was arraigned on, his pleas, and the findings of the court-martial are as follows:

Chg	Art	Spc	Summary of Findings	P	F
I	120			NG	G
		1	Did, a/o/n Newmarket, UK, o/a 3 Mar 12, cause A1C ■■■ to engage in a sexual act, to wit: penetrating her vaginal opening with his fingers, by causing bodily harm upon her, to wit: offensive touching of the vulva and vaginal opening.	NG	G
		2	Did, a/o/n RAF Mildenhall, UK, o/a 3 Mar 12, wrongfully commit indecent conduct, to wit: licking the areola and surrounding area of the breast of SrA ■■■.	NG	NG
		3	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 30 Apr 12, engage in sexual contact with A1C ■■■, to wit: grabbing the buttocks of A1C ■■■, and such sexual contact was w/o legal justification or lawful authorization and w/o the permission of A1C ■■■.	NG	NG, but G of attempted wrongful sexual contact in violation of Article 80, by excepting the word "engage" and substituting therefor the words "attempt to engage."
II	134			NG	G

		1	Did, a/o/n RAF Mildenhall, UK, o/a 31 Mar 12, unlawfully enter the dorm room of A1C ■■■, which conduct was prejudicial to good order and discipline in the armed forces.	NG	G
		2	A married man, did, a/o/n RAF Mildenhall, UK, b/o/a 4 Dec 11 and o/a 3 May 12, wrongfully have sexual intercourse w/ SrA ■■■, a woman not his wife, which conduct was prejudicial to good order and discipline in the armed forces.	NG	NG
Add'l Charge I	92			NG	G
			Who knew or should have known of his duties, b/o/a 1 Jan 12 and o/a 31 Mar 12, was derelict in the performance of those duties in that he negligently failed to maintain professional relationships w/ junior enlisted members, as it was his duty to do; by repeatedly visiting the dorm rooms of junior enlisted members, providing alcohol and other gifts for junior enlisted members, and partying w/ junior enlisted members in the dorms and clubs.	NG	G
Add'l Charge II	93			NG	NG
			a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 1 Mar 12, did maltreat A1C ■■■, a person subject to his orders, by making divers unwanted sexual comments and sexual advances.	NG	NG
Add'l Charge III	120			NG	NG
		1	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Feb 12 and o/a 30 Apr 12, wrongfully commit indecent conduct, to wit: fondling his groin area and penis in the presence of A1C ■■■.	NG	NG

		2	Did, a/o/n Newmarket, UK, o/a 3 Mar 12, engage in sexual contact, to wit: touching the genitalia, groin, or inner thigh, w/ A1C ■ by causing bodily harm to her, to wit: offensive touching of the genitalia, groin, or inner thigh.	NG	NG
		3	Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Jan 12 and o/a 1 Mar 12, engage in sexual contact w/ A1C ■, to wit: touching the breast of A1C ■, and such sexual contact was w/o legal justification or lawful authorization and w/o the permission of A1C ■.	NG	NG
Add'l Charge IV					
	128			NG	G
			Did, a/o/n RAF Mildenhall, UK, b/o/a 1 Feb 12 and o/a 30 Apr 12, unlawfully push A1C ■ by the chest or shoulders onto her bed and hold her down.	NG	G, except the words "chest or shoulders" and substituting therefor the words "shoulders."

Appellant was sentenced to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. R. at 941-942. On 11 April 2013, the convening authority approved the findings and sentence as adjudged. Record of Trial, Vol. 1, Action. Pursuant to Article 57, UCMJ, the convening authority deferred both Appellant's reduction in grade and mandatory forfeitures until Action. *Id.* Additionally, pursuant to Article 58, the convening authority waived mandatory forfeitures for a period of sixth months. *Id.*

Summary of Facts

Facts necessary to the disposition of Appellant's case are contained in the respective argument sections below.

Argument

I.

THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO CONVICT APPELLANT OF SPECIFICATION 1 OF CHARGE I.

Statement of Facts

A. Incident with A1C ■

On Saturday, 3 March 2012, A1C ■ went to Club Innocence in Newmarket, UK, with several female friends. R. 171-72. At the club, A1C ■ engaged in a dance with several different partners, including Appellant, known as twerking. R. 178, 188. She testified that twerking is a dance where you “shake your butt” as fast as you can while you are facing away from your dance partner. R. 178-79, 204. *See* Pros. Ex. 3. She further testified that when she is twerking, it is common to have physical contact between her butt and her partner’s crotch and the front of his legs. R. 180. Sometimes her partners will put their hands on her hips when she is twerking. *Id.* She denied that twerking is a sexually suggestive dance. R. 200-01.

A1C ■ had four alcoholic drinks of Ciroc vodka and cranberry juice in six- to eight-inch tall glasses while at the club. R. 181-82. She testified that she was tipsy but not stumbling or slurring her speech. R. 182-83.

A1C ■ testified that while she was on the stage she began twerking with someone for several minutes, and he put his hands on her hips while they danced. R. 184-86. While dancing on the stage, A1C ■ had her hands on the wall, which was made up of a wall length mirror about waist high on the stage. R. 184-85; Pros. Ex. 11. It was very loud in the club and difficult to hear. R. 204. Then, in a “split second” and while she was bent over and shaking her hips and

butt, he put his right hand up underneath her shirt and down her pants and put his both his index and middle fingers two knuckles deep into her vagina. R. 186, 188-89, 209-211. A1C ■ testified that she did not feel anything, including movement of her pants and underwear, until Appellant's fingers penetrated her vagina. R. 211-12. She even testified that she did not feel Appellant's hand touch her pubic region or "the lips of [her] vagina." R. 212. It was at this point that she pushed his hand away, turned around, and realized she had been twerking with Appellant. R. 188. She testified that Appellant did not touch her genital area at all before putting his fingers in her vagina. *Id.* She claimed that Appellant then "put both his fingers in his mouth and sucked them and then smirked." *Id.* She then left the stage, found her friends, and left the club. R. 189. A1C ■ had not met Appellant prior to that night. R. 171.

A1C ■ testified that she was wearing a green button down shirt and form-fitting leggings—kind of like spandex pants. R. 187. Her pants were tight and had an elastic waistband. R. 200-01. She also had on thong underwear. *Id.* She was not wearing a belt. *Id.* See Pros. Exs. 3 and 13, which show what A1C ■ was wearing that night. A1C ■ testified it "is possible for someone to put their hands into [her pants] without stretching them." R. 187. A1C ■ initially told her friends that Appellant "tried to finger her." R. 190, 198, 199. This was corroborated by A1C ■, SrA ■ and A1C ■ who all testified that A1C ■ said that Appellant "tried to finger her." R. 286-87, 319, 360, 580, 586.

On the car ride home from the club, A1C ■ called her boyfriend in Georgia and told him what happened. R. 190-91. She denied being worried about telling her boyfriend that she had been twerking with Appellant. R. 192-93. A1C ■ testified that she does not remember giving Appellant a hug at the club that night but it is possible that she did hug him. R. 193. During

cross-examination, she maintained that she did not black out that evening but does not remember hugging Appellant. R. 205. However, she admitted that Prosecution Exhibit 13 showed her hugging Appellant at the club. *Id.*

A1C ■ sent Appellant an email on Monday, 5 March 2012, accusing him of fingering her. R. 194-95. *See* Pros. Ex. 14. Appellant consistently maintained to A1C ■ her friends, and investigators that he did not remember fingering A1C ■ but apologized to her too. R. 195-96, 215, 233-235, 349, 437, 439, 440, 441, 453, 467. During a pretext phone call, Appellant maintained he did not remember the incident but said, “I know you wouldn’t accuse me of doing that if I didn’t do it.” R. 234. That same week while talking with her boyfriend via Skype, A1C ■ called Appellant on her cell phone and had Appellant talk to her boyfriend. R. 196. A1C ■ boyfriend confronted Appellant about the incident. *Id.* A1C ■ eventually reported the incident to the Sexual Assault Response Coordinator (SARC) in April—a month later. R. 235. She broke up with her boyfriend in September 2012. R. 191.

Standard of Review

Questions of factual sufficiency are reviewed *de novo*. *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007). “The test for factual sufficiency ‘is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,’ the court is ‘convinced of the accused’s guilt beyond a reasonable doubt.’” *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Law and Analysis

No other witness testified to seeing Appellant digitally penetrate A1C ■. Thus, A1C ■ credibility is extremely important in determining whether Appellant is guilty. However, she

is not credible because the sexual assault was not physically possible, her testimony is riddled with inconsistencies, and she had a motive to fabricate the allegation.

During closing argument, senior trial defense counsel made the point that Appellant must have “magic fingers” to have pulled off the sexual assault as described by A1C ■ R. 825, 829. If A1C ■ is to be believed, then Appellant reached up under her untucked shirt and down her tight spandex pants inside her underwear and into her vagina without her noticing or touching any other part of her body, including the outside of her vulva, all while A1C ■ was twerking and shaking her hips and butt as fast as she could. Despite this, A1C ■ testified that it “is possible for someone to put their hands into [her pants] without stretching them.” R. 187.

A1C ■ is also not credible because she claimed she was only tipsy and did not black out that evening. She also maintained she does not remember hugging Appellant even though Prosecution Exhibit 13 clearly shows her hugging him. R. 182-83. Her selective memory is further evidence of her lack of credibility. Moreover, she also denied that twerking is a sexually suggestive dance, but Prosecution Exhibit 3 and common sense clearly show otherwise. R. 200-01. She also claimed that she did not know she was dancing with Appellant until she turned around even though she was dancing in front of a large mirror. R. 184-85, 188.

A1C ■ also waited a month to report the incident to the SARC, but she called her boyfriend in Georgia on the ride home from the club and told him. R. 190-91, 235. Apparently, she was more interested in making sure her boyfriend knew she had been sexually assaulted than reporting the incident to the authorities. Perhaps she was more worried that her boyfriend might find out that she had been hugging Appellant, twerking with him, and letting him digitally penetrate her, so she fabricated a sexual assault allegation against Appellant. It is also plausible

that A1C ■ fabricated a sexual assault allegation in an attempt to re-ignite her long-distance relationship with her boyfriend in Georgia. Interestingly, there was no testimony that her friends or her boyfriend attempted to persuade her to report the incident. Perhaps they too did not believe her.

Appellant consistently maintained that he does not remember digitally penetrating A1C ■; however, he frequently followed his denials with an apology to A1C ■. Trial counsel argued that “innocent people do not apologize for sexual assaults they didn't commit.” R. 773-74. However, Appellant was steadfast and consistent even when he was repeatedly confronted by A1C ■ her friends, her boyfriend, and for hours by AFOSI agents. It is just as likely that Appellant apologized because he did not know what else to say to A1C ■ and was trying to be nice in the middle of an awkward conversation.

A1C ■ was the only witness against Appellant for this specification. However, because the digital penetration she alleges occurred was physically impossible, she is not a credible witness, and she had a motive to fabricate the allegation there is not enough evidence to prove beyond a reasonable doubt that Appellant is guilty of this offense.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the finding of guilt with regard to Specification 1 of Charge I and remand the case for a sentencing rehearing.

II.

THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO CONVICT APPELLANT OF SPECIFICATION 3 OF CHARGE I AND ADDITIONAL CHARGE IV AND ITS SPECIFICATION.

Statement of Facts

A1C ■ testified that around 0200 in the morning in March 2012 Appellant knocked on her dorm room door. R. 599, 602. She heard him say her last name when he knocked, and she instantly recognized his voice. R. 598, 619. She then invited him into her room. R. 602. Appellant appeared intoxicated to her, and she testified that the way Appellant said her name led her to believe he was drunk. R. 603.

While conversing with Appellant next to her bed, A1C ■ claimed he asked her if she had ever been with a black man before. R. 605. A1C ■ said, “no.” *Id.* Then, Appellant asked if she wanted to be with a black man, and, again, she said, “no.” *Id.* Then, he allegedly grabbed her by the shoulders and pushed her onto the bed. R. 606. She landed on her back on the bed with her knees pulled up to her chest like she was in the fetal position. *Id.* Then, she alleged Appellant put his left arm across her collar bone and chest area while he used his right arm to try and pull her legs out from between them. R. 607. She also tried to use her legs to push him off of her, but she was unable because Appellant’s body weight was on top of her. R. 608.

Appellant testified that during this alleged 30-45 second interaction Appellant did not grab her butt; he just came into contact with her “lower butt, upper thigh.” R. 609. According to her, Appellant was laughing the entire time, and his laughter caused A1C ■ to go “from being scared and uncomfortable to being angry because he was making it seem like a game *and it was no longer a game to me.*” R. 609-10 (emphasis added). Trial counsel immediately asked A1C ■ if it had ever been a game to her, and she said, “no.” R. 610. Then, A1C ■ hit Appellant in the temple with her left closed fist. *Id.* He immediately got off of her, backed away, and just stood there in silence. R. 611. A1C ■ testified she went back to her computer, and her

“intention was to logon to Facebook and see if [she] could get in contact with anybody to see if they could help [her] get him out of [her] room.” *Id.* A1C █████ did not make contact with anyone on Facebook. R. 614. Then, Appellant walked over to her bed and lay down. R. 612. A1C █████ testified she never directly looked at him while he was lying on her bed even though she was allegedly scared. R. 613, 630. She could only see Appellant out of the corner of her eye, and it appeared that he was falling asleep. R. 631. Eventually Appellant just got up and left her dorm room. R. 614.

A1C █████ never attempted to leave her room even though she admitted she had the opportunity. R. 627. She also never screamed or tried to use a phone to call for help. R. 611, 627. Though she testified that she frequently can hear other people’s music and it is hard to tell if someone is knocking on her door or someone else’s. R. 605, 615, 621.

A1C █████ said she told Appellant a few days later while at work to never talk with her again unless it was work related. R. 615-16. She claims that Appellant apologized to her and said that the incident happened because he was drunk. R. 616. A1C █████ testified that Appellant never acted inappropriately toward her before or after the incident. R. 616, 619-20. A1C █████ claims she later told a co-worker, A1C █████, that she had an “unpleasant encounter” with Appellant, but she never provided her with details or told anyone else about the incident. R. 617. She did not report the incident to investigators until she was contacted sometime after 15 June 2012 by AFOSI while she was deployed to Ali Al Salem Air Base in Kuwait. R. 616-17.

Standard of Review

The standard of review for this issue is the same as the standard of review for Issue I.

Law and Analysis

There is no evidence beyond a reasonable doubt that supports Appellant's conviction for attempting to grab the buttocks of A1C [REDACTED] with the intent to abuse, humiliate, or degrade A1C [REDACTED] or to arouse or gratify his or her sexual desires.¹ A1C [REDACTED] specifically denied Appellant ever grabbed her buttocks. R. 609, 639. She consistently testified that he tried to pull her leg out from between them. R. 607-08, 626, 637, 639. One can reasonably deduce that had Appellant intended to grab her buttocks, he would have just done so instead of pulling on her leg.²

According to A1C [REDACTED] own version of these events, she was lying on the bed with her knees at her chest in the fetal position, and Appellant was on top of her. R. 606-08. This would have exposed a very large portion of her buttocks to Appellant, making it very easy for him to grab it, but he did not. He grabbed her leg instead. R. 607-08, 626, 637, 639.

A1C [REDACTED]'s credibility also casts reasonable doubt about whether Appellant grabbed her by the shoulders and pushed her onto the bed without her consent.³ A1C [REDACTED] admitted that at some point while she and Appellant were wrestling on the bed that it was no longer a game to her. R. 609-10. This means that at some point it was just a game to her. Immediately noticing how damaging this testimony was, trial counsel followed up by asking her if it was ever a game to her, and she of course said, "no." R. 610.

¹ The military judge instructed that the first element of wrongful sexual contact was that the Appellant "engaged in sexual contact." R. 739. The military judge also defined "sexual contact" as "intentional touching . . . of the . . . buttocks of another person . . . with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." *Id.*

² Because we do not know whether this incident or the incident with A1C [REDACTED] as described in Issue I occurred first in time, we have no way of knowing whether Appellant's purported deftness with his magic fingers dramatically improved or diminished between these incidents.

³ The military judge instructed that the "act must be done without legal justification or excuse and without the lawful consent of the victim." R. 755, 59.

It is more likely that this was a consensual and playful encounter between Appellant and A1C ■■■. She testified that she instantly recognized his voice outside her dorm room, and she invited this married man in, even though he appeared drunk, she was alone, and it was 0200. R. 599, 602-03. She never cried out for help, never even attempted to leave the room, and never attempted to call anyone on her phone even though she admitted she could have done these things. R. 611, 627. Instead, she opened her laptop, logged back onto the Internet, and logged into Facebook while Appellant lay on her bed. R. 627-28. Even though moments earlier Appellant was supposedly willing to resort to force to get what he wanted, he was now content to almost fall asleep on her bed before simply getting up and walking out the door. R. 612, 614, 631.

She purports that she confronted Appellant at work, but she cannot remember if it was the next day or several days later—a fact that a true victim would not likely forget. R. 615. She claims he approached her at work and apologized, and then, even though no one else was around and she had no idea how he would respond, she decided to confront him. R. 616. It is also telling that she did not report the alleged incident even after she learned that Appellant may have done something to A1C ■■■. She and A1C ■■■ conveniently did not even discuss the details of what had happened to them. R. 617. However, when AFOSI contacted her, she only had two choices, admit that she had been fooling around with a married man or concoct a sexual assault allegation.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specification 3 of Charge I and Additional Charge IV and its Specification and remand the case for a sentencing rehearing.

III.

THE MILITARY JUDGE ERRED BY INSTRUCTING THE PANEL MEMBERS THEY COULD CONSIDER SPECIFICATIONS 1 AND 3 OF CHARGE I AND SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE III AS EVIDENCE OF APPELLANT'S PROPENSITY TO COMMIT SEXUAL ASSAULT BECAUSE THIS EVISCERATED THE SPILLOVER INSTRUCTION WITH REGARD TO ADDITIONAL CHARGE IV AND ITS SPECIFICATION.

Statement of Facts

On 15 October 2012, trial counsel submitted a written motion requesting a Military Rule of Evidence (MRE) 413 instruction with regard to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. App. Ex. X. Trial defense counsel submitted a written response on 6 December 2012 opposing a MRE 413 instruction. App. Ex. XII. The military judge heard oral argument from the parties before ruling on the motion. R. 703-15. Trial defense counsel opposed the MRE 413 instruction because it would “essentially eviscerate the spillover instruction.” R. 708-09. The military judge ultimately granted trial counsel’s motion and instructed the panel members they could consider Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III as evidence of Appellant’s propensity to commit sexual assault. R. 766-67. The military judge also instructed the panel that “potential propensity use only applies to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. It does not apply to any other charged offenses.” R. 767. Specification 3 of Charge I (i.e. grabbing the buttocks of A1C [REDACTED]) includes the same continuing course of misconduct alleged in Additional Charge IV and its Specification (i.e. pushing A1C [REDACTED] by the shoulders onto her bed and holding her down). R. 9.1, 9.6. *See* Issue II. Appellant was

convicted of violating both Additional Charge IV and its Specification and Specification 3 of Charge I. R. 881-82.

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed *de novo*.” *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013) (quoting *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). “The military judge has an independent duty to determine and deliver appropriate instructions.” *Ober*, 66 M.J. at 405. “Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.” *United States v. Westmoreland*, 31 M.J. 160, 164 (C.M.A. 1990) (citations omitted).

Law and Analysis

By instructing the panel members that they could consider Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III as evidence of Appellant’s propensity to commit sexual assault, the military judge eviscerated the spillover instruction with regard to Additional Charge IV and its Specification. It did not matter that the military judge gave a spillover instruction and instructed that the propensity evidence only applied to Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III. By permitting the use of propensity evidence with regard to whether Appellant grabbed A1C ██████ buttocks, the military judge inadvertently implicated the use of propensity evidence with regard to whether Appellant held A1C ██████ down on her bed while he attempted to grab her buttocks. Thus, there was an inherent contradiction in the military judge’s instructions that resulted in an

evisceration of the spillover instruction with regard to Additional Charge IV and its Specification—a non-sexual assault offense. The military judge could have avoided this error by not including Specification 3 of Charge I in his propensity instruction or declining to give a propensity instruction at all.

This error prejudiced Appellant because the panel members were not only allowed to consider sexual assault propensity evidence with regard to Specification 3 of Charge I but also with regard to Additional Charge IV and its Specification. The Government cannot show that this error was harmless or that the panel members did not use propensity evidence to convict Appellant of both Specification 3 of Charge I and Additional Charge IV and its Specification. Thus, Appellant’s convictions for Specification 3 of Charge I and Additional Charge IV and its Specification must be overturned.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specification 3 of Charge I and Additional Charge IV and its Specification and remand the case for a sentencing rehearing.

IV.

WHETHER THE MILITARY JUDGE ERRED BY FAILING TO INSTRUCT THE PANEL MEMBERS ON THE DEFENSE OF VOLUNTARY INTOXICATION WITH REGARD TO SPECIFICATIONS 1 AND 3 OF CHARGE I.

Statement of Facts

The military judge never instructed the members on the defense of voluntary intoxication. In other words, the military judge never instructed the members that voluntary intoxication could be considered for its effect on Appellant’s ability to form the specific intent necessary to commit

Specifications 1 and 3 of Charge I. The only instruction the military judge gave to the members regarding voluntary intoxication was how it was not relevant to the defense of mistake of fact as to consent. The military judge instructed the members with regard to Specification 1 of Charge I (aggravated sexual assault in violation of Article 120, UCMJ) as follows:

There is evidence in this case that indicates that, at the time of the alleged aggravated sexual assault, the accused may have been under the influence of alcohol. The accused's state of voluntary intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that [A1C █████] consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. Voluntary intoxication does not permit what would be an unreasonable belief in the mind of a sober person to be considered reasonable because the person is intoxicated.

R. 733-34. The military judge did not provide the same instruction for Specification 3 of Charge I (wrongful sexual contact in violation of Article 120, UCMJ). Although there was evidence that Appellant was under the influence of alcohol at the time of the alleged wrongful sexual contact, the military judge did not give a voluntary intoxication defense instruction. R. 603. He simply stated that "the defense of mistake of fact as to consent does not apply" if Appellant's "belief was not a reasonable belief for a sober person under all of the facts and circumstances." R. 741.

The military judge also instructed the panel members on the lesser included offense of attempt for both Specification 1 and 3 of Charge I. R. 735, 741. Appellant was ultimately convicted of attempt with regard to Specification 3 of Charge I. R. 881-82.

During voir dire, trial counsel told the panel members that "[v]oluntary intoxication is not a defense to sexual assault." R. 61. Trial counsel reiterated this during findings argument. R. 796-97. Senior Defense Counsel conceded that voluntary intoxication was not relevant to a mistake of fact as to consent defense. R. 830.

Standard of Review

“Whether a panel was properly instructed is a question of law reviewed *de novo*.” *Garner*, 71 M.J. at 432. “The military judge has an independent duty to determine and deliver appropriate instructions.” *Ober*, 66 M.J. at 405. “Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury is properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law.” *Westmoreland*, 31 M.J. at 164.

Law and Analysis

To be guilty of aggravated sexual assault, Appellant must have engaged in a sexual act. A sexual act is defined as “the penetration, however slight, of the genital opening of another by a hand or finger or by any object, *with an intent* to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” R. 731 (emphasis added). To be guilty of wrongful sexual contact, Appellant must have engaged in sexual contact. Sexual contact is defined as “*the intentional touching*, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, *with an intent to* abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.” R. 739 (emphasis added). Thus, because aggravated sexual assault and wrongful sexual contact require a specific intent, a voluntary intoxication defense instruction should have been given by the military judge. A voluntary intoxication defense instruction was also appropriate and should have been given each time the military judge instructed on the lesser included offense of attempt, which he did for both Specifications 1 and 3 of Charge I.

The only instruction regarding voluntary intoxication given by the military judge was that it was irrelevant to the defense of mistake of fact as to consent. R. 733-34. Additionally, trial counsel pointed out in both voir dire and findings argument that “[v]oluntary intoxication is not a defense to sexual assault.” R. 61, 796-97. This only exacerbated the military judge’s failure to give a voluntary intoxication defense instruction. Thus, the panel members were not able to consider whether Appellant’s voluntary intoxication affected his ability to form the specific intent necessary to complete the crimes of aggravated sexual assault and attempted wrongful sexual contact of which Appellant was ultimately convicted.

WHEREFORE, Appellant respectfully requests that this Honorable Court not approve the findings of guilt with regard to Specifications 1 and 3 of Charge I and remand for a sentencing rehearing.

Respectfully,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 12 May 2014.



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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant GLENN J. LITTLE
United States Air Force**

ACM 38338

19 September 2014

Sentence adjudged 14 December 2012 by GCM convened at Royal Air Force Mildenhall, United Kingdom. Military Judge: Jefferson B. Brown.

Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Thomas A. Smith.

Appellate Counsel for the United States: Captain Richard J. Schrider and Gerald R. Bruce, Esquire.

Before

MITCHELL, SANTORO, and TELLER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SANTORO, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of attempted wrongful sexual contact for grabbing the buttocks of Airman First Class (A1C) ■■■, one specification of dereliction of duty by failing to maintain professional relationships with junior enlisted members, one specification of aggravated sexual assault for penetrating A1C ■■■ vagina with his fingers, one specification of battery for pushing A1C ■■■ onto her bed, and one specification of unlawfully entering A1C ■■■ dorm room, in violation of Articles 80, 92, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 920, 928, 934. The adjudged and

approved sentence was a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Before us, the appellant asserts that: (1) the evidence was factually insufficient to sustain his conviction for the aggravated sexual assault of A1C ■■■; (2) the evidence was factually insufficient to sustain his conviction for the attempted wrongful sexual contact and assault consummated by a battery against A1C ■■■; (3) the military judge erred in his instructions concerning use of evidence of sexual assault; and (4) the military judge erred by failing to instruct on the effect of voluntary intoxication. We disagree and affirm.

Background

Five junior Airmen, A1C ■■■, A1C ■■■, A1C ■■■, A1C ■■■, and A1C ■■■ were stationed together at RAF Mildenhall at the time of the offenses. A1Cs ■■■, ■■■ and ■■■ were assigned to the Force Support Squadron as food service workers. A1Cs ■■■ and ■■■ were assigned to a different squadron. The appellant was a food service supervisor in the Force Support Squadron.

On 3 March 2012, A1Cs ■■■ and ■■■ planned to go to an off-base “hip-hop club.” Before going to the club, the Airmen stopped at the Galaxy Club on RAF Mildenhall so A1C ■■■ could speak with the appellant. The appellant gave A1C ■■■ money to spend that evening, which she shared with her friends. The appellant was not introduced to A1C ■■■.

Once at the hip-hop club, the Airmen drank and “twerked,” which was described as a dance in which a female shakes her buttocks while facing away from her dance partner, who not uncommonly has his hands on her hips. While A1C ■■■ was “twerking,” the appellant, who had arrived at the club separately, approached her from behind and began dancing with her. Because her body was facing away from him, A1C ■■■ did not know that the appellant had become her dance partner. They danced for one to two minutes with the appellant’s hands on A1C ■■■ hips.

A1C ■■■ testified that her dance partner put his hand inside her pants and digitally penetrated her vagina. She immediately pushed his hand away. She turned around, saw that it was the appellant, and pushed him away. According to A1C ■■■ the appellant put his fingers in his mouth, sucked them, and smirked.

The women then left the club. As they drove away, A1C ■■■ called her boyfriend in the United States and told him what happened. After that phone call, A1C ■■■ called the appellant from the car. A1C ■■■ told the appellant that she couldn’t believe that he “tried to finger [her friend].” The appellant told A1C ■■■ that he didn’t remember doing that, but if he did, he was sorry.

The following day, A1C [REDACTED] sent the appellant an e-mail telling him that she was mad at him and that he was “disgusting.” The appellant responded as he did to A1C [REDACTED], saying that he did not remember doing what A1C [REDACTED] claimed, but that if he did, he was sorry. A similar conversation between A1C [REDACTED] boyfriend and the appellant followed.

Approximately one month after the incident, A1C [REDACTED] told the base Sexual Assault Response Coordinator (SARC) what had occurred. The SARC report led to a criminal investigation by the Air Force Office of Special Investigations (AFOSI). When interviewed by AFOSI, the appellant maintained that he had no recollection of inserting his finger into A1C [REDACTED] vagina while they were dancing, but that if he did it, he was sorry. He told investigators that he had purchased several bottles of Cîroc, a flavored vodka, but that much of what he purchased had been consumed by others.

The investigation ultimately identified other women who claimed the appellant had engaged in inappropriate acts with them. A1C [REDACTED] reported, and testified at trial, that on an evening in March 2012, the appellant came to her dormitory room and knocked on the door. A1C [REDACTED] recognized him and let him in. She believed he was intoxicated. Once inside her room, the appellant asked her whether she had ever “been with” a black man. She told him she had not; the appellant asked her if she wanted to. After she said no, the appellant asked whether she was racist. A1C [REDACTED] had never spoken before to the appellant about sexual topics and felt that the conversation was inappropriate.

When A1C [REDACTED] denied that she was a racist, the appellant grabbed her shoulders and pushed her down to her bed. He took his left arm and placed it across her collar bone and chest, and with his right arm he tried to pull her legs out from underneath her. A1C [REDACTED] struggled against him and told him to get off, but he had her pinned to her bed. As the appellant tried to pull A1C [REDACTED]’s legs out from under her, his hand “kept going higher and higher” until he “was grabbing [her] upper thigh and [her] lower butt area.” A1C [REDACTED] clarified that although the appellant made contact with her buttocks, he did not actually “grab” her buttocks.

A1C [REDACTED] struck the appellant’s temple with her closed fist in an attempt to get him to release her. He let her up and stepped away from her. A1C [REDACTED] moved to her computer, intending to log onto Facebook and see whether she could contact one of her friends for help. The appellant lay down on her bed and asked whether she wanted to “see his dick.” She said no, but when she looked over at him, she saw the appellant touching himself through his clothing. The appellant then got up and left the room.

A day or two later, A1C [REDACTED] saw the appellant at work. He apologized to her for what he had done and told her that he had been drunk. A1C [REDACTED] did not report this incident to law enforcement. She did, however, tell A1C [REDACTED] that she had had an “unpleasant encounter” with the appellant but did not go into detail.

Airman First Class █████ testified that the appellant told her that he wanted to “be with” her and be her “sugar daddy.” Approximately one month after the incident with A1C █████ at the hip-hop club, A1C █████ and a friend were drinking in A1C █████ dorm room. The appellant sent A1C █████ a text asking her what she was doing. She replied that they were in her room drinking. The appellant asked if he could join them, and A1C █████ said yes.

Another of A1C █████ friends arrived around the same time as the appellant, and they all drank throughout the night. The appellant again told A1C █████ that he wanted to be with her. She again said no. Around 0100, as the evening wound down, A1C █████ asked the appellant to leave her room. He said he had been drinking and asked if he could stay. She said no, and he left. The door was closed, but not locked, behind him.

The next morning, A1C █████ awoke to find the appellant in her room sleeping on her loveseat, with vomit on the floor and on her laptop computer. She woke the appellant and told him to clean up the mess. He did, and he also gave her several hundred dollars for a new laptop.

Additional facts necessary to resolve the assignments of error are included below.

Factual Sufficiency

The appellant argues that the evidence is factually insufficient to establish his guilt beyond a reasonable doubt. We review claims of factual insufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test is “whether, 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. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224–25 (C.M.A. 1973).

1. Aggravated Sexual Assault

Under the law applicable at the time of the appellant’s offense,¹ the elements of the charged offense of aggravated sexual assault were:

- (1) That at or near the time and place alleged, the appellant caused A1C █████ to engage in a sexual act, to wit: penetrating her vaginal opening with his fingers, and

¹ The date of the offense, 3 March 2012, determines the applicable version of Article 120, UCMJ, 10 U.S.C. § 920. See *Manual for Courts-Martial, United States (MCM)*, A28 (2012 ed.).

(2) That the appellant did so by causing bodily harm to A1C [REDACTED] to wit: offensive touching of the vulva and vaginal opening.

See Manual for Courts-Martial, United States (MCM), A28-6, ¶ 45.b.(3)(b) (2012 ed.). A “sexual act” is the penetration, however slight, of the genital opening with an intent to abuse, humiliate, harass, degrade, or to arouse or gratify sexual desires. The vulva is the external genital organs of the female, including the entrance to the vagina and the labia majora and minora. An offensive touching of another, however slight, constitutes bodily harm. *MCM, A28-3 (2012 ed.).*

The appellant challenges only the factual sufficiency of the evidence, arguing that we should find A1C [REDACTED] not to be credible because (1) her version of events is physically impossible and riddled with inconsistencies and (2) she had a motive to fabricate a sexual assault allegation to cover up her allowing the appellant to digitally penetrate her.

Although the appellant raises a number of factual matters for our consideration, the most significant relates to A1C [REDACTED] description of the assault itself. Immediately after the incident and several times later, A1C [REDACTED] said that the appellant “tried to finger” her. At trial, she testified that the appellant did, in fact, insert his fingers into her vagina up to his second knuckle. She explained that her saying “he tried” meant that when she pushed him away “he didn’t keep doing it.”

We have thoroughly reviewed the evidence, including the appellant’s arguments at trial and on appeal about the weight of the evidence and the credibility of the witnesses. We have paid particular attention to the evidence concerning the various witnesses’ level of intoxication and the consistency (or inconsistency) of the witnesses’ statements about what occurred at the club and thereafter. After weighing the evidence and making allowances for not having personally observed the witnesses, we are nonetheless convinced of the appellant’s guilt of this offense beyond a reasonable doubt. We therefore reject this assignment of error.

2. Attempted Wrongful Sexual Contact and Assault Consummated by a Battery

Although initially charged with wrongful sexual contact,² the appellant was convicted of the lesser included offense of attempted wrongful sexual contact in violation of Article 80, UCMJ. The elements of that offense are:

² Because the offense occurred in early 2012, the applicable version of Article 120, UCMJ, is the one for offenses committed between 1 October 2007 and 27 June 2012. *See MCM, A28 (2012 ed.).*

(1) That at or near the time and place alleged, the appellant did a certain act, that is: attempt to grab the buttocks of A1C ■■■,

(2) That the act was done with specific intent to commit the offense of wrongful sexual contact,

(3) That the act amounted to more than mere preparation, that is: it was a substantial step and a direct movement toward the commission of the intended offense, and

(4) That the act apparently tended to bring about the commission of the offense of wrongful sexual contact, that is, the act apparently would have resulted in the actual commission of the offense except for the appellant's inability to grab A1C ■■■ buttocks, which prevented completion of that offense.

See MCM, Part IV, ¶ 4.b.; see also MCM, A28-9, ¶ 45.b.(13) (2012 ed.).

“Sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person with the intent to abuse, humiliate, degrade, or arouse or gratify sexual desires. *MCM, A28-3 (2012 ed.).*

The elements of the charged offense of assault consummated by a battery are:

(1) That at or near the time and place alleged, the appellant did bodily harm to A1C ■■■,

(2) That the appellant did so by pushing her by the shoulders³ onto her bed, and

(3) That the bodily harm was done with unlawful force or violence.

See MCM, Part IV, ¶ 54.b.(2).

³ The appellant was initially charged with pushing her “by the chest or shoulders” onto her bed. In their finding of guilty, the members excepted the words “chest or.”

In attacking the factual sufficiency of the evidence of these offenses, the appellant asserts that there is insufficient evidence that the appellant ever intended to grab A1C █████ buttocks and that, if he did, it was not done with the requisite intent. He also argues that A1C █████ viewed his actions as a game and therefore consented to his touching her. Finally, he asserts that A1C █████ is not credible and fabricated the sexual assault allegation when interviewed by AFOSI to deflect attention from her decision to “fool around” with the married appellant.

We have again thoroughly reviewed the evidence contained in the record of trial, paying particular attention to those matters the appellant has called to our attention. After weighing the evidence and making allowances for not having personally observed the witnesses, we are nonetheless convinced of the appellant’s guilt of these offenses beyond a reasonable doubt. We therefore reject this assignment of error.

Findings Instructions

We review de novo the military judge’s instructions to ensure that they correctly address the issues raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376 (C.A.A.F. 2010); see *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981). Where there is no objection to an instruction at trial, we review for plain error. *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013). If we find error, we must determine whether the error was harmless beyond a reasonable doubt. *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011).

The appellant argues that the military judge’s instructions were erroneous in two ways: (1) that the instruction given pursuant to Mil. R. Evid. 413 eviscerated the “spill-over” instruction and (2) that the military judge failed to instruct on the impact of voluntary intoxication.

1. Mil. R. Evid. 413 Instruction

In Specification 1 of Charge I, the appellant was charged with the aggravated sexual assault of A1C █████. Specification 3 of Charge I alleged the wrongful sexual contact of A1C █████. Specification 2 of Additional Charge III (abusive sexual contact for touching A1C █████ genitalia) and Specification 3 of Additional Charge III (wrongful sexual contact for touching A1C █████ breasts) both resulted in acquittals.

In his instructions to the members, the military judge said:

An accused may be convicted only on evidence before the court, not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you

find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

....

In addition, evidence that the accused committed a sexual assault, as alleged in Specifications 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III may have a bearing on each other—but only if you first determine by a preponderance of the evidence, that is more likely than not, the offenses alleged in Specification [sic] 1 and 3 of Charge I and Specifications 2 and 3 of Additional Charge III occurred.

The military judge then properly instructed the members, in accordance with Mil. R. Evid. 413, how they could use this “propensity” evidence if they found the alleged acts more likely than not occurred. After reminding the members that this “propensity” instruction applied only to the specifications and charges he stated, he concluded:

The prosecution’s burden of proof to establish the accused’s guilt beyond a reasonable doubt remains as to each and every element of each offense charged. Proof of one charged offense carries with it no inference the accused is guilty of any other charged offense. The burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt; proof of one offense carries with it no inference the accused is guilty of any other offenses.

Before us, the appellant argues that by instructing the members as he did, the military judge eviscerated the spillover instruction as it related to the specification alleging that the appellant pushed A1C █████ onto her bed and allowed the members to use evidence of the appellant’s sexual assaults to conclude that he had a propensity to commit an assault consummated by a battery.

The appellant objected to the military judge’s instruction at trial. The appellant does not argue, nor do we conclude, that the instruction was an erroneous statement of the law. Rather, he argues that the instruction was so confusing that it overcomes the presumption that the members followed the law. *See United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991). The military judge specifically identified the charges and specifications to which the Mil. R. Evid. 413 “propensity” instruction applied. We do not believe that the juxtaposition of the two legally-correct instructions, under the facts of this case, was confusing. Moreover, the members’ acquittal of the appellant of four

additional sexual assault offenses supports this conclusion. We find no error, plain or otherwise, and reject this assignment of error.

2. Voluntary Intoxication

Finally, the appellant alleges the military judge erred by failing to give an instruction on the impact of voluntary intoxication on the two specific-intent crimes of which he was convicted: the aggravated sexual assault of A1C ■ and the attempted wrongful sexual contact with A1C ■.

The military judge instructed the members that voluntary intoxication was not relevant to whether the appellant mistakenly believed that either victim consented as follows: he explained fully the effect of voluntary intoxication and mistake of fact with respect to A1C ■ and said, with respect to A1C ■, that the previous instruction “applies equally here.”

The military judge did not, however, give the instruction found in the Military Judge’s Benchbook on the effect of voluntary intoxication on specific intent crimes. That instruction says, in part:

In deciding whether the accused had a specific intent at the time you should consider the evidence of voluntary intoxication. The law recognizes that a person’s ordinary thought process may be materially affected when he is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone, or together with other evidence in the case cause you to have a reasonable doubt that the accused (had the specific intent to _____).

Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges’ Benchbook*, ¶ 5-12 (1 January 2010).

The appellant never requested this instruction at trial and, aside from the objection to the Mil. R. Evid. 413 instruction, affirmatively told the military judge that the instructions as given were correct statements of the law and that no additional instructions were requested. Therefore, the appellant has either waived or forfeited this issue. *See* Rule for Courts-Martial (R.C.M.) 920(f).⁴

⁴ Although *United States v. Smith*, 50 M.J. 451 (C.A.A.F. 1999) holds that the waiver rule applies only absent plain error, the basis for that holding is less than clear. On the one hand, R.C.M. 920(f) states that failure to object to an instruction or the omission of an instruction constitutes “waiver” absent plain error. The text of R.C.M. 920(f) clearly contemplates a situation in which an accused stands mute and/or does not seek to enforce his right. This is forfeiture, not waiver. *United States v. Olano*, 507 U.S. 725, 733 (1993) (stating that waived rights are those where there is an intentional relinquishment or abandonment of a known right, whereas forfeited rights are those where there is simply a failure to make a timely assertion of the right). On the other hand, in a situation where there is a

R.C.M. 916(l)(2) provides:

[E]vidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

However, “[w]hen raising an issue of voluntary intoxication as a defense to a specific-intent offense, ‘there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent,’ not just evidence of mere intoxication.” See *United States v. Peterson*, 47 M.J. 231, 233–34 (C.A.A.F. 1997) (quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989)).

In our determination of whether failure to give this instruction amounted to plain error, we consider how this matter was litigated at trial. *United States v. Hibbard*, 58 M.J. 71, 76 (C.A.A.F. 2003). The evidence that the appellant may have been intoxicated during the incident with A1C █████ came primarily from his statement to AFOSI, in which he said that although he had purchased several drinks that night, most of what he had purchased had been consumed by others. He also told AFOSI that although he could remember certain details of the evening, including much of what occurred before and after his dancing with A1C █████, he could not remember doing what she alleged.

The evidence that the appellant may have been intoxicated during the incident with A1C █████ came during A1C █████ testimony. She stated that although she did not remember smelling the odor of an alcoholic beverage on the appellant’s breath and he was able to articulate his words clearly, he “appeared intoxicated.” She also testified that after the incident, the appellant apologized for his conduct and attributed it to his drinking.

In closing argument, trial defense counsel argued that either 1) the incident with A1C █████ never occurred or 2) the appellant’s actions with A1C █████ were intended as playful and he mistakenly believed she consented. In neither case did trial defense counsel argue that the appellant’s level of intoxication was so significant that it negated his ability to have the necessary intent to commit the offense.

discussion about a specific instruction and an accused affirmatively exercises his right to waive an instruction, we fail to see how a plain error analysis would apply. *United States v. Sousa*, 72 M.J. 643 (A.F. Ct. Crim. App. 2013).

We discern no time where the defense introduced evidence of the appellant's intoxication "for the purpose of raising a reasonable doubt as to the existence of . . . specific intent." R.C.M. 916(1)(2). Therefore, we conclude that the appellant has not met his burden of demonstrating plain error by the military judge for not sua sponte instructing further on voluntary intoxication. Moreover, even if the military judge had given the voluntary intoxication instruction, we conclude that the evidence of intoxication was not of the severity contemplated by *Peterson*. Therefore, we find beyond a reasonable doubt that any error did not contribute to the appellant's convictions on these offenses. We therefore reject this assignment of error.

Conclusion

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

AFFIRMED.



FOR THE COURT

A handwritten signature in cursive script, appearing to read "L. Calahan".

LEAH M. CALAHAN
Deputy Clerk of the Court

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

United States

v.

Accused
Unit (AFSOC)
Joint Base Lewis-McChord, WA

Defense Motion to Dismiss For Void for
Vagueness and Failure to State an Offense

2 July 2014

COMES NOW, accused, by and through his undersigned counsel, and requests that this Court dismiss the Charge and Specification alleging a violation of Article 120. The authority for this motion is Rules for Courts-Martial (R.C.M.) 907(b)(1)(B), and the Fifth and Sixth Amendments of the U.S. Constitution.

BACKGROUND & FACTS

1. On 17 March 2014 accused had one charge and specification of sexual assault in violation of Article 120 of the UCMJ preferred against him for allegedly sexually assaulting SrA [REDACTED] on 28 January 2013. On 1 April 2014 the charge and specification were investigated by Lt Col MP and he recommended dismissal. Attachment 1. On 12 May 2014 the charge and specification were referred to a General Court-Martial despite the investigating officer's recommendation. Attachment 2. This charge is under the 2012 version of Article 120. See *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶45.a.(b)(3) (2012 ed.).

LAW & ANALYSIS

2. **Standard of Review.** The constitutionality of a statute is reviewed *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C A A.F. 2005). Whether an accused had fair notice that an act was criminal before being charged with it is a question of law reviewed *de novo*. *United States v. Saunders*, 59 M.J. 1, 6 (C A A.F. 2003). Whether a specification states an offense is a question of law, reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C A A F. 2006).

3. There are three principles at issue in this motion:

A. *void-for-vagueness* – grounded in the Fifth Amendment

B. *failure to state an offense* – grounded in the Fifth and Sixth Amendments, specifically:

- i) fair notice that an offense is criminal before being prosecuted for it, and
- ii) actual notice of the offense that must be defended against.

4. “No person shall be ... deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “It is a basic principle of due process, than an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). “The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A statute is void-for-vagueness when it fails to either: 1) provide sufficient notice of what conduct is forbidden; or 2) provide explicit standards for law enforcement officials, thus allowing discriminatory and arbitrary enforcement. *Parker v. Levy*, 417 U.S. 733, 774-75 (1974).
5. “A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.” *United States v. Crafter*, 64 M.J. 209, 211 (C A A.F. 2006); R.C.M. 307(c)(3).
6. Due process “requires that a person have fair notice that an act is criminal before being prosecuted for it.” *United States v. Vaughan*, 58 M.J. 29, 31 (C A A.F. 2003). There are several potential sources of “fair notice” including: federal law, state law, military case law, military custom and usage, and military regulations. *Id.* at 31-32.
7. “[W]hat is general is made specific through the language of a given specification. The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.” *Fosler*, 70 M.J. at 229 (internal citations omitted).
8. “[T]he terminal element of Article 134, UCMJ, like any element of any criminal offense, must be separately charged and proven.” *United States v. Ballan*, 71 M.J. 28, 33 (C A A.F. 2012) (emphasis added). An element is “each component of the actus reus, causation, the mens rea, any grading factors, and the negative of any defense.” Black’s Law Dictionary 360 (6th ed. 1998).
9. The difference between the Fifth and Sixth Amendments as well as between the principles of fair notice and failure to state an offense were described in *United States v. Girouard*, 70 M.J. 5, 10 (C A A.F. 2011):
10. The Fifth Amendment provides that no person shall be “deprived of life, liberty, or property, without due process of law,” U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall “be informed of the nature and cause of the accusation,” U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with. See *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *Cole v. Arkansas*, 333 U.S. 196, 200 (1948); see also *United States v. Jones*, 68 M.J. 465, 468 (C A A.F. 2010). But 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. See *United States v. Marshall*, 67 M.J. 418, 421 n. 3 (C A A.F.2009) (noting the government's dual due process obligations of fair notice and “proof beyond a reasonable doubt of the offense alleged” (emphasis added by CAAF)). As the Supreme Court explained in *Patterson v. New York*, “the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.” 432 U.S. 197, 210 (1977) (emphasis added by CAAF); see also *United States v. Wilcox*, 66 M.J. 442, 448 (C A A.F.2008) (“To satisfy the due process requirements of the Fifth

Amendment, the Government must prove beyond a reasonable doubt every element of the *charged offense*.” (emphasis added by CAAF)). Thus, when “all of the elements [are not] included in the definition of the offense of which the defendant is charged,” then the defendant’s due process rights have in fact been compromised. See *Patterson*, 432 U.S. at 210

11. There are three different categories under the 2012 version of Article 120 for committing a sexual assault offense. See subsections a.(b)(1), (2) and (3). Each theory of offense has a different focus and different means of defending against the charge. For example, threatening or placing another person in fear in order to accomplish a sexual act is an entirely different element than committing a sexual act upon someone who is asleep or unconscious. Compare subsection a.(b)(1)(A) with a.(b)(2). Consequently, the proposed specifications for this section are different for each theory of sexual assault. See Attachment, JSC, Proposed Amendments to MCM 2012.

12. The problem with this statute is that it fails to sufficiently identify how subsection a.(b)(3) is different from subsections a.(b)(1) and (2), and where the line is between being capable of consenting and incapable of consenting. Consider the statutory definition of “consent” in Article 120.a.(g)(8); when matched up against the different theories of assault, little remains to define what accused is charged with. More to the point, the statute does not adequately put an Airman on notice as to when this particular offense is committed or how to defend against the ambiguous and vague language that leaves each judge or juror to apply their own subjective assessment.

Definition of Consent in Article 120	What theory of sexual assault it defines
(A) The term ‘consent’ means a freely given agreement to the conduct at issue by a competent person	All subsections.
An expression of lack of consent through words or conduct means there is no consent	Subsections a.(b)(1) and (2) because an expression of lack of consent would mean the individual is capable of consent, so it cannot be applicable to subsection a.(b)(3).
Lack of verbal or physical resistance of submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent.	Subsection a.(b)(1).
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.	All subsections.
(B) A sleeping, unconscious...person cannot consent.	Subsection a.(b)(2)
[An] incompetent [person cannot consent].	Subsection a.(b)(3)
A person cannot consent to force causing or	Subsection a.(b)(1)

likely to cause death or grievous bodily harm or to being rendered unconscious.	
A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1)	Subsection a.(b)(1)
(c) Lack of consent may be inferred based on the circumstances of the offense.	All subsections.
All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.	All subsections.

13. By breaking out the definition of consent, the guidance we have for defining “incapable of consenting” is that consent is freely given by a competent person, an incompetent person cannot consent, a dating history does not constitute consent, and it is a consideration of all of the circumstances. Everything else goes to a section and theory for which accused is not charged. For example, accused is not charged with committing a sexual act while the complaining witness was asleep or unconscious. Under the 2012 version of Article 120, that is a separate theory of offense and it is plainly not part of the specification with which he is charged. It would, therefore, be error to instruct on a theory not charged.

14. The heart of this motion is this: What does it really mean to be “incapable of consenting”? We know it is different from being asleep or unconscious because that is a separate subsection and theory of offense (much like clauses 1, 2 and 3 are different theories of committing an Article 134 offense). See *United States v. Jones*, 68 M.J. 465, 468 (C A A.F. 2010) (stating that 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.) (emphasis added). The statute does not sufficiently define it in a way that a reasonable Airman knows exactly where the line is and how to defend against it. Moreover, it lacks sufficient clarity to avoid arbitrary and discriminatory enforcement.

15. **Fair Notice of What is an Offense at the time of the Alleged Misconduct.** With respect to fair notice, under what circumstances is a person awake but incapable of consenting? Can one be incapable of consenting but still be capable of marriage, contracting, or other legal decisions? It is not about being intoxicated, as that is simply a means of getting to the point of being incapable of consent. If it was simply being intoxicated, then the statute would prohibit sexual acts with someone intoxicated and not even discuss consent. Moreover, Congress is well aware of the term “drunk” as they used it in Articles 111 and 112, UCMJ. If Congress meant being drunk is sufficient, then Congress would have used that term. On the contrary, it requires more; it requires some undefined level of intoxication short of unconsciousness. The best we have is the term “incompetent” which is not further defined. An Airman is not fairly on notice of when his or her conduct crosses the line. Without greater clarity, those who do not desire to engage in illegal behavior may be unfairly trapped in a serious offense without due process.

16. **Actual Notice.** Although the specification at issue does contain all of the elements listed by Congress, it fails to provide actual notice because it does not fill the gap just discussed. What is general is made more specific through the charge. In this case, the specification provides no greater clarity than the statute and it fails to afford accused due process to defend against the standardless offense. In short, without a clear definition of the offense, it is not possible to fairly defend against it.

17. **Void for Vagueness.** A necessary feature of a lawful offense is that it provides explicit standards for law enforcement officials, thus avoiding discriminatory and arbitrary enforcement. It is this constitutional principle that mandates offenses be grounded in objective standards, otherwise law enforcement would be chasing moving targets (offenses). In this case, there are no explicit standards to ensure accused is not at the mercy of the subjective beliefs of his fact-finders. Consider this: if a police officer entered the enlisted club and spotted a bunch of airmen drinking, what standard is he to apply in assessing which Airmen are “incapable of consenting?” The standard should be explicit enough that ten officers tasked with the same responsibility would mark the same individuals. In this case, it is not even clear whether the inability to consent is somehow different than the legal ability to contract, make purchases, get married, or any of a number of other legally-binding decisions. The vagueness of this statutory provision leaves those caught in the web, like accused, subject to the subjective beliefs of whoever happens to decide his case.

REQUEST FOR RELIEF

18. WHEREFORE, the Defense respectfully requests that this Honorable Court dismiss the charge and its specification. Additionally, pursuant to R.C.M. 905(h), the Defense requests an Article 39(a) session for this motion.

Respectfully submitted this 2nd day of July 2014.

, Maj, USAF
Senior Defense Counsel