

to cure the misconduct, and (3) the weight of the evidence supporting the conviction. 62 M.J at 184. Here, the misconduct was severe in that it was repeated and permeated the entire argument.

While the defense did not object, the judge also made no attempt to cure this error that was plain and obvious. This is significant given that the weight of evidence supporting sexual assault convictions in this case was low. The complaining witness did not recall the events due to her consumption of alcohol. (R₅ at 138-42.) The accused described that she was a willing participant in the charged sexual acts and there were no eyewitnesses in the hotel room. (R₄ at 25, 73; R₅ at 62-106.) While the complaining witness was seen to be intoxicated earlier in the night, she was also seen to be actively flirting with the accused of her own volition immediately prior to when the charged offenses would have taken place. (R₃ at 244-45, 256-57.) Thus, the evidence was weak. The sum of these factors show the trial counsel's arguments prejudiced EM3 Rogers.

Request for Relief

This Court should set aside and dismiss the findings and sentence and remand for a rehearing so EM3 Rogers receives a fair trial based upon the evidence alone, and not trial counsel's improper arguments.

III.

THIS COURT HAS A DUTY TO ENSURE THAT THE FACTS AND LAW SUPPORT A CONVICTION. HERE, EM3 ROGERS WAS CONVICTED IN SPECIFICATION ONE OF CHARGE III OF PLACING HIS PENIS IN THE MOUTH OF M.C., WHO WAS SUBSTANTIALLY INCAPACITATED. THE ONLY EVIDENCE CONSISTED OF EM3 ROGERS' OWN STATEMENT THAT M.C. CLIMBED ON TOP OF EM3 ROGERS AND GAVE HIM "ORAL

**PLEASURE.” WAS THE CONVICTION
FACTUALLY AND LEGALLY SUFFICIENT?**

Standard of Review

Issues of factual and legal sufficiency are reviewed *de novo*. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

Discussion

This Court has an independent obligation to review each case *de novo* for factual and legal sufficiency, and may substitute its own judgment for that of the trial court. Art. 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (1994); *Turner*, 25 M.J. at 324. The test for legal sufficiency 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.” *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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, [this Court is] convinced of the accused’s guilt beyond a reasonable doubt.” *Id.* at 325. In exercising this duty, the Court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge, or court-martial members. Art. 66(c), UCMJ; *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

To sustain a conviction for Article 120, the Government must prove beyond a reasonable doubt that EM3 Rogers “placed his penis inside [M.C.’s] mouth, when [M.C.] was incapable of consenting to the sexual act due to impairment by an intoxicant, and that condition was known or reasonably should have been known by the accused.”

(Charge Sheet, R₁ at 9.)¹⁰ The evidence adduced at EM3 Rogers' trial is both factually and legally insufficient to support a finding of guilty to Charge III, Specification 1.

The evidence is factually insufficient due to the lack of any affirmative evidence in the record that EM3 Rogers' actively placed his penis in M.C.'s mouth while she was substantially incapacitated. All of the evidence references "her performing oral sex on him." (R₁ at 16.) Even with making allowances for not having personally observed the witnesses, this Court cannot be convinced beyond a reasonable doubt that EM3 Rogers committed the act as alleged by the Government.

During opening statements, trial counsel improperly referred to EM3 Rogers as "placing his penis inside of her mouth" to conform to the specification as written. (R₃ at 17.) However, the trial counsel's opening statement is not evidence. This is not a matter of semantics but rather the Government's attempt to turn passive participation into forcible sodomy in order to overcharge EM3 Rogers and increase his punitive exposure. Throughout the record, the trial counsel's repeated substitution of "he placed his penis" for "she performed oral sex" supports this contention.

Police Officer ██████, the first to interview EM3 Rogers, states on the record that, "he said . . . she was performing oral sex on him . . ." (R₄ at 25.) Detective ██████, who subsequently interviewed EM3 Rogers further confirms, "she was giving him what he stated was oral pleasure." (*Id.* at 73.) To Coast Guard Investigative Service (CGIS) Special Agent (S/A) ██████, another Government witness, EM3 Rogers said "she came over to the bed and performed oral sex on him." (R₅ at 62.) Again, upon further questioning from trial counsel, S/A ██████ reiterated that M.C. performed oral

¹⁰ R₁ refers to the Record of Trial, Volume 1, dated 15 July 2013.

sex on EM3 Rogers for "10 to 15 minutes." (R₅ at 76.) On cross-examination, S/A [REDACTED] again stated the only statement from EM3 Rogers was that M.C. performed oral sex on him and rubbed his penis. (*Id.* at 105-106.)

Of note, Detective [REDACTED] also opines that "forcible sodomy" would be an offense in this case if "... he either performed oral sex on her or she performed oral sex on him without her consent." (R₄ at 91.) This is also not a legal basis for a conviction. Trial counsel again attempts to put facts in the record during a follow on question to Detective [REDACTED], "and the only sexual act that he recalled performing, or having performed on him, was oral sex . . ." (*Id.* at 100.) The interrupted answer was "yes." (*Id.*) On cross-examination, the defense counsel corrected the trial counsel's misleading question:

Q. So in questioning you, trial counsel used the term, 'placed his penis in her mouth.'

A. Correct.

Q. At no point did he tell you that he placed his penis in anyone's mouth, correct?

A. Correct.

Q. What he told you was that that person came to his bed?

A. Yes and gave him oral - oral pleasure.

Q. And gave him oral pleasure?

A. Yes.

Q. And you clarified that "oral pleasure" to him, meant oral sex?

A. Yes, I did.

Q. And by that, you meant -- and by that, in your understanding, you understood that she opened her mouth and put her mouth on his penis?

A. Are you asking me what he described oral pleasure was, or how he described the act?

Q. What you -- what your understanding of that act entailed?

A. My understanding was that she put -- she performed oral sex on him.

Q. By opening her mouth

A. By opening her mouth and his penis was in -- entered it.

Q. And putting her mouth onto his penis?

A. Correct.

(R₄ at 106.) Similarly, the testimony from EM3 Rogers' co-worker was that EM3 Rogers said "she was sucking my dick." (R₆ at 50.) EM3 Rogers was always the passive participant in the act, not the active, and thus, there is a lack of any evidence that he "placed his penis" anywhere.

Likewise, the evidence is legally insufficient because there is no way the members could have found all of the essential elements of the Article 120 charge beyond a reasonable doubt. The trial defense counsel moved for a finding of not guilty as to Charge III, Specification 1 due to the lack of evidence presented at the trial. The military judge denied the motion without comment. (*Id.* at 213.)

It is well-recognized the members are not bound to accept the entire confession, but may accept a part and reject the balance. *U. S. v. Wilson*, 178 F. Supp. 881, 886 (D.D.C. 1959). "Assuming, however, that the jury rejects the exculpatory portions it may not draw an inference contrary to them unless there is affirmative evidence contradicting such assertions, be that evidence direct or circumstantial, from which the opposite deduction can be drawn." *Wilson*, 178 F. Supp. at 886. In *Wilson*, the jury had a right to discard a disclaimer of intention to kill and of premeditation and deliberation, it was not permitted draw an inference to the contrary because of the lack of evidence to support such an inference. *Id.*

Thus, even permitting the members to accept the portion of EM3 Rogers' statements that his penis was, at some point, in the mouth of M.C., there is no evidence to suggest he "placed" his penis in her mouth. EM3 Rogers' statements, and all of the evidence adduced at trial, consistently reference M.C. taking EM3 Rogers' penis in her mouth from the active vantage point. The evidence is that M.C. was on top of EM3

Rogers. There is no evidence that he pulled her head down in order to place his penis in her mouth. The only facts provided to the members describe M.C. placing her mouth on EM3 Rogers' penis, not the reverse. Thus, even allowing the members to only believe a portion of EM3 Rogers' statement, there is no evidence to the contrary to allow for a conviction of Charge III, Specification 1 in this case.

Contrast *United States v. Useche*, where a sister court considered the offense of sodomy under Article 125. In *Useche*, the court held the Government satisfied the burden based on the victim's testimony that the appellant "placed his penis in her mouth." 70 M.J. 657, 661-62 (N-M. Ct. Crim. App. 2012) *review denied*, 71 M.J. 379 (C.A.A.F. 2012) ("That testimony alone is certainly sufficient to lead any trier of fact to reasonably conclude beyond a reasonable doubt that the appellant's actions met the elements of Article 125"). Even acknowledging the difference in charged offenses, the Government was required to prove that EM3 Rogers "placed" his penis into M.C.'s mouth.

No one, besides trial counsel, used that language. M.C. did not testify to such, nor did the Sexual Assault Nurse Examination (SANE) provide any evidence to the contrary. Thus, there is no evidence on the record to support the conviction for Charge III, Specification 1, and this Court should substitute its judgment for that of the members, who clearly relied on trial counsel's argument and not the facts in evidence.

Further, M.C.'s testimony about the oral sex is irrelevant to the determination of legal sufficiency because it does not offer affirmative evidence contrary to EM3 Rogers' repeated description of the events. During the Article 32 hearing, M.C. stated it was "possible" she gave another man oral sex on the night in question. (R₅ at 227.)

During the trial, M.C. also acknowledges a lack of memory from that night but qualifies, "I don't think that I would do that." (R₅ at 226.) When pressed by defense counsel, M.C. admits that although "she would not consent to anything sexual with somebody other than [her] husband . . . anything is possible." (*Id.*) M.C. claimed the act would be "out of character" for her, much like all of the other things she was doing in the bar that night. (*Id.* at 241.)

In closing, trial counsel minimized the legal distinction, "whether you want to call it "placing a penis into the mouth," or you want to call it "oral pleasure," or you want to call it, "She got on top of me," at some point he had a decision to make, right?" (R₇ at 139.) Here, the trial counsel equates the criminal misconduct of placing one's penis into the mouth of another without consent, with the act of waking up as a recipient of unexpected oral sex. However, charging the complaining witness is not an option, so instead the Government charges EM3 Rogers with receiving oral sex from a woman.

Typically, the aggressor is charged as they are the one committing the act upon another. It is not a matter of semantics, but rather a crucial piece of a conviction – to be guilty of committing an unwanted act upon another. EM3 Rogers is being held criminally responsible for not pulling his penis out of M.C.'s mouth. The conviction is unsupportable.

Conclusion

This Court's "fresh, impartial look at the evidence" will reveal the evidence presented at trial does not support a conviction for Charge III, Specification 1. *United States v. Mize*, No. 37993, 2013 WL 2436519 at *2 (A.F. Ct. Crim. App. May 15,

2013), *review denied*, 73 M.J. 40 (C.A.A.F. 2013).¹¹ As such, this Court should set aside and dismiss Charge III, Specification 1 and reassess the sentence.

IV.

UNCHARGED MISCONDUCT CANNOT BE INTRODUCED AT TRIAL AS PROOF OF THE CHARGED OFFENSE. HERE, THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO OFFER EVIDENCE OF SEXUAL INTERCOURSE BETWEEN EM3 ROGERS AND M.C. IN ORDER TO PROVE OTHER SEXUAL OFFENSES. DID THE MILITARY JUDGE ERR?¹²

Over defense objection, the military judge permitted the trial counsel to solicit testimony from Officer [REDACTED] that EM3 Rogers engaged in sexual intercourse with M.C. (R₄ at 25.) The defense objected. (R₄ at 2, 7.) The military judge ruled:

I find that this is evidence *is* relevant to determine if sexual encounters between the accused and the complaining witness were consensual, and determine the veracity based on the several statements that he made to law enforcement. Conducting a 403 balancing test, I find that the probative value is not substantially outweighed by the danger of unfair prejudice.

(R₄ at 5-6.) Officer Cherry testified, “they had intercourse, sex” (R₄ at 25.)

Standard of Review

This Court reviews the military judge's evidentiary rulings for an abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). This Court reviews a military judge's determination that evidence is admissible under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 for an abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (1999).

¹¹ See Appendix.

¹² Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1981).

doubt that MC was so intoxicated that night that she could not remember her name, let alone consent to sexual activity. The evidence was overwhelming, and a different closing argument would have not have changed that fact. Because of the awesome strength of the government's case, Rogers was not prejudiced, let alone materially prejudiced, and is not entitled to relief.

III. THE EVIDENCE SHOWS THAT THE APPELLANT RECEIVED ORAL SEX FROM A WOMAN WHO WAS SEVERLY INTOXICATED, SUCH THAT SHE COULD NOT REMEMBER HER NAME AND LOST CONTROL OF HER BLADDER. WAS THAT EVIDENCE FACTUALLY AND LEGALLY SUFFICIENT TO SUPPORT A GUILTY FINDING TO CHARGE III, SPECIFICATION 1?

Standard of Review

Article 66, UCMJ, requires this Court to conduct a *de novo* review of the legal and factual sufficiency of this case. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Argument

Article 120, UCMJ, was written to prohibit a wide range of sexual activity when one party is incapable of consenting due to alcohol intoxication. It specifically prohibits any contact between the penis of one person and the mouth of another if one of the actors is incapable of consenting for whatever reason. Here, the evidence, from Rogers' own words, showed that he was awake at the time the oral sex began and remained awake throughout the entire act, that he helped MC remove his pants and underwear, and that there was then contact between his penis and her mouth.

The defense argues that no one testified that Rogers admitted to "placing" his penis in MC's mouth, which is the word that the government used in Charge III, Specification 1. However, the evidence is clear that Rogers received oral sex from MC while she was too drunk

to consent to such activity, and that is a crime. The evidence was legally and factually sufficient to conclude that Rogers put his penis in MC's mouth, that MC was incapable of consenting to this act because of her intoxicated state, and that Rogers knew she could not consent.

Under Article 120(g)(1)(A), UCMJ, a sexual act is defined in part as contact between the penis of one person and the mouth of another. A service member is guilty of sexual assault if he commits a sexual act upon another person when the other person is incapable of consenting due to impairment by a drug or intoxicant, and that condition is known or reasonably should be known to the perpetrator. Read together, a member is guilty of a sexual act if he causes contact between his penis and the mouth of another when the other party is incapable of consenting due to alcohol intoxication.

A plain reading of the statute is clear that a person who receives oral sex may still be guilty of an offense if the person providing the orifice is incapable of consenting. The law specifically allows for that by criminalizing "contact between the penis and the . . . mouth" without further requiring that the perpetrator be the one giving the oral sex.

The current Article 120 offenses are significantly broader than previous versions. Over the past thirty years, each revision of Article 120 has a greater breadth of sexual activity. This trend is an intentional act by Congress, which was started in 1986 when it significantly revised the federal rape laws. One of Congress' purposes in rewriting the laws, a purpose that was avowed in the legislative history, was to modernize the laws to criminalize more sexual behavior. "[The statute] modernizes and reforms Federal rape provisions by . . . expanding the offenses to reach all forms of sexual abuse of another." H.R. Rep. 99-254, 99th Cong., 2d Sess. (1986), at 10. The language was "drafted broadly to cover the widest possible variety of sexual abuse." *Id.* at 12. Had Congress intended to criminalize only giving oral sex, rather than being

the recipient of oral sex, it would have done so by using a word other than “contact.” But that would have been inconsistent with the stated intent to broaden the definition of sex crimes.

Rogers focuses on the fact that the victim was an “active” participant in the oral sex. Appellant Br. at 28. He points to the fact that MC was on top of Rogers and argues that she must have “placed” her mouth on his penis, rather than he placing his penis in her mouth. But again, the statute is sufficiently broad to criminalize a sexual act if one of the parties is incapable of consenting, even if that person can still physically move her body. To suggest a different result would allow for any number of penetrative assaults to victims that cannot consent.

Rogers seemingly argues that only an unmoving or unconscious person, lying on the bed, could be victimized. This is too narrow a reading of the statute. Article 120(b)(2) criminalizes such activity, as it prohibits a sexual act done when the other party is “asleep, unconscious, or otherwise unaware that the sexual act is occurring.” Congress specifically covered the situation where the victim is passed out or asleep in subsection (b)(2). However, Congress did not stop there. Instead, it drafted Article 120(b)(3), which prohibits sexual activity when one person is incapable of consenting. If Congress only intended to criminalize sexual activity when the victim is passed out from alcohol use, there would have been no need to write subparagraph (b)(3) too. The fact that it was written must be given significant weight. Congress made the statute broad for a reason. It did so to criminalize the very activity that Rogers engaged in, which is to receive oral sex from someone who could not validly consent to give it.

Rogers told different versions of his story every time he spoke of or was interviewed about the night of 15 August 2012. When speaking to the hotel staff, he said that no sexual

activity took place at all that night and that he only allowed the victim to stay with him because the taxi that he supposedly called never came. R₃ at 275. When he spoke to the first of three Portsmouth law enforcement officers, he said that he awoke to MC performing oral sex on him, failing to mention that he was awake when the act started and helped MC remove his clothes. R₄ at 24. He repeated that story to the detectives. *Id.* at 73. He also initially repeated the story about waking up as the recipient of oral sex from MC when questioned by CGIS a month after the incident. R₅ at 62. However, after further questioning, he changed his story yet again, admitting that he was awake while MC was on the other bed, that he remained awake when she left her bed to come to his, that he played an active role in removing his pants and underwear, and that he was awake the entire time that he was receiving oral sex. *Id.* at 67. His last version of events was later memorialized in a confession that he wrote by his own hand. PE 17.

Conveniently, Rogers does not refer to this last, most detailed, confession in his brief to this Court, but refers only to the story he told the Portsmouth officers, in which he claimed he was awakened by MC's performing oral sex on him. There is of course a critical difference in his two versions. In one, he was asleep and only awoke to find himself unclothed from the waist down with his penis already in MC's mouth. During his later confession, Rogers admitted that he was awake the whole time, helped removed his own clothes, and was active when the oral sex began.

The fact that Rogers kept changing his story is significant. As discussed *infra* in Part IV, variations in an accused's statements made after the crime can be considered by the panel members as evidence of his consciousness of guilt. *See United States v. Daniels*, 56 M.J. 365, 369 (C.A.A.F. 2002). The fact that Rogers told a different story every time he talked about that night, and that each story given in Portsmouth downplayed his own involvement, was evidence

that the members could consider to corroborate his confession to CGIS, during which he acknowledged that he was an active participant. The members were free to conclude that Rogers was not forthright during the first interviews because he knew that MC was too drunk to consent. He even acknowledged to CGIS that he lied initially because “‘she was a lot drunker than [he] was’ and he knew it would look bad that he had done this with someone who was that intoxicated.” R₅. at 78-79. Therefore, the members could conclude that Rogers lied because he knew what he did was a crime, and they could credit his final story, where he admitted to being an active participant, rather than his initial lies.

The defense also points out that there is no evidence that Rogers pulled MC’s head down in order to place his penis in her mouth. Unquestionably, the government had no burden to prove that. The government was not required to establish that Rogers used force against the victim in order to prove Specification 1 of Charge III. Had there been evidence that Rogers had forced MC’s head down on to his penis, he would be guilty of rape under Article 120(a). To argue that the government did not meet its burden because it did not prove that Rogers used force is to conflate the sexual assault charge with a rape charge. The government did not have to show force to prove sexual assault, and the fact that no force was used is not evidence that no crime occurred.

The government charged Rogers with “placing his penis inside MC’s mouth.” The defense essentially argues that one of the witnesses had to testify that Rogers specifically used the words “I placed my penis in her mouth” when describing the act in order to convict him of Charge III, Specification 1. Such semantics and specious word games are not required to sustain the conviction. *See generally United States v. Bridges*, 1996 WL 107576, at *2 (A.F. Ct. Crim. App. Mar. 4, 1996). The government had to show that a sexual act occurred, and that the

victim was incapable of consenting to that sexual act because of alcohol intoxication. The evidence indisputably shows that the victim was too drunk to consent that night, which satisfies the second element. To satisfy the first, the government needed only to point to Roger's confession, where he wrote: "She began giving me oral pleasure." Based on this statement, and his lies throughout the investigation showing his consciousness of guilt, the members could conclude that Rogers put his penis in MC's mouth when she climbed on top of him and after they removed his clothes together. His confession is corroborated by his lies, intended to minimize his own actions because he knew he was guilty. There are no magic words required to convict. It was Rogers' own words, not magic words, which the members relied on in finding him guilty of Charge III, Specification 1.

IV. UNCHARGED MISCONDUCT CANNOT BE INTRODUCED AT TRIAL AS PROOF OF THE CHARGED OFFENSE. HERE, THE APPELLANT WAS CHARGED WITH ORAL AND DIGITAL PENETRATION OF THE VICTIM. ONE OF THE OFFICERS TESTIFIED THAT THE APPELLANT HAD ADMITTED TO "INTERCOURSE" WITH THE VICTIM. WAS IT ERROR FOR THE MILITARY JUDGE TO ALLOW THIS TESTIMONY?

Standard of Review

This Court reviews a military judge's evidentiary rulings for an abuse of discretion.

United States v. McCollum, 58 M.J. 323, 335 (C.A.A.F. 2003).

Argument

"It is abundantly clear that evidence which is offered simply to prove that an accused is a bad person is not admissible." *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

However, evidence of uncharged misconduct is permitted if it has independent relevance under