

**IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS**

UNITED STATES,	)	3 August 2018
Appellee)	
	)	BRIEF AND ASSIGNMENT OF ERRORS ON
	)	BEHALF OF APPELLANT
v.)	
	)	Dkt. 1461
	)	Case No. G 0365
	)	Before McClelland, Judge, Brubaker
)	
Juan A. GUZMAN	)	Tried at Seattle, Washington by a general court-
Machinery Technician Third Class	)	martial convened by Commander, Thirteenth
U. S. Coast Guard,	)	Coast Guard District, on 15 November 2016, 13
Appellant	)	January, 6 March, and 14-19. 21-25 August
	)	2017.

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS**

Statement of the Case

A general court-martial, composed of members with enlisted representation, convicted Machinery Technician Third Class (MK3) Juan A. Guzman, United States Coast Guard (USCG), contrary to his pleas, of one specification of making a false official statement in violation of Article 107 of the Uniform Code of Military Justice (UCMJ) and two specifications of sexual assault in violation Article 120, UCMJ. The members acquitted MK3 Guzman of two specifications of sexual assault in violation Article 120, UCMJ. (R. at 1354-55.) Following the announcement of the findings, the military judge conditionally dismissed one of the two guilty findings pending appellate review. (CA's Action.)

On 25 August 2017, the members sentenced MK3 Guzman to reduction in pay-grade to E-1, four years' confinement, forfeiture of all pay and allowances, and a dishonorable discharge. (R. at 1456.) The convening authority approved the sentence as adjudged and, with the

exception of the dishonorable discharge, ordered it executed on 01 February 2018. (CA's Action.)

On 27 February 2018, the Judge Advocate General of the Coast Guard referred the case to the Coast Guard Court of Criminal Appeals (CGCCA) for review under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012).

Statement of Facts

A. AS's Evening Out in Port Angeles

On 16 May 2014, seventeen-year-old AS, left her home on the Lower Elwha tribe's reservation and headed to the nearby town of Port Angeles, Washington. (R. at 568-9.) Once in town, she stole a bottle of whiskey and a bottle of vodka from a grocery store and proceeded to the grounds of the local elementary school where she met her friend and ex-boyfriend, ML. (R. at 570-72, 704.)

After drinking some of the bourbon, and while it was still light out, AS and ML left the schoolyard and went to an area of bushes near the Albertson's grocery store in town. (R. at 573-4.) She continued drinking and had a half to three quarters of the bottle of whiskey before falling asleep by the bushes. (R. at 574.) She woke, noticed that she had missed several calls, and passed-out again. At about 1950, ML left AS in the bushes. (R. at 726.) When she next woke, she noticed that it was dark, ML was gone and her shirt, backpack and cell phone were all missing. (R. at 575, 630.) Later she learned that ML had taken her shirt, backpack, and cell phone. (R. at 626.)

After waking this second time she began walking toward Safeway to use a phone. Along the way, a car pulled over and the driver gave AS a shirt to cover up since she was wearing only her bra on top. (R. at 577.) Shortly after that, MK3 Guzman and his friend, [REDACTED],

pulled over, and offered AS a ride. (R. at 577.) MK3 Guzman drove to his apartment and the three of them went inside. (R. at 580.) Inside MK3 Guzman's bedroom, he had vaginal sex with AS. (R. at 583.)

B. AS's Report to the Police

The next morning, MK3 Guzman took her back to the area around Albertson's. She looked for her missing belongings, but did not find them. (R. at 585-6.) She then set off walking home. Along the way, AS came upon a stranger doing landscaping work and she asked him for a ride to the reservation. (R. at 689.) The man asked her if she was alright. (R. at 686.) AS told him that she thought she had been raped. The man then reported the rape to the local police, who began an investigation. (R. at 586.)

AS spoke with the police officer who responded to the call and gave a written statement. (R. at 613, AE 81.) She told the police officer that she fell asleep in the bushes behind Albertsons and woke up to find her shirt, backpack and phone missing and that she felt like she had been raped. (R. at 613-4.) She did not mention anything about being with MK3 Guzman and his friend in this initial interview. (R. at 614.)

C. Evidence of MK3 Guzman's Sexual Encounter

Following the police report, AS was forensically examined. (Appellate Ex. 25 at 32.) During this examination, the sexual assault nurse examiner (SANE) noted an area of redness around AS's posterior fourchette, a thin fold of skin at the back of the vulva. (Appellate Ex. 25 at 32.) The sample collected from AS in the forensic examination was analyzed for DNA content. (Appellate Ex. 25 at 35.) The Washington State Patrol laboratory analysis found a match with both MK3 Guzman and ML on the sample collected from the back panel of AS's underwear and a match with MK3 Guzman in the vaginal swab sample. (Appellate Ex. 25 at

[Redacted]

E. Defense Motion for Reconsideration of the M.R.E. 412 Ruling

[Redacted]



F. The Charges in the Alternative

In drafting the instructions on findings, all parties and the military judge recognized that Specifications 1 and 2 were Article 120(b) sexual assault allegations charged in the alternative. (R. at 1155, 1184-5.) Specifically, the defense requested that the instruction about capacity to consent be removed from the bodily harm instructions out of concern that it “blurs the lines too much between the alternative theories of liability.” (R. at 1156.) The military judge agreed with this position and did not include the capacity to consent instruction under the bodily harm instructions. (R. at 1185.)

Immediately after the members departed the courtroom to begin deliberations, the military judge asked the government to state its position on specifications 1 and 2 of the charged violation of Article 120. (R. at 1392.) The Government responded that it would not oppose merger of the specifications for sentencing. (R. at 1392.) The defense on the other hand requested that specification 2 be dismissed as an unreasonable multiplication of charges. (R. at 1393.) With little argument on the subject, the military judge made the following ruling:

In accordance with the Court of Appeals of the Armed Forces’ holding in *United States v. Campbell*, 71 MJ 19, CAAF, 2011, I find that Specifications 1 and 2 constitute an unreasonable multiplication of charges as it applies to sentencing. I find that the proper

remedy is a conditional dismissal of Specification 2 pending the completion of appellate review.

(R. at 1949.)

G. Post-Trial Processing

On 25 August 2017, the members announced MK3 Guzman’s sentence. (R. at 1909.)

On 20 December 2017, the Staff Judge Advocate (SJA) provided her recommendation to the convening authority. (R. at 28.) The recommendation contained self-conflicting advice on the “straddling offense” aspect of the case: The SJA identified the case as one containing straddling offenses and stated that consequently he could take “whatever action you deem appropriate.”

(*Id.*) In the following section of the recommendation, however, the SJA told the convening authority that his discretion was limited “[b]ecause the adjudged sentence includes confinement for more than six months and a dishonorable discharge.”

Trail defense counsel noted this error in his submission. The addendum to the SJA’s recommendation addressed this alleged error by stating that she “assume[d], without conceding” that trial defense counsel was correct, but failed to provide any corrective advice and continued to advise that “corrective action is not warranted.” (R. at 8.) The convening authority acted on 1 February, 162 days after sentencing. He approved the findings and the adjudged sentence.

Errors and Argument

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III

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IV

ALTHOUGH THE EXIGENCIES OF PROOF DOCTRINE ALLOWS PRESENTATION OF EVIDENCE ON MULTIPLE CHARGES FOR THE SAME CONDUCT, THE MILITARY JUDGE IS REQUIRED TO INSTRUCT THE MEMBERS THAT THEY CANNOT FIND THE ACCUSED GUILTY OF BOTH. THE MILITARY JUDGE DID NOT PROVIDE THIS INSTRUCTION AND THE MEMBERS CONVICTED MK3 GUZMAN OF BOTH OFFENSES FOR THE SAME CONDUCT. DID THE JUDGE ERR?

Standard of Review

The sufficiency of an instruction provided to the members without defense objection is reviewed for plain error. *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017).

Discussion

A. Where the government alleges multiple charges under the same statute for contingencies of proof, members may not enter guilty findings for more than one specification.

The Government charged sexual assault due to incapacitation in Charge II, Specification 1 in violation of Article 120(b)(3)(A). As a contingency of proof for that alleged act, the government also charged sexual assault by bodily harm in Charge II, Specification 2 in violation of Article 120(b)(1)(B). Both specifications alleged the same vaginal penetration as at the *actus reus*. The members returned findings of guilty on both. The military judge conditionally dismissed Specification 2 of Charge II on the basis of unreasonable multiplication of charges for sentencing. MK3 Guzman argues below that conditional dismissal violates double jeopardy principles. MK3 Guzman raises this instructional issue in the event this Court's disposition of the case results in reviving Specification 2 of Charge II so as not to waive the issue.

At trial, there was no question that the penetrative act described in Specifications 1 and 2 of Charge II was a single act. (R. at 1392-93.) Charging multiple specifications for the same act is permissible under the “exigencies of proof” doctrine. *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014). This practice allows the government to charge and present evidence on alternative charges or specifications under which convictions are impermissible to accommodate unpredictable testimony at trial. *Id.*

The military judge’s instructions on findings must address the procedure for reaching findings and include a description of the elements of each offense charged. MCM, R.C.M. 920(e)(1), 920(e)(6). Where charges or specifications are brought in the alternative to allow for exigencies of proof, the members should be instructed that they may not convict on both offenses. *United States v. Gaddis*, 424 U.S. 544, 549–50 (1976). Correct instructions on these charges would have followed the statutory language and instructed the members that they could convict under one specification *or* the other.

B. The failure to instruct the members that they could not make a guilty finding in both of the alternate theories presented was plain error.

The military judge has a *sua sponte* duty to instruct the members on certain subjects. *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). Without affirmative waiver by the defense, the failure to give such an instruction is plain error. *Compare id. with United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992). Instructions on lesser-included offenses are one such subject. *Id.* In at least the Sixth Circuit Court of Appeals, it has been held plain error not to instruct the members that they may not convict on multiple offenses charged alternatively to accommodate exigencies in proof. *United States v. Marshall*, 248 F.3d 525, 536 (6th Cir. 2001). Here, the military judge’s failure to instruct the members before they deliberated was plain error.

C. The exigencies of proof doctrine does not permit the practice of “conditional dismissal” after a finding of guilty has been made by the members.

The practice of conditionally dismissing charges appears to be the spawn of “A Proposed Approach to Appellate Review Addressing the Interests of the Parties” in Judge Effron’s concurrence in *United States v. Britton*. 47 M.J. 195, 202 (C.A.A.F. 1997), *overruled by United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).² Since then the practice has spread from the appellate level to the trial level, which the service courts have, in turn, countenanced. *See, e.g., United States v. Hines*, 75 M.J. 734 (A. Ct. Crim. App. July 27, 2016); *United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim App. 2014); *United States v. Parker*, 75 M.J. 603 (N-M. Ct. Crim. App. Feb. 18, 2016). In fact, this Court in *United States v. Frazier* was one of the first to address the practice. 51 M.J. 501 (C. G. Ct. Crim. App. 1999).

To the extent that *Frazier* provides authority for the practice of trial-level conditional dismissal in certain scenarios, those cases are readily distinguishable from this. The charges in *Frazier*, involved three different Articles—92, 120, and 134—which this Court characterized as “neither lesser-included nor multiplicitous under current standards.” *United States v. Frazier*, 51 M.J. 501, 505 (C.G. Ct. Crim. App. 1999). The two specifications sent to the members here, on the other hand, were alternate theories of liability for the same offense and the same act. They were an unreasonable multiplication of charges, describing the same conduct as two different varieties of sexual assault under Article 120(b).

² Even the terminology is confusing. In federal practice trial judges *vacate* multiplicitous guilty findings because “once a guilty plea has been accepted, the defendant stands convicted” and the “charges” may no longer be “dismissed.” *United States v. Hector*, 577 F.3d 1099, n.1 1100 (9th Cir. 2009). Similarly, past practice in the military justice system appears to have been “setting aside” multiplicitous guilty findings. The C.M.A. at the time stated that “[o]nly in this way can we assure that the results of a trial by court-martial accurately and properly reflect the extent of an accused’s misconduct.” *United States v. Zupancic*, 18 M.J. 387, 390 (C.M.A. 1984).

The practice of conditional dismissal solves one double-jeopardy problem by creating another. In *Green v. United States*, which the CAAF recently called out in *United States v. Sager*, the Supreme Court held that a defendant whose second degree murder conviction was reversed could not be re-tried on a first degree murder charge that went to the jury, but resulted in neither an express acquittal nor conviction. *Green v. United States*, 355 U.S. 184, 193 (1957); *United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017). In *Green*, similar to MK3 Guzman’s case, the accused could not have been convicted of both the greater and lesser offenses. The Supreme Court rejected the contention that to appeal a conviction “a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal.” *Green v. United States*, 355 U.S. 184, 193 (1957).

Although perhaps less obvious, MK3 Guzman’s position is even worse here: the military judge allowed the members to enter guilty findings on multiplicitous sexual assault specifications, one of which was afterward “dismissed” on the condition that the other guilty finding survived appellate review. If MK3 Guzman succeeds on appeal, rather than facing a retrial like the defendant in *Green*, a back-up guilty finding will spring to life by operation of the law. If, on the other hand, the members had been instructed that MK3 Guzman could only be convicted of one of the alternate specifications, the resulting not guilty finding would have clearly barred a future prosecution. This analysis holds equally true to cases where the specifications are merged by the military judge after findings.

In *Green*, Justice Black quoted a dissent by Judge McKenna, which is strikingly apt here: “I submit that the state seeks no convictions except in legal ways, and because it does not it affords means of review of erroneous rulings and judgments, and freely affords such means. It

does not clog them with conditions or forfeit by their exercise great and constitutional rights.” *Green v. United States*, 355 U.S. 184, 196 (1957) (quoting *Trono v. United States*, 199 U.S. 538, *McKenna J. dissenting*). The practice of conditionally dismissing guilty findings clogs MK3 Guzman’s exercise of his right not to be twice guilty of the same offence and consequently it cannot be used to justify or excuse the military judge’s error in failing to properly instruct the members that the specifications were charged in the alternative and could not result in guilty findings under both.

D. The findings on two specifications was prejudicial and requires a remedy.

To obtain relief for this error, the appellant must also show that the error in instructions had an unfair prejudicial impact on the members’ deliberations. *Id.*; *United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014). Where an instructional error raises constitutional implications, the error is tested for prejudice using a ‘harmless beyond a reasonable doubt’ standard.” *United States v. Davis*, 73 M.J. 268, 271 (C.A.A.F. 2014). Additionally,

When a ‘panel return[s] guilty findings for both specifications and it was agreed that these specifications were charged for exigencies of proof, it [is] incumbent’ either to consolidate or dismiss a specification. Dismissal of specifications charged for exigencies of proof is particularly appropriate given the nuances and complexity of Article 120, UCMJ, which make charging in the alternative an unexceptional and often prudent decision.

Elespuru, 73 M.J. at 329-30.

Here, the members of the court-martial that tried MK3 Guzman were able to enter two guilty findings on specifications that the law says can result in only one. The second impermissible conviction is the prejudice. Additionally, the conditional dismissal gives rise to the possibility of a back-up conviction should the incapacitation specification be set aside.

Relief Sought

The nature of the findings procedures precludes this court from determining on which theory the members would entered a guilty finding had they been properly instructed they could not convict on both. WHEREFORE, MK3 Guzman respectfully requests this Court set aside the two specifications of sexual assault in violation Article 120, UCMJ.

V

WHAT IS SUBSTANTIALLY ONE TRANSACTION SHOULD NOT BE MADE THE BASIS FOR AN UNREASONABLE MULTIPLICATION OF CHARGES. MK3 GUZMAN WAS CONVICTED OF TWO DIFFERENT SPECIFICATIONS OF SEXUAL ASSAULT FOR ONE ACT OF PENETRATION. SHOULD THIS COURT SHOULD CONSOLIDATE HIS CONVICTIONS?

Standard of Review

A military judge's unreasonable multiplication of charges determination is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

Discussion

“[W]hen a ‘panel return[s] guilty findings for [multiple] specifications and it was agreed that these specifications were charged for exigencies of proof, it [is] incumbent’ [upon the military judge] either to consolidate or dismiss [the contingent] specification[s],” not merely merge them for sentencing purposes. *United States v. Elespuru*, 73 M.J. 326, 329-30 (C.A.A.F. 2014) (quoting *United States v. Mayberry*, 72 M.J. 467, 467-68 (C.A.A.F. 2013)).

MK3 Guzman was convicted of two Article 120, UCMJ, specifications: one for vaginally penetrating AS while she was unable to consent due to intoxication and the other for vaginally penetrating as “by bodily harm” for the same act. At trial it was understood that the two specifications were charged in the alternative for contingencies of proof. (R. at 1155, 1184-5.) After findings, the defense requested that the military judge merge the findings into a single

specification. The military judge declined to do so. Instead he conditionally dismissed the specification for sexual assault by bodily harm.

At sentencing, the members asked for the military judge to “restate or re-explain why Specification 2 of Charge II, Article 120, will not be considered for sentencing.” (Appellate Ex. 128.) In response the military judge explained that they were “charged in the alternative” to account for “how facts are going to come out at trial.” (R. at 1432.) The judge further instructed that MK3 Guzman should only be sentenced based on the single specification he had not conditionally dismissed. (R. at 1432.) The military judge should have merged the findings, as the defense requested.

Generally, “[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” MCM, R.C.M. 307(c)(4), Discussion. This prohibition against the unreasonable multiplication of charges exists because of “those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion.” *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).

To determine whether there is an unreasonable multiplication of charges, this Court applies the following factors from *Quiroz*: (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresents or exaggerates the appellant’s criminality; (4) whether the number of charges and specifications unreasonably increases the appellant’s punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Id.* at 338. No single factor is dispositive. *Campbell*, 71 M.J. at 23. In MK3 Guzman’s case, the second and third factors control. The specifications were

unambiguously aimed at a single act and varied only on the element that described AS's consent; two findings of guilt misrepresent MK3 Guzman's criminality.

In *United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim. App. 2014), the Navy-Marine Corps Court examined an analogous UMC issue. There, the court found the two sexual assault specifications were charged separately for contingencies of proof. *Id.* at 568. The specifications alleged "the same sexual act, on the same date, and at the same place" with the only difference being whether the complaining witness was asleep or impaired by an intoxicant. *Id.* at 568. The court found the *Quiroz* factors favored the appellant and consolidated the charges for findings even though the military judge had merged them for sentencing. *Id.* at 568-69. Notably, the NMCCA explained that where the unreasonably multiplied specifications are under the same article, consolidation and not conditional dismissal, is the correct remedy.

Relief Sought

This Court should consolidate the specifications into one conviction, just like the NMCCA did in *Thomas*, into a single specification.

VI

WHEN DEFENSE COUNSEL ALLEGES LEGAL ERROR UNDER RULE FOR COURT-MARTIAL 1105, THE STAFF JUDGE ADVOCATE MUST ADVISE THE CONVENING AUTHORITY WHETHER SHE AGREES AND WHETHER CORRECTIVE ACTION IS CALLED FOR. THE STAFF JUDGE ADVOCATE'S ADDENDUM DID NEITHER. WAS THE ADDENDUM DEFICIENT?

Standard of Review

This Court has broad discretion under Article 66(c) to address errors in post-trial processing. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

Discussion

A. The staff judge advocate’s advice on authority to disapprove the sentence was erroneous and clearly prejudiced MK3 Guzman’s chances of clemency.

When defense counsel raises legal error in clemency submissions, the staff judge advocate (SJA) should inform the convening authority whether she agrees with the defense on the issue. MCM, R.C.M. 1106(d)(1); *United States v. Edwards*, No. 200602314, 2007 CCA LEXIS 350, *4-5 (N-M. Ct. Crim. App. Sept. 18, 2007). If an accused raises an allegation of legal error to the convening authority, the staff judge advocate shall advise the convening authority whether “corrective action on the findings or sentence should be taken.” MCM, R.C.M. 1106(d)(4).

The SJA’s statement that the convening authority “may not disapprove, commute, or suspend the sentence of confinement and dishonorable discharge” was incorrect. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, 127 STAT. 672, 956–57 (2013). Her unwillingness to affirmatively state that the advice was incorrect was insufficient to meet the requirement to provide a “statement of agreement or disagreement” set out in R.C.M. 1106, let alone whether corrective action should be taken.

This Court will grant relief when the appellant alleges error in the SJAR that has a prejudicial result that is capable of resolution. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Incorrect advice on the Convening Authority’s power to disapprove, commute, or suspend the adjudged sentence is “an affirmative misstatement of the law that effectively precluded the appellant’s opportunity to receive clemency.” *United States v. So*, 2017 WL 1034630, at *2 (N-M. Ct. Crim. App. Mar 17, 2017). As such it is prejudicial and this Court should remedy it. *See id.*

Relief Sought

WHEREFORE, MK3 Guzman respectfully requests this Court set aside the convening authority's action and remand the case for new post-trial processing.

VII

WHETHER THE CONVICTION FOR SEXUAL ASSAULT BY BODILY HARM, CHARGE II, SPECIFICATION 2, IS FACTUALLY SUFFICIENT.³

Standard of Review

This Court reviews factual sufficiency *de novo*. Art. 66(c), UCMJ, 10 U.S.C. §866(c) (2012); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (internal citations omitted).

Discussion

Factual sufficiency review by this Court is “a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition of Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses.” *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). A guilty finding is factually insufficient if the members of this Court are not convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Here, Charge II, Specification 2, alleging sexual assault by bodily harm in violation of Article 120(b)(1)(B), is factually insufficient. This specification alleged MK3 Guzman “penetrating her vulva with his penis without her consent.” (Charge Sheet.) In Article 120(g)(3), the term “bodily harm” is defined as “any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.” To give meaning to Articles 120(b)(2) and (b)(3), this element must be understood to encompass

³ This assignment of error is raised in the event this Court's disposition of the case revives Charge II, Specification 2. The military judge dismissed that specification on the condition that the conviction for Charge II, Specification 1 is affirmed on appeal.

situations where a lack of consent can be shown by words, conduct, or circumstances not amounting to incompetence. This was, in fact, the reason that the judge declined the government's request to provide the *Pease* definition of competence to consent under the bodily harm charges. (R. at 1184.)

Remarkably, the sexual penetration in this case was witnessed by a third party, [REDACTED]. [REDACTED]'s testimony described AS during the start of sex as "easy," "willing and very open." (R. at 796.) [REDACTED] also testified that she was kissing MK3 Guzman while in bed, that she undressed herself and was moaning at points.. (R. at 832-33.) [REDACTED] never heard anything that indicated AS wanted to stop or that she did not want to have sex. (R. at 833.) Taking this together with MK3 Guzman's statement to CGIS that the sex was consensual and the fact that AS could not remember anything from when the sex began, there is no evidence of either affirmative non-consent or circumstantial lack of consent. (R. at 582.)

Likewise, the trial counsel's arguments on the R.C.M. 917 motion to dismiss the specification provides no basis for affirming the guilty finding. The government pointed to three pieces of evidence—none provide proof beyond a reasonable doubt when viewed in the light most favorable to the government. First, trial counsel alleged that "Ms. A.S. testified that she did not consent." (R. at 980.) This claim is not borne out by the transcript, which contains testimony that she did not remember asking MK3 Guzman to have sex and that she "wasn't exactly capable of making any decisions for myself." (R. at 585.) While these statements certainly support the incapacitation allegation, they do not support a bodily-harm lack of consent theory. Similarly, the second fact the defense pointed out—that [REDACTED] testified that AS's sexual willingness seemed strange—certainly does not support a lack of consent. (R. at 980.) Finally,

the absence of an affirmative verbal communication of consent that MK3 Guzman described also fails to prove the element. (R. at 980.)

Relief Sought

In light of uncontradicted testimony of a third-party witness that AS was unusually willing to engage in sex and the absence of evidence of bodily harm, Specification 2 of Charge II must be set aside as factually insufficient.

VIII

WHETHER THE CONVICTION FOR SEXUAL ASSAULT BY BODILY HARM, CHARGE II, SPECIFICATION 1, IS FACTUALLY SUFFICIENT.⁴

Standard of Review

This Court reviews factual sufficiency *de novo*. Art. 66(c), UCMJ, 10 U.S.C. §866(c) (2012); *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (internal citations omitted).

Discussion

The evidence that AS was incapable of consenting at the time the sexual act with MK3 Guzman was insufficient to clear reasonable doubt, even where the evidence is viewed in the light most favorable to the government. The first reasonable doubt arises from the fact after she passed out at about 1900 she consumed no more alcohol for the rest of night. (R. at 574, 627, 749.) Thus more seven hours passed between her last drink and arriving at MK3 Guzman's apartment. R. at 826, 832.) When she did arrive at the apartment, [REDACTED] testified she did not appear intoxicated. (R. at 827-30.)

[REDACTED] testimony on this point actual contradicted that of MK3 Guzman, his friend. Expert testimony showed that [REDACTED]'s testimony was more reliable because witnesses

⁴ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1981).

who themselves have been drinking alcohol are known to be incapable of accurately judging the intoxication level of others. (R. at 816, Expert testimony also addressed AS's actions after waking up with sufficient executive functions to recall a store in town that was still open and set out there in order to call for a ride. (R. at 1043-46.) She also testified that the evidence showed AS had "cognitive ability" to consent to sex and the "mental and physical ability to communicate" that decision. (R. at 1048, 1070-71.) Furthermore, the government's own expert testimony showed that the decision to engage in sexual activity does not require a high level of function. (R. at 1134.) Likewise, expert testimony established that the level of blood alcohol associated with memory blackout—like that described by AS—can be quite low and does not correlate to impairment of one's executive function. (R. at 1029.) Consequently, AS's testimony that she does not remember portions of the time in MK3 Guzman's apparent is not evidence that she lacked the capacity to consent at the time.

Last, all of the government's witness testimony on both the amount of alcohol consumed by AS and her level of impairment relied on testimony from AS and ML whose credibility was called into question, for all those reasons above in Assignments of Error I and III.

Relief Sought

This court should set aside the guilty finding for Specification 1 of Charge II as factually insufficient.