

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40815

UNITED STATES

Appellee

v.

Greg A. VELAZQUEZ

Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 October 2026

Military Judge: Matthew P. Stoffel.

Sentence: Sentence adjudged 16 January 2025 by GCM convened at Joint Base Elmendorf-Richardson, Alaska. Sentence entered by military judge on 3 March 2025: Dishonorable discharge, confinement for 24 months, reduction to E-1, and a reprimand.

For Appellant: Dwight H. Sullivan, Esquire; Joshua R. Traeger, Esquire.

For Appellee: Major Vanessa Bairos, USAF; Major Heather R. Bezold, USAF; Major Kate E. Lee, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MCCALL, and KUBLER, *Appellate Military Judges*.

Judge MCCALL delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge KUBLER joined.

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.3.**

MCCALL, Judge:

Appellant was tried by a general court-martial composed of a military judge sitting alone. Contrary to his pleas, Appellant was convicted of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.^{1,2} The military judge sentenced Appellant to a dishonorable discharge, confinement for 24 months, reduction to E-1, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises two issues on appeal: (1) whether the conviction for sexual assault is legally and factually sufficient, and (2) whether the military judge abused his discretion by excluding evidence under Mil. R. Evid. 412.

We find no error materially prejudicial to Appellant’s substantial rights and affirm the findings and sentence.

I. BACKGROUND

Appellant was a 31-year-old college graduate when he enlisted in the Air Force. At his first duty location, he worked with SL, a 19-year-old Airman, and both lived in the same dorm. SL saw Appellant every day at work and started to see him at the dorms when he began “hanging out” with her group of friends. SL explained she considered Appellant somewhere between a “friend” and an “acquaintance” and that she visited his room to talk about work and sometimes to get alcohol from him. SL visited Appellant’s room “more than monthly, less than weekly,” and spent more time in the rooms of KK and JG, two other Airmen in her friend group. Appellant never visited SL’s room and Appellant and SL never went anywhere or did anything together off base.

SL, who testified at trial, and Appellant, whose Air Force Office of Special Investigation (OSI) interview was admitted as evidence, both indicated the relationship was platonic. Appellant described his relationship with SL as “friendly” and further elaborated, “It’s never been like, we’ve never had this, like, I don’t know, any sort of like, I mean, from my side, I’ve never had any sort of like attraction towards her.” Both KK and JG confirmed the platonic

¹ All references to the punitive articles are to the *Manual for Courts-Martial, United States* (2019 ed.). Unless otherwise noted, all other references to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

² Appellant was acquitted of one specification of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920, alleged to have occurred on 16 April 2023.

nature of SL and Appellant's relationship and indicated they never expressed any romantic feelings toward the other.

During his OSI interview, Appellant pointed to a change in their relationship a few days before the charged incident, indicating SL "started like, talking to me a little bit more just being a little bit more . . . jokey, a little bit more coming by." When pressed by OSI if Appellant thought SL was being flirtatious, Appellant indicated, "I didn't take it as flirtatious but I feel like it was a little bit more flirty than normal." Appellant further indicated,

One time she came over, it just started getting a little comfortable, like . . . getting more and more like comfortable. And then like over time, she just started like . . . showing a little bit more. I don't know if it was comfortable or again, flirtatious, I don't know, I can't tell you the difference. But over time, I could see, like, she started wearing more, like, shorter shorts, and like just, kind of, like, getting a little bit, like closer.

Appellant claimed SL slept over "multiple times" but indicated "it was always platonic."

During her testimony, SL admitted she slept in Appellant's room one time prior to the charged incident. On this occasion, which occurred on 15 April 2023, the night before the charged incident, SL fell asleep on top of the covers in the bed. She was wearing pink athletic shorts and a hoodie and slept next to JG, who was lying between her and Appellant on the bed. SL indicated there was no romantic relationship or sexual relationship between her and Appellant; there was no prior cuddling, no holding hands, no kissing, and no sexual conduct. While SL and Appellant texted back and forth, she did not consider any of the texts flirtatious or romantic in nature.

Appellant's account of the night before the charged incident largely mirrored SL's testimony but varied in one significant detail. Appellant claimed SL took his hand and had him touch a bruise on her thigh. SL testified that Appellant touched the bruise on her thigh and it made her uncomfortable so she walked away. Despite this "touch" of the bruise on her thigh, Appellant indicated that "nothing intimate was ever, like, with me and her. There was no kissing. There was no dating. There was no texting, like, in a romantic way or anything like that."

Later the next day, 16 April 2023, SL prepared alcoholic drinks which she delivered to several friends in the dorm. She delivered Appellant's drink to him last and stayed in his room. SL was wearing the same pink athletic shorts and black hoodie she wore the night before and drank 3 or 4 drinks. SL did not remember if she drank any more drinks in Appellant's room. She indicated she

did not black out, lose consciousness, or have any memory lapses due to intoxication. SL fell asleep on top of the covers on Appellant's bed. She woke up when she felt Appellant's hand on her vagina, over her clothing. This incident formed the basis for the abusive sexual contact specification of which Appellant was acquitted.

In an attempt to prevent Appellant from touching her further, SL rolled over onto her side facing away from him, and Appellant moved his hand away. Nonetheless, SL was afraid and remained awake staring at the wall. Appellant then put his hand under SL's shorts and inserted his finger into her vagina. SL forcefully pushed Appellant's hand away. When she thought he was asleep, SL gathered up her belongings and left Appellant's room. SL testified she was not attracted to Appellant and had no romantic interest in him. She also testified Appellant did not express any romantic interest in her that evening and it never crossed her mind there was any sexual tension on Appellant's part. SL did not give any prior consent for any touching that occurred.

Appellant's account of that night from his OSI interview varied slightly from SL's testimony. He indicated they were "drinking drinking drinking to the point where it was just like we got super twisted." Appellant asserted, "[Y]eah there was a lot of drinking and yeah ended up passing out." Appellant further indicated, "[S]he slept over and I mean, she stayed through the night. And woke up and she ended up leaving. And I don't exactly know, but I just had, like a bad feeling in my stomach that I might have done something."

When asked by an OSI agent whether there was any cuddling, Appellant replied:

[S]o it was more of like . . . she would lay down and then we would kind of both just be watching TV. And then she would just be kind of like, just kind of like, you know, comfortable, you know, just kind of like getting close. You know I wouldn't call it cuddling, but it was just, like kind, like, a just, I don't know, just getting close, stealing my blankets, you know, my pillows, and stuff and just kind of making it like, her own little thing There was no like, again, this intentional kind of, like, whatever, like, going on. It just felt, like, she just kept, like opening up and becoming more and more just comfortable being like next to me and whatever. And was able just to be like, you know, her body just being next to mine and stuff. But it was never like, you know, just kind of on top of each other thing or what people, you know, perceive is what cuddling do in, like a relationship. There's none of that.

Appellant claimed his arm came over SL's leg and he remembered his hand was "over, like, her body, and she moved my hand away from her." Appellant

later clarified he touched SL's genital region over the clothes. Appellant said he realized he was drunk, or "too twisted for this" so he went to the bathroom then moved over and laid on the other side of the bed.

SL testified that after she left Appellant's room, she went to her room where she took a long shower then sat "staring at the wall" for a period of time. SL then went to KK's room and told her what happened. KK encouraged her to report the incident, and SL made a restricted report three days later. When SL began to panic after seeing Appellant at work every day, she changed her report to an unrestricted report.

The morning after the penetrative sexual assault, Appellant texted SL and apologized, stating:

I wanted to apologize face to face about last night. I didn't mean any disrespect or cross any lines. I read the vibe/energy wrong and I just don't want things to be weird or whatever. I am truly sorry. I feel like an idiot. The drinking had me feeling nice but I still had control and still took it there. I really like our friendship dynamic and I hope I didn't f[**]k that up.

Appellant later slid a letter under SL's door where he again apologized for his actions, stating he was embarrassed and ashamed of what he did. Appellant went on to say, "Please know this is something I don't do and still confused why, in that moment, felt it was okay to do or was wanted by you." Both the text and letter were admitted as prosecution exhibits at trial.

Appellant discussed the events of 16 April 2023, with JG. Without identifying SL, Appellant said he had touched a female's "genital region" over her clothes and this female pushed Appellant's hand away. Appellant said he was embarrassed and ashamed, he could not really fix what he did, and the situation was really on his mind. In addition to talking to JG, Appellant also told SL he reached out to his family for guidance. In his interview with OSI, Appellant said he apologized to SL because he believed he might have "done something" as he "kind of woke up" after SL moved his hand away. Appellant also talked to his noncommissioned officer-in-charge, JC. Appellant told JC he tried to touch SL when she was in his bed and she pushed him away.

During trial, Appellant sought admission of three categories of evidence under Mil. R. Evid. 412 but only appeals the military judge's decision on one – a conversation about sex "toys" that occurred between Appellant and KK, in which Appellant alleges that SL laughed and participated."³

³ Though some evidence discussed in this opinion is contained in materials sealed by the military judge, we refer to such evidence to the extent necessary to resolve the issues presented in this appeal.

II. DISCUSSION

A. Legal Sufficiency – Law and Analysis

Appellant challenges the legal sufficiency of his conviction for sexual assault upon SL, and in particular, SL’s ability to consent. Appellant claims SL was in an unconscious state, and the Government’s framing of this case as a “lack of consent” case instead of incapacitation makes the conviction legally insufficient per *United States v. Mendoza*, 85 M.J. 213 (C.A.A.F. 2024). In *Mendoza*, CAAF clarified that “Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, establish separate theories of liability.” 85 M.J. at 220. The government “cannot charge one offense under one factual theory and then argue a different offense and a different factual theory at trial.” *Id.*

We review issues of legal sufficiency de novo. *United States v. Harrington*, 83 M.J. 408, 414 (C.A.A.F. 2023) (citing *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)). The test for legal sufficiency is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted).

The Government was required to prove (1) Appellant committed a sexual act upon SL by penetrating SL’s vulva with Appellant’s finger, with intent to gratify his sexual desire; and (2) Appellant did so without SL’s consent. See *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), pt. IV, ¶ 60.b.(2)(d). “Sexual act” is defined as “the penetration, however slight, of the vulva . . . of another by any part of the body . . . with an intent to . . . arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920(g)(1)(C). “Consent” is defined as “a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent.” 10 U.S.C. § 920(g)(7)(A).

Applying the *de novo* standard to the legal framework, we reject Appellant’s *Mendoza* argument. The CAAF held that “the Government cannot . . . prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim [was incapable of consenting at the time of the sexual act].” *Mendoza*, 85 M.J. at 222. There is no support to Appellant’s claim that SL was unconscious or incapacitated due to her alcohol consumption. On the contrary, trial counsel argued during their closing argument the theory of their case was SL did not consent to the penetration, not that SL was asleep and not able to consent. Additionally, SL testified unequivocally that she was awake and not incapacitated when Appellant digitally penetrated her vulva. She testified she woke up when she felt Appellant’s hand on her vagina, over her clothing, and

then turned over to keep him from touching her further. However, after this incident, SL remained awake and was staring at the wall until she felt Appellant place his hand under her shorts and insert his finger into her vagina. At that point she pushed Appellant's hand away.

Viewing this testimony in the light most favorable to the Prosecution, a rational trier of fact could have found beyond a reasonable doubt that SL was awake, possessed the capacity to consent, and did not consent to Appellant digitally penetrating her vulva.

B. Factual Sufficiency – Law and Analysis

Appellant also challenges the factual sufficiency of his conviction. We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *United States v. Harvey*, 85 M.J. 127, 130 (C.A.A.F. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i)). To show a specific deficiency in proof, an appellant must make “a specific, reasonable, nonfrivolous statement of error as to a particular finding.” *United States v. Hunt*, __ M.J. __, No. 25-0257, 2026 CAAF LEXIS 661, at *7 (C.A.A.F. 6 Aug. 2026).

As a specific showing of a deficiency of proof, Appellant asserts the Government failed to prove penetration, because SL's testimony was vague and contradictory and there was no corroboration. In his analysis, Appellant highlights the lack of physical or forensic evidence as well as SL's intoxication. Appellant then raises the argument that the Government failed to overcome the affirmative defense of a reasonable mistake of fact, predicated on SL's and Appellant's increasingly intimate relationship and her choice to spend time in Appellant's room, drink in this room, and sleep in his bed with him. Based on these assertions, we find Appellant raised a reasonable, nonfrivolous, specific deficiency of proof allowing us to conduct a factual sufficiency review under Article 66(d), UCMJ.

Under Article 66(d)(1)(B)(ii), UCMJ, the court may weigh the evidence and determine controverted questions of fact, giving appropriate deference both to the trial court's opportunity to observe the witnesses and other evidence, and to the findings of fact entered into the record by the military judge. 10 U.S.C. § 866(d)(1)(B)(ii). As a result of this Article 66(d)(1)(B)(ii), UCMJ, review, “[i]f . . . the Court is *clearly convinced* that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.” 10 U.S.C. § 66(d)(1)(B)(ii), (emphasis added). For this court “to be clearly convinced that the finding[s] of guilty [were] against the weight of the evidence, two requirements must be met. First, [we] must decide that the evidence, as [we] weighed it, does not prove that the appellant is guilty beyond a reasonable doubt. Second, [we] must be clearly convinced of

the correctness of this decision.” *Harvey*, 85 M.J. at 132 (emphasis and internal quotation marks omitted).

1. Evidence of Non-Consent to Digital Penetration

Turning first to evidence of digital penetration, we find the evidence provided sufficient to prove Appellant digitally penetrated SL without her consent, as charged, beyond a reasonable doubt. Contrary to Appellant’s assertions, SL testified credibly. She was not able to describe with specificity the length of time of various events during the night, but she was very clear on the circumstances surrounding the sexual assault. SL explicitly testified about the elements of the sexual assault in addition to the surrounding circumstances. SL described how she had rolled away from Appellant when he first touched her over her clothes, how she was “scared” to move, how she was staring at the wall, how she “wanted to leave,” and then how Appellant’s hand went under her shorts and he inserted his finger inside her vagina. When the special trial counsel asked SL, “Did the finger go inside your vagina,” SL responded, “Yes, Sir.” SL further described how she reacted when Appellant inserted his finger into her vagina. SL was awake, lucid, and physically manifested her lack of consent by pushing away Appellant’s hand.

Once SL knew Appellant was asleep, she collected all her belongings, then went to her room and took a long shower. SL then immediately reported the incident to her friend, KK. KK’s testimony of what SL told her happened that night was consistent with SL’s testimony at trial.

Appellant’s OSI interview also corroborated much of SL’s testimony. Per his interview, it was SL pushing his hand away that “woke” him up and made him think he “might have done something.” The fear that he might have “done something” led him to apologize for his actions both over text and in a letter Appellant slipped under SL’s door. Appellant apologized not for something he “might have done” but rather took responsibility for his actions. He told SL he was sorry and that he “still had control and still took it there.” He also indicated he was confused why he felt “it” was okay to do what he did or was “wanted by [her].” Appellant argues there was no medical or other forensic evidence collected, however that evidence is not required to support a conviction for sexual assault. The evidence that was admitted in this case supports the finding of guilty to sexual assault of SL beyond a reasonable doubt.

2. Mistake of Fact as to Consent

The affirmative defense of mistake of fact is defined by R.C.M. 916(j)(1) which provides “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.” “It is an offense to commit a sexual act without consent, although an honest and reasonable (nonnegligent) mistake of fact as to consent serves as an affirmative defense.” *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019). While the quantity of evidence required to raise the mistake of fact defense is low, the record must contain evidence supporting both the subjective “honest” and the objective “reasonable” mistaken belief. See *United States v. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017).

Appellant alleges the increasingly familiar relationship, as demonstrated by SL spending time in his room and sleeping in his bed, created a mistake of fact as to consent. However, per Appellant’s OSI interview, he had no romantic interest in SL and did not think SL had any romantic interest in him. This was conveyed by Appellant to his friends and further conveyed by both Appellant’s friends and SL’s friends during the court-martial. SL also indicated a lack of romantic feelings towards Appellant. SL was “coming by” Appellant’s room more often and was, as Appellant described, more “jokey” but even Appellant was uncomfortable describing her behavior as “flirtatious.” The night of the assault, Appellant describes their interaction as, “[t]here was no like, again, this intentional kind of, like, whatever, like, going on. It just felt, like, she just kept, like opening up and becoming more and more just comfortable being like next to me and whatever.” There was no conversation about their changing relationship, no kissing, no intimate touching, no dating, not even flirtatious or romantic texting.

Even if we were to agree that Appellant had an honest mistaken belief, that belief was not reasonable. Signs of romantic interest are not synonymous with consenting to a sexual act. Further, Appellant conceded any mistake of fact as to consent was unreasonable when he stated in his apology letter he was “still confused why, in that moment, [he] felt it was okay to do or was wanted by [her].” The interactions Appellant had with SL could not support a mistake of fact argument when Appellant honestly and reasonably knew SL was not interested in him and did not consent. Per *Davis*, the evidence does not support that there was both a subjective and objective mistaken belief. Thus, the affirmative defense of mistake of fact as to consent does not exist.

We have weighed the evidence, and after giving the appropriate deference to the trial court, we find Appellant sexually assaulted SL and that this was proven beyond a reasonable doubt. As such, the finding of guilty to sexual assault of SL is factually sufficient.

C. Military Rule of Evidence 412

Appellant claims the military judge erred by improperly excluding evidence under Mil. R. Evid. 412, which was essential to Appellant’s defense of reasonable mistake of fact as to consent.

1. Additional Background

In his ruling on the Defense’s motion to admit evidence under Mil. R. Evid. 412, the military judge found KK and SL were present in Appellant’s room about a month prior to the assault, and KK said something about sex toys to Appellant. SL testified she did not participate in this conversation and did not recall any discussion of sex toys or other sexual topics. Appellant believed SL laughed and did participate in the conversation. Appellant testified for the limited purpose of the Defense motion that he considered his relationship with SL as “platonic” at the time, though “it felt like she was opening up and possibly showing some short [sic] of interest.” Appellant testified that weeks later, SL discussed a relationship she was ending and as a result Appellant believed she may be interested in dating him.

The military judge concluded the Defense failed to satisfy its burden to demonstrate the admissibility of evidence regarding any statements SL may have made about sex toys reasoning:

[S]uch evidence is not relevant to whether she consented to the sexual activity alleged in the specifications. The extended duration of time between the conversation, if any, and the alleged offenses along with the dissimilarity between the nature of the conversation of the alleged offenses makes such evidence irrelevant on the issue of consent. The court also concludes that such evidence is not relevant to the defense of reasonable mistake of fact Even assuming such evidence met the low threshold of relevance on either exception cited by the defense to the general rule of inadmissibility, such evidence fails an [Mil. R. Evid.] 403 balancing test. As noted above, the probative value, if any, would be exceeding low. On the other hand, the danger of unfair prejudice, including confusion of the issues and waste of time on this topic substantially outweighs that very low probative value.

2. Law and Analysis

Appellant alleges the military judge erred when he excluded the conversation about sex toys. In support of this allegation, Appellant argues the military judge misinterpreted case law, did not properly analyze the materiality of the excluded evidence, and failed to consider the evidence in terms of SL and Appellant’s on-going relationship.

We review a military judge’s decision to admit evidence for an abuse of discretion. *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019)). “Military judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal

principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable.” *United States v. Washington*, __ M.J. __, No. 25-0044, 2026 CAAF LEXIS 353, at *9 (C.A.A.F. 13 Apr. 2026) (quoting *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024)). “This abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.” *St. Jean*, 83 M.J. at 112 (alteration in original) (quoting *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017)).

Though evidence of a victim’s sexual predisposition or sexual behavior is generally inadmissible under Mil. R. Evid. 412, evidence of specific instances of a victim’s sexual behavior with an appellant offered to prove consent (Mil. R. Evid. 412(b)(2)) and evidence that is constitutionally required (Mil. R. Evid. 412(b)(3)) are exceptions to this prohibition. Evidence is generally constitutionally required and must be admitted under the constitutional exception “when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice.” *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citation omitted). Military judges receive wide discretion in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice (as per Mil. R. Evid. 403), but their rulings receive less deference if they fail to articulate their analysis on the record. *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009).

Based on his argument that the findings of fact are clearly erroneous and that the military judge relied on incorrect legal principles, Appellant claims both the Mil. R. Evid. 412(b)(2) and Mil. R. Evid. 412(b)(3) exceptions applied to the excluded evidence in his case. In reviewing the evidence under both the Mil. R. Evid. 412(b)(2) and Mil. R. Evid. 412(b)(3) exceptions, the military judge’s findings of fact were supported by the evidence, the military judge used correct legal principles, and the military judge’s exclusion of the evidence was reasonable when applying the facts of the case to the law. Furthermore, the military judge articulated his analysis of the balancing test under Mil. R. Evid. 403 on the record, finding the probative value of the evidence “exceedingly low” vice the dangers of unfair prejudice, confusion of the issues, and waste of time. Thus, per *St. Jean*, 83 M.J. at 112, there was no abuse of discretion.

III. CONCLUSION

The findings are correct in law and fact. Article 66(d), UCMJ, 10 U.S.C. § 866(d). In addition, the sentence is correct in law and fact, and no error materially prejudicial to Appellant’s substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d) (2019 *MCM*). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court