

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KENNETH J. PERRY
INFORMATION SYSTEMS TECHNICIAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 201100273
GENERAL COURT-MARTIAL**

Sentence Adjudged: 14 January 2011.

Military Judge: CAPT Carole Gaasch, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, California.

Staff Judge Advocate's Recommendation: CDR L.B. Sullivan, JAGC, USN.

For Appellant: LT Gregory M. Morison, JAGC, USN.

For Appellee: CDR John Flynn, JAGC, USN; Capt David N. Roberts, USMC.

31 July 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

WARD, Judge:

A general court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault and one specification of obstruction of justice, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934, respectively. The appellant was sentenced to confinement for 36 months, reduction in pay grade to E-1, total forfeitures, and a dishonorable discharge. The

convening authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

The appellant raises five assignments of error: (1) the military judge erred when she prohibited the appellant from using evidence of the complaining witness's sexual behavior with the appellant's friend earlier in the evening to defend against the sexual assault charge; (2) the evidence is factually insufficient to sustain both convictions; (3) the military judge erred in using a "saving instruction" when instructing the members on the charge of aggravated sexual assault; (4) the obstruction of justice charge should be dismissed because the specification fails to state an offense; and (5) the military judge erred in instructing the members on the elements of aggravated sexual assault.

After consideration of the pleadings of the parties, reviewing the entire record of trial, and hearing oral argument, we find that the obstruction of justice charge fails to state an offense. We will take appropriate in our decretal paragraph. Following our corrective action, we find that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Facts

TD and five of her female friends visited San Diego, California, from 2-4 April 2010 during their college spring break. Record at 544-46. On Friday, 2 April, one of TD's friends learned about a party from Petty Officer DJ, who was hanging out with a group of young Navy enlisted personnel to include the appellant. *Id.* at 546-47, 592-93. TD and her friends first met the appellant and his group of friends at a house party and then spent up to two hours at Petty Officer DJ's apartment on board Naval Base San Diego. *Id.* 556, 592-94. There was no noticeable interaction between the appellant and TD that evening. *Id.* at 556, 594.

On Saturday, TD and her friends spent the day swimming, napping and eating barbeque. *Id.* at 556-57. The group started drinking at approximately 1900 while they were preparing to go out to a local club. *Id.* at 557-58, 596. TD consumed approximately three shots of tequila and two mixed drinks of hard liquor and juice before departing for the club. *Id.* at 596. She then continued to consume a mixed drink in transit to the club. *Id.* at 559, 596. She did not drink at the club but began drinking again after the group left the club and proceeded

to Petty Officer DJ's on-base apartment. *Id.* at 597-98. At the apartment, TD recalls having two shots of vodka and one mixed drink made with hard liquor. *Id.* at 598. During the party, TD and the appellant engaged in highly sexualized dancing. *Id.* at 1083.

At some point that evening or in the early morning hours, TD became nauseous and began throwing up over the balcony outside the apartment. *Id.* at 563-64, 599, 806. She testified at trial that she had little recall of events after this point. *Id.* at 599-600. TD's friend, Ms. H, and one of the males at the party named Chris assisted TD from the balcony to the bathroom, and ultimately to a bedroom where she lay down resting on the right side of the bed. *Id.* at 566, 569-70. At this point, TD's friends described her as asleep. *Id.* at 570. Another friend, Ms. T, reclined on the bed next to the sleeping TD for some time. *Id.* at 570, 812. While Ms. T lay next to TD, the appellant entered the bedroom and also lay on the bed. *Id.* at 812. Ms. T did not notice any interaction between the appellant and TD while she was on the bed. *Id.* Eventually, Ms. T. got up and left TD in the bed with the appellant. *Id.*

Sometime later, TD's best friend, Ms. H, looked in the bedroom to check on TD and saw the appellant on top of her. TD still appeared to be sleeping. *Id.* at 878, 881. Indeed, TD appeared not to have moved from her initial position on the bed. *Id.* at 878. TD also did not respond when Ms. H called out her name. *Id.* Ms. H then left the room and returned with Ms. T. *Id.* at 878-79. Upon entering the bedroom, Ms. T saw the appellant on top of TD in the bed and yelled at him to get off her. *Id.* at 815-16. Ms. H then attempted to get TD to sit up and prepare to leave the party. Even with Ms. H's assistance, TD was unable to stand up and fell to the floor. *Id.* at 879. TD then began rolling on the floor and gasping for air. *Id.* at 880. By this point, others from the living room had come into the bedroom and were concerned that TD was suffering from a seizure. Shortly thereafter, the appellant took TD to the emergency room at a nearby hospital. *Id.* at 724, 1272.

TD's treating physician at the emergency room, Dr. O, testified at trial that when he examined her, TD was lethargic but could still answer questions. *Id.* at 951. Dr. O ordered blood work, a CAT scan of TD's head, x-rays of her chest, and a urine screen. *Id.* TD's blood alcohol concentration (BAC) was later reported as .06. *Id.* at 953. No drugs were detected in her system. *Id.* at 954. None of these tests could confirm the

existence of any seizure related activity. *Id.* at 959, 966-67, 969.

At trial, the defense called LT S, a forensic toxicologist, who testified that a person's BAC can be a predictor of behavior, but it cannot determine behavior alone. *Id.* at 1160, 1172. LT S testified that typically a person "blacks out" or becomes unconscious at a BAC of .2. *Id.* at 1173. He also estimated that TD's BAC at the time of the alleged assault was approximately .09. *Id.* at 1177.

The appellant testified in his own defense at trial. He testified that while he lay on the bed next to TD, he asked her if he could give her a massage and she agreed. *Id.* at 1237. He then described how the massage quickly led to sexual intercourse. *Id.* at 1243-52. He further stated that she actively participated and moaned loudly. *Id.* at 1253-54.

The next day, Naval Criminal Investigative Service (NCIS) agents met with the appellant and escorted him to their office for an interview. While in the car on the way to the NCIS office, the appellant sent a text message to his friends, including Aviation Ordnanceman Airman (AOAN) K-P, in which he asked them to "pull some magic and talk to these girls and get them to drop the charges or I'm done. My whole career out the window!!!" *Id.* at 618, 1099; Prosecution Exhibit 1.

Under a grant of immunity, AOAN K-P, a friend of the appellant's who was also at the party, testified for the appellant at trial. He testified that he spoke several times to TD while she lay on the bed, asked if she was "okay" and she responded that she was. *Id.* at 1086-89. He also explained that he later offered TD money to drop the charges against the appellant, but that he did so for his own reasons. *Id.* at 1089. Specifically, he testified that he offered TD money only because he was married and afraid of getting in trouble because he had had sexual intercourse with TD in the bathroom during the party. *Id.* at 1091.

Prior to trial, the trial defense counsel (TDC) sought to introduce evidence of TD and AOAN K-P's sexual intercourse in the bathroom during the party. Appellate Exhibit XIII.¹ TDC

¹ In support, TDC offered a sworn statement by AOAN K-P to NCIS detailing intercourse in the apartment bathroom, a transcript of excerpts of TD's testimony at the Article 32 hearing, and a report summary from U.S. Army Criminal Investigation Laboratory (USACIL) with a finding that TD's DNA

argued that the evidence was necessary to explain why TD would have a motive to fabricate her allegation against the appellant. *Id.* at 135. In support, TDC offered multiple theories: 1) that AOAN K-P and appellant are similar looking men and TD mistakenly believed she was having sexual intercourse with AOAN K-P instead of the appellant ("mistaken identity"); 2) that TD was embarrassed and did not want her friends to know that she had had consensual sex with two different men that evening ("embarrassment"); and 3) to attack TD's credibility because TD testified at the Article 32 hearing that she did not have sex with AOAN K-P that night. *Id.* at 152, 156-157, 160, 179; AE XIII, Encl. 5 at 3.

The military judge denied the defense's motion noting that there was "no evidence that [TD] thought she was consenting to having intercourse with [AOAN K-P]." Record at 165, 179-80. The military judge further found the evidence far more prejudicial than probative. *Id.* at 164-65, 179-80. She also rejected the second theory that TD fabricated her allegation due to "embarrassment". The military judge explained that no limiting instruction would guard against members viewing this as evidence that TD had a "propensity . . . to have intercourse with people she had just met, which is what 412 is designed to prevent." *Id.* at 164. Last, the military judge stated "if the door is opened to the impeachment, then certainly, if the rules allow and the door is opened, then the Defense can get into this."² *Id.* at 165.

Ultimately, this evidence was later admitted during AOAN K-P's testimony. However, the military judge limited this evidence to the obstruction of justice charge. *Id.* at 1058, 1063.³

material was recovered from AOAN K-P's underwear. AE XIII, Encls. 2, 5, and 11.

² The military judge's reference to the "door being opened" was focusing on TD's ability to recall events during the evening. Record at 160-63. She made no explicit reference to impeachment through a prior act of untruthfulness nor did the TDC query her on this point following her ruling.

³ Prior to calling AOAN K-P to testify, TDC requested an Article 39a session. At that session, TDC proffered that this evidence was essential to explain AOAN K-P's motivation for sending text messages to TD's friends offering money in exchange for TD dropping charges against the appellant. *Id.* at 1050-53. The military judge agreed but limited this evidence to the obstruction of justice charge. When the TDC then renewed his motion to admit this evidence as a motive to fabricate, the military judge replied that her original ruling under MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) "stands." *Id.* at 1060.

THE EXCLUSION OF EVIDENCE UNDER MIL. R. EVID. 412

The appellant argues that the military judge erred when she excluded evidence of TD's sexual intercourse with AOAN K-P. We review the military judge's ruling on whether to exclude evidence pursuant to MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) for an abuse of discretion. *United States v. Roberts*, 69 M.J. 23, 26 (C.A.A.F. 2010). We review the findings of fact under a clearly erroneous standard and the conclusions of law *de novo*. *Id.* The abuse of discretion standard "recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (internal quotation marks and citation omitted).

MIL. R. EVID. 412 states that evidence offered by the accused to show that the alleged victim engaged in other sexual behavior is inadmissible except in limited contexts. MIL. R. EVID. 412(b)(1)(A-C). The third exception states that the evidence is admissible if "the exclusion of [it] would violate the constitutional rights of the accused." MIL. R. EVID. 412(b)(1)(C). If there is a theory of admissibility that falls under one of the exceptions, then before admitting the evidence, the military judge must conduct a balancing test as outlined in MIL. R. EVID. 412(c)(3) and clarified by *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011).

The evidence is tested to see if it is "relevant, material, and [if] 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). Relevant evidence is any evidence that has "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." MIL. R. EVID. 401. Evidence is material if it is "of consequence to the determination of appellant's guilt[.]" *United States v. Dorsey*, 16 M.J. 1, 6 (C.M.A. 1983) (citation and internal quotation marks omitted).

In determining whether evidence is of consequence to the determination of Appellant's guilt, we "consider the importance of the issue for the which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to the issue."

United States v. Smith, 68 M.J. 445, 448 (C.A.A.F. 2010)
(citation omitted).

Finally, if evidence is relevant and material then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See MIL. R. EVID. 412(c)(3). Those dangers include concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Ellerbrock*, 70 M.J. at 319 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). If the evidence survives the inquiry, the final consideration is whether the “evidence in the record support[s] [the] inference” that the moving party is relying on. *Ellerbrock*, 70 M.J. at 319.

In the instant case, we conclude that the military judge did not abuse her discretion when she excluded this evidence for the purpose of the sexual assault charge. As to the first theory, we agree with the military judge that TDC offered no evidence that TD was under a mistaken belief that she was consenting to intercourse with AOAN K-P. The record reveals nothing more than speculative assertions and conjecture in this regard and we therefore conclude that the appellant failed to meet his burden in demonstrating relevance. MIL. R. EVID. 412(c)(3); see also *Roberts*, 69 M.J. at 27-28. On the second theory, we conclude that the “embarrassment” theory fails to carry a logical nexus to TD’s credibility. As a predicate matter, we find no evidence that TD was embarrassed by her actions that evening, let alone embarrassed enough to fabricate a claim of sexual assault.⁴ We also note that the minimal probative value this evidence might have, if actually supported in the record, fails to outweigh the danger of unfair prejudice under MIL. R. EVID. 412(c)(3) as articulated by the military judge. See *Ellerbrock*, 70 M.J. at 319 (danger of unfair prejudice includes harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant).

We now address the final theory advanced at trial; to impeach TD’s credibility with her untruthfulness at the Article 32 hearing. Since the military judge failed to articulate her balancing analysis with respect to this theory, we accord her ruling less deference than we might otherwise. See *United States v. Mann*, 54 M.J. 164, 166 (C.A.A.F. 2000). Under this

⁴ To the contrary, the evidence TDC offered at the motion hearing and later at trial portrayed TD, her friends, the appellant and his friends all engaging in highly sexualized behavior without reservation.

theory, the evidence offered was material to the victim's credibility, a significant issue. But there was a genuine dispute as to whether sexual intercourse between TD and AOAN K-P actually occurred. In his statement to NCIS, AOAN K-P related that the two had engaged in intercourse in the bathroom earlier in the evening. AE XIII, Encl. 2. At the Article 32 hearing, TD testified that during the party she was "grinding" with AOAN K-P and kissing him, and later he followed her into the bathroom. She described this meeting at the Article 32 hearing as follows:

DC: Now, did you and [AOAN K-P] sort of go off alone that night?

TD: No. The only time that me and [AOAN K-P] were alone I had walked to the bathroom and then soon after he had came in there, but not even too much longer, my two friends had came in, too.

DC: Okay. Did he show his penis to you?

TD: He had like—he was like on me and stuff and then he was like he had pulled it out and I was just like, "No, I'm not about to do this like," and then like I was like I wasn't—it was just like something —I was just like in shock basically because I was like—I was like drunk and like I knew there were kissing and stuff. Apparently I gave him the wrong impression, but I wasn't — I didn't have sex with him, though.

DC: Okay. Now, some of your DNA ended up in his shorts.

TD: Okay.

DC: Can you explain how that might have happened.

TD: It's possibly from when we were dancing, like from the picture. Other than that, I couldn't really tell you.

DC: As far as you know, you two did not have sex?

TD: We absolutely didn't have sex; I know that.

. . . .

DC: Did you have a conversation with NCIS at the hospital?

TD: I believe, yeah. Yeah, that was them.

DC: And did you tell them what you just told us today?

TD: Yes.

DC: Have you since had a conversation with all your girlfriends about this?

TD: Yes.

DC: Have you told them anything different than what you've told us today?

TD: No.⁵

Evidence that a witness has previously lied can be an appropriate method of impeachment. MIL. R. EVID. 608(b); see also *United States v. Stavelly*, 33 M.J. 92, 94 (C.M.A. 1991). However, in this case there existed a genuine dispute between the only two witnesses to the event. If the issue was impeachment through contradiction, then attacking TD's account of what happened in the bathroom with the contradicting testimony AOAN K-P may have been appropriate. But the key issue was not what exactly happened in the bathroom. Instead, the issue was whether TD engaged in a prior act of untruthfulness at the Article 32 hearing. The only evidence TDC offered in support was AOAN K-P's contrary statement to NCIS.⁶ The appellant had the option but chose not to call TD to testify at the motion hearing. Had she testified and admitted that she did engage in intercourse with AOAN K-P, or a witness from USACIL testified that their test results refuted TD's explanation at the Article 32 hearing, then the appellant may have established a sufficient factual predicate for this theory. Without such evidence, TDC failed to establish his proffered theory with anything more than two witnesses' contradictory accounts of the same event.⁷ Under the facts of this case, we conclude that the

⁵ AE XIII, Encl. 5 at 3-4.

⁶ TDC also offered a summarized DNA report from USACIL, which among other findings concerning the appellant also reported that TD's DNA material was detected in a cutting from AOAN K-P's underwear. As indicated above, TDC questioned TD about this at the Article 32 hearing. TD could give no explanation other than perhaps it occurred when the two were dancing and "grinding" together. AE XIII, Encl. 5 at 3.

⁷ See *United States v. McElhanev*, 54 M.J. 120, 130 (C.A.A.F. 2000), overruled on other grounds by *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005) (proffer by trial defense counsel of victim's unrelated false rape complaint failed to establish impeachment evidence under MIL. R. EVID. 608(b) where proffer was supported by nothing more than general denial by assailant identified in victim's prior rape complaint). We also see this case as distinguishable from *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011). In *Savala*, the victim had previously reported a sexual assault to local police. When confronted by police with the purported assailant's description of

military judge did not abuse her discretion in excluding this impeachment evidence.⁸

Further, even if the military judge did err, the error was harmless. TDC was ultimately successful in introducing this evidence at trial. While the military judge ostensibly admitted it only for the obstruction of justice charge, she gave no such limiting instruction at the time of AOAN K-P's testimony or during her findings instructions.⁹ TDC relied heavily on this evidence during argument without any limitation.¹⁰ Additionally, TDC had ample opportunity to attack TD's credibility on a number of areas, to include her highly sexualized dancing with the appellant and AOAN K-P, how intercourse with the appellant might have affected her relationship with her boyfriend, her actions and statements made while at the hospital, and her delay in seeking testing related to possible seizures.

We also note that the Government's case overall was strong. Their theory was that TD was substantially incapacitated either because of her intoxication, being asleep, or both, and therefore unable to consent to the sexual act. The sexual act

consensual intercourse, the victim conceded that his description could have been true, but she could not remember. *Id.* at 74. Unlike the victim in *Savala*, no evidence was offered that TD ever admitted or conceded that she may have had intercourse with AOAN K-P.

⁸ Even if TDC had factually supported this theory, we would still find no error when we take into consideration the victim's privacy interest under MIL. R. EVID. 412(c)(3), the dangers articulated in *Van Arsdall* and the probability that this evidence would only lead to distracting the panel with a collateral matter; what exactly happened between TD and AOAN K-P in the bathroom. MIL. R. EVID. 403.

⁹ Record at 1354-72; AE LXVII.

¹⁰ Record at 1326 ("[t]hese are the choices that [TD]'s making"); 1329 (describing AOAN K-P's testimony of a "joke" between he and TD, which was a reference to their intercourse in the bathroom); 1329-30 (TD was predisposed to have sex with some of the men because she had sex with AOAN K-P); 1335 (reference to "second poor decision" TD made, referring to earlier incident between TD and AOAN K-P in the bathroom); 1345 (describing choices that TD made and referring to intercourse between TD and AOAN K-P). The Government did not object to these repeated references nor did the military judge *sua sponte* provide any limiting instruction to the panel. While the appellant lost the ability to confront TD with potential evidence of untruthfulness, he gained the windfall of arguing the underlying facts without restriction. Furthermore, assuming TDC was permitted to cross-examine TD on this matter, he would have been "stuck" with TD's answer and could not introduce extrinsic evidence. See MIL. R. EVID. 608(b); see also *United States v. Bahr*, 33 M.J. 228, 233 (C.M.A. 1991).

of intercourse was not in dispute. TD's description of her intoxication was corroborated by other's testimony describing her condition on the balcony, in the bathroom, and in the bedroom both before and after the appellant penetrated her. As to the toxicologist's testimony that estimated a BAC of .09 at the time of the sexual act, we note that the evidence unequivocally established that TD was throwing up not long before the events in question, she was on the floor of the bathroom in an unflattering position next to the toilet, and she needed assistance getting to bed. We also note the testimony that described her position on the bed as unchanged from the moment she was first placed there until her friends saw the appellant on top of her with her eyes closed, and her hands and arms by her side.

These latter facts corroborate TD's testimony and her level of intoxication, and by implication her capacity to respond, communicate or recall. For all these reasons we conclude that, assuming that the military judge erred, a "reasonable jury [would not have] received a significantly different impression of [TD's] credibility had [the appellant] been permitted to pursue his proposed line of cross-examination." *United States v. Collier*, 67 M.J. at 347, 352 (C.A.A.F. 2009) (quoting *Van Arsdall*, 475 U.S. at 680) (internal quotation marks omitted). Consequently, we find that any error was harmless beyond a reasonable doubt.

Factual Sufficiency

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 appellant's guilt beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Due to our action on the appellant's claim that the obstruction of justice fails to state an offense, we will only address this assignment of error as it pertains to the aggravated sexual assault conviction.

For this conviction to stand, the Government must have proven that the appellant engaged in a sexual act with another person and that the other person was substantially incapacitated. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 45(b)(3)(c). The appellant contends that this court cannot find beyond a reasonable doubt that TD was substantially incapacitated due to the following: TD's lack of credibility; the medical evidence which seemingly refutes that TD experienced

a seizure after the sexual assault; the toxicologist's testimony estimating TD's BAC to be .09 at the time of the sexual act; and the appellant's testimony that TD was coherent during the sexual act.

In the record there is ample evidence of significant alcohol consumption by TD,¹¹ such that she vomited off the balcony of the apartment and needed assistance getting up from the bathroom floor and to the bedroom. Record at 563-564, 566-68, 599, 806, 809. There is also evidence that after being placed on the bed, she appeared to be sleeping and did not move from this position. *Id.* at 570, 878. In fact, the only evidence that TD was coherent and interactive during the sexual act comes from appellant's own self-serving testimony. *Id.* at 1253-54. But his assertion is contradicted by other testimony that describes him on top of TD engaged in the sexual act while she remained immobile, appeared "passed out" and nonresponsive to the sexual act. *Id.* at 813-15, 877-79.

Viewing the record as a whole, we are convinced beyond a reasonable doubt that the appellant's conviction for aggravated sexual assault is factually sufficient.

Failure to State an Offense

Whether a specification states an offense is reviewed *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense when it alleges every element of the offense either expressly or by necessary implication. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). If a specification fails to allege all the elements of an offense expressly or by necessary implication, we then test for prejudice. *United States v. Nealy*, 71 M.J. 73, 77 (C.A.A.F. 2012). "In the plain error context the defective specification alone is insufficient to constitute substantial prejudice to [an appellant's] material right." *United States v. Humphries*, 71 M.J. 209, No. 10-5004, 2012 CAAF LEXIS 691, at *19 (C.A.A.F. Jun. 15, 2012) (citations omitted). Where the prejudice to a material right is rooted in notice, the record is examined to see if the missing terminal element is somewhere extant in the trial record, or whether the element is essentially uncontroverted. *Id.*

¹¹ TD consumed three shots and two mixed drinks of hard liquor and juice (Record at 558-559, 596); TD continued to drink a mixed drink on the drive over to the club (*Id.* at 559, 596); at the apartment TD recalls having two shots of vodka and one mixed drink made with hard liquor (*Id.* at 598).

The specification for obstructing justice fails to allege that the act was prejudicial to good order and discipline or service discrediting. The appellant claims that he was denied sufficient notice of the terminal element. The record supports his claim. The pretrial proceedings did not make any mention of the terminal element. The Government made no reference to the terminal element during opening statement and did not introduce any direct evidence that might satisfy the element. The military judge did instruct the panel on the terminal element and the trial counsel alluded to it during closing argument, but these references came after the close of evidence. In line with our superior court's reasoning in *Humphries*, we must conclude that appellant suffered prejudice and will take appropriate action in our decretal paragraph.

Instruction of the Members

The appellant next argues that the military judge erred when she used a "saving instruction" to cure the constitutional infirmities of the burden shift in Article 120, UCMJ. As this question has been settled by our superior court in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011), we decline to revisit the issue. The appellant also argues the military judge erred when she used a definition of "substantially incapacitated" that effectively lessened the Government's burden of proof on this element.

Whether a panel is properly instructed is a question of law we review *de novo*. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). This obligation includes the duty to "provide appropriate legal guide-lines to assist the jury in its deliberations." *United States v. McGee*, 1 M.J. 193, 195 (C.M.A. 1975) (citation omitted). The instructions ultimately given to the members must adequately cover the issues and circumstances raised by the evidence. R.C.M. 920(e)(7); R.C.M. 920(a) and (c), Discussions. Instructions are judged by "the context of the overall message conveyed to the jury." *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (citation and internal quotation marks omitted). A jury instruction which lessens to any extent the Government's burden to prove every element of a crime violates due process. See *Francis v. Franklin*, 471 U.S. 307 (1985). When instructional error as to the elements of a crime is found, the error must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States*, 527 U.S. 1, 13-15 (1999)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable

doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotation marks and citations omitted).

In her instructions, the military judge defined "substantially incapacitated" as "that level of mental impairment due to consumption of alcohol, drugs or similar substance while asleep or unconscious or for other reasons which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue or otherwise unable to make or communicate competent decisions." Record at 1356 (emphasis added); AE LXVII at 2; Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-45-5d (1 Jan 2010).

The appellant contends that this last phrase is unclear and points out that it appears nowhere in the statute. We agree that the phrase "competent decisions" is not found in the statute. Nor is that phrase found in the District of Columbia statute upon which our UCMJ Article 120 is modeled. See D.C. Code § 22-3003. Article 120 only uses the word "competent" in explaining the affirmative defense of consent. But in the Benchbook definition of "substantially incapacitated", the object that "competent" modifies is changed from "competent person" to "competent decisions". The appellant posits that "competent" in this latter context can be defined as "acceptable", "capable" or "having the necessary ability, knowledge, or skill to do something successfully." Appellant's Supplemental Brief of 24 Oct 2011 at 4 (citing New Oxford American Dictionary 347 (2nd ed. 2005)). In other words, the Government only had to prove that TD was, due to alcohol consumption, a competent person who made an "incompetent," i.e. unacceptable decision to engage in sexual intercourse, a definition that lessens the Government's burden of proof under the statute.

Assuming without deciding that the use of this phrase "competent decisions" was error, we find any error harmless beyond a reasonable doubt. First, the remainder of the definition the military judge used is consistent with the statute. Second, the military judge also instructed the panel on the issue of consent. Consistent with *Prather*,¹² she instructed them that they must find beyond a reasonable doubt

¹² *Prather*, 69 M.J. at 338.

that TD did not consent. She then defined consent in accordance with the statute as "words or overt acts indicating a freely given agreement to the sexual conduct by a *competent person*." Record at 1356 (emphasis added). Absent evidence to the contrary, we presume that members understand and follow the military judge's instructions. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001) (citation omitted).

In following the military judge's instructions and by finding the appellant guilty, the members were convinced beyond a reasonable doubt that TD did not consent; specifically, that due to her intoxication she was not "a competent person" who freely gave agreement to the sexual conduct at issue. Since the military judge defined consent in terms of a "competent person" instead of "competent decisions", and the panel rejected the notion that TD consented, we are convinced that the panel did not rely upon any improper connotation from the words "competent decisions" in the definition of "substantially incapacitated." We therefore conclude that the statute is satisfied and any error in the instruction is harmless beyond a reasonable doubt.

Sentence Reassessment

Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006) and carefully considering the entire record, we conclude that there has not been a dramatic change in the penalty landscape and that we are satisfied beyond a reasonable doubt that even if the specification had been were dismissed at trial, the members would have adjudged a sentence no less than that approved by the convening authority in this case.

Conclusion

The guilty findings to Charge II and its sole specification are set aside and Charge II and its sole specification are

dismissed. The guilty finding to Charge I and its specification and the sentence as approved and reassessed are affirmed.

Senior Judge PAYTON-O'BRIEN and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge Maksym participated in the decision of this case prior to detaching from the court.