**IN THE UNITED STATES NAVY-MARINE CORPS**

 **COURT OF CRIMINAL APPEALS**

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| UNITED STATES, | REPLY BRIEF ON BEHALF OF APPELLANT |
|  Appellee |  |
|  v.  | Docket No. 201400373 |
|  |  |
|  | Tried at Naval Station Norfolk, Virginia on 12 May and 12, 24, and 25 June 2014,by a general court-martial, convened by Commander, Navy Region Mid-Atlantic. |
| **DARIN G. LOPEZ**Intelligence Specialist Second Class (E-5) |
| United States Navy,  |
|  Appellant |

TO THE HONORABLE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

 Appellant submits the following in reply to the government brief:

1. The government failed to prove that E.H. lacked the mental or physical ability to consent due to impairment by an intoxicant.

 The government brief acknowledges that, “E.H. consumed three alcoholic beverages—two mixed drinks of ‘pineapple juice and Coconut Rum’ and ‘one shot of Goldschlager.’” (Government Br. at 20; R. 126-27, 156.). The government charged and appellant was convicted of committing a sexual act upon E.H. when E.H., “was incapable of consenting to the sexual act due to impairment by an intoxicant. . . .” (Charge Sheet). However, as the government acknowledges, the evidence at trial was that the only intoxicant E.H. consumed were the three drinks – an amount of intoxicant well below that required to make a person incompetent to consent. Because the only evidence of an intoxicant introduced at trial is E.H.’s own testimony, the evidence is factually and legally insufficient to sustain the conviction.

 As this court recently pointed out, Article 120(g)(8) defines “consent” as, “a freely given agreement to the conduct at issue by a competent person.” *United States v. Pease*, 74 M.J. 763, 770 (NMCCA 2015). Article 120(g)(8)(B) lists three conditions that may render a person incapable of consenting: “[a] sleeping, unconscious, or incompetent person cannot consent.” *Id*. The government must prove that one of these, “listed condition[s] rendered the complainant incapable of entering a freely given agreement.” *Pease*, 74 M.J. at 770. In this case, the government alleged that E.H. was incompetent to consent, “due to impairment by an intoxicant.” (Charge Sheet). However, the government offers no explanation either at trial or on appeal as to how three drinks could cause E.H. to become so intoxicated as to be incompetent to consent. The government, not appellant, had the burden to explain how three drinks could cause E.H. to become incompetent. *Id*.

 The government disavows the possibility that the three drinks interacted with hydrocodone. (Government Br. at 26). Because they disavow the possibility that E.H. was taking hydrocodone at the relevant time, the government argument relies solely on speculation as to the meaning of E.H.’s testimony that she vomited and may have urinated. (Government Br. at 21; R. 133, 161-62). There are many possible explanations why E.H. may have vomited, assuming her testimony is accurate. Furthermore, there is no evidence indicating whether she vomited before having sex or after having sex with appellant.

 Furthermore, the government exaggerates the evidence when they state that, “The bed was . . . soaked with her urine; she had been lying in her urine when she awoke in the morning, after the sexual assault.” (Government Br. at 21). E.H. first testified that the sheets were merely wet:

Q. What did you notice about yourself when you woke up?

A. I had vomit in my hair and on the sheets. There was a sticky fluid .

Q. Was the bed wet?

A. It was.

R. at 133. Later on redirect, she failed to affirmatively adopt her written statement explaining instead, “At the time I believed it to be urine.” (R. at 161-62; Appellate Ex. XVIII.) The government assertion that it was in fact urine is speculative. There was also no evidence introduced as to what the sticky fluid may have been. The government’s reliance on these side issues is an attempt to distract from the weakness of the government’s evidence on the key undisputed issue: E.H. consumed only three drinks. E.H.’s credibility on these points is not determinative of the outcome of this case: it is undisputed that E.H. consumed only three drinks and three drinks could not have caused E.H. to become so intoxicated as to be incompetent to consent.

2. The government brief turns well known scientific truths upside down.

 The government brief asserts that E.H.’s apparent memory blackouts, “lends proof to her level of intoxication.” (Government Br. at 21-22, n. 3). The government asserts, “the memory ‘blackout’ established that LCpl EH was incapable of consenting.” (Government Br. at 22). This astonishing assertion contradicts known scientific facts: “[p]ass-out . . . typically occurs at BACs of .30 or higher. . . .” *Pease*, 74 M.J. at 769. The drinks E.H. consumed in the hours prior to having sex with appellant were significantly less than the amount required to cause her to reach a .30 BAC and pass-out. Had the defense counsel called their readily available consultant to testify, this evidence would also be available in this case.

3. The government incorrectly asserts that “appellant failed to identify specific information of what he would have submitted” in his clemency request. (Government Br. at 32).

 Contrary to the government’s brief, appellant’s affidavit identifies specific information that he wanted included in the clemency submission. Appellant’s affidavit states, “I provided numerous letters of support and records of accomplishment to the brig, and LT Hochmuth told me he would get them from the brig. He never did so.” (Appellant’s Affidavit).

Conclusion

 WHEREFORE, appellant respectfully requests this Honorable

Court grant the requested relief.

Respectfully submitted,

signing for

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