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as military music is to music.*

CAAFLOG

The AFCCA reverses a rape conviction for factual insufficiency

By [Zachary D Spilman](#), Thursday, September 18, 2014

In an unpublished *en banc* opinion in *United States v. Soto*, No. 38422 (A.F. Ct. Crim. App. Sep. 16, 2014) ([link to unpub. op.](#)), the Air Force Court of Criminal Appeals reverses a conviction for forcible rape in violation of Article 120(a) (2006), finding that the Government failed to satisfy its burden to demonstrate that the appellant used physical force to cause the sexual intercourse.

The appellant was a military training instructor at Joint Base San Antonio-Lackland, Texas. A general order prohibited “developing or attempting to develop a personal, intimate, or sexual relationship with a trainee, including former basic trainees who remained in follow-on technical training school” and also prohibited “such relationships with a trainee’s immediate family member.” Slip op. at 2. The appellant engaged in numerous such relationships, leading to pleas of guilty before a general court-martial composed of a military judge alone to two specifications of violating a lawful general regulation, one specification of making a false official statement, and two specifications of adultery, in violation of Articles 92, 107 and 134.

However, the appellant was also charged with rape, aggravated sexual assault, and wrongful sexual contact involving his sexual encounters with one particular former trainee. He pleaded not guilty to these charges. The military judge acquitted the appellant of the aggravated sexual assault and wrongful sexual contact charges, but convicted him of the rape.

The rape charge involved a former trainee identified as Senior Airman (SrA) TS, who contacted the appellant after completing her basic training and flew from California to San Antonio in order to visit him. She planned to stay at the appellant’s apartment during the visit.

The incident that led to the rape specification took place soon after SrA TS arrived in San Antonio. She stated the appellant met her at the airport and as she entered his car, he promptly pushed her into her seat and kissed her. She stated she attempted to distract him by stating she wanted to go out to eat, but the appellant insisted they stop by his apartment to drop off her luggage. SrA TS stated she used the restroom in his apartment, and when she emerged from the restroom, the appellant hugged her, kissed her, took her to the bed, pulled down her shorts, and had sexual intercourse with her. SrA TS stated this was against her will; she pushed him and told him, “No, I’m not ready,” to no avail.

At trial and on appeal, the parties focused much of their attention on SrA TS’s actions following this charged rape. SrA TS continued to stay at the appellant’s apartment and slept in his bed for her five-day stay in San Antonio. When she returned to

California, she continued to communicate with the appellant and sent him explicit pictures of herself. She also communicated with a friend from basic training that she was dating the appellant, that he was her boyfriend, and that the relationship was a “dream come true.” Although she considered herself in a relationship with the appellant, SrA TS also remained in an “on again, off again” relationship with her boyfriend in California during this time; however, the relationship was strained.

Over the next several months, SrA TS visited the appellant twice more, both times bringing family members to view houses for the family’s possible move to San Antonio. Some consensual sexual activity took place between SrA TS and the appellant during SrA TS’s visits to San Antonio, and she stayed with the appellant during each visit. During the last visit, SrA TS stated that she woke up after consuming alcohol to find herself unclothed in the appellant’s apartment smelling like she had sex. However, SrA TS could not state positively whether intercourse occurred, and she testified that she did not feel like she had sex. The appellant was acquitted of aggravated sexual assault and wrongful sexual contact resulting from this incident. Soon after this last visit, SrA TS and the appellant stopped communicating, and SrA TS married her boyfriend in California.

Slip op. at 3. The CCA considers these facts and the evidence presented at trial and concludes that the evidence is factually insufficient to support the rape conviction “on narrower grounds than the parties’ focus in their initial briefs, focusing solely on the evidence introduced about the charged rape itself.” Slip op. at 4. Writing for the court, Judge Weber avoids the appellant’s assertion “that SrA TS’s actions following the charged incident undermine her credibility and demonstrate her consent to sexual activity with the appellant,” focusing instead on the legal definition of force and the evidence presented on that element. Slip op. at 4.

Article 120(a) (2006) defined as rape “caus[ing] another person of any age to engage in a sexual act by— (1) using force against that other person.” Force was defined in Article 120(t)(5) as:

(5) Force. The term “force” means action to compel submission of another or to overcome or prevent another’s resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

Judge Weber explains that:

The appellant was convicted of causing SrA TS to engage in sexual intercourse “by using physical strength or power or restraint applied to her person sufficient that she could not avoid or escape the sexual contact.”

Slip op. at 4.

But “at trial, the Government elicited only cursory information about the intercourse that was charged as rape. The entire substance of SrA TS’s testimony consists of the following:

As soon as I came out [from the restroom] he started hugging me and try[ing] to guide me on his bed and trying to have sex with me.

....

I'm just pretty scared and didn't know what to do.

....

I said, "No, I'm not ready."

....

I was afraid because like I couldn't believe that I came to San Antonio and I [was having] sex with my [MTI]. And then another thing I was scared because I already [was having] a sexual relationship with [another] male. [It doesn't] matter [if] it's my fault or his fault, it's still considered cheating on my boyfriend at that time.

....

[When I came out of the restroom], he wrapped [his arms] around me.

....

Then he tried kissing me; kissing my lips and my neck.

....

We [were] moving. He kind of like turn[ed] me around towards the bed.

....

Then he's got my back on the bed and he stopped kissing and tried to take off my pants. Then we started having sex.

Slip op. at 5. Based on this testimony (and some summarized follow-up questions), the CCA is not convinced "beyond a reasonable doubt that the appellant took 'action to compel submission of [SrA TS] or to overcome or prevent [her] resistance by [applying] strength, power, or restraint applied to [her], sufficient that [she] could not avoid or escape the sexual conduct.'" Slip op. at 6 (modifications in original).

Judge Weber addresses three parts of the Government's case directly:

The Government elicited three primary pieces of evidence about the charged act itself to build its case: 1) SrA TS told the appellant "No, I'm not ready" at some point after the appellant began his advances; 2) SrA TS pushed the appellant while he was on top of her in an unsuccessful attempt to get the appellant off her; and 3) SrA TS was afraid during the encounter. The testimony on each point was extremely brief and left several questions unanswered. For example, the Government did not elicit sufficient context about when the "No, I'm not ready" statement occurred, what her tone of voice was, whether the appellant could have been expected to hear her, or whether the two said anything else before or during the intercourse. SrA TS testified that she pushed the appellant while he was on top of her, but trial counsel did not elicit sufficient evidence to indicate that the appellant used force to overcome the pushing. On the third point, SrA TS did testify that she was afraid during the encounter, but she never testified that she was afraid of the appellant; rather, she only testified that she was afraid she was having sex with her MTI and she would be seen as cheating on her boyfriend.

Slip op. at 6.

Judge Weber also specifically notes the potential for coercion by the appellant, who was SrA TS's former military training instructor:

We do not discount SrA TS's testimony, and we recognize she portrayed what could have been a sinister act by the appellant. The appellant was previously SrA TS's

military training instructor, and he placed SrA TS in a situation where they would be alone in an environment unfamiliar to her without her own means of transportation. It is certainly possible the appellant used some combination of his coercive power as SrA TS's former MTI, his knowledge that she was dependent on him for shelter and transportation during the visit, his body weight, and his refusal to heed SrA TS's cues that she was not ready to cause SrA TS to have sexual intercourse.

However, the Government charged the appellant with using force to complete a rape. Whatever mental pressure the appellant utilized on his former trainee, the Government retained the burden to demonstrate that the appellant used physical force to cause the intercourse. The Government did not satisfy its burden.

Slip op. at 7.

The analysis concludes with a reminder of the court's duty to conduct an independent review focused on the law and the facts:

Whatever possibilities SrA TS's testimony raises about the appellant's actions, it is not this court's role to speculate on what possibly occurred in the appellant's bedroom or to fill in the gaps left by the Government's presentation of its case. We also may not affirm the conviction simply because the record of trial portrays the appellant as an unsavory character. Rather, we are prohibited from affirming a conviction unless we find it both factually and legally sufficient. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007); *United States v. McAllister*, 55 M.J. 270, 277 (C.A.A.F. 2001). We take this charge seriously, as our unique factfinding authority "provide[s] a source of structural integrity to ensure the protection of service members' rights within a system of military discipline and justice where commanders themselves retain awesome and plenary responsibility." *United States v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004).

Slip op. at 7. Judge Weber explains that "under these facts, we simply are not personally convinced that the Government satisfied its heavy burden of proving force beyond a reasonable doubt. The Government's evidence is too thin to satisfy us beyond a reasonable doubt that the appellant used force to cause the sexual conduct." *Id.* The court also declines to affirm any lesser offense, "given the minimal facts presented in this record." Slip op. at 8.

For all of the misconduct (including the guilty pleas) the appellant was sentenced to confinement for 48 months, total forfeitures, reduction to E-1, and a dishonorable discharge. But the court is "unable to determine to [its] satisfaction what the appellant's sentence would have been without the rape conviction." Slip op. at 9. So the CCA remands the case for a sentence rehearing.

The Government could take this case to CAAF, where that court can review a CCA's action on factual sufficiency to determine if "the CCA clearly acted without regard to a legal standard or otherwise abused its discretion." *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010). And the Judge Advocate General of the Air Force hasn't been shy about certifying cases to CAAF over the past year (see [Part V of the 2013 End o' Term Stats](#)). But Judge Weber's opinion is focused on the facts of the case and doesn't involve the sort of "purely equitable factors" or "simpl[e] disagree[ment] that certain conduct— clearly proscribed by an unambiguous statute— should be

criminal” that CAAF has found constitutes an abuse of discretion. *Nerad*, 60 M.J. at 147. So I think any such appeal faces very long odds.

caaflog.com/?p=28951

 [CCA Opinions](#)

37 Responses to “The AFCCA reverses a rape conviction for factual insufficiency”

1. Advocaat says:

September 18, 2014 at 10:11 AM

Very proud of AFCCA today; this is going to make the usual suspects in Congress unhappy and shrill...

2. RKincaid3 (RK3PO) says:

September 18, 2014 at 10:32 AM

Finally, the appellate courts are applying as much scrutiny to the allegations as they previously expended on explaining away the accused’s defenses to sustain a commander’s sacrosanct charging decision.

Once both sides receive the same level of scrutiny—JUSTICE will result—and the American service member will find confidence in the system again while a results-driven political agenda will die the death it so richly deserves.

Now, about the rumored AFOSI decision to title a husband for slapping his wife on the rear-end based upon the complaint of a third party when wife wasn’t affected—what’s up with that? Any truth to it? If so, QED: system out of control!

3. DCGoneGalt says:

September 18, 2014 at 12:05 PM

I understand de novo review is the standard but I am not seeing how this one does not meet the force standard. The evidence was admitted (“no, I’m not ready”, MTI fear, tried to push him) and the factfinder found it sufficient. I would have likely voted to acquit (based largely on the post-allegation issues discussed later in this paragraph, hint: in most cases I am not an adherent of the counter-intuitive behavior school) but I certainly think there is sufficient evidence for a vote to convict. It seems the Court took an aggressive stance to review in this case than is normally shown. The opinion is based on insufficient evidence of lack of force and seems to go to lengths to say that it is not casting aspersions on the truthfulness of the victim (even giving a footnote to explicitly state that). However, there are paragraphs of facts that list post-incident behavior (texts, sexts, emails, cross-country visits for seemingly consensual sex, etc.) and how the Government utilized a counter-intuitive behavior/Vietnamese culture expert at trial. Although the opinion states that these non-force issues received the bulk of attention on appeal it is weird that they take up the majority of the factual section in an opinion on sufficiency of force for which they are wholly irrelevant. If these facts are relevant it is because they go not to force but to the lack of factual sufficiency of the entire allegation. Therefore, they are only relevant if the post-allegation behaviors are part and parcel of the case not meeting

factual sufficiency. If they were included because they are relevant and Court disagreed with the counter-intuitive behavior theory in this case then I wish they would have said so.

On a side note, it would have been interesting to get the Court's take on a Daubert challenge to the Vietnamese culture portion of the expert testimony. Of course, I am assuming one was made as the opinion states that "trial defense counsel effectively explored the limitations of the expert witness's testimony".

4. stewie says:

September 18, 2014 at 12:57 PM

I think they are saying that they in fact did not believe the alleged victim even as they bend over backwards not to question her credibility. I think, correctly, they are saying that the post-alleged SA evidence is so overwhelmingly indicative of consent/willingness that it renders her testimony as to force insufficient standing on its own. (even as they demure and say, but we aren't challenging her credibility).

5. Lieber says:

September 18, 2014 at 1:42 PM

What Stewie said.

(I seem to say that a lot for some reason...I'm glad I don't know who Stewie is in real life in case it's someone I don't want to admit agreeing with :))

6. RKincaid3 (RK3PO) says:

September 18, 2014 at 2:32 PM

Since when can a witnesses' credibility not be challenged? Whether on appeal or at the trial court, a witnesses credibility is always an issue...unless, heaven forbid, we are finally getting really--no--awfully close to that insipid colloquialism (which has no legal merit but sounds great to the politically inclined) that holds "if an accused is presumed not guilty until convicted, then the accuser is presumed truthful until the accused is acquitted."

I find the following statement of this case to be most telling:

It is certainly possible the appellant used some combination of his coercive power as SrA TS's former MTI....

But "possible" is FAR from beyond reasonable doubt. And the money-quote to be this:

Whatever POSSIBILITIES SrA TS's testimony raises about the appellant's actions, it is NOT this court's role to SPECULATE on what POSSIBLY occurred in the appellant's bedroom or to fill in the gaps left by the Government's presentation of its case. (Emphasis added).

That being said, I am not sure that I agree with the court's statement that there were "...gaps left by the Government's presentation of its case." It is just as—if not more—likely that the Government's case was ALL it had because it was a bad case and should never have been prosecuted (and at any other time probably never would have been prosecuted) but for the political UCI so conspicuously touching every MJ decision today. Especially given the following tortuous narrative about the accuser's history (which certainly affect her credibility):

SrA TS continued to stay at the appellant's apartment and slept in his bed for her five-day stay in San Antonio. When she returned to California, she continued to communicate with the appellant and sent him explicit pictures of herself. She also communicated with a friend from basic training that she was dating the appellant, that he was her boyfriend, and that the relationship was a "dream come true." Although she considered herself in a relationship with the appellant, SrA TS also remained in an "on again, off again" relationship with her boyfriend in California during this time; however, the relationship was strained.

Over the next several months, SrA TS visited the appellant twice more, both times bringing family members to view houses for the family's possible move to San Antonio. Some consensual sexual activity took place between SrA TS and the appellant during SrA TS's visits to San Antonio, and she stayed with the appellant during each visit. During the last visit, SrA TS stated that she woke up after consuming alcohol to find herself unclothed in the appellant's apartment smelling like she had sex. However, SrA TS could not state positively whether intercourse occurred, and she testified that she did not feel like she had sex. The appellant was acquitted of aggravated sexual assault and wrongful sexual contact resulting from this incident. Soon after this last visit, SrA TS and the appellant stopped communicating, and SrA TS married her boyfriend in California.

But this practice of people going out of their way to appear to NOT challenge a witnesses—any witnesses'—credibility exasperates me. It is facile at best and downright despicable and deceptive. Trials are all about challenging credibility and I lament what this trend says about us as practitioners—or worse, those of us who are or become judges—that we feel so strongly compelled—in this environment—to avoid talking or writing in plain, accurate and simple truths.

Sigh. In any event, I bet the AF TJAG certifies this because the outcome is not government—or Congressional tinkering—friendly.

7. **stewie** says:

September 18, 2014 at 3:08 PM

Well, acknowledging that I wasn't there and don't know the case, reading the opinion, it seems to me the court is saying that if the government had brought a case under Article 93, or Article 120 using a constructive force argument, they might have had enough there (or at least they'd be closer to being sufficient).

But, they chose to go the whole hog and went with full on force, in which case the

evidence wasn't enough. I think that's certainly a legit route to go. Someone can be pressured into sex or even dating in the right situation. (not saying that's what happened here).

As for credibility at the appellate level, doesn't Article 66 allow for judging the credibility of witnesses but with the cautionary reminder that the appellate court didn't see the witnesses testify? I think the court is never going to say, that witness lied, and it's not their role to do that quite frankly. They did, and should, simply stick to the government didn't meet their burden.

8. RKincaid3 (RK3PO) says:

September 18, 2014 at 4:41 PM

Good points, Stewie. I think the following comment of yours is the kicker:

But, they chose to go the whole hog and went with full on force, in which case the evidence wasn't enough.

Isn't part of the problem that we now ask whether the government presented a weak case (e.g., commanders and lawyers making decisions for the wrong reasons) or whether the case itself was weak and unwinnable in some regard no matter how skilled the government? In a just system, we should never be able to credibly challenge the reasons for bringing a case. (Okay...that "perfect system" is not humanly possible—but certainly we can do better than what has been done to date).

Many people—both in and out of the service—have no confidence in the decision-making processes that far too often seem to lead to weak cases going to trial for reasons having nothing to do with the quality or strength of the evidence. And to make matters worse, this case and others like it get chalked up as "yet another" example of the military "failing" to do the right thing. First it was commanders failing to prosecute good soldiers who committed crimes, and in the process, neglecting the rights of victims. Then it was JAGs failing to recommend CMs due to some obscure and misguided belief that facts and law matter; now we are seeing claims that panels are failing because they aren't convicting some of the more absurd cases being brought under an Art 120 that tortures the definition of sex assault to include much non-sexual behavior simply because a penis, vagina, buttocks, anus, mouth or breast, inner thigh, etc., is involved in some collateral way. If we see many more cases like this, soon we will see allegations that the appeals courts are failing, simply because they occasionally overturn some Art 120 conviction for some silly reason like "credibility" (i.e., the believability) of the evidence.

Those considerations lead to an observation many have made. I said here a long time ago that the military is losing the statistics game—we are in a death spiral because the way cases are tracked and recorded. We have the number of assaults is going up—not down (and it allegedly has nothing to do with the overbroad language of Art 120, or the phenomena of false allegations, I am sure) and the number of convictions is NOT going up as fast—or worse—depending upon panel and appellate court actions—the numbers start to go down in an inverse relationship with the number of allegations. What will Congress—and the services—do when that happens? How much more intimidation towards an outcome can the system withstand without sending all

servicemembers to the exit doors (since modern Americans of all education levels know a kangaroo court when they see one) as they quit volunteering to re-enlist or enlist/commission in the first place?

My primary criticism against the systemic cancer that is Art 120 (and its promoters in politics) is that there is no confidence in the way Art 120 cases are handled. An allegation? Well, tee it up for the full bull! Facts? Law? Worry not...why let facts get in the way of Congress's or a congressionally-influenced leader's agenda? Justice? Well, if Congress and the putative victims are happy—and I get promoted because I prefer even weak cases where accusing witnesses are less than credible—isn't that justice? All those thoughts, concerns, allegations, complaints, what have you, are inevitable when a system is as compromised as the UCMJ is now, following the torturing of Art 120 and after implementing NDAA changes which are facially incoherent (i.e., commanders are the best decision makers—unless they decide to not prosecute—then their judgment is obviously questionable—as is their promotability). When JAG training sessions start off talking about the AFOSI titling a man for swatting his wife's buttocks as they kissed and parted company, and a third party complains but the wife laughs it off, and now that Airman's career is in the toilet—well, that is a bad sign that the system is on the verge of having lost service members' confidence in not only the way it works—but that any weaknesses in the way it works can be addressed by mature, level-headed leaders who care more about doing the right thing than getting Congress's blessings by obtaining a particular preferred result.

Service members must have confidence in not only both their military and civilian, leaders (both in them personally and in their decisions), but also in the UCMJ as a system, both as designed and modified. Nowadays, with anything involving certain body parts—even when the conduct is non-sexual (say, streaking through a barracks)—all the stops are pulled out and the full weight of the punitive/investigative system is brought to bare like a jack hammer when less severe and time consuming, limited-resource-consuming investigations are otherwise sufficient for addressing non-sex offenses. The system is unbalanced and until that changes, there can be and will be no confidence in it, or in those of us working so hard day to day within that system with what little Congress gives us (besides grief).

As for Art 66, yes, I agree. Appellate courts are indeed stuck with only the “cold” record to review, which, like e-mail and social media coms, lacks the necessary nuances to really, fully and effectively communicate. But really, how “warm” or “hot” must a record be before the appeals courts can do their job of neutrally effectuating justice as to both parties (the government and the accused—which excludes the accusing witness) without having to tap dance between foot notes and insinuations that “we aren't challenging the believability of the evidence and without being accused of being hostile to an accusing witness—especially when “factual and legal sufficiency” are the issue?

Indeed, isn't the credibility (e.g., the believability) of the evidence THE keystone to factual sufficiency, which then drives or at least runs with a conculsion on the legal sufficiency of the conviction?

No need to answer, Stewie. I have been away a while and my mind is spinning trying to catch up. Most of this is just more of my rhetorical ranting which most people tend to ignore anyway.

:)

9. stewie says:

September 18, 2014 at 5:17 PM

As usual, that was a lot of words ;). I won't comment on all of it, but I will say no I don't think credibility is "THE" keystone to factual sufficiency. I think lack of facts is. I'm not trying to be glib, but I think if credibility were the keystone there would be more factual insufficiency findings. I think the fact that they are (probably rightfully) rare birds/unicorns is because at the end of the day, the factfinder can find an accused guilty simply on the word of one person (usually the alleged victim) if they find that person sufficiently credible...and appellate courts are understandably unwilling to step into a cold record and make a different credibility determination barring extraordinary circumstances (such as existed in this case—and even then they still focus on the government failing to meet the burden over credibility).

As for the rest, I think you are preaching to the collective choir about the idea that at least some bad cases are going to trial. I think another unicorn would be the JAG who privately didn't agree with that, even in the SVP community. I think however that ship (to mix metaphors) has sailed. I think the goal now is, if we are going to force bad cases to trial, we should fight to keep laws that make that trial as fair as possible. Win that battle, and most accused will have a just result. (No system can guarantee all accused get a just result.)

10. RKincaid3 (RK3PO) says:

September 18, 2014 at 5:58 PM

Roger on the "lot of words," Stewie. Alas, brevity has never been my strong suit—as you should well know by now!

As for boats having "sailed"—especially Congressional boats—I hope we don't have to give up hope that "right" will reign supreme over petty political agendas—especially when people's lives are at stake. Congressional boats can be sunk every November and with such sinking, fresh blood can and will hopefully start doing the correct thing for the service member—not the politician and their pet agendas that are obtained on the backs of ordinary American's brave enough to serve their nation in the military.

I for one am not content with being forced to take bad cases to trial or with trying to ensure that the laws governing cases are as fair as possible—especially when both issues are controlled by the folks on the ships that just sailed. And those folks apparently want both the bad cases tried and the laws governing trials skewed towards convictions in those bad cases. How can we just live with or accept that?

At what point will I have to tell my son or my step son or any young person who asks to NOT join the armed service because service members can't get a fair shake

from Congress, the system or worse, sometimes from their commanders? When do I need to discourage re-enlistment to those who ask my advice on re-enlisting? Are we at the point where it is simply take it or leave it? Toxic leadership and political agendas—from congress on down through the chain of command and into the panel deliberation room—wins? Really?

The civilian economy isn't always going to suck and the services won't always be in a draw-down. As such, the time will come again when volunteers will be needed to serve and I hope tomorrow's volunteers don't tell America when it calls, sorry, "that ship has sailed."

As always, Stewie, I appreciate your thoughts and input.

11. AF JAG says:

September 18, 2014 at 7:21 PM

Here's a piece of irony—the author of this decision, Judge Weber, was the appellate government counsel in *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010) where the government successfully challenged the AFCCA's overturning of a factually and legally sufficient child porn charge based upon their Article 66(c) power to affirm only cases that are both factually and legally sufficient, AND in its opinion "***should be approved.***"

(*In *Nerad* AFCCA had dismissed a possession of child porn charge stemming from nude pictures which Appellant's 17 year old paramour sent to him during the course of their adulterous affair. Appellant pled guilty to the child porn charge along with failure to obey a lawful order, wrongful disposition of military property, larceny of military property, sodomy and larceny at trial. CAAF remanded noting that a CCA must apply a legal NOT an equitable standard to utilize its Article 66(c) should be approved power. On remand, AFCCA admitted that it had utilized an "equitable" analysis for exercising its Article 66(c) power, namely: they didn't think Appellant should be marked as a sex offender. Having admitted exercising Article 66(c) on an improper basis, they then vacated their prior ruling and reinstated the charge and sentence.*)

So why is Judge Weber's authorship here ironic? At least to me it's ironic because this case screams a Court exercising its "***should be approved***" power to over-rule a *legally sufficient* charge.

Accordingly, I concur wholeheartedly with DCGG's observations that while an acquittal at trial ***would*** have made sense (given the ***credibility issues*** raised by SrA TS's post-incident actions), an acquittal on the basis of "factual insufficiency" that the government didn't prove "force" DOES NOT make sense. Cue the South Park

clip: <http://www.bing.com/videos/search?q=chebacca+defense&FORM=VIRE5#view=detail&mid=DoDE1885CA40D77506A3DoDE1885CA40D77506A3>

And that's the problem I have with the Court's analysis: JUST OWN IT. I'll grant you that factual insufficiency may make sense in this case, but that would be based entirely upon credibility issues, not insufficient evidence qualifying as "force." So

memo to AFFCA: just say that you find that SrA TS's allegations that she told appellant "[she] wasn't ready," and tried to push him off of her but couldn't, to be false and be done with it. Say that you think she lied because she had a motive to fabricate to protect her other relationship, that the fact that she stayed 5 days after the incident and continued to sleep in the appellant's bed leads them to believe that she is misrepresenting the alleged rape incident.

Instead, the Court contorts its analysis to avoid casting aspersions on SrA TS's credibility by saying that "NO" followed by a PUSH to dislodge the appellant, who then refused to budge, is factually insufficient to qualify as "**force**"??? In the words of Cris Carter: "**C'mon MAN!**" <http://www.bing.com/videos/search?q=ESPN%20c'mon%20man%20short%20clip&qsn&form=QBVR&pq=espn%20c'mon%20man%20short%20clip&sc=0-14&sp=-1&sk=#view=detail&mid=3E3BE17F104A3C377DB83E3BE17F104A3C377DB8>

And if you're not convinced that this case is really an Article 66(c) "should be approved" case masquerading as a "factually insufficient case" consider this—the Court refused to exercise its power to affirm on a lesser included offense. Now how does that work? It had Aggravated Sexual Assault (via "bodily harm", i.e. "offensive touching, however slight") or even Wrongful Sexual Contact to choose from, neither of which require the degree of "force" for a Rape charge, yet they refused to affirm. So not only is saying "I'm not ready" and then pushing the appellant not enough to constitute "force" but it's also not enough to constitute conduct "without the other person's permission?" for Wrongful Sexual Contact??? C'mon man.

12.stewie says:

September 18, 2014 at 7:33 PM

Well, as I said above, it's a credibility case which means it's a factual insufficiency case. That the Court demurred on overtly saying so may be unfortunate, but it's fairly obvious. I don't think this is a "should be approved" situation.

RK3, while we all worry about the future with good reason, I don't agree that the current system is so far gone that "justice takes a holiday." No justice system is perfect, all have flaws, so the standard IMO is, at the end of the day, can an accused get a fair trial based on a fair standard with a fair chance at winning. The answer clearly is still yes based on the conviction rates for contested cases and the fact that basically those rates have not only not increased, but slightly decreased.

I mean at the end of the day, that's where the proof lies. or lays. or Lays.

13.RKincaid3 (RK3PO) says:

September 18, 2014 at 8:21 PM

Amen, AF JAG! Interesting analysis! No one wants to own anything anymore. It seems anymore that too many in leadership positions, both military and civilian, want to avoid leading and instead excel at managing (e.g., avoiding leading). And we

saw what “managers” in the military got us in the Vietnam War.

Stewie: Roger. And that slight decrease in convictions is the precursor to the next Congressional allegation that we in the services are once again failing to hold people accountable and Congress will then feel the need to engage in even more dangerous, blind tinkering

14.k fischer says:

September 18, 2014 at 8:53 PM

Advocaat, one does not applaud the tenor for clearing his throat.
AF JAG, we don't deal in truth anymore regarding sexual assault. We deal in what sounds good (Vietnamese cultural expert), it's perfectly normal for a woman to attempt to normalize her relationship by flying across the US to be with her rapist, and it is victim blaming to argue against this.

DCCG, I wonder if defense counsel questioned the cultural expert about how little currency the Vietnamese places in telling the truth and how they will lie to save face because that is the most important thing to them. That might be a bit non-pc, although it was trained in SE Asia assignment back in the day.....

And as far as drinking herself into oblivion and not knowing whether or not they had sex, but assuming they did because it “smelled like it”ehwww.

15.Pres Camacho says:

September 18, 2014 at 9:04 PM

Those who have experience in state courts, do these types of “cases” ever see a courtroom. I mean this is the 2nd case I have seen lately where the “victim” dates the “rapist”. Sinclair being the other.

16.Ed says:

September 18, 2014 at 10:06 PM

Most prosecutors wouldn't touch it. The case is a disgrace. The TC an embarrassment. The CV I assume a hack someone who has his nose in McGaskill's and Boxer's face. The MJ the worst. Send out the alarm. Don't touch your wife's butt or you may be 120'd.

17.DCGoneGalt says:

September 18, 2014 at 10:20 PM

kfischer: Interesting point on the “lying to save face” issue. I am sure there are sociology articles on the topic that the expert could have been asked about. I suppose if the gates are opened to pseudo-science masquerading as expert testimony then one should make lemons into lemonade.

AFJAG: I agree with you, I see this as a failure of the Court to say what they mean. And that, regardless of outcome, is scary. I see the focus on force as an attempt to

avoid the “second guessing” dilemma that a more broad factual insufficiency based on credibility issues would raise. If the footnote is designed to limit political backlash . . . good luck.

18.Vic Ferrari says:

September 19, 2014 at 12:22 AM

This case is a prime example of the ironies that arose from the “New 120” starting in 2007. That definition of “Force” comes straight from the legislation, and it’s the most defense-friendly definition of force a DC could hope for. “Force” is (1) use of a weapon; (2) “the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person” or (3) “inflicting physical harm sufficient to coerce or compel submission by the victim.” This is clearly a (2) case – no weapon or injury. So, did he achieve penetration by using “physical strength or violence”? Since she made just one attempt to push him off, and then simply acquiesced, it’s certainly reasonable to conclude that he didn’t need to “overcome, restrain or injure” her.

19.stewie says:

September 19, 2014 at 8:07 AM

Really? So how many times is she required to push him off before it’s not reasonable? I think the court just didn’t believe her, but if the Court had believed her, then pushing off once, and saying no is all that is required.

20. Advocaat says:

September 19, 2014 at 8:44 AM

I enjoy this blog and the many terrific insights I get from it. I will admit I approach things at a more practical level and that I tend to look beyond the courtroom. AFCCA, en banc no less, reversed a rape conviction. In 2014. Some may call that a mere clearing of the throat, others may say the court isn’t saying what it really, really, really means. I think everything about the opinion, to include not issuing it during Congress’ recess, was calculated with great precision and purpose. I suppose Riley v. California was just a throat-clearing case about cell phones? To paraphrase the VP, this opinion is a big [insert your favorite adjective] deal.

21.Tami (a/k/a Princess Leia) says:

September 19, 2014 at 10:16 AM

I say BRAVO to AFCCA for doing its duty in reviewing this case, instead of just giving it the rubber stamp of approval like we’ve all seen (and griped about) in sexual assault cases.

This case serves as a valuable lesson learned for the Government on what the TCs need to do to prove their cases. Take a good long look at the opinion:

In setting aside the “expert” Asian culture counterintuitive stuff, AFCCA didn’t need to malign the complainant’s credibility. Even accepting her testimony at face value, assuming her testimony was truthful, her testimony was INSUFFICIENT to

establish the elements of rape by physical force.

The TC limited the case to the following:

1. She said “no, I’m not ready” as they were hugging and kissing.
2. He was on top of her, she tried to push him off but he was too heavy, so she gave up.
3. She was afraid.

Absolutely no elaboration on any of these 3 points, so AFCCA shot them all down:

1. No context to the “no, I’m not ready.” No testimony about “when did she say this,” “where were they when she said this” “did she say it loud enough to hear him,” etc.
2. Simply being on top of her was not enough to prove physical force, as there was no testimony about the actual intercourse itself. Implied is that AFCCA couldn’t determine if him being on top was simply part of being in the missionary position during sex, or if there was additional use of his weight to pin her down to force the sexual intercourse.
3. No testimony of what she was afraid of—was she afraid of the accused, or of her boyfriend accusing her of cheating on him?

Regarding the possible “psychological” coercion, due to him being her former MTI, AFCCA said no, that is not a substitute for physical force, which is what the Government alleged.

From my perspective, what TCs are presenting, and what we are teaching our Servicemembers, is that certain acts and words AUTOMATICALLY lead to sexual assault. That is simply not the case.

Lesson learned—TCs need to focus on the “who said what, where, when, and why,” and “who did what, where, when, and why.” The “counterintuitive behavior” stuff is nice, but not a substitute for the details about the actual elements of the crime itself.

22. k fischer says:

September 19, 2014 at 10:21 AM

Advocaat, we’re on the same page b/c I halfway expected this case to be affirmed when I read about the the case in the news when he was convicted. And you are right, it’s a pretty big flipping deal. Riley, in my opinion, took a little more heavy lifting.

I don’t know how in the heck as a prosecutor you can get to proof beyond a reasonable doubt, or that any reasonable juror would be convinced beyond a doubt that Soto raped a woman who flew from California to Texas to be with him, got raped, flew back to Texas a few more times, then the first time she reports months later is when she finds out he’s been seeing other people.....just as she has seen other

people. I wish that the Court would have simply said that, then doing the mental gymnastics of reversing because of lack of force.

Stewie's correct. How much force does it take? When a woman says, "Stop," you stop. Then, if she was just saying "Stop" because she didn't want you to think she was loose, (kind of like when you grab for your wallet when the check comes, but then acquiesce because someone else is paying for the meal), then she will reengage when you actually do stop. So, the Court takes a huge leap by saying that there was not enough evidence to prove "force." If this was not enough evidence, then I don't know what is.

The grounds for reversal that does make sense to me is the evidence that the appellate Court refused to consider, and that is her post-intercourse behavior and the motive for her to fabricate the allegation (Hell hath no fury like a woman scorned), makes it just as likely that she was attracted to her MTI, visited him thrice in San Antonio, got pissed because he was seeing other women, then when he got outted for having various other relationships, told CID that he raped her to really kick him in the nuts. Because that scenario is equally as plausible, then the evidence of guilt is insufficient for any reasonable juror to find the SOTO guilty BARD.

It makes me wonder what if the Court would have reversed if there was no evidence in the record of her post-intercourse behavior, i.e. she never came back after the first trip and kept it to herself until she heard he was facing court martial, then reported it.

23. k fischer says:

September 19, 2014 at 10:41 AM

Leia,

I guess that is why there are some objections to the logic of the opinion and how it affects future cases. Instead of discouraging prosecutors from pissing on the factfinder's leg and telling them it's raining (calling in some professor to talk about cultural differences to explain illogical behavior), the opinion encourages the Trial Counsel to piss on their leg and tell them that it's raining, as long as they prep the complaining witness enough.

There is no way in heck that you would ever be able to convince me beyond a reasonable doubt that this woman was not making this up. Maybe I am biased against complaining witnesses, whether they be male or female, in my belief that if there is (1) no physical evidence of a rape, (2) no other witnesses to the rape, (3) no confession of a rape by the Defendant, and (4) there is a motive to fabricate presented by the Defense, then the Government can never get to proof BARD. If we are being intellectually honest, in those cases where those four elements hold true, which this case was one of them, the Government should be perpetually stuck in that purgatory between "reasonable grounds" based solely on her accusation to prefer a case and a level of proof under BARD to satisfy a conviction.

24. DCGoneGalt says:

September 19, 2014 at 10:56 AM

k fischer: You said:

It makes me wonder what if the Court would have reversed if there was no evidence in the record of her post-intercourse behavior, i.e. she never came back after the first trip and kept it to herself until she heard he was facing court martial, then reported it.

Great point, and one I wish I had made in my original post. I could not imagine them reversing on force alone because I think it was those additional facts that made them want to reverse the result. But that would have been political suicide so IMO they used those facts in the opinion but limited their holding to force and inserted the footnote on not considering credibility. IMO if it weren't for the "counter-intuitive" behavior this conviction would have stood.

As I said, I would have voted to acquit at trial on the issue of credibility but I see the evidence of force as sufficient. I could have reversed on factual sufficiency based on credibility creating a doubt as to the offense itself but not on the issue of force alone.

25. stewie says:

September 19, 2014 at 12:19 PM

I think the answer is no, the Court would not have reversed if none of the other subsequent stuff happened/was in the record. That tells me, that respectfully, I disagree with her highness that what was provided was, by itself, insufficient to justify force. I think it was plenty sufficient to justify force, but it was not when you added in all of the post-sex actions that overwhelmingly contradicted the idea that she was forced to have sex the first time.

I mean the Court talks about it for a reason.

26. k fischer says:

September 19, 2014 at 12:35 PM

Stewie,

I mean the Court talks about it for a reason.

Just like I said above. The Court talks about it to say they are not considering the counter-intuitive behavior. Now, pretty much everyone knows that's not true. They had to have considered it because without it, they would have affirmed.

But, boy doesn't it sound good to say that "we are not going to victim blame in this case because we don't have to. We will blame the Government for failing to prove the element of "Force" beyond a reasonable doubt." So, just like the Cultural Expert who said a bunch of crap that sounded good, the AFCCA said a bunch of stuff that sounded good, but we all know what really happened.....hmmmmmmmm.....on second thought, the opinion was brilliant if this irony was intended.

27. The Silver Fox says:

September 19, 2014 at 1:46 PM

Congress will invariably use this as Exhibit A to repeal the "and fact" language in Article 66(c). Goodnight, sweet prince.

28. RKincaid3 (RK3PO) says:

September 19, 2014 at 2:08 PM

I think the proof of force was sufficient, but its credibility was undercut by all the other evidence. Nothing in trial operates in a vacuum. There was evidence of force in the allegations, but the allegations just weren't believable. Now how hard was that to say?

Apparently, in this climate, it is very hard—arguably it is a career killer.

29. RKincaid3 (RK3PO) says:

September 19, 2014 at 2:25 PM

I mean, really, the more I think about this—how effective is it, from a mentoring, precedent perspective, to have an appellate court saying that the description of force didn't really describe force under Art 120? That is a terrible message given that the language of Art 120—as screwed up and overly broad as it is—clearly and accurately describes the conduct at issue in this case as cognizeable FORCE.

Really, the only issue—both at trial and on appeal—really was simply: is the allegation involving force believable, as a whole, along with all the other evidence? By trying to thread that needle to avoid making a clear rule in a clear ruling—the appellate court actually hurts its own credibility and offers very little actually teachable lessons. It is certainly an example of how not to properly engage in statutory interpretation.

30. k fischer says:

September 19, 2014 at 2:31 PM

The language at Footnote 4 is probably the most telling:

“The narrow basis of our holding renders it unnecessary to cast any aspersions on SrA TS's credibility, and we recognize that the nature of rape cases dictates that precise testimony about every detail is rarely possible. ”

We don't want to cast aspersions on SrA TS's credibility, so we are going to provide a holding that is has the most narrow basis. Then, we will recognize in dicta that precise testimony about every detail is RARELY possible, so nobody else will be able to use this case for any authority whatsoever, in case someone submits this unpublished opinion to the Court.

The AFCCA could have done so much more with this opinion by saying that no reasonable person could have found guilt beyond a reasonable doubt when a person reports a rape six months after it allegedly occurred, after the motive to fabricate presented itself, where there was no witness or physical evidence corroborating a rape, and the Defendant did not confess. Of course, that sounds a lot like a corroboration requirement.

31. Charlie Gittins says:

September 19, 2014 at 3:39 PM

At least CAAF addressed the issue of post-coital conduct to negate "by force and lack of consent" head on, albeit in a lack of legal sufficiency light in US v. Bright, another case of a DS picking the fruits of the trainee pool. This decision is disingenuous on so many levels, but thankfully, provides the proper result for the accused, and in this era of burning sex assault accuseds at the stake, and presuming guilt, I'd take disingenuity to get the correct result any day.

32. Tami (a/k/a Princess Leia) says:

September 19, 2014 at 10:52 PM

I believe that the "expert" testimony on Asian culture was a bunch of BS, and I thought the conviction was BS. I believe that she was a willing participant in everything, and therefore lied about being raped. Whether to protect her relationship with her husband (then boyfriend), or to avoid being called a derogatory term, or to get revenge, I really don't care. What matters to me is what CG points out, the end result is the proper result. This is more than what we've all seen in most of these kinds of cases, which is a rubber stamp from the service appellate courts, especially AFCCA, which seems especially fond of rubber-stamping most of the sexual assault cases it sees. Does it matter that AFCCA went to great lengths to avoid the political incorrectness of calling her a liar? I don't think so.

Actually, I think I am glad they accepted her testimony at face value, then called her testimony BS. So many cases I've seen where "victims" tries to pigeon-hole their cases into a sexual assault case by fudging words (i.e. he "guided" me to the bed instead of he grabbed my arm and dragged me to the bed and I had no choice but to go with him) so that they can make their cases for sexual assault without others being able to call her a liar, because the words SUGGEST force, where in reality, known only to the accused and the complainant, no force was used.

Would it have been great for AFCCA to throw the BS flag on her post-incident behavior, like the majority of us would? Absolutely! But they didn't, much like appellate courts go to great lengths to avoid addressing a constitutional issue. Does it change the result, which is justice for the wrongly accused, AND he's getting due process through a sentencing rehearing, as opposed to AFCCA playing a guessing game? NO! I'm not about to look a gift horse in the mouth.

33. RKincaid3 (RK3PO) says:

September 20, 2014 at 8:28 AM

Leia says:

What matters to me is what CG points out, the end result is the proper result.

Gittens says:

I'd take disingenuity to get the correct result any day.

Really? Sounds like you two are going down, or worse, have already gone down the "the ends justify the means" rabbit hole mantra used by those in favor of the BS that

is Art 120 and which the “pro-victim lobby” has crammed down the armed forces’ collective throat—the very same inane, facile logic that we so often rant about on this forum.

I don’t care whether it is the “pro-women as perpetual victims” lobby or the “pro-men as victims of the ‘pro-women-as-perpetual-victims’” lobby—if we are to measure of justice by an individual, subjective view of simple “satisfaction with the outcome of a trial,”—no matter how that outcome was achieved, then we are as guilty of the same degree of institutionalizing injustice as those who we have so often criticized on this website.

Consistency is a b\$*@h, but it is necessary for credibility. That is why the process must be fair and consistently applied TO BOTH SIDES through even-handed rules lest the result be INJUSTICE.

If anything, I expect a much more principled stand than this from the skilled, educated and usually correct bloggers on this forum. We cannot become that which we hold in contempt or we are no better than them—also known as hypocrites.

We are not that, are we?

34. stewie says:

September 20, 2014 at 11:35 AM

“A foolish consistency is the Green Goblin of little minds.” Wait, that’s not quite right, might be Hobgoblin. Either way, it’s a Spiderman villain of little minds. No, I do not believe the process must be fair to both sides and always consistently applied. Heck, our very system is set up with the idea of a slant to the accused (better ten guilty men go free than one innocent man go to jail).

I think that’s principled.

35. RKincaid3 (RK3PO) says:

September 20, 2014 at 11:09 PM

I concur that if an imbalance should exist, it should be tilted against government given the constitutional bias towards a government of “limited” power and authority, however that does not mean that we shouldn’t have a blind justice system. The UCMJ is hardly blind as currently structured. And that is a problem that only Congress can fix.

And they don’t fix it by setting up rules which guarantee an outcome for either party’s subjective pleasure, consistent with notions of limited government. That’s all I mean!

36. stewie says:

September 21, 2014 at 12:54 PM

Not all imbalances are set up for the accused, and rightfully so. 4th Amendment law is a good example of this. I think process is important, but so's result.

37. RKincaid3 (RK3PO) says:

September 21, 2014 at 8:58 PM

Fair point, Stewie! 'Tis all about the proper balance!! Which is my point, too. So we agree—to a point! :)

<http://www.caaflog.com/2014/09/18/the-afcca-reverses-a-rape-conviction-for-factual-insufficiency/>