

No. 17-

IN THE
Supreme Court of the United States

JUAN LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STANLEY E. SACKS

Counsel of Record

ANDREW M. SACKS

SACKS & SACKS

150 Boush Street, Suite 801

Norfolk, Virginia 23510

(757) 623-2753

sacks@lawfirmofsacksandsacks.com

Counsel for Petitioner



**STATEMENT OF THE QUESTIONS
PRESENTED FOR REVIEW**

1. Whether the United States Court of Appeals for the Fourth Circuit erred in holding that the evidence was sufficient to support the jury's finding of guilty of the defendant under Count One for administering a drug to the complainant without her permission and then engaging in a sexual act with her without her permission, in violation of 18 U.S.C. 2241 (b)?

2. Whether the United States Court of Appeals for the Fourth Circuit erred in holding that the evidence was sufficient to support the jury's finding of guilty of the defendant under Count Two of making a false statement in violation of 18 U.S.C. § 1001 (a) (2)?

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS.....	ii
TABLES OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW.....	1
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
ARGUMENT.....	11
I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR ADMINISTERING A DRUG WITHOUT THE COMPLAINANT'S PERMISSION AND FOR THEN ENGAGING IN A SEXUAL ACT WITH HER WITHOUT HER PERMISSION, UNDER COUNT ONE.....	11

Table of Contents

	<i>Page</i>
A. The evidence is insufficient to support a finding that the defendant administered a drug to the complainant without her permission.....	11
B. The evidence is insufficient to support a sexual act.....	14
II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEFENDANT 'S CONVICTION FOR MAKING A FALSE STATEMENT UNDER COUNT TWO	15
CONCLUSION	16

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MAY 16, 2017	1a
APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION, FILED SEPTEMBER 12, 2016	8a
APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 20, 2017	17a
APPENDIX D — INDICTMENT of THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, FILED JULY 22, 2015	18a

TABLE OF CITED AUTHORITIES

Page

CASES:

<i>United States v. Arch Trading Co.,</i> 987 F.2d 1087 (4th Cir. 1993).....	15
---	----

STATUTES & OTHER AUTHORITIES:

28 U.S.C. § 1254(1).....	1
18 U.S. C. § 2241(b)	1, 3, 11
18 U.S. C. § 1001(a)(2)	2, 3, 15
18 U.S.C. § 2246(2)(C).....	14

OPINIONS BELOW

Defendant-appellant, Juan Lopez, appeals from a final order of the United States Court of Appeals for the Fourth Circuit entered on June 20, 2017 (Appendix C), which denied the Petition for Rehearing, affirmed the earlier judgment and unpublished Opinion of the Fourth Circuit of May 16, 2017 (Appendix A), and, in turn, affirmed the conviction and final order entered by the Honorable Mark S. Davis of the United States District Court for the Eastern District of Virginia on September 12, 2016 (Appendix B).

Defendant-appellant now files this Petition For A Writ Of Certiorari. This Petition was originally due on September 18, 2017, but, upon defendant-appellant's request, this Court, via letter dated September 20, 2017, graciously granted an extension until November 17, 2017.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1254(1).

The undersigned counsel is retained to represent the defendant-appellant (hereinafter “defendant”).

STATUTORY PROVISIONS

1. The defendant was convicted of administering a drug to the complainant without her permission and then engaging in a sexual act without her permission in violation of 18 U.S. C. § 2241 (b) , which makes it a crime to commit the following act(s) as follows:

(b) Whoever, in the... territorial jurisdiction of the United States... knowingly-

....

(2) administers to another person ...without the... permission of that person, a drug ... and thereby –

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person...

2. The defendant was convicted of making a false statement in violation of 18 U.S. C. § 1001 (a) (2), which makes it a crime to commit the following act(s) as follows:

(a)...whoever, in any matter within the jurisdiction of the executive... branch of the Government of the United States knowingly and willfully-

....

(2) makes any materially false, fictitious, or fraudulent statement or representation...

STATEMENT OF THE CASE¹

On July 22, 2015, the defendant was indicted in a Second Superseding Indictment (Appendix D) in the United States District Court for the Eastern District of Virginia, charging in Count One that he administered a

1. References to the Joint Appendix filed in the Fourth Circuit are designated by the initials “JA.” Referenced to the Appendices filed in this Court are designated by the title “Appendix.”

drug to the complainant, without her permission, and then engaged in a sexual act with her, without her permission, in violation of 18 U.S. C. § 2241 (b). In addition, the defendant was charged in Count Two with making a false statement in violation of 18 U.S.C. § 1001 (a) (2). (JA 11-13).

On July 27, 2015, the defendant appeared at his arraignment on the Second Superseding Indictment, entered pleas of not guilty, and requested a trial by jury. (JA 5).

On February 2- 5, 2016, defendant was tried by a jury at the conclusion of which he was found guilty of both Counts. (JA 6-7).

The defendant moved for a judgment of acquittal as to Count One at the conclusion of the Government's evidence, which motion was denied (JA 288-291) and again renewed this motion as to Count One and also made a similar motion as to Count Two, at the conclusion of the evidence, which motions were denied. (JA 498-500).

On September 9, 2016, the defendant was sentenced to imprisonment for a term of 204 months on Count One and 96 months on Count Two, to be served concurrently, for an active term of imprisonment of 17 years. (JA 577-78).

On September 22, 2016, defendant timely noted his appeal to the United State Court of Appeals for the Fourth Circuit. (JA 583-84). The Fourth Circuit, by Opinion dated Mary 16, 2017, denied the appeal (Appendix A). Defendant-appellant timely filed a Petition for Rehearing, which the Fourth Circuit also denied by Order dated June 20, 2017 (Appendix C).

Defendant, Juan Lopez, was employed as a registered nurse at the Hampton, Virginia VA Hospital emergency department at the time of the relevant events. The complainant sought post-surgical pain relief medical services at the emergency department on September 20, 2014. The complainant asserts that while administering pain medication to her and assisting her in urinating, the defendant placed his fingers in her vagina.

Special Agent Jason Root with the Veterans Affairs Office of Inspector General testified that on October 21, 2014, the defendant initially denied that he had inserted his fingers into the victim's vagina, echoing previous such denials. (JA 118, 124).

Mr. Root further testified that he asked the defendant "if he had ever thought about doing what was alleged to have happened to any other patient that he ever treated," to which defendant replied that "yes, he had thought about it, but that he had never acted upon that." (JA 124-125).

Mr. Root also testified that the defendant "initially denied placing" the victim "on a bed pan;" "initially denied helping her remove any clothing;" "initially denied assisting her in wiping her vaginal area;" and "initially denied penetrating her vaginal canal with his fingers." (JA 126). However, Mr. Root stated that "the defendant [s]ubsequently...admitted to placing" the victim "on a bed pan," and "to helping her remove her undergarments and shorts because she wasn't able to do it herself." (JA 126).

Mr. Root also testified that the defendant "felt that he could help her out so he also assisted her in wiping," her, and "did... mention possibly penetrating her vaginal area... when he was wiping her." (JA 126).

Mr. Root further stated that the defendant said that “when he placed her...on the bed pan at first, she couldn’t go to the bathroom,” but that “she all of a sudden said I think I can go now, so he left her on it.” (JA 127).

Mr. Root further testified that the defendant “said that he placed his fingers inside of her vaginal canal to see if she had urinated.”

The complainant testified that on September 19, 2014, she underwent outpatient surgery for an Achilles tendon injury. (JA 199).

As a result of subsequent pain and swelling, she and another individual (later identified as Benjamin Kinkade) went to the Hampton, Virginia Veterans Administration facility emergency department for pain relief on September 20, 2014. (JA 201, 203).

She was treated by a female nurse, and a male nurse whom she identified as the defendant. (JA 206).

The complainant admitted that she was “short-tempered,” “angry,” and “loud.” (JA 206-07). She admitted that she had suffered from a frontal lobe traumatic brain injury in the past, and “was being difficult.” (JA 207). More specifically, the complainant testified that she had experienced traumatic brain injuries in both 2006 and 2011 and that she suffered from PTSD. (JA 217). She admitted that one of the results of her brain injuries was a “struggle... with sometimes being polite.” (JA 219).

The complainant further testified that when the defendant advised her that he was going to administer

Morphine for her pain, the complainant testified that ,“I told him that I didn’t want the Morphine until my husband was allowed to come back. I told him that I was scared I might have an allergic reaction to the Morphine.” (JA 213).

The complainant further testified that the defendant “said that he would not go get my husband until after I was given my medication.” (JA 213). Just prior to the administration of the Morphine, the complainant testified that she said, “ I don’t want it, I want Ben,” at which point the defendant began to administer the Morphine through an IV. (JA 215-216).

The complainant also testified that she then indicated to the defendant that she had to urinate, at which point the defendant had a bed pan. (JA 220-221). She stated that the defendant “pulled my pants and my underwear down, and he rolled me up on my side and put the bed pan underneath me.” No one else was in the room at the time (JA 221). However, the complainant was unable to urinate (JA 221).

The complainant then testified as follows:

He put my legs up, bent, like a stirrup position like if you had gone to the OB/GYN, and he pulled the sheet up onto my knees and he looked down, he put his head down between my legs, and he was like, “Did you go yet?” And he was like, “No?” And then he, he put his fingers inside me.

(JA 222).

The complainant indicated that the defendant had put his fingers inside of her vagina and then had taken them out. (JA 222).

The complainant further testified as follows:

Like every two seconds he would pull the sheets back up and he would just kept acting like, oh, did you pee yet? And then every time he did that, he just stuck his fingers inside me. ... and then one of the times that he stuck his fingers in me, he pushed down on my stomach and he said I can make you go pee. ...

... And then I was trying to pull my underwear up again, and he was like, "No, I got it." And then I felt him put three fingers in my vagina. And then when he pulled up my pants, he was like, "You have pretty underwear."

(JA 223-224).

Two days later, the complainant talked to her traumatic brain injury psychologist. (JA 229). She testified that:

I was confused about it. I would say the majority was still not wanting to report it. So I guess I would say that I was still kind of set on not reporting it.

JA 229.

Upon the advice on her brain injury psychologist, however, the complainant then contacted the authorities

and said that she “needed to report a sexual assault that happened in the ER.” (JA 229).

On cross-examination, the complainant admitted that while living in Texas in 2000, she had made “a false statement under oath that” she was “sexually assaulted in a parking lot by a stranger.” (JA 244).

On re-direct examination, the complainant testified that she had been raped by an instructor in the instructor’s home while the complainant was in the Air Force, but that she lied to a medical provider about what had happened, about where it happened, and about who had purportedly done it. (JA 245-48).

Benjamin Kinkade testified that he was the complainant’s ex-husband but was intending to remarry her (JA 252). Mr. Kinkade testified that on the evening of the alleged assault at the VA in Hampton, the complainant “said that the male nurse that had been in earlier had assaulted her.” (JA 258).

Special Agent Katie O’Neil of the Veterans Administration Department of Office of Inspector General testified that on September 24, 2014, the complainant “indicated that the assault occurred on September 20, 2014, in the morning, when she had visited the emergency department.” (JA 263, 265-266). The complainant “indicated that he had penetrated her vagina with his fingers approximately 10 times.” (JA 267).

On September 25, 2014, Special Agent O’Neil and another agent from her office, Special Agent Paul Powis, interviewed the defendant. (JA 268, 271). At that time, Special Agent O’Neil testified to the following exchange:

We asked him if - - we asked him about that and let him know that Harmony Allen had made the specific complaint, that he had inserted his fingers in her vagina.

Q. What did he say to you?

A. He denied that allegation immediately. Within probably the first 10 minutes of us sitting down.

(JA 275).

Special Agent O'Neil further testified that the defendant said that "he was never anywhere near" the complainant's "vaginal area , and he specifically stated that his hands were nowhere near" the complainant's "vaginal area."

The defendant testified in his own defense, stating that on September 20, 2014, he was employed as a registered nurse in the emergency department at the VA Hospital, and that he had been a registered nurse since 2006. (JA 297-98).

The defendant testified that a VA physician (Dr. Gruber) had issued an order for medications for the complainant, including Morphine. (JA 312).

The defendant testified that the complainant said that as far as the Morphine, "[s]he said okay, as long as I don't have anaphylaxis I'll be fine." (JA 314). The defendant also testified that after administering the Morphine "she demanded that I put her on the bed pan because she had to go." (JA 316).

The defendant denied making any comments about the complainant's underwear (JA 314), and denied that he had inserted his fingers into her vagina. (JA 322).

The defendant testified that he signed a statement for the investigating agents stating that he had placed his fingers in her vagina because the agents told him as follows:

What you need to say is that you put your fingers in her vagina, so this way you don't get 10 years. If you sign the statement that you put your fingers in her vagina, you get a slap on the hand, you get suspended from work for a short period of time, you don't get fired, you keep your license, and life goes on.

(JA 327).

He later reiterated that the agents said "you have to say that you penetrated her vagina with your fingers." (JA 330).

VA emergency department physician, Dr. Brian Gruber, testified that on September 20, 2014, he treated the complainant in the emergency department for pain relief. (JA 376-380). As part of his medical treatment of the complainant, Dr. Gruber testified that "She had some Dilaudid and I remember her telling me that Morphine worked better so I gave her some Morphine as well with the Dilaudid" for pain. (JA 380).

ARGUMENT**I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR ADMINISTERING A DRUG WITHOUT THE COMPLAINANT'S PERMISSION AND FOR THEN ENGAGING IN A SEXUAL ACT WITH HER WITHOUT HER PERMISSION, UNDER COUNT ONE.**

The jury convicted the defendant of Count One, which charges that the defendant administered a drug to the complainant without her permission and then engaged in a sexual act with her without her permission, in violation of 18 U.S. C. § 2241 (b).

However, the evidence was insufficient as a matter of law to support this conviction.

A. The evidence is insufficient to support a finding that the defendant administered a drug to the complainant without her permission.

First, there is insufficient evidence to support a finding that the defendant administered a drug (Morphine) to the complainant without her permission.

The evidence establishes that the complainant voluntarily submitted herself to the Hampton VA Hospital emergency department for relief from post-surgical pain. By doing so, she expressly and impliedly consented to appropriate medical treatment for such pain. The attending emergency physician, Dr. Gruber, testified that as part of his medical orders, he directed

that Morphine be administered to the complainant for pain relief. The defendant, a registered nurse under the duty to carry out the physician's orders, did as he was directed and administered the pain medication. While the complainant testified that she indicated that she did not want to receive the Morphine without the presence of her significant other because of her concern about an allergic reaction, such testimony does not sufficiently constitute the requisite lack of permission when the complainant has submitted herself as a patient for pain relief and is under the care of a physician who orders such medication. At best, the complainant's testimony indicated a reluctance or hesitation about receiving the medication, which is not uncommon amongst patients, but fails to constitute an unequivocal refusal or lack of permission that rises to a beyond a reasonable doubt standard.

As indicated above, the defendant argued that the patient at issue "expressly and impliedly consented to appropriate medical treatment," by visiting the emergency department, which contention the Panel Opinion rejected. (Appendix A at p. 4a.).

However, the uncontradicted evidence is that the drug in question, morphine, was administered to the patient by the defendant nurse upon the specific orders of an emergency department physician supervising the defendant nurse. (J.A. 312, 376-380). VA emergency department physician Dr. Brian Gruber testified that on September 20, 2014, he treated the complainant in the emergency department for pain relief. (J.A. 376-280). Dr. Gruber specifically testified that as part of his medical treatment of the patient, "She had some Dilaudid and I remember her telling me that Morphine worked better

so I gave her some Morphine as well with the Dilaudid” for pain. (J.A. 380).

Accordingly, while the patient did testify that she advised the defendant nurse that she “didn’t want the Morphine until my husband was allowed to come back” because she “was scared I might have an allergic reaction to the Morphine” (J.A. 213), the defendant nurse was under a professional obligation to follow his supervising emergency department physician’s orders to give the patient the very drug that the patient had just earlier told the ordering physician “worked better” for her.

Furthermore, the defendant respectfully submits that the question of whether a subordinate nurse should be held criminally liable for administering a drug to a patient ordered by a supervising medical doctor, comprises an issue of exceptional importance.

The defendant respectfully submits that a foundation of proper healthcare administration is the dutiful adherence by subordinate medical personnel to the orders of medical doctors and physicians. If subordinate personnel are held criminally liable for following those orders, then situations may arise where subordinate personnel elect not to follow supervisory medical orders for fear of criminal liability, raising the potential for compromising not only the chain of medical command but the administration of proper medical care itself. If subordinate medical personnel cannot rely upon a supervising physician’s orders without being exposed to criminal liability, a considerable element of uncertainty may be injected into the proper maintenance of the healthcare system.

B. The evidence is insufficient to support a sexual act.

Second, there is insufficient evidence of a sexual act.

18 U.S.C. 2246 (2) (C) defines a “sexual act” as, in pertinent part:

the penetration, however, slight, of the... genital opening of another by a hand or finger... with an intent to... arouse or gratify the sexual desire of any person.

However, all of the evidence indicates that the purported penetration occurred while the defendant was attempting to assist the complainant who was having difficulty urinating. While not necessarily the most orthodox of means of providing such assistance, nevertheless, there is an absence of sufficient evidence that such penetration was done for sexual arousal or gratification purposes. There is no evidence that the penetration was done in any lascivious manner or accompanied by any other acts or statements evincing sexual arousal or gratification intent. While the complainant does contend that the defendant commented on her underwear, that alone is not sufficient to establish such an intent beyond a reasonable doubt.

Accordingly, because there is insufficient evidence that the doctor-ordered Morphine was administered without the complainant’s permission and because there is insufficient evidence that the purported finger penetration was to sexually arouse or gratify a person, the evidence is insufficient as a matter of law to support the defendant’s conviction on Count One.

II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR MAKING A FALSE STATEMENT UNDER COUNT TWO.

The jury also found the defendant guilty of Count Two, which charges the defendant with making a false statement in violation of 18 U.S. C. § 1001 (a) (2).

An essential element of a false statement offense is that “ the false statement... was material to a matter within the jurisdiction of the agency.” United States v. Arch Trading Co., 987 F.2d 1087, 1095 (4th Cir. 1993). Moreover, the Court in that case held that, “A material fact about a matter within the jurisdiction of the agency is one that has a natural tendency to influence agency action or is capable of influencing agency action.” *Id.*

In the instant case, Government's evidence indicates that on September 25, 2014, the defendant denied placing his fingers in the complainant's vagina. However, the evidence further indicates that on October 14, 2014, the defendant effectively recanted that initial denial and admitted that he had placed his fingers in the complainant's vagina while attempting to assist her with her difficulties in urinating.

Accordingly, by correcting his initial misstatements, and admitting to the penetration, the defendant's initial denial was not material, was corrected, and neither tended to influence nor was capable of influencing the agency's decision, because of his recantation and correction.

Accordingly, for the foregoing reasons, the defendant respectfully submits that the evidence is insufficient

to establish that the defendant made a material false statement.

CONCLUSION

For the foregoing reasons, therefore, the defendant respectfully submits that this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

STANLEY E. SACKS

Counsel of Record

ANDREW M. SACKS

SACKS & SACKS

150 Boush Street, Suite 801

Norfolk, Virginia 23510

(757) 623-2753

sacks@lawfirmofsacksandsacks.com

Counsel for Petitioner

APPENDIX

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT, FILED MAY 16, 2017**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Virginia, at Newport News.
Mark S. Davis, District Judge. (4:15-cr-00014-MSD-
LRL-1)

Submitted: April 28, 2017

Decided: May 16, 2017,

Before MOTZ, SHEDD, and KEENAN, Circuit Judges.

Affirmed by unpublished per curiam opinion

Unpublished opinions are not binding precedent in this
circuit.

Appendix A

PER CURIAM:

A jury convicted Juan Lopez of aggravated sexual abuse, in violation of 18 U.S.C. § 2241(b)(2) (2012), and making a false statement in a matter within the jurisdiction of the executive branch of the United States Government, in violation of 18 U.S.C. § 1001(a)(2) (2012). The district court sentenced Lopez to a total of 204 months' imprisonment. On appeal, Lopez challenges the sufficiency of the evidence supporting his two convictions. We affirm.

“We review [a] challenge to the sufficiency of the evidence de novo.” *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012). “The jury’s verdict must be upheld on appeal if there is substantial evidence in the record to support it, where substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *United States v. Perry*, 757 F.3d 166, 175 (4th Cir. 2014) (emphasis and internal quotation marks omitted). In evaluating evidentiary sufficiency, we view the evidence in the light most favorable to the government, and “we defer to the jury’s determinations of credibility and resolutions of conflicts in the evidence, as they are within the sole province of the jury and are not susceptible to judicial review.” *United States v. Louthian*, 756 F.3d 295, 303 (4th Cir. 2014) (internal quotation marks omitted).

Beginning with Lopez’s conviction for aggravated sexual abuse, a person is guilty of the offense if he,

Appendix A

“in the . . . territorial jurisdiction of the United States . . . administers to another person . . . without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—(A) substantially impairs the ability of that other person to appraise or control conduct; and (B) engages in a sexual act with that other person.” 18 U.S.C. § 2241(b)(2). The term “sexual act” includes “the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2)(C) (2012).

Viewing the evidence in the light most favorable to the Government, the victim reported to the Hampton Roads Veterans Administration Medical Center (VAMC) for severe pain and nausea. Lopez was on duty as a nurse at the VAMC when the victim arrived. Due to her pain, the victim was belligerent, loud, and impolite toward Lopez. When Lopez and the victim were alone in an examination room together, Lopez administered morphine to the victim despite the victim’s repeated demands that she not be given morphine. The victim subsequently indicated to Lopez that she felt the need to urinate, and Lopez obtained a bedpan, pulled down the victim’s pants and underwear, and placed the bedpan underneath her. Lopez then repeatedly placed his fingers inside of the victim’s vagina and inquired whether she had urinated. After the victim urinated, Lopez removed the bedpan, obtained a cloth, and inserted the cloth into the victim’s vagina, causing her great pain. Before pulling up the victim’s pants and underwear, Lopez again placed his fingers

Appendix A

inside the victim's vagina. The victim soon thereafter discovered blood in her underwear. Lopez later admitted in a sworn statement that he placed one or two fingers into the victim's vaginal canal.

Lopez first argues that there is insufficient evidence to support a finding that he administered morphine to the victim without her permission because the victim "expressly and impliedly consented to appropriate medical treatment" by visiting the VAMC. However, Lopez's argument overlooks the victim's autonomy in making medical decisions. A competent patient does not surrender herself to a medical professional's whim by crossing the emergency room threshold. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."); *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (recognizing same). Indeed, the doctor who prescribed morphine for the victim testified at trial that a patient may refuse the administration of a particular drug. The victim twice unequivocally informed Lopez that she did not want the drug, yet Lopez nevertheless administered it. Therefore, we conclude that there is substantial evidence that Lopez administered morphine to the victim without her permission. *See United States v. Wilson*, 115 F.3d 1185, 1190 (4th Cir. 1997) (recognizing that uncorroborated testimony of one witness can be sufficient support conviction).

Lopez next contends that there is insufficient evidence that he engaged in a "sexual act" with the victim because

Appendix A

his actions were intended to assist the victim and not for the purpose of sexual arousal or gratification. We first note that Lopez conceded at trial that penetrating the victim's vagina would serve no medical purpose, and thus, we find disingenuous—and incredible—Lopez's contention on appeal that he was only attempting to assist the victim. Second, Lopez fails to acknowledge that the statutory definition of "sexual act" also includes actions taken "with an intent to abuse, humiliate, harass, [or] degrade." 18 U.S.C. § 2246(2)(C). We find that a rational jury could infer that Lopez retaliated against the victim for her hostile and rude behavior by performing actions intended to abuse, humiliate, harass, or degrade her. *See Engle*, 676 F.3d at 418 (recognizing that "jury may infer intent from circumstantial evidence"). Our determination is further supported by the victim's testimony that Lopez inserted a cloth into her vagina with enough force to cause her great pain and that she discovered blood in her underwear after Lopez repeatedly penetrated her vagina. Therefore, we conclude that substantial evidence supports Lopez's conviction for aggravated sexual abuse.

Turning to Lopez's conviction for providing a false statement, federal law prohibits the making of "any materially false, fictitious, or fraudulent statement or representation" in connection with any matter within the jurisdiction of the federal government. 18 U.S.C. § 1001(a)(2). "To obtain a conviction under this statute, the government must prove that: (1) the defendant made a false statement in a matter involving a governmental agency; (2) the defendant acted knowingly or willfully; and (3) the false statement was material to a matter within

Appendix A

the jurisdiction of the agency.” *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012). As to the third element, “[t]he test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.” *United States v. Garcia-Ochoa*, 607 F.3d 371, 375 (4th Cir. 2010) (internal quotation marks omitted). Whether the false statement actually influences an agency’s action is irrelevant. *Hamilton*, 699 F.3d at 362.

Evidence adduced at trial showed that Lopez was interviewed by federal agents and initially denied inserting his fingers into the victim’s vagina. Lopez stated to the agents that any person who committed such an act should be criminally prosecuted. At an interview with federal agents about one month later, Lopez admitted penetrating the victim’s vagina with one or two of his fingers.

Lopez avers that his initial denial was immaterial because it was not capable of influencing the agents’ actions and he later corrected it. We disagree. Lopez falsely told the agents that he did not penetrate the victim’s vagina—a statement which, according to Lopez’s later sworn statement, he knew was untrue. Lopez’s initial denial was material because it was capable of influencing the agents’ ongoing investigation. *See United States v. Sarihifard*, 155 F.3d 301, 307 (4th Cir. 1998). If the agents believed Lopez’s initial statement, then the investigation could have ceased because the “sexual act” element of § 2241(b)(2) would not be satisfied. Even Lopez realized the materiality of his lie as he told the agents that a person

Appendix A

who committed the acts described by the victim should be prosecuted. Furthermore, Lopez’s argument ignores that “there is no safe harbor for recantation or correction of a prior false statement that violates [§] 1001.” *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir. 2006); *see also United States v. Beaver*, 515 F.3d 730, 742 (7th Cir. 2008). For these reasons, we conclude that substantial evidence supports Lopez’s conviction for making a false statement.

Accordingly, we affirm the district court’s judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

**APPENDIX B — JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA, NEWPORT NEWS
DIVISION, FILED SEPTEMBER 12, 2016**

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Newport News Division

Case Number: 4:15cr14
USM Number: 85434-083

UNITED STATES OF AMERICA,

v.

JUAN LOPEZ,

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty by a jury on Counts 1 and 2 after a plea of not guilty as to the Second Superseding Indictment.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
T. 18, USC § 2241(b)	Aggravated Sexual Abuse	Felony	September 20, 2014	1
T. 18, USC § 1001(a)(2)	False Statement	Felony	September 25, 2014	2

9a

Appendix B

As pronounced on September 9, 2016, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signed this 12th day of September, 2016

/s/ _____
Mark S. Davis
United States District Judge

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED-FOUR (204) MONTHS. This term of imprisonment consists of a term of TWO HUNDRED-FOUR (204) MONTHS on Count 1 and a term of NINETY-SIX (96) MONTHS on Count 2, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

- 1) The defendant shall be incarcerated in a facility as close to the Hampton Roads Virginia area as possible, preferably FCI Petersburg.

The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWENTY (20) YEARS. This term consists of a term of TWENTY (20) YEARS on Count 1 and a term of THREE (3) YEARS on Count 2, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

Appendix B

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. As reflected in the presentence report, the defendant presents a low risk of future substance abuse, and therefore, the Court hereby suspends the mandatory condition for substance abuse testing as defined by 18 U.S.C. 3563(a)(5). However, this does not preclude the Probation Office from administering drug tests or other substance abuse tests as they deem appropriate.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

* * *

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

Appendix B

- 1) The defendant shall participate in a program approved by the United States Probation Office for mental health treatment, to include a psychosexual evaluation, and sex offender treatment. The costs of these programs are to be paid by the defendant as directed by the probation officer. The defendant shall waive all rights of confidentiality regarding sex offender/mental health treatment to allow the release of information to the United States Probation Office and authorize communication between the probation officer and the treatment provider.
- 2) The defendant shall submit to penile plethysmograph testing or Abel Assessment for Sexual Interest (AASI) as directed by the United States Probation Office as part of his sexual offender therapeutic treatment. The costs of the testing are to be paid by the defendant, as directed by the probation officer. To the extent he wishes to assert his Fifth Amendment rights during such testing, he may do so, and that issue may be brought back to the Court to determine whether the defendant should be compelled to respond.
- 3) The defendant shall submit to polygraph testing as directed by the United States Probation Officer as part of the defendant's sex offender therapeutic program. The costs of the testing are to be paid by the defendant, as directed by the probation officer. To the extent he wishes to

Appendix B

assert his Fifth Amendment rights during such testing, he may do so, and that issue may be brought back to the Court to determine whether the defendant should be compelled to respond.

- 4) The defendant shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards. The defendant shall submit any records requested by the probation officer to verify compliance with this condition including, but not limited to, credit card bills, telephone bills, and cable/satellite television bills.
- 5) The defendant shall not have any access to or possess any pornographic material or pictures displaying nudity.
- 6) Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall register with the state sex offender registration agency in any state where the defendant resides, works, and attends school, according to federal and state law and as directed by the probation officer.
- 7) Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time by any law enforcement or probation officer with reasonable suspicion

Appendix B

concerning unlawful conduct or a violation of a condition of supervision, upon prior notification to and approval by the court or with a warrant.

- 8) The defendant shall apply monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation; or in a lesser amount to be determined by the Court upon the recommendation of the probation officer.
- 9) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
- 10) The defendant shall provide the probation officer access to any requested financial information.
- 11) The defendant shall participate in the Treasury Offset Program (TOP) as directed by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

Count	Assessment	Fine	Restitution
1	\$100.00	\$0.00	\$122,211.24
2	\$100.00	\$0.00	\$0.00
TOTALS:	\$200.00	\$0.00	\$122,211.24

15a

Appendix B

FINES

No fines have been imposed in this case.

RESTITUTION

SEE RESTITUTION ORDER ENTERED AND FILED
IN OPEN COURT ON SEPTEMBER 9, 2016.

The Court determined that the defendant does not have
the ability to pay interest and it is ordered that:

the interest requirement is waived for the
restitution balance as long as the defendant
makes timely payments in accordance with the
payment schedule, or any modified payment
schedule, established by the Court.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay,
payment of the total criminal monetary penalties is due
as follows:

The special assessment and restitution shall be due
in full immediately.

Any balance remaining unpaid on the special
assessment and restitution at the inception of supervision,
shall be paid by the defendant in installments of not less
than \$200 per month, until paid in full. Said payments shall
commence 60 days after defendant's supervision begins.

Appendix B

At the time of supervision commences, the probation officer shall take into consideration the defendant's economic status as it pertains to his ability to pay the special assessment ordered and shall notify the court of any changes that may be needed to be made to the payment schedule.

Any special assessment may be subject to penalties for default and delinquency.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

Since this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including the special assessment, shall be due during the period of imprisonment. All criminal monetary penalty payments, including the special assessment, are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

17a

**APPENDIX C — DENIAL OF REHEARING OF
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT, FILED JUNE 20, 2017**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4612
(4:15-cr-00014-MSD-LRL-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN LOPEZ,

Defendant-Appellant.

ORDER

The court denies the petition for rehearing and rehearing *en banc*. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing *en banc*.

Entered at the direction of the panel: Judge Motz,
Judge Shedd and Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

18a

**APPENDIX D — INDICTMENT OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA, FILED JULY 22, 2015**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL NO. 4:15CR14

UNITED STATES OF AMERICA

v.

JUAN LOPEZ

18U.S.C. § 2241
Aggravated Sexual Abuse
(Count 1)

18U.S.C. § 1001
False Statement
(Count 2)

SECOND SUPERSEDING INDICTMENT

JULY 2015 Term - At Norfolk, Virginia

COUNT ONE

THE GRAND JURY CHARGES THAT:

On September 20, 2014, in the special maritime and
territorial jurisdiction of the United States, within the

Appendix D

Eastern District of Virginia and elsewhere, the defendant. JUAN LOPEZ, did unlawfully, knowingly and intentionally administer to H.A., without the permission of H.A., a drug, intoxicant and other similar substance, to wit: morphine, and did substantially impair the ability of H.A. to appraise and control conduct, and then did engage in a sexual act with a person, to wit: H.A., without the permission of H.A.

(Title 18, United States Code, Section 2241(b))

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

On or about September 25, 2014, the defendant, JUAN LOPEZ, in the Eastern District of Virginia, did willfully and knowingly make a false statement, knowing the same to contain a materially false, fictitious, and fraudulent statement in a matter within the jurisdiction of the executive branch of the Government of the United States, by stating that he had not touched the vagina of H.A., well knowing and believing that he in fact had touched and penetrated the vagina of H.A.

(In violation of Title 18, United States Code,
Section 1001(a)(2))